NORTH CAROLINA REPORTS
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NORTH CAROLINA REPORTS

Vol. 257

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1962
FALL TERM, 1962

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1962

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

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OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1962.
FALL TERM, 1962.

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SUPERIOR COURTS, FALL TERM, 1962.

FIRST DIVISION

First District—Judge Bundy.

Camden—Sept. 24.
Chowan—Sept. 10; Nov. 26.
Currituck—Sept. 3.
Dare—Oct. 22.
Gates—Oct. 15(a).
Pasquotank—Sept. 17†; Oct. 15†; Nov. 12*; Dec. 3†.
Perquimans—Oct. 29.

Second District—Judge Stevens.

Beaufort—Sept. 3†; Sept. 17*; Oct. 15†; Nov. 5*; Dec. 3†.
Hyde—Oct. 8; Oct. 29.†.
Martin—Aug. 6†; Sept. 24*; Nov. 19† (2); Dec. 10.
Tyrrell—Aug. 27†; Oct. 1.
Washington—Sept. 10*; Nov. 12†.

Third District—Judge Mintz.

Carteret—Aug. 27†(a)(2); Oct. 15†; Nov. 5.
Craven—Sept. 3(2); Oct. 1†(2); Oct. 29†(a); Nov. 12; Nov. 26†(2).
Pamlico—Aug. 6(2).
Pitt—Aug. 20(2); Sept. 17†(2); Oct. 8(a); Oct. 22†; Oct. 29; Nov. 19; Dec. 10.

Fourth District—Judge Parker.

Duplin—Aug. 27; Sept. 3†; Oct. 8*; Nov. 5*; Dec. 3†(2).
Jones—Sept. 24; Oct. 29†; Nov. 26.
Onslow—July 16‡(a); Oct. 1; Oct. 15† (a)(2); Nov. 12†; Nov. 19†#.
Sampson—Aug. 6(2); Sept. 10†(2); Oct. 15*; Oct. 22†; Nov. 19*(a).

Fifth District—Judge Bone.

New Hanover—July 30*; Aug. 6†; Aug. 20*; Sept. 10†(2); Oct. 1*; Oct. 8†(2), Oct. 29*(2); Nov. 19†(2); Dec. 3*(2).
Pender—Sept. 3†; Sept. 24; Oct. 22†; Nov. 12.

Sixth District—Judge Cowper.

Bertie—Aug. 27(2); Nov. 19(2).
Halifax—Aug. 13(2); Oct. 1†(2); Oct. 22*; Dec. 3(2).
Hertford—July 23(a); Sept. 10; Sept. 17†; Oct. 15.
Northhampton—Aug. 6; Oct. 29(2).

Seventh District—Judge Morris.

Edgecombe—Sept. 3†(a); Sept. 17*; Oct. 8*(2); Nov. 5†(2).
Nash—Aug. 20*; Sept. 10†; Sept. 24†; Oct. 1*; Oct. 22†(2); Nov. 19*(2); Dec. 3†(a).
Wilson—July 16*; Aug. 27*(2); Sept. 24†(a)(2); Oct. 22*(a)(2); Dec. 3†(2).

Eighth District—Judge Paul.

Greene—Oct. 8†(a); Oct. 15*(a); Dec. 3.
Lenoir—Aug. 20*; Sept. 10†(2); Oct. 8†(2); Oct. 22*(2); Nov. 19†(2); Dec. 10.
Wayne—Aug. 13*; Aug. 27†(2); Sept. 24†(2); Nov. 5(2); Dec. 3†(a).

SECOND DIVISION

Ninth District—Judge Williams.

Franklin—Sept. 17†(2); Oct. 15*; Nov. 26†(2).
Granville—July 16; Oct. 8†; Nov. 12(2).
Person—Sept. 10; Oct. 1†(a)(2); Oct. 29.
Vance—Oct. 1*; Nov. 5†; Dec. 10†.
Warren—Sept. 3*; Oct. 22†.

Tenth District—Judge Clark.

Wake—July 9*(a)(2); July 23#(a); July 30*(a); Aug. 6†; Aug. 13*(2); Aug. 20†# (a); Aug. 27†; Sept. 3†(a)(2); Sept. 3*(2); Sept. 17†#; Sept. 24†; Oct. 1*(a)(2); Oct. 8†(2); Oct. 15*(a); Oct. 22†#(a); Oct. 22†(2); Oct. 29*(a)(2); Nov. 5†(2); Nov. 12†#(a); Nov. 19*(2); Nov. 19†(a)(2); Dec. 10†(a); Dec. 10*.

Eleventh District—Judge Mallard.

Harnett—Aug. 13†; Aug. 27*(a); Sept. 10†(a)(2); Oct. 8†(2); Nov. 12*(a)(2).
Johnston—Aug. 20; Sept. 24†(2); Oct. 22; Nov. 5†(2); Dec. 3(2).
Lee—July 30*; Aug. 6†; Sept. 10*†; Sept. 17†; Oct. 29*; Nov. 26†.

Twelfth District—Judge Hall.

Cumberland—Aug. 6†; Aug. 13*; Aug. 27*(2); Sept. 10†; Sept. 24†(a)(2); Sept. 24*(2); Oct. 8†(2); Oct. 15*(a); Oct. 22† (2); Nov. 5†(a)(2); Nov. 5*(2); Nov. 26† (2); Dec. 10*.
Hoke—Aug. 20; Nov. 19.

Thirteenth District—Judge Carr.

Bladen—Oct. 15*; Nov. 12†.
Brunswick—Sept. 17; Oct. 22†.
Columbus—Sept. 3*; Sept. 24†(2); Oct. 8*; Oct. 29†(2); Nov. 19*(2).

Fourteenth District—Judge McKinnon.

Durham—July 9*(a)(2); July 30(2); Aug. 27*; Sept. 3†; Sept. 10*(2); Oct. 1*(2); Oct. 15†(2); Oct. 29*(2); Nov. 12†(2); Nov. 26(2); Dec. 10*.

Fifteenth District—Judge Hobgood.

Alamance—July 16†(a); July 31†; Aug. 13*(2); Sept. 10†(2); Oct. 15*(2); Nov. 12†(2); Dec. 3*.
Chatham—Aug. 27†; Oct. 8; Oct. 29†; Nov. 5†; Nov. 26.
Orange—Aug. 6*; Sept. 24†(2); Dec. 10.

Sixteenth District—Judge Bickett.

Robeson—July 9†(a); Aug. 13*; Aug. 27†; Sept. 3*(2); Sept. 17†(2); Oct. 8†(2); Oct. 22*(2); Nov. 12†(2); Nov. 26*.
Scotland—July 23†; Aug. 20; Oct. 1†; Nov. 5†; Dec. 3(2).

THIRD DIVISION

Seventeenth District—Judge Crissman.

Caswell—Nov. 12*(a); Dec. 3†.
Rockingham—Sept. 3*(2); Sept. 24†(a)(2); Oct. 15†; Oct. 22*(2); Nov. 19†(2); Dec. 10*.
Stokes—Oct. 1*; Oct. 8†.
Surry—July 9†(2); Sept. 17*(2); Nov. 5†(2); Dec. 3(a).

Eighteenth District—

Schedule A—Judge Armstrong.

Guilford Gr.—July 9*; July 23*; Aug. 27*; Sept. 3†; Sept. 10†(2); Oct. 1*; Oct. 1†‡(a); Oct. 8†(2); Oct. 22*; Nov. 5*; Nov. 5†‡(a); Nov. 12†(2); Nov. 26*; Dec. 3*.
Guilford H.P.—July 16*; Sept. 24*; Oct. 29*; Dec. 10*.

Schedule B—Judge Phillips.

Guilford Gr.—Aug. 27†‡; Sept. 10*(2); Sept. 24†(2); Oct. 8*(2); Oct. 22†(2); Nov. 19†(2); Dec. 10†‡.
Guilford H.P.—Sept. 10†(a); Oct. 15†(a); Nov. 5†(2).

Nineteenth District—Judge Johnston.

Cabarrus—Aug. 20*; Aug. 27†; Oct. 8(2); Nov. 5†(a)(2).
Montgomery—July 9(a); Sept. 24†; Oct. 1; Oct. 29(a).
Randolph—July 16†(a)(2); Sept. 3*; Sept. 24†(a)(2); Nov. 5†(2); Nov. 26† Dec. 3*(2).
Rowan—Sept. 10(2); Sept. 24†(a); Oct. 22†(2); Nov. 26*(a); Dec. 3†(a).

Twentieth District—Judge Olive.

Anson—Sept. 17*; Sept. 24†; Nov. 19†.
Moore—Aug. 13*(a); Sept. 3†(2); Nov. 12.
Richmond—July 16*; July 23†; Oct. 1*; Oct. 8†; Dec. 3†(2).
Stanly—July 9; Oct. 15†(2); Nov. 26.
Union—Aug. 20†(a); Aug. 27; Oct. 29(2).

Twenty-First District—Judge Gambill.

Forsyth—July 9†(2); July 23(2); Aug. 27†‡; Sept. 3(3); Sept. 10†(a)(2); Sept. 24†(2); Oct. 8†‡(a); Oct. 8(2); Oct. 22†(a)(2); Oct. 29(3); Nov. 12†‡(a); Nov. 19†(2); Dec. 3†(a)(2); Dec. 3(2).

Twenty-Second District—Judge Gwyn.

Alexander—Sept. 24.
Davidson—July 16†(a); Aug. 20; Sept. 10†(2); Oct. 8†; Oct. 15†(a); Nov. 12(2); Dec. 10†.
Davie—July 30; Oct. 1†; Nov. 5.
Iredell—Aug. 27; Sept. 3†; Oct. 15†; Oct. 22(2); Nov. 26†(2).

Twenty-Third District—Judge Shaw.

Alleghany—Aug. 27; Oct. 1.
Ashe—July 16*; Sept. 10†; Oct. 22*.
Wilkes—July 23; Aug. 13(2); Sept. 17†(2); Oct. 8; Oct. 29†(2); Nov. 12(a); Dec. 3.
Yadkin—Sept. 3*; Nov. 12†(2); Nov. 26.

FOURTH DIVISION

Twenty-Fourth District—Judge Campbell.

Avery—July 9(a)(2); Oct. 15(2).
Madison—July 23*; Aug. 27†(2); Oct. 1*; Oct. 29†; Dec. 3*; Dec. 10†.
Mitchell—July 30†(a); Sept. 10(2).
Watauga—Sept. 24*; Nov. 5†(2).
Yancey—Aug. 6; Aug. 13†(2); Nov. 19(2).

Twenty-Fifth District—Judge Clarkson.

Burke—Aug. 13; Oct. 1(2); Nov. 19.
Caldwell—Aug. 20(2); Sept. 17†(2); Oct. 22†(2); Dec. 3(2).
Catawba—July 30(2); Sept. 3†(2); Nov. 5(2); Nov. 26†.

Twenty-Sixth District—

Schedule A—Judge Froneberger.

Mecklenburg—July 9*(a)(2); July 23†‡(a); July 30*(2); Aug. 13†(a)(2); Aug. 27†(2); Sept. 10†; Sept. 17†(2); Oct. 1*(2); Oct. 15†; Oct. 22†(2); Nov. 5†; Nov. 12†(2); Nov. 26†; Dec. 3*(2).

Schedule B—Judge McLean.

Mecklenburg—Aug. 13†(3); Sept. 3*(2); Sept. 17†(2); Oct. 1†(2); Oct. 15†(2); Oct. 29*(2); Nov. 12†(2); Nov. 26†; Dec. 3†(2).

Twenty-Seventh District—Judge Pless.

Cleveland—July 9(2); Sept. 24†(2); Oct. 22*; Nov. 26†(a)(2).
Gaston—July 23†‡(a); July 23*; Aug. 6†(a)(2); Aug. 13*(a)(2); Sept. 10†(a)(3); Sept. 17*; Oct. 8*(a)(2); Oct. 8†(2); Oct. 29†(2); Nov. 12†‡(a); Nov. 12*(2); Dec. 3†; Dec. 10*.
Lincoln—Sept. 3(2).

Twenty-Eighth District—Judge Patton.

Buncombe—July 9*(a)(2); July 23†(a); July 30†(3); Aug. 20*(2); Sept. 3†(3); Sept. 17*(a)(2); Sept. 24†(3); Oct. 15*(2); Oct. 29†(3); Nov. 19*(a)(2); Nov. 19†; Nov. 26†(3).

Twenty-Ninth District—Judge Huskins.

Henderson—Aug. 13†(2); Oct. 15.
McDowell—Sept. 3(2); Oct. 1†(2).
Polk—Aug. 27.
Rutherford—Aug. 13*†(a); Sept. 17†*(2); Nov. 5*†(2).
Transylvania—July 9(2); Oct. 22(2).

Thirtieth District—Judge Farthing.

Cherokee—July 23; Nov. 5(2).
Clay—Oct. 1.
Graham—Sept. 3.
Haywood—July 9; Sept. 17†(2); Nov. 19(2).
Jackson—Oct. 8(2).
Macon—July 30; Dec. 3(2).
Swain—July 16; Oct. 22.

* Indicates criminal term.
† Indicates civil term.
‡ Indicates jail and 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

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ALTON T. CUMMINGS, RALEIGH, N. C.
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WILLIAM L. HILL, II, RALEIGH, N. C.

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HUGH SALTER, RALEIGH, N. C.

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SAMUEL A. HOWARD, RALEIGH, N. C.

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L. THOMAS GALLOP, ELIZABETH CITY, N. C.

MIDDLE DISTRICT

Judges

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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.
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MRS. SUE L. BUMGARNER, WILKESBORO, N. C.
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MRS. RUTH M. TRUITT, GREENSBORO, N. C.
WAYNE N. EVERHART, GREENSBORO, N. C.

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WILSON WARLICK, NEWTON, N. C.

U. S. Attorney

WILLIAM MEDFORD, ASHEVILLE, N. C.

U. S. Marshal

PAUL D. SOSSAMON, ASHEVILLE, N. C.

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MISS ANNIE ADERHOLDT, STATESVILLE, N. C.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 11th day of August, 1962, and said persons have been issued certificates of this Board.

CLAUDE WILLIAM ALLEN, JR. ..... Creedmoor

SYLVIA XIMINES ALLEN ..... Fayetteville

CARL EDWIN ALLMAN, JR. ..... Webster

JULIUS EDMOND BANZET, III ..... Warrenton

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ANTHONY MASON BRANNON ..... Durham

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ROBERT MONTGOMERY BURROUGHS ..... Carrboro

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GABRIEL MARLIN EVANS ..... High Point

WILLIAM HARRELL EVERETT, JR. ..... Williamston

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EDWARD L. CANNON, *Secretary*
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1962

MARSHALL C. COLLINS, EDWIN MOORE, HAYWOOD WISE, GEORGE MIDGETT, ALFONZO SCARBOROUGH AND DAVE ALEXANDER, DEACONS OF THE HAVEN CREEK BAPTIST CHURCH, MANTEO, NORTH CAROLINA, ACTING AS TRUSTEES HOLDING TITLE TO THE PROPERTY OF THE CHURCH, AND MARSHALL C. COLLINS, EDWIN MOORE, HAYWOOD WISE, GEORGE MIDGETT, ALFONZO SCARBOROUGH AND DAVE ALEXANDER, INDIVIDUALLY FOR THEMSELVES AS MEMBERS OF SAID CHURCH AND FOR SUCH OTHER MEMBERS OF SUCH CHURCH AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. REVEREND J. C. SIMMS.

(Filed 2 May 1962.)

1. Appeal and Error § 60—

A decision of the Supreme Court becomes the law of the case in respect to questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal.

2. Same—

Decision that there was no error in the adjudication by the lower court that defendant had not then been elected pastor of the church in question, and that order restraining defendant from attempting to act as pastor violated no constitutional rights of defendant, is the law of the case and precludes defendant from thereafter asserting incumbency based upon any act or transaction occurring prior to the date of the institution of the action, or that the entry of judgment in accordance with the mandate of the Supreme Court violated any constitutional right of defendant.

3. Same; Judgments § 21—

An irregular judgment is not void, and even after decision of the Su-

preme Court holding it to be irregular such judgment stands until it is set aside by judgment entered in the trial court in conformity with the mandate of the Supreme Court.

4. Appeal and Error § 60—

After remand of a cause by the Supreme Court, the lower court is bound by the decision, and a judgment of the Superior Court which fails to conform entirely and completely to the mandate of the Supreme Court is erroneous, irregular, or void.

5. Same; Judgments § 18—

Where the Supreme Court holds the judgment appealed from is irregular and remands the cause, judgment of the Superior Court thereafter entered which is in conformity with the mandate so far as the judgment goes, but which inadvertently fails to strike out or modify the former judgment, *is held* contrary to the course and practice of the Court, and the proper procedure to make it conform with the mandate of the Supreme Court is by motion in the cause.

6. Appeal and Error § 2—

Where judgment of the Superior Court upon remand of the cause by the Supreme Court fails to conform with the mandate of the Supreme Court, either through insubordination, misinterpretation, or inattention, the Supreme Court, in the exercise of its supervisory jurisdiction, will enforce its own mandate, regardless of the manner in which the cause is brought before it, or even *ex mero motu* if necessary, in accordance with the requirements of justice. Constitution of North Carolina, Art. IV, § 8.

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

PARKER, J., concurring in result.

APPEAL by defendant from *Morris, J.*, October 1961 Term of DARE.

From denial of his motion to vacate specified judgments theretofore entered in this cause and to dissolve the permanent injunction theretofore decreed herein, defendant appeals.

Frank B. Aycock, Jr., for plaintiffs.

James R. Walker, Jr., Robert L. Harrell, Sr., and Samuel S. Mitchell for defendant.

MOORE, J. This case was here on appeal at the Spring Term 1961. In an opinion delivered by *Parker, J.*, the factual background, pleadings, and proceedings had prior to that appeal are clearly and concisely stated. *Collins v. Simms*, 254 N.C. 148, 118 S.E. 2d 402. We repeat them here in brief outline only as a background for a discussion of subsequent developments. For a fuller and more complete statement, the former opinion should be read and considered in connection herewith.

The action was instituted 11 February 1960. The complaint alleges that defendant served as pastor of Haven Creek Baptist Church, Manteo, North Carolina, in 1959, that at a regular business meeting of the church congregation defendant was voted out and was notified that his pastorate would end at the close of the year 1959, that defendant notwithstanding the notice appeared at the church on every preaching Sunday until this action was begun and attempted to serve as pastor. Plaintiffs, church officers and members, ask that defendant be permanently enjoined from trespassing on the church property.

On 15 February 1960 a temporary restraining order was issued, enjoining defendant from appearing at the church and interfering in any manner with worship services and other church meetings, and directing him to show cause, at a specified time and place, why the restraint should not continue until the final hearing. Copies of the summons, complaint and restraining order were personally served on defendant on 20 February 1960. On 5 March 1960 defendant signed, in person, consent to an order continuing the temporary restraining order to the final hearing of the cause on the merits.

Defendant failed to answer or otherwise plead to the complaint and neglected to request an extension of time for pleading. At the May Term 1960 of the Superior Court of Dare County, on motion of plaintiffs, Hooks, Judge presiding, entered a judgment by default final and "decreed that the defendant be, and he is hereby perpetually enjoined and restrained from appearing at the Haven Creek Baptist Church or trespassing on the grounds or in the church building located on the grounds of the Haven Creek Baptist Church."

On 30 September 1960 defendant filed a motion to vacate the judgment by default final entered by Judge Hooks, and to dismiss the complaint. This motion was heard at the October Term 1960 of Dare County Superior Court by Bone, Judge presiding, and was overruled. Defendant excepted and appealed to Supreme Court. As stated above, this appeal was heard here at the Spring Term 1961. Our opinion was filed 1 March 1961.

The questions raised in the present appeal must be viewed in the light of the rule that a decision of this Court on former appeal constitutes the law of the case in respect to questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal when the same matters are involved. *Glenn v. Raleigh*, 248 N.C. 378, 103 S.E. 2d 482; *Maddox v. Brown*, 233 N.C. 519, 64 S.E. 2d 864. Our decision on the former appeal (254 N.C. 148) makes the following holdings the law of the case:

(1). "Defendant's failure to answer within the statutory time prevents him from denying any facts set forth in the verified complaint,

and admits that plaintiffs are entitled to such relief as the law gives them upon the facts alleged."

(2). "The verified complaint states a good cause of action for injunctive relief to prevent defendant after the year 1959 from appearing at the church and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor."

(3). "It (the complaint) does not state a good cause of action against defendant for perpetual injunctive relief to prevent him from merely appearing at the church, and Judge Hooks' judgment by default final in which he decreed 'that the defendant be and he is hereby perpetually enjoined and restrained from appearing at the Haven Creek Baptist Church or trespassing on the grounds or in the church building' is not supported by the allegations of fact in the verified complaint, and is far in excess of the relief the law gives plaintiffs upon the facts alleged. . . ."

(4). Upon the facts alleged in the complaint and admitted by failure to answer, a judgment by default final restraining defendant "from appearing at this church after the year 1959 and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor," violates no rights guaranteed to him by Article I, Sections 1, 17, 25 and 26 of the North Carolina Constitution, or by the 1st and 14th Amendments to the United States Constitution.

(5). "Judge Hooks' judgment by default final, which grants relief in excess of that encompassed in the verified complaint, is irregular. . . . 'An irregular judgment is not void. It stands as the judgment of the court unless and until it is set aside by a proper proceeding.' "

(6). "That part of Judge Bone's judgment denying defendant's motion to vacate Judge Hooks' judgment by default final cannot be sustained, and is remanded to the lower court for a judgment vacating that part of Judge Bone's judgment, and for the entry of a judgment by default final restraining defendant in accordance with the injunctive relief to which this opinion holds plaintiffs are entitled."

On 16 March 1961 plaintiffs made a motion in writing and duly verified that defendant be cited by the Superior Court for contempt. Defendant filed a verified "Reply and Answer" to the motion. The matter came on for hearing before Morris, J., on 25 March 1961, and he entered an order, in pertinent part as follows:

> "The Court makes the following findings of fact and conclusions of law based upon the various affidavits and other paper writings, statements, stipulations of counsel and a consideration of the

record in this action, including the Opinion of the Supreme Court of North Carolina, Spring Term, 1961. . . .

"5. On the 6th day of March, 1961, the defendant Simms went on the Church grounds and attempted to enter the building which was locked at the time. He accounted for his actions by asserting that he was the pastor and that he was taking charge and desired to enter the Church building in his capacity as such pastor.

"6. On the 12th day of March, 1961, the defendant Simms attended a meeting of the Baptist Training Union at said Church and again asserted that he was the pastor in charge of the Church. At this time, the defendant posted a notice on the bulletin board of the Church, signing himself as 'Rev. J. C. Simms, Pastor in charge.'

"At this same time and place, the defendant again orally asserted that he was the pastor and that he would preach at the next worship service on March 19, 1961.

"7. In accordance with the above assertion, the defendant did appear on the 19th day of March, 1961, at said Church, the regular pastor, the Reverend Horace Moore, being present. At this time, the defendant took over, by means and in a manner not made clear to the Court at the hearing; whereupon, to avoid any further trouble, the regular pastor and the greater part of the membership of the Church left the Church, only four or five adults out of a normal attendance of fifty or more adults remaining for worship services.

"8. These acts on the part of Simms in taking over as pastor and asserting his right to do so were done on advice of counsel, this advice being to the effect, as the Court understands it from statements made by defendant's counsel, that there was error in the previous orders and judgments of the Superior Court of Dare County, that Simms was the pastor of the Church and had the right to take over and act as pastor of said Church in view of the decision of the Supreme Court above referred to."

". . . (T)he Court finds that the defendant is in contempt of this Court. . . .

". . . (T)he Court finds that the contempt is a technical contempt and withholds sentence for said contempt on condition that the defendant shall not usurp or attempt to usurp the office of pastor of the Haven Creek Baptist Church or attempt, in any manner, to act as such pastor, until such time as final judgment based upon the decision of the Supreme Court has been entered by the Superior Court of Dare County. In accordance with the Court's construction of said decision of the Supreme Court of

North Carolina, the defendant may attend worship services and any other meetings of said Church open to members of the general public."

There was no appeal from the contempt order.

Thereafter Judge Joseph W. Parker entered the following judgment.

"THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the May Term, 1961, Superior Court of Dare County, UPON MOTION BY THE PLAINTIFFS for a judgment conforming to the opinion of the Supreme Court of North Carolina in the above captioned case, Spring Term, 1961, No. 32:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant be, and he is hereby enjoined and restrained from attempting to assume the office of pastor of the Haven Creek Baptist Church until such time as he may be re-elected as such pastor in accordance with the custom and usage of said church."

There was no exception to or appeal from the judgment of Judge Joseph W. Parker.

On 10 October 1961 defendant filed a motion, in writing and duly verified, requesting the Superior Court of Dare County to vacate the judgments of Judges Hooks, Bone and Joseph W. Parker, and dissolve the injunctions. The motion alleges in substance: Defendant was duly re-elected pastor of Haven Creek Baptist Church on 4 December 1959, and his contract as pastor was approved by the Church on 4 November 1960, 2 December 1960 and 19 March 1961; such re-election and approvals constitute such a change in conditions and circumstances as to cause a court of equity "to vacate all orders and judgments restraining and curtailing defendant's rights and privileges as a Pastor or as a citizen attending public worship and assembly at the Haven Creek Baptist Church"; and the judgments violate defendant's rights and privileges guaranteed to him "by the North Carolina Constitution, Article I, Sections 1, 17, 25, 26 and 37; and as guaranteed to the defendant by the United States Constitution, the First and Fourteenth Amendments."

The motion was heard and denied by Morris, J., at the October 1961 Term of Dare County Superior Court. Defendant in apt time excepted and appealed. The denial of the motion is the basis of the present appeal.

The primary component of defendant's motion is that he was duly re-elected pastor of the church on 4 December 1959 and that his re-election was approved at several church meetings thereafter. On this

premise, defendant contends that his persistent attempts to serve the church as pastor are consistent with and not in violation of the law of the case as laid down in the former opinion of this Court, and that the judgments of the Superior Court entered in this cause deny him the rights and privileges to which he is entitled by virtue of his contract with the church. Defendant's contention overlooks an important element of our former opinion. It held, and it is the law of this case, that defendant's failure to answer the complaint amounts to an admission that plaintiffs are entitled to such relief as the law gives them upon the facts alleged in the complaint, and that the verified complaint states a good cause of action for injunctive relief to prevent defendant after the year 1959 from appearing at the church and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor. The substance of the allegations of the complaint, deemed admitted by defendant's failure to answer, is that defendant was not re-elected, his pastorate terminated 31 December 1959, and his appearances at the church and attempts to act as pastor were trespasses. The facts thus alleged are deemed established as a matter of law, and defendant may not now assert or call to his aid any alleged re-election or approval of his contract had or made prior to 11 February 1960, the date of the institution of this action. If he relies on an alleged election or contract had or made since 11 February 1960, it must be judicially established before he may act pursuant thereto.

It is also the law of this case that the entry of a judgment in accordance with the mandate of this Court on the former appeal violates none of defendant's constitutional rights and privileges, State or Federal.

It must be conceded that the judgment entered by Judge Parker (Joseph W.) falls short of compliance with the mandate of this Court in the former opinion in this case in several respects. Even so, the judgment of Judge Hooks is an irregular judgment, is not void, and stands as the judgment of the court until regularly set aside — an action not heretofore taken.

The status and effect of the judgments of Judges Hooks and Bone were discussed and decided in our former opinion. Plaintiffs contend that the judgment of Judge Joseph W. Parker is an erroneous judgment, there was no exception thereto or appeal therefrom, and defendant may not now call it into question. The contention has some procedural significance, and leads to the inquiry as to whether the judgment is erroneous, irregular or void. The question is not without difficulty. The decisions in this and other jurisdictions establish no strict lines of demarcation, in this category of judgments, for de-

termining whether particular judgments are erroneous, irregular or void. We have held judgments of Superior court which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court in the respective causes, especially where they amounted to insubordination, to be unauthorized and *void. Newberry v. Fertilizer Co.,* 206 N.C. 182, 173 S.E. 67; *Chavis v. Brown,* 174 N.C. 122, 93 S.E. 471; *Banking Co. v. Morehead,* 126 N.C. 279, 35 S.E. 593; *Black v. Black,* 111 N.C. 300, 16 S.E. 412; *Stephens v. Koonce,* 106 N.C. 222, 10 S.E. 996; *In re Griffin,* 98 N.C. 225, 3 S.E. 515; *White v. Butcher,* 97 N.C. 7, 2 S. E. 59. But we have held judgments, which indicated the judge misunderstood and misinterpreted the opinion of this Court on former appeal and gave it broader significance or narrower scope than we intended, to be *erroneous. Robertson v. Robertson,* 255 N.C. 581, 122 S.E. 2d 385; *Cannon v. Cannon,* 226 N.C. 634, 39 S.E. 2d 821; *Durham v. Cotton Mills,* 144 N.C. 705, 57 S.E. 465; *Dobson v. Simonton,* 100 N.C. 56, 6 S.E. 369; *Isler v. Brown,* 69 N.C. 125. Judgments of the lower court have been held to be *erroneous* in a number of cases where its rulings were inconsistent with prior appellate decisions. *Alexander v. Brown,* 239 N.C. 527, 80 S.E. 2d 241; *Maddox v. Brown, supra; O'Briant v. Lee,* 214 N.C. 723, 200 S.E. 865; *Stanback v. Haywood,* 213 N.C. 535, 196 S.E. 844. The Supreme Court has, in at least two cases, held judgments by the lower court to be *irregular* where they undertook to modify prior opinions of Supreme Court. *Murrill v. Murrill,* 90 N.C. 120; *Calvert v. Peebles,* 82 N.C. 334.

"Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the courts of error would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself." *Murrill v. Murrill, supra.* This is established principle. But there is no rule of thumb for classifying non-conforming judgments as to whether they are erroneous, irregular or void. Of course general principles apply. 2 McIntosh: North Carolina Practice and Procedure, ss. 1713, 1714, 1715, pp. 163-166. But decisions have undoubtedly taken into consideration the circumstances of the particular case, and the necessity for doing justice.

5B C.J.S., Appeal & Error, s. 1993, p. 646, states the general rule thus: "While such action may constitute reversible error, the failure of the trial court to follow the decision or the mandate of the appellate court does not generally render the action of the trial court completely void or invalid but merely erroneous. Under some circumstances, how-

ever, proceedings in the trial court on remand of a cause which are contrary to the express directions or mandate of the appellate court must be treated as null and void." In *Gridley v. Wood,* 137 N.E. 251 (Ill. 1922), the trial court entered judgment inconsistent with the mandate of the appellate court. On second appeal the appellate court said: ". . . (W)hether the court intended to follow the directions of the Appellate Court or not, the decree entered by it was not void. If it did not conform to the directions of the Appellate Court, the decree was erroneous and was subject to be reversed on appeal. . . ." See also: *In re Waters of Doan Creek,* 299 P. 383 (Wash. 1931); *Patterson Land Co. v. Lynn,* 199 N.W. 766 (N.D. 1924): *Gayheart v. Childers,* 125 S.W. 1085 (Ky. 1910). *Fischer v. Blank,* 31 N.Y.S. 10 (1894) is very similar to the case at bar, and involves injunction and a contempt order. The lower court had entered a non-conforming judgment. The appellate court said: ". . . (I)f the court did not follow the decision of the court of appeals in reference to the modification of the injunction, that fact did not make its action void. The proper course for defendant was to have moved to vacate the order, and, if that was refused, to appeal. . . . The Court was not without jurisdiction; it was acting within its jurisdiction when it attempted to make the judgment of the court of appeals the judgment of this court. Erroneous action is never ground for attacking the jurisdiction of the court." Though the appellate court refers to the judgment as erroneous, it seems to indicate by the suggested procedure that it was irregular. There are many opinions from many jurisdictions, however, which hold inconsistent judgments and judgments which go beyond the mandate of the appellate court, absolutely void. *Eastern Iron and Metal Co., Ltd, v. Patterson,* 40 Hawaii 382 (1953); *Ethredge v. Diamond Drill Contracting Co.,* 93 P. 2d 324 (Wash. 1939); *A. L. Klemm & Son v. City of Winter Haven,* 192 S. 652 (Fla. 1939); *Lial v. Superior Court,* 23 P. 2d 795 (Cal. 1933).

Though it has been argued insistently to the contrary, we do not consider it absolutely essential that the judgment of Judge Joseph W. Parker be classified. If it is to be classified, we think its most logical resting place is among irregular judgments. The court had jurisdiction and authority to enter judgment in accordance with our opinion and attempted to do so, and nothing more. The judgment entered was not contrary to law, or upon a mistaken principle of law — so far as it went it conformed to the law of the case. It was contrary to the course of practice because it inadvertently failed to fully conform, in that it did not also expressly vacate the Hooks judgment. Defendant followed proper procedure by moving in the cause to set it aside.

Regardless of classification, however, when it comes to our attention that a lower court has failed to comply with the opinion of this Court, whether through insubordination, misinterpretation or inattention, this Court will, in the exercise of its supervisory jurisdiction, *ex mero motu* if necessary, enforce its opinion and mandate in accordance with the requirements of justice. N. C. Constitution, Art. IV, s. 8; *Wescott v. Bank,* 227 N.C. 644, 43 S.E. 2d 844.

From the general nature and content of defendant's motion Judge Morris might well have supposed that defendant was requesting him to re-open matters already decided in our former opinion, and to overrule the judgments of other superior court judges — neither of which he had authority to do. But we are of the opinion that the motion is sufficiently broad to include the request that our former opinion be carried out and the judgment of the court be made certain. Indeed, it is high time that matters already decided be put at rest.

The court below will enter judgment in this cause in words and figures as follows: "It is adjudged and decreed: (1) That defendant is hereby enjoined and restrained from appearing at the Haven Creek Baptist Church, Manteo, North Carolina, and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor; (2) that, for the purposes of this action, defendant is not, and will not be, pastor of said Haven Creek Baptist Church until there has been a final judicial determination in this cause or in another cause in a court of competent jurisdiction, that defendant has, on a date subsequent to 11 February 1960, been duly elected pastor of said church in accordance with and pursuant to the customs, usages and practices of said church; (3) that this judgment does not violate any of defendant's rights and privileges guaranteed to him by the North Carolina Constitution, Art. I, ss. 1, 17, 25, 26 and 37, and by the First and Fourteenth Amendments of the Constitution of the United States; and (4) that all judgments and orders heretofore made and entered in this cause in Superior Court, especially the judgments of Judges Hooks, Bone and Joseph W. Parker, are hereby vacated and set aside insofar as they, or any of them, are in conflict or at variance with this judgment."

Plaintiffs will pay one-half of the court costs in Supreme Court, and defendant will pay one-half of the court costs in Supreme Court.

For the reasons stated, and to the extent indicated, the judgment of Morris, J., entered at the October Term 1961 of the Superior Court of Dare County is

Reversed.

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

PARKER, J. I concur in the result of the majority opinion, but I do not agree with the following statements in that opinion: "If it [Judge Joseph W. Parker's judgment] is to be classified, we think its most logical resting place is among irregular judgments. . . . It [Judge Joseph W. Parker's judgment] was contrary to the course of practice because it inadvertently failed to fully conform. . . ."

As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. *Hayes v. 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; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164; *Robinson v. McAlhaney,* 216 N.C. 674, 6 S.E. 2d 517; Strong's N. C. Index, Vol. 1, Appeal and Error, sec. 60, where many of our cases are cited; 3 Am. Jur., Appeal and Error, sec. 985.

"In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta.*" *Hill v. Houpt,* 292 Pa. 339, 342, 141 A. 159, 160.

This Court said in *Goodson v. Lehmon,* 225 N.C. 514, 35 S.E. 2d 623, 164 A.L.R. 510:

> "This Court may, of course, render a final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion of the Court is certified down to the Superior Court of the county whence the appeal came, where a judgment in accordance with the opinion is entered. In that event, while the certified decision is binding on the court of original jurisdiction, the cause is not terminated until the authority of that court has been exercised."

On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court. Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals. *Harrington v. Rawls,* 136 N.C. 65, 48 S.E. 571; *Robinson v. McAlhaney, supra; Cannon v. Cannon,* 226 N.C. 634, 39 S.E. 2d 821; 3

Am. Jur., Appeal and Error, sec. 1234, where many cases are cited supporting the text; 5B C.J.S., Appeal and Error, secs. 1966 and 1967, where many cases are cited supporting the text.

As a general rule "after the reviewing court has determined a case before it and remanded such case to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court, even during the continuance of the term in which it was rendered. The judgment of the higher court is not reviewable in any way by the court below, in the exercise of its equitable powers, or otherwise. The lower court cannot vary or examine the decree of the higher court for any other purpose than execution; give any other or further relief; review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. It can only proceed to execute the mandate and settle so much as remains to be done, without rescission or modification." 3 Am. Jur., Appeal and Error, sec. 1237. 5B C.J.S., Appeal and Error, sec. 1967 is to the same effect.

"If the trial court fails or refuses to comply with the appellate court's mandate, the latter may, broadly speaking, take any steps or issue any appropriate writ necessary to give effect to its judgment." 5B C.J.S., Appeal and Error, sec. 1994.

The Court said in *United States v. Pink,* 36 N.Y.S. 2d 961: "The power to compel obedience to its mandate is inherent in the appellate court itself. It exists quite independently of statute, and has been exercised since early times. Indeed, it is well settled that a trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith. Moreover, the appellate court, in the event of refusal of the trial court to carry its mandate into effect, may take any steps or issue any appropriate writ or order to compel obedience thereto."

A universal principle as old as the law is that the proceedings of a court without jurisdiction are a nullity. Authority is a prerequisite of judicial action. Jurisdiction is essential to a valid judgment. *Cannon v. Cannon, supra;* 14 Am. Jur., Courts, sec. 167.

We have held in the following cases that judgments of the superior court, which were entered not in strict accordance with a mandate of this Court on a prior appeal, were unauthorized because of lack of jurisdiction, and void. *Newberry v. Fertilizer Co.,* 206 N.C. 182, 173 S.E. 67; *Chavis v. Brown,* 174 N.C. 122, 93 S.E. 471; *Banking Co. v. Morehead,* 126 N.C. 279, 35 S.E. 593; *Black v. Black,* 111 N.C. 300, 16 S.E. 412; *Stephens v. Koonce,* 106 N.C. 222, 10 S.E. 996; *In re*

Griffin, 98 N.C. 225, 3 S.E. 515; *White v. Butcher,* 97 N.C. 7, 2 S.E. 59; *Cannon v. Cannon, supra,* (dictum).

The majority opinion states: "The Supreme Court has, in at least two cases, held judgments by the lower court to be *irregular* where they undertook to modify prior opinions of Supreme Court. *Murrill v. Murrill,* 90 N.C. 120; *Calvert v. Peebles,* 82 N.C. 334." I do not so understand these cases. The opinion in the *Murrill* case states:

> "It is very clear that it was the duty of the superior court to proceed in the case in that court, in strict accordance with the decree of affirmance in this court. Indeed, it had no authority to modify or change in material respect the decree affirmed. The latter decree is conclusive as to the matters embraced by it, and the court below had no power to review, correct or modify it. Any further action taken in the case must be in pursuance of and consistent with it.
>
> "Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the court of errors would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself.
>
> "Appellate courts of errors are founded upon the fundamental principle and theory, and to the end that the errors of subordinate judicial tribunals shall be corrected by them in the orderly course of judicial procedure; the law applicable to the cases before them is unalterably settled and applied by their judgments and decrees, until and unless these be altered by themselves in a proper proceeding for the purpose, or by some proper action attacking them for fraud, mistake, or other like consideration as may be allowed by law. This view is in accordance with that of this court in *Calvert v. Peebles,* 82 N.C. 334. In that case the court, *Mr. Justice Ashe* delivering the opinion, said, 'when this court announced by its decision that there was no error in the judgment of the court below, that court had no right or power to modify that judgment in any respect. It could only be done by direct proceeding alleging fraud, mistake, imposition, &c.' To the like effect are the cases of *State v. Lane,* 26 N.C. 434; *Grissett v. Smith,* 61 N.C. 297; *Perry v. Tupper,* 71 N.C. 380."

I am fortified in my opinion by what this Court said in *Tussey v. Owen,* 147 N.C. 335, 61 S.E. 180, in respect to these two cases:

> "When this case was here before, 139 N.C. 457, we declared

that there was error and that the Superior Court should have entered a judgment of nonsuit. The judgment of this Court was duly certified to the court below, with directions to proceed further in the cause in accordance with the opinion by which the nonsuit had been ordered. The nonsuit was ordered, not upon the pleadings, but upon the evidence, under the provisions of the statute (Revisal, sec. 539.) It was in law equivalent to a reversal of the judgment below and a direction to dismiss the action. *Hollingsworth v. Skelding,* 142 N.C. 246; *Bowden v. R. R.,* 144 N.C. 28. It was therefore the duty of the Superior Court, when it received the certificate of this Court, with the accompanying opinion, to dismiss the action in accordance with the mandate of the judgment delivered here. It had no power to proceed otherwise than as directed in that judgment, and especially did it not have the power to proceed in a manner inconsistent therewith. The cases to this effect are numerous. *Calvert v. Peebles,* 82 N.C. 334; *Murrill v. Murrill,* 90 N.C. 120; *Brendle v. Herren,* 97 N.C. 257; *Pearson v. Carr,* 97 N.C. 194; *Dobson v. Simonton,* 100 N.C. 56; *Stephens v. Koonce,* 106 N.C. 222; *Herndon v. Ins. Co.,* 108 N.C. 648; *Black v. Black,* 111 N.C. 300. In *McCall v. Webb,* 126 N.C. 760, this Court held that after final judgment in the Supreme Court it is too late to set up a new cause of action by amendment of the complaint, and in *White v. Butcher,* 97 N.C. 7, this Court refused to permit any change in the pleadings for the purpose of introducing new matter into the case after it had been finally decided upon the merits. 'The controversy adjusted in this Court could not be reopened in the court below, as seems to have been attempted, by new pleadings introduced or by permitting anything to be done inconsistent or at variance with the rulings here made.' *White v. Butcher,* 97 N.C. 10.

"In *Murrill v. Murrill, supra,* it is suggested that the refusal of the Superior Court to obey the mandate of this Court is not reviewable by appeal, as there is nothing to be reviewed, the proper remedy being by *mandamus,* following *Ray v. Ray,* 34 N.C. 24. In this case the Superior Court eventually did what should have been done when the judgment and opinion of this Court were certified to and received by the court below."

The majority opinion states: "But we have held judgments, which indicated the judge misunderstood and misinterpreted the opinion of this Court on former appeal and gave it broader significance or narrower scope than we intended, to be erroneous. *Robertson v. Robertson,* 255 N.C. 581, 122 S.E. 2d 385; *Cannon v. Cannon,* 226 N.C. 634,

39 S.E. 2d 821; *Durham v. Cotton Mills,* 144 N.C. 705, 57 S.E. 465; *Dobson v. Simonton,* 100 N.C. 56, 6 S.E. 369; *Isler v. Brown,* 69 N.C. 125."

In my opinion, the cases cited do not support the statement of the majority opinion.

In the *Isler v. Brown* case at the Spring Term 1872 of the court below there was judgment for plaintiff, and defendant appealed to the Supreme Court. At the June Term of the Supreme Court the judgment was affirmed. At the Spring Term 1873 of the court below, defendant moved to vacate the judgment rendered against him at the Spring Term 1872 upon the ground of mistake, and his Honor vacated the judgment and granted a new trial, from which plaintiff appealed to this Court. The Court in its opinion said:

> "In this there was error. There was no judgment below which his Honor could vacate. The appeal to this Court vacated the judgment below, and then there was judgment in this Court at June Term, 1872, in favor of the plaintiff.
>
> "There being no judgment below to vacate, and his Honor having no power to vacate the judgment of this Court, it follows that the order below vacating the judgment and granting a new trial was erroneous."

If his Honor below *had no power to vacate the judgment of this Court,* his order was not erroneous but void, because authority is a prerequisite of judicial action.

In the *Dobson v. Simonton* case, the Court held the superior court has no right to disturb a judgment which has been affirmed by the Supreme Court. As I read the case of *Durham v. Cotton Mills,* it does not support the statement for which it is cited, and the statement in the fourth headnote of that case in our Reports to the effect a judgment entered by the court below, supposed to be in conformity with a former order of this Court, but *erroneous,* is not supported by the language of the opinion, for nowhere in that opinion is a statement that an order entered by the court below not in conformity with a mandate of this Court is erroneous. As I read the *Cannon v. Cannon* case, it does not support the statement in the majority opinion for which it is cited, but a *dictum* in that case supports my view, which will appear below.

In the *per curiam* decision of the *Robertson v. Robertson* case, cited in the majority opinion, appears this *dictum*: ". . . but if the court had misunderstood what was then said [in the decision on the former appeal], and because of such misunderstanding failed to submit an issue locating all the boundaries of the property, the judgment entered

on the verdict would not be void. It would merely be erroneous. 5B C.J.S. 646-7."

5B C.J.S., Appeal and Error, sec. 1993, page 646, reads:

> "The failure to follow the decision or comply with the mandate of the appellate court generally renders the action of the trial court erroneous, and may constitute reversible error.
>
> "While such action may constitute reversible error, the failure of the trial court to follow the decision or the mandate of the appellate court does not generally render the action of the trial court completely void or invalid but merely erroneous. Under some circumstances, however, proceedings in the trial court on remand of a cause which are contrary to the express directions or mandate of the appellate court must be treated as null and void."

In note 8 under section 1993 appear two cases, one from North Dakota, and one from Washington, *In re Waters of Doan Creek in Walla Walla County,* 162 Wash. 695, 299 P. 383. In this Washington case the decision seems to have been controlled by a state statute, and in the later case of *Etheridge v. Diamond Drill Contracting Co.,* 200 Wash. 273, 93 P. 2d 324, the Supreme Court of Washington said:

> "In remanding the cause to the trial court it was the duty of the trial court to comply with the mandate of this court. Such mandate must be strictly followed and carried into effect according to its true intent and meaning, as determined by the directions given by this court. Proceedings contrary to the mandate must be treated as null and void. *Gudmundson v. Commercial Bank & Trust Company,* 160 Wash. 489, 295 P. 167; 3 Am. Jur., page 730, § 1234."

Sec. 1994, page 647, is entitled Remedy.

Whatever the law may be in other jurisdictions, in my opinion, the law in this jurisdiction is firmly settled by many decisions that a judgment or an order of the superior court, which does not strictly conform to a mandate of this Court upon a prior appeal, is null and void. None of our decisions that I have been able to find, and this includes our cases cited in the majority opinion, when rightly read, hold otherwise, though some loose language and *dicta* have been used in some of the opinions. I cannot agree to what is in effect the overruling of a long, unbroken line of our decisions for over a century, which, speaking realistically, is done by the statement in the majority opinion: "If it [Judge Joseph W. Parker's judgment] is to be classified, we think its most logical resting place is among irregular judgments."

Why do I write this lengthy opinion merely to express my disagreement with a *dictum* in the majority opinion? My answer is this: I believe that it is a reasonable assumption that after the filing of the majority opinion superior court judges will consider a judgment like Judge Joseph W. Parker's judgment here as irregular. If one superior court judge enters a judgment in a case not in conformity with a mandate of this Court on a prior appeal in the case, and if such judgment is irregular, and a motion is made in the case before another superior court judge to set it aside for irregularity, then the second judge must consider the rights of innocent third persons, if any, who have acquired interests under a judgment not conforming with a mandate of this Court on a prior appeal in the case, and see that they are protected, and further, determine whether the movant has acted within a reasonable time to protect his rights. *Coffin Co. v. Yopp,* 206 N.C. 716, 175 S.E. 164; McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 2, sec. 1715— Vacating an Irregular Judgment. This could entail protracted and expensive litigation, and in certain cases make the mandate of this Court on a prior appeal in the case nugatory.

If a judgment of a superior court judge not in conformity with a mandate of this Court on a prior appeal in the case is erroneous, and a motion is made before another judge as here, then the second judge has no power to do anything, because an erroneous judgment entered by one superior court judge cannot be modified, reversed or set aside by another superior court judge, *Davis v. Jenkins,* 239 N.C. 533, 80 S.E. 2d 257, and the remedy to obtain redress from an erroneous judgment is by appeal, *Menzel v. Menzel,* 250 N.C. 649, 110 S.E. 333, and, further, a superior court judge is not vested with the constitutional power, as we are by the N. C. Constitution, Art. IV, sec. 8 "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." However, if the judgment of the first superior court judge is not in conformity with the mandate of this Court on a prior appeal in the case and is null and void, as I believe it is under our decisions, then another superior court judge can treat the judgment of the first judge as a nullity, and enter a judgment to conform with the mandate of this Court on a prior appeal in the case. *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716; *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460. I think the question as to whether Judge Joseph W. Parker's judgment is void is squarely presented to this Court for decision, and should have been held null and void.

OVERNITE TRANSPORTATION COMPANY v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA.

(Filed 2 May 1962.)

1. Courts § 19; Master and Servant § 14—

29 U.S.C. 187 (a) confers jurisdiction on a State court having jurisdiction of the parties to entertain an action against a labor union under the Labor Management Relations Act to recover damages resulting from an alleged unlawful strike and secondary boycott. In such action the State court must accept the interpretation placed upon the pertinent Acts of Congress by the Supreme Court of the United States. Constitution of the United States, Art. VI, § 2; *Constitution of North Carolina*, Art. I, §§ 3, 5.

2. Master and Servant § 16—

The introduction of evidence of defendant labor union's constitution, showing control by the union over its local unions, with right to suspend a local's charter and place it in trusteeship, together with evidence that the union issued letters requesting exchange carriers not to handle cargo for plaintiff carrier, contributed to the expenses of maintaining the strike against plaintiff, and that its local unions, including local unions under trusteeship and the joint council, participated in the alleged unlawful strike and secondary boycott, *is held* sufficient to raise the question of the liability of the union under the doctrine of *respondeat superior*.

3. Evidence § 43—

Evidence of the education and experience of the witness over a period of years in the field of accounting *is held* sufficient to support the court's finding that the witness was an expert in cost accounting so as to render competent testimony of the witness from synopsis sheets made by him or under his direction from the original records as to the amount of loss suffered by the plaintiff in regard to the pertinent items of damage, including loss of prospective profits.

4. Damages § 2—

Loss of profits resulting to plaintiff from defendant's wrongful act may not be based upon mere speculation and conjecture, but may be recovered if plaintiff introduces evidence from which the amount of such loss can be ascertained by the jury with reasonable certainty.

5. Damages § 10—

Punitive damages are never awarded as compensation, but are awarded above and beyond actual damages in proper instances as punishment inflicted for intentionally wrongful conduct.

6. Same; Master and Servant § 16—

The National Labor Management Relations Act does not authorize the recovery of punitive damages.

7. Same—

An action for the recovery of damages resulting from the violation of

the Labor Management Relations Act may be joined with an action to recover damages for a tort of violence under the State law, and when so joined the State court may award punitive damages under State law in proper instances, even though punitive damages may not be recovered in the cause under the Federal Act.

8. Same—

Where the complaint alleges a cause of action under the Labor Management Relations Act for defendant union's unlawful activities in attempting to coerce plaintiff interstate carrier to accept the union as a bargaining agent for plaintiff's employees when the union had not been certified by any authority as the bargaining agent, but the complaint does not allege a breach of the peace or any violence in connection with the alleged unlawful strike and secondary boycott, plaintiff may not recover punitive damages.

APPEAL by the defendant from *Pless, J.*, November 13, 1961, Regular "A" Civil Term, MECKLENBURG Superior Court.

In this civil action the plaintiff seeks to recover damages, actual and punitive, alleged to have been caused by the defendant's unfair labor practices in calling and maintaining a strike and secondary boycott designed to compel the plaintiff, an unorganized trucking company, to recognize the defendant as the bargaining agent for the plaintiff's employees.

Summons was issued against the defendant and served on the Secretary of State on September 3, 1959. The plaintiff filed and also served on the Secretary of State the following verified complaint:

"The plaintiff, complaining of the defendant, says and alleges:

"(1) That the plaintiff is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, and maintains one of its principal offices and places of business at Charlotte, North Carolina.

"(2) That the plaintiff is a common carrier, engaged in the business of transporting freight by motor vehicle.

"(3) That the defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is as the plaintiff is informed and believes, an unincorporated labor organization or Union.

"(4) That the plaintiff derives its revenues and profits from handling and transportation of direct freight, which is a freight transported from origin to destination entirely by the plaintiff, and from handling and transportation of interchange freight, which is freight not transported from origin to destination entirely by the plaintiff but interchanged between the plaintiff and other Trucking Companies and transported part of the way from

origin to destination by the plaintiff and part of the way by such other interchange Companies.

"(5) That on or about May 17, 1959, the defendant called a strike against the plaintiff for the purpose of forcing or requiring the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(6) That the defendant was not able to accomplish such purpose by the direct pressure of such strike upon the plaintiff, for despite such strike the great majority of the plaintiff's employees continued at work with the plaintiff and despite such strike the plaintiff remained ready, able and willing to render its common carrier services as it had been doing theretofore.

"(7) That the defendant, however, by an additional means and device, has prevented the plaintiff from carrying on its business in a normal way, thereby damaging the plaintiff as hereinafter set forth; that such means and device which the defendant has thus used against the plaintiff has been as follows: That the defendant has induced and encouraged the employees of the plaintiff's customers and employees of the aforesaid Trucking Companies doing interchange freight business with the plaintiff to engage in a concerted refusal, in the course of their employment, to transport or otherwise handle any goods, articles, materials, or commodities going to or coming from the plaintiff; that the object of such inducement and encouragement of the employees of the plaintiff's customers and said employees of said Trucking Companies was to force and require the said customers and Trucking Companies to cease doing business with the plaintiff and to force and require the plaintiff to recognize or bargain with the defendant as the representative of plaintiff's employees, although the defendant, as stated above, had not been certified as the representative of the plaintiff's employees by any Governmental agency or authority whatever.

"(8) That such action on the part of the defendant was wrongful and in violation of law and was taken by the defendant for the willful, deliberate and malicious purpose of injuring and damaging the plaintiff; that as a result of such action on the part of the defendant, the plaintiff has been shut off from and deprived of freight business which otherwise and normally the plaintiff would have profitably handled and has been required to pay out large sums of money for extraordinary expenses incurred by the plaintiff in its efforts to secure, handle and transport freight ship-

ments and otherwise operate its business despite the wrongful and unlawful acts of the defendant hereinabove set forth; and that in this manner and by this means the plaintiff has been grievously injured and damaged by the defendant.

"(9) That by reason of the matters hereinabove set forth the plaintiff has been injured and damaged by the defendant in the sum of $500,000.00 and is entitled to judgment against the defendant in that amount, and by reason of the defendant's deliberately, willfully and maliciously inflicting such injury and damage upon the plaintiff as hereinabove set forth, the plaintiff is entitled to judgment for punitive damages against the defendant in an additional sum of $500,000.00.

"(10) The acts of the plaintiff in the operation of its business described above affects interstate commerce within the meaning of the Labor Management Relations Act (29 U.S.C.A. 151, et seq.), and jurisdiction of this cause is conferred upon this Court by Section 303 (b) of said act (29 U.S.C.A. 187 b).

"WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of $1,000,000.00, together with the cost of this action; and the plaintiff prays the Court for such other and further relief as the Court may deem just and proper."

After the court disposed of preliminary motions, the defendant, on September 29, 1960, filed the following verified answer:

"The defendant, answering the plaintiff's complaint, says:

"1. Paragraph 1 of the plaintiff's complaint is admitted.

"2. Paragraph 2 of the plaintiff's complaint is admitted.

"3. Paragraph 3 of the plaintiff's complaint is admitted.

"4. Answering paragraph 4 of the plaintiff's complaint, the defendant says that it is informed and believes that the plaintiff derives its revenues and profit at least in part from the handling and transportation of direct freight, and in part from the handling and transportation of interchange freight. Except as herein specifically admitted the defendant does not have information sufficient from which to form a belief as to the truth of the plaintiff's allegations and the same are therefore denied.

"5. Paragraph 5 of the plaintiff's complaint is untrue and denied. Upon information and belief, the dispute and such stoppages of work as occurred in the plaintiff's places of business were caused by and resulted from the plaintiff's unfair labor practices and wrongful acts toward and against its employees and their local union.

"6. Answering paragraph 6 of the plaintiff's complaint, it is

denied that this defendant sought to accomplish any such purpose as that set forth in the plaintiff's complaint by pressure either direct or indirect, and the allegations of paragraph 6 of the plaintiff's complaint, upon information and belief, are untrue and denied.

"7. Paragraph 7 of the plaintiff's complaint is untrue and denied.

"8. Paragraph 8 of the plaintiff's complaint is untrue and denied.

"9. Paragraph 9 of the plaintiff's complaint is untrue and denied.

"10. Paragraph 10 of the plaintiff's complaint is untrue and denied.

"WHEREFORE, having fully answered the plaintiff's complaint, the defendant prays that the plaintiff have and recover nothing; that this cause be dismissed, and that the plaintiff be required to pay the costs of this action."

The evidence tends to show that Overnite Transportation Company (hereafter called Overnite) is a Virginia corporation duly licensed by the Interstate Commerce Commission and by the licensing authorities of Virginia, North Carolina, South Carolina, and Georgia, to engage in the transportation of freight by motor vehicles in those States. The plaintiff maintained 33 terminals, among which the following are perimeter or gateways: Richmond, Virginia, Asheville, Charlotte, and Winston-Salem, North Carolina, Greenville and Columbia, South Carolina, and Atlanta, Georgia. At the time complained of, Overnite employed approximately 1,500 men. Its average monthly freight carriage was approximately 111,000,000 pounds, 60 per cent of which was freight picked up and delivered within its territory. The remaining 40 per cent was exchange freight, that is, (1) shipments originally received by Overnite to be transferred to other carriers for delivery, and (2) shipments received from other carriers to be delivered by Overnite. The exchanges were made pursuant to agreements. Overnite had exchange agreements with approximately 150 other carriers.

Beginning in April, 1959, the defendant International began efforts to organize Overnite's employees. The activities began in Charlotte and spread throughout Overnite's entire system. The organization attempts met with little success. The union did not, by petition or otherwise, have the National Labor Relations Board call an election to select a bargaining agent for Overnite's workers. The union, however, made demand on the plaintiff to recognize it as the bargaining agent. Overnite refused. Immediately the strike began. Picket lines were

established at plaintiff's terminals. Nevertheless the majority of plaintiff's employees continued to work and refused to honor the picket lines. Whereupon the union, through its members who were employees of other carriers, organized a boycott against movement of plaintiff's interchange freight. The union's contracts with other carriers contained clauses forbidding discharge for refusal to handle "hot cargo." Any union member who assisted in moving any freight routed over plaintiff's lines was reported to the union for discipline. As a result of the strike the volume of plaintiff's interchange freight fell off materially. In order to prevent complete stoppage of its interchange business, the plaintiff hired additional men, procured additional equipment, and obtained additional operating authority.

According to the testimony of Mr. Simmons, plaintiff's expert accountant, whose evidence will be discussed in the opinion, the plaintiff's excess cost of handling freight was $232,837.00. The cost of guard service to protect interchange freight, including the workers and their equipment during the strike, amounted to $16,662.00. Extra telephone and communication expenses amounted to $2,116.00. Extra cost in moving, including damage thereto, 20 million pounds of freight that normally would have been brought to Overnite's terminals by connecting lines amounted to $51,759.00. The extra cost of operating 23 additional trailers and nine additional tractors during the strike was $20,170.00. The above listed extra costs of operating the plaintiff's business do not take into account the loss of profits in reasonable contemplation during the period of the strike. Mr. Simmons testified that for the first four months of 1959 Overnite experienced a gross increase in its business of 22 per cent over the same period for the preceding year; that after the strike the rate of increase dropped to 16 per cent for the remainder of the year, and that the last eight months of that year should have shown a material increase.

At the trial the plaintiff introduced in evidence the defendant's constitution, Article 1, Section 2, which states the purpose of the union to be "To organize under one banner all workmen engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization; . . ." The plaintiff likewise introduced a number of the union's agreements with lines which interchanged with plaintiff, relating to over-the-road transportation, the pickup, forwarding, and freight delivery service. The agreements protected from discharge union employees who refused to handle "hot cargo." The plaintiff introduced photostatic copies of the financial reports showing expenditures by the defendant, by its Joint Council No. 9, and by its several local unions in support of the strike. These reports showed expenditures by International and by Joint Council

No. 9 and the local unions involved during the strike activities. The evidence tended to show that approximately $40,000.00 was contributed by International and by its Council No. 9, and by Local 391 which was in trusteeship and operated directly under the order of James R. Hoffa, President of the defendant. The total expenditures in support of the strike by International, by its Council No. 9, and by the local unions involved, exceeded $125,000.00.

The defendant introduced four witnesses, each of whom was a member of the defendant union. Each testified to his participation in the strike as a member of a local union. The testimony tended to confine the strike activities to the local unions and to disassociate International from responsibility. However, Mr. Cook, one of International's witnesses, testified: "The International Union will not pay out any money in support of a strike it does not sanction."

At the close of the evidence the court submitted four issues:

> "1. Was the plaintiff damaged by the wrongful actions of the defendant, as alleged in the complaint?
>
> "2. If so, what amount, if any, is the plaintiff entitled to recover of the defendant as actual damages?
>
> "3. Was plaintiff damaged by the reckless, wanton and malicious actions of the defendant, as alleged in the complaint?
>
> "4. How much, if any, is plaintiff entitled to recover of defendant as punitive damages?"

In apt time the defendant requested the court to give the jury special instructions:

> "The Court charges you that, under Section 303 of the National Labor Relations Act, if the plaintiff is entitled to any damages at all, it is entitled to recover only those damages it has actually sustained and the cost of this action. Under Section 303, the plaintiff is not entitled to recover punitive damages. Consequently you are instructed to answer the fourth issue, referring to punitive damages with the word, 'None.' "

The Court declined to give the requested instruction, but did charge in part as follows:

> "That issue (Third) ladies and gentlemen of the jury, refers to what are known as punitive damages. The Court instructs you, reading from . . . that if you find the conduct of the defendant in respect to this strike was reckless, wanton and malicious, that it was without regard to the rights of the plaintiff, then it would be within your discretion to include in your answer to the last issues

a sum of money which you may deem proper as smart money, or punitive damages. You are not required by the law, notwithstanding what your findings as to fact may be, to include any punitive damages, but the whole matter as to whether or not you shall include punitive damages is left to your discretion, to your sound judgment, providing you shall find that the conduct of the defendant was reckless, wanton and malicious.

"Now, ladies and gentlemen of the jury, while every legal wrong entitles the party injured to recover damages. . . . sufficient to compensate for the injury inflicted, not every legal wrong entitles every party to recover exemplary or punitive damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature."

The jury answered the first and third issues, Yes, the second issue, $363,193.00, and the fourth issue, $500,000.00. The court entered judgment that the plaintiff recover $363,193.00 actual, and $500,000.00 punitive damages. The defendant excepted and appealed, assigning errors.

Blakeney, Alexander & Machen, By J. W. Alexander, Jr., Ernest W. Machen, Jr., for plaintiff appellee.

Robinson, Jones & Hewson, Hunter M. Jones, Francis M. Fletcher, Jr., for defendant appellant.

David Previant, Milwaukee, Wis., Herbert S. Thatcher, Washington, D. C., Edwin Pearce, John S. Patton, Joseph Jacobs, Atlanta, Georgia, of counsel.

HIGGINS, J. Before us are 1,500 pages of record, exhibits and briefs. The defendant's assignments of error alone cover 165 pages of the record. They are based on 484 exceptions taken during the course of the long and hotly contested trial. Review in detail is not indicated. Procedural questions involving the service of process and motion to postpone the trial have been considered. They are without merit.

The plaintiff instituted this civil action in the Superior Court of Mecklenburg County to recover damages, both actual and punitive, alleged to have resulted from a strike and secondary boycott called by the defendant in an unlawful effort to compel the plaintiff to sign a union labor contract with plaintiff's employees. The plaintiff alleges its business "affects interstate commerce within the meaning of the Labor Management Relations Act." (29 U.S.C.A. 151, *et seq.*) Section 187(a) provides: "It shall be unlawful for the purposes of this sec-

tion only, in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . transport . . . any goods, articles, materials, or commodities . . . where an object thereof is— . . . (2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; . . . (b) whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit." (Note: Section 187(a) seems to have been amended effective September 14, 1959, a date subsequent to the conduct complained of.)

The right to maintain the action and the jurisdiction of the State court to hear it arise by congressional grant. In fixing the rights and liabilities of the parties, the Superior Court on the trial, and this Court on appeal, must accept the interpretation the Supreme Court of the United States has placed upon the Acts of Congress here involved. Constitution of the United States, Article VI, Section 2; Constitution of North Carolina, Article I, Sections 3 and 5; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163; *Norris v. Telegraph Co.,* 174 N.C. 92, 93 S.E. 465.

Three basic questions are presented by the assignments of error: (1) The liability of International for the damages which proximately resulted from the strike. (2) Sufficiency of the evidence of actual damages to support the jury's finding. (3) Sufficiency of the pleadings and evidence to support an award of punitive damages. Discussion of these questions will necessarily involve the challenged portions of the court's charge with respect to them.

Its constitution states: The International Brotherhood of Teamsters, etc., shall consist of an unlimited number of local unions chartered by International. The stated purpose is "To organize under one banner all workmen engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization. . . . This organization has jurisdiction over all teamsters, chauffeurs, warehousemen and helpers; all who are employed on or around . . . automobiles, trucks, trailers, and all other vehicles hauling, carrying or conveying freight, merchandise, or materials." So complete is International's control over local unions that it may suspend the local charter and place the locals in trusteeship under the direct supervision

of International's president. Indeed, even in this case, two of the locals, No. 55 and No. 391, involved in this strike, were in trusteeship, operating under the direct authority of James R. Hoffa, International President.

The evidence shows an agent of the union sent out "hot cargo" letters and addressed members of locals, particularly employed by Roadway Express, requesting them not to handle exchange freight for Overnite. The contribution to the expenses of maintaining the strike made by International, the active participation of its Locals Nos. 55 and 391, under trusteeship, and by its Joint Council No. 9, sufficiently show that International was using the locals as its hands and arms to carry on the strike throughout the area according to plans which originated in its own head. *N.L.R.B. v. International Brotherhood of Teamsters*, 267 Fed. 2d 870, *Certiorari* denied, 361 U.S. 914, Rehearing denied, 361 U.S. 945; *Dairy Distributors, Inc. v. International Brotherhood of Teamsters*, 8 Utah 2d 124, 329 P. 2d 414, *Certiorari* denied, 360 U.S. 909; *United Mine Workers of America v. Patton*, 211 Fed. 2d 742, *Certiorari denied*, 348 U.S. 824.

The evidence offered at the trial sufficiently established a principal-agency relationship between International and its local unions in fomenting the strike in order to force plaintiff, an unorganized freight carrier, to enter into an employment contract with the union. There is not a suggestion that the union had been designated or certified as a proper bargaining agent for plaintiff's employees. With respect to the principal-agency relationship, Judge Pless charged the jury:

> "Now, then, coming to the first issue: Was the plaintiff, referring to Overnite Transportation Company, damaged by the wrongful acts of the defendant, as alleged in the Complaint? Now, that issue, ladies and gentlemen, will depend upon several factors. In the first place, the defendant, and you will remember that there is nobody here as party to this case except International Brotherhood which I have referred to as the union in the charge, is the only defendant, and it could be held responsible for what was done by others only in the event this was done in law as agent of the union. . . . To give you what is meant by agency, it is the relation which results where one party called the 'principal' authorizes another party, called an 'agent' to act for him or it. The relationship of principal and agent may be created by word of mouth, writing or implied, by consent or acquiescence. A servant is an agent of his master, to deal more generally with things rather than with persons. The distinguishing difference between an agent and servant is that an agent can

contract for his principal and bind his principal contractually, whereas a servant cannot so bind in contract his master. Both principal and master are liable for the torts of their agents and servants when acting in the scope of their employment.

"A person is responsible for not only his own acts, but for the acts of his employees or his agent when they are done within the scope of their employment and in furtherance of the business which is entrusted to them. The test of the liability, in all cases, depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

The parol testimony and the exhibits, interpreted in the light of International's constitution, clearly indicate the cords which joined the many locals together in the strike effort, binding them to act in close concert throughout the four states, were manipulated by International. The evidence was sufficient to warrant the jury in finding the plaintiff was damaged by defendant's wrongful acts.

The second question presents a somewhat more difficult problem. For proof of its actual damages, Overnite relied upon the testimony of its vice president and general manager and accounting supervisor, Mr. P. S. Simmons. After completing business college training and a course in financing, he became bookkeeper and cashier of Motor Transit Company, Raleigh. He was appointed terminal manager and then traffic manager dealing with cost analysis.

Upon returning from service he accepted employment by the North Carolina Utilities Commission and traveled throughout the State instructing motor carriers as to the method of keeping records, checking costs, and making the reports required by the Commission. He testified before the Commission in matters involving rates, etc. In 1951 he became assistant traffic manager for Overnite. "In addition to our own company's expense items and accounts in detail, I study and analyze, and compare with our own, rates reported of other carriers, . . . this information being obtained through . . . reports on file in the I.C.C. and various State commissions. . . . This is the kind of thing I deal in all the time. . . . I testified in various finance cases before the I.C.C. and the State Commissions. . . . 60 or 70 times."

The evidence was sufficient to support the court's finding the wit-

ness was an expert in cost accounting. With respect to the weight to be given his testimony, Judge Pless instructed the jury:

> "Ladies and Gentlemen of the jury, in holding Mr. Simmons to be an expert in the field of cost analyses, the court does not mean by that, that you are bound by his testimony, nor should you give it any more credit than you would any other witness that appeared to be qualified, that is, it permits him to analyze and to some extent synopsize figures that would otherwise take a great deal of time. Of course, in that field, he is also permitted to express opinions that he would not be permitted to express were he not held to be an expert. However, none of these things are binding upon you, you would treat him just as you would any other witness, to determine whether or not it is acceptable to you. The objection is overruled."

Mr. Simmons testified he kept a daily record of the costs of the strike to his company. He gave the gross revenue each year beginning in 1955 as $5,843,530.00, which had increased to $12,000,000.00 in 1959. In 1958 the profit return was 9.2 per cent. In 1959 it was 3.11 per cent. The witness did not have in court the original records. He examined the records in 33 terminals operated by Overnite during 1959. Synopsis sheets made by him or under his direction, gave composite of the original records. In summary he testified the following losses resulted from the strike: Excess labor costs, $232,837.00; guards, $16,662.00; loss and damage to freight, $51,759.00; extra telephone and communications expense, $2,116.00; operating additional tractor-trailers, $20,170.00. The witness did not make a calculation showing the loss of profits during the term of the strike. However, counsel in the argument used the percentage of the net income fall-off during the strike which showed the loss to be $59,819.00. The jury accepted the evidence, including the calculation, and fixed plaintiff's actual damages at $363,193.00.

The one debatable item in the recovery is the loss of profits. "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of. . . . in a case of this kind it is open to the plaintiff to show a loss of profit upon the issue of injury and damage to his business, if he is able to present evidence from which the jury may be able to draw a reasonably accurate conclusion, not based on conjecture or speculation, as to the extent of the injury inflicted and amount of damage caused." *Steffan v. Meiselman*, 223 N.C. 154, 25 S.E. 2d 626.

On the issue of actual damages, Judge Pless charged:

> "I instruct you further that such actual damages, if any, allegedly sustained by the plaintiff must be proven with reasonable certainty, although it is not required that such actual damages be proven with mathematical exactness or with absolute certainty unless the damages are such as are susceptible of definite or precise proof. However, in no event may an award of damages be based on conjecture, speculation or guess.
>
> "In your consideration of what actual damages, if any, were sustained by the plaintiff in this case, you are not authorized to presume any such damages or base your decision thereon on guesswork or speculation, but you must look to the evidence as introduced in the trial of this case and determine whether a preponderance of the evidence shows, with reasonable certainty, that plaintiff, in fact, sustained any actual damages, and if so, you must then determine whether the evidence shows, with reasonable certainty, that any definite sum of such damages was sustained by the plaintiff.
>
> "Recovery for the loss of future profits may be had where they are reasonably certain in character and are the proximate result of the tort. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn."

The plaintiff's evidence made out a case for the jury on actual damages. It was sufficient to support the amount fixed.

Under the Labor Management Relations Act of Congress, recovery is authorized "for the damages sustained and the cost of the suit." Damages sustained are limited to actual damages suffered as a result of the wrong inflicted. *United Mine Workers v. Patton,* 211 Fed. 2d 742. Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful.

The plaintiff has stated one cause of action and only one. It does not allege a breach of the peace. It does not allege violence. So far as the evidence discloses, the picketing and the refusal to handle exchange cargo were peaceful. The cause of action arose by reason of the defendant's unlawful activities and demands for a contract without its prior designation as the bargaining agent for the plaintiff's

employees. In this particular field, the Federal authority is exclusive.

Admittedly, where a cause of action is asserted for a tort involving violence under State law and is coupled with a cause of action for violation of the Labor Management Relations Act, the State court may proceed to hear and determine both causes. The court may award punitive damages if authorized by State law in the case involving the State tort, but actual damages only may be awarded in the cause of action under the Labor Management Relations Act. The Federal courts recognize the right of the State court in a proper case to award punitive damages for a tort committed in violation of a right the State has recognized under its police power, although it is coupled with a separate Federal right, the jurisdiction over which is given to the State court by Congress. The joinder is permitted because the Act of Congress does not forbid it. *San Diego Trade Council v. Garmon,* 359 U.S. 236; *United Automobile Workers v. Russell,* 356 U.S. 634.

In the *Garmon* case the Supreme Court of the United States used this significant language: "It is true that we have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell,* 356 U.S. 634; *United Construction Workers v. Laburnum Corp.,* 347 U.S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our Federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (Citing *International Union v. Wisconsin Board,* 336 U.S. 245.) In cases where punitive damages have been allowed, a cause of action under State law was alleged, founded on violence, threats of violence, and intimidation. *United Mine Workers v. Osborne Mining Co., Inc.,* 279 Fed. 2d 716, *Certiorari* denied, 364 U.S. 881; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131; *Automobile Workers v. Wisconsin Employer Relations Board,* 351 U.S. 266.

In this case the plaintiff's complaint fails to state any separate cause of action under State law based on violence. In view of the authorities here quoted, and others of like import, we conclude the plaintiff's pleadings and evidence are insufficient to support an issue for punitive damages. Consequently the defendant's prayer for instructions should have been given. The exception based on its denial is sustained. The award of punitive damages is without a proper foundation and is stricken from the judgment. The record, however, does not disclose error in the award of actual damages.

As to Actual Damages — No error.

As to Punitive Damages — Reversed.

JUANITA SIMS, BY HER NEXT FRIEND, RUTH MAE SIMS v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 2 May 1962.)

1. Appeal and Error § 51½—

Exceptions to the exclusion of evidence connot be sustained if the evidence is inadmissible on any legal ground.

2. Evidence § 3—

It is common knowledge that modern hospitals are staffed by medical, surgical and technological experts, and that the accuracy of daily records made by them is essential to the proper operation of the hospital and the welfare of the patient.

3. Evidence § 25—

Hospital records properly identified and shown to have been entered in the usual course, reasonably contemporaneously the occurrence of the facts referred to therein, by persons having knowledge of the data set forth, and which are made *ante litem motam*, are not rendered incompetent by the hearsay rule, but constitute an exception to that rule.

4. Statutes § 5—

The caption of a statute may be considered in its construction only when the meaning of the act is doubtful, and the caption cannot control when the language of the statute is clear and unambiguous.

5. Evidence § 14—

Hospital records are privileged under G.S. 8-53 insofar as the entries are made by a physician or surgeon or under his direction and control and pertain to communications and information, obtained professionally, relating to matters necessary to diagnosis or treatment, but the privilege does not extend to notations made by nurses, technicians and others unless they were assisting, or acting under the direction of, a physician or surgeon.

6. Same—

The provisions of G.S. 8-53, being in derogation of the common law, are to be strictly construed, and the privilege therein provided is for the benefit of the patient and not the physician or surgeon. Nevertheless, the courts must not limit the scope of the statute so as to exclude from its coverage transactions coming within the plain meaning of its language.

7. Same—

G.S. 8-53 gives the judge of the Superior Court discretionary power to compel the disclosure of information by a physician or surgeon in regard to a patient, including information on hospital records entered by a physician or surgeon or by another under his direction and control, and the Superior Court should not hesitate to exercise this power when necessary to a proper administration of justice, in which instance the court should enter upon the record his finding of such necessity.

8. Insurance § 17—

False statements in regard to health upon an application for a policy

of life insurance are deemed material as a matter of law, and therefore it is error for the court in its charge to submit to the jury, in addition to the questions of whether insured made the statements and whether they were false, the further question of whether the statements were material.

9. Appeal and Error § 42—

A misstatement of the pertinent law must be held prejudicial even though made in stating the contentions of the parties.

10. Insurance § 34—

Evidence tending to show that insured died shortly after receiving a blow to the head, together with testimony that the witness did not know whether the blow was inflicted by another person or by accident, or how it was inflicted, is insufficient to show death by accidental means from bodily injury sustained solely through external, violent and accidental means. Further the court should explain in its charge the term "accidental means."

HIGGINS, J., concurring in result.

PARKER, J., joins in concurring opinion.

APPEAL by defendant from *Crissman, J.*, March 20, 1961 Term of FORSYTH. This appeal was docketed and heard as Case No. 387, Fall Term, 1961.

This is a civil action to recover death benefits provided in a policy of insurance issued by defendant on the life of Delia Sims, plaintiff beneficiary's mother. On 12 January 1959 the insured, Delia Sims, signed a written application on the basis of which the policy was issued on 26 January 1959. To question No. 14, "Are you in good health?", the insured answered, "Good." To question No. 18, "Have you ever had: heart trouble, high blood pressure, paralysis, asthma, tuberculosis, cancer, diabetes, kidney trouble, ulcers, syphilis, tumor, neurosis or alcoholism," the insured answered, "None." "Have you had any disease, illness or injury not mentioned herein?" Insured answered "No." The application included the following statement by insured: "I certify that the above statements and representations are complete and true. I agree that no obligation shall exist against said Company by reason of this application, although I may have made a deposit thereon, unless a policy is delivered to me, and unless upon said delivery I shall be alive and in good health."

The policy provided for coverage of $980 or double that amount if death resulted "solely through external, violent and accidental means."

Insured died on 31 January 1959, five days after the policy was issued.

Defendant denied liability on the ground that the application contained false statements with respect to insured's health.

Defendant introduced in evidence the signed application containing the quoted questions and answers. It attempted to introduce the properly authenticated records of Kate Bitting Reynolds Memorial Hospital showing the insured had been a patient and had been treated (1) for nine days in March, 1956; (2) ten days in April, 1957; (3) eleven days in July, 1957; (4) four days in October, 1957; and (5) the final admission on 31 January 1959 — the date of death. In ruling upon plaintiff's objection to the hospital records, the court said: "I will allow these for the purpose of showing when she was in the hospital . . . and for no other purpose." The exclusion of these records for other purposes is the basis of defendant's Assignment of Error No. 1.

The records in the time sequence of admission to the hospital showed the following diagnoses: (1) burns, nutritional anemia; (2) acute alcoholism, gastritis, chronic alcoholism, portal cirrhosis; (3) cirrhosis of the liver, chronic alcoholism; (4) valvular heart disease, and (5) the admission diagnosis of 31 January 1959, 6:30 P.M., cirrhosis, concussion, pancreatitis, and the final diagnosis at 9:30 P.M., subdural hematoma, chronic alcoholism, chronic pancreatitis, and tubular nephrosis.

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

"1. Did Delia Sims in the written application to the defendant represent that she was in good health on the date of the issuance of said application? Answer: Yes.

"2. Was said representation false? Answer: No.

"3. Did Delia Sims represent in her written application to the defendant that she had no disease at the time of the issuance of said application? Answer: Yes.

"4. Was said representation false? Answer: No.

"5. Was the death of Delia Sims caused by accidental means? Answer: Yes.

"6. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $1960.00."

The court entered judgment against the defendant for $1960.00, double the face value of the policy, from which defendant appealed.

Hoyle C. Ripple for plaintiff.

Womble, Carlyle, Sandridge & Rice and Wesley Bailey for defendant.

MOORE, J. The trial court excluded the contents of the hospital records without assigning any reason for the ruling. Conseqently if they were inadmissible on any legal ground, the ruling should be up-

held. The plaintiff insists the records were inadmissible upon two grounds: (1) as hearsay, and (2) as privileged communications.

Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule — entries made in the regular course of business. Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to prevent utter confusion. An inaccurate and false record would be worse than no record at all. Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication. *Builders Supply Co. v. Dixon,* 246 N.C. 136, 97 S.E. 2d 767; *Breneman Co. v. Cunningham,* 207 N.C. 77, 175 S.E. 829; *Insurance Co. v. R. R.,* 138 N.C. 42, 50 S.E. 452.

It is a matter of common knowledge, we think, that modern hospitals are staffed by medical, surgical and technological experts who serve as members of a team in the diagnosis and treatment of human ills and injuries. The hospital record of each patient is the daily history made in the course of examination, diagnosis and treatment. The welfare, even the life of the patient, depends upon the accuracy of the record. And the records, as evidence, are more credible perhaps, as to accuracy, than the independent recollection of the physicians, surgeons and technicians who make them. Motive for falsification is lacking. *Globe Indemnity Co. v. Reinhart,* 152 Md. 439, 137 A. 43; 26 Am. Jur., Hospitals and Asylums, s. 6, p. 590; 75 A.L.R. 1124; 13 N.C. Law Review 326; 24 Missouri Law Review 51; 58 West Virginia Law Review 76; 14 Southern California Law Review 99. On this subject *Parker, J.,* of the United States Court of Appeals for the Fourth Circuit, delivered an illuminating opinion — *U. S. v. Wescoat,* 49 Fed. 2d 193.

In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.* The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

The hospital records offered at the trial are not inadmissible as hearsay. They fall within the exception to the hearsay rule.

The next inquiry is whether or not the hospital records are privileged under the provisions of G.S. 8-53 and therefore inadmissible.

At comon law communications from patients to physicians are not privileged. Such privilege is purely statutory. It is the purpose of such statutes to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination. In 1828 New York became the first state to recognize the privilege. Now twenty-nine states have statutes dealing with this subject. In 1885 the General Assembly of North Carolina passed an Act providing: "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." Ch. 159, Laws of N. C., 1885; G.S. 8-53. Except for the proviso, our law is the same as the original New York statute.

The caption or title of our statute according to the original enactment is: "An Act making it unlawful for physicians or surgeons to disclose information lawfully communicated to them by their patients." From this it would appear that the statute relates only to information orally communicated to the physician or surgeon by the patient. But the act itself is more comprehensive than the title and extends the privilege to include also any information which the physician or surgeon acquires in attending the patient in a professional character, and which is necessary to enable him to prescribe for or treat the patient. It is the law in this jurisdiction that the caption or title of a statute will be considered in its construction when the meaning of the act is doubtful, but when, as in G.S. 8-53, the text is clear the title does not control. *Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E. 2d 898; *In re Chisholm's Will*, 176 N.C. 211, 96 S.E. 1031. We have no constitutional provision giving special significance to statute titles as has Pensylvania for instance. In that state a statute is constitutional only to the extent that its purpose is clearly expressed in the title. A Pennsylvania statute renders privileged the information a physician acquires in attending the patient in a professional capacity and which tends to blacken the character of the patient. But the title of the statute refers only to communications. The Pennsylvania court limits

the privilege to oral communications. *In re Phillips' Estate,* 145 A. 437 (Pa. 1929).

The North Carolina statute has been construed as follows: "It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.,* 147 N.C. 62, 64, 60 S.E. 717, citing cases from other jurisdictions. It is conceded that in the *Smith* case such construction of the statute was only incidentally necessary to decision on the facts presented. But this construction has been followed by us in many cases directly involving information obtained by physicians and surgeons through examination and treatment. *Brittain v. Aviation, Inc.,* 254 N.C. 697, 120 S.E. 2d 72; *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137; *Yow v. Pittman,* 241 N.C. 69, 84 S.E. 2d 297; *Creech v. Woodmen of the World,* 211 N.C. 658, 191 S.E. 840; *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575; *Insurance Co. v. Boddie,* 194 N.C. 199, 139 S.E. 228.

Most of the privilege statutes in the states having such legislation are similar to ours and were modeled after the original New York statute. However, in seven states the privilege is limited by statute to oral communications, and court decisions generally follow the statutes as written. In some jurisdictions the privilege statutes are strictly construed on the theory that they are in derogation of the common law; in others the courts say that the statutes are remedial and consequently should be liberally construed. 39 Michigan Law Review 1258. Ohio has a statute which limits privilege to communications by the patient, but its courts hold that a communication may be, not only by word of mouth, but also by exhibiting the body or any part thereof to the physician for his opinion, examination or diagnosis. *Meier v. Peirano,* 62 N.E. 2d 920 (Ohio 1945). North Carolina is a strict constructionist. We are not disposed to extend the privilege beyond the plain sense of the text of the statute, but we are required to give effect to that.

We have not heretofore had occasion to apply the statute in a hospital records case. Frankly, we perceive no difference in the application of the statute between examination and treatment of the patient by a physician or surgeon in a hospital and in the home. The information is no less privileged that it was obtained in a hospital. "It may be laid down as a general rule that the incompetency of a physician to testify concerning information acquired while attending a person in a professional capacity extends to a physician connected

with a hospital . . . who offers testimony as to the condition of the patient therein," where his duty in the hospital involved professional attention to the patient. 22 A.L.R., Anno. — Witness — Hospital Physicians, p. 1217, where many cases from many jurisdictions are cited and reviewed. *A fortiori,* if the hospital physician is incompetent personally to testify to information obtained, entries made by him or under his direction pertaining to the same matter are inadmissible as evidence. We therefore hold that G.S. 8-53 applies to the hospital records offered in evidence in this case insofar as they contain entries made by physicians and surgeons, or under their direction, pertaining to communications and information obtained by them in attending the insured professionally, which information was necessary to enable them to prescribe for her. However, any other information contained in the records, if relevant and otherwise competent, is not privileged. The effect of the statute is not extended to include nurses, technicians and others, unless they were assisting, or acting under the direction of, a physician or surgeon. *Prudential Life Ins. Co. v. Kozlowski,* 276 N.W. 300 (Wis. 1937); 14 Southern California Law Review 109.

In North Carolina the statutory privilege is not absolute, but is qualified. A physician or surgeon may not refuse to testify; the privilege is that of the patient. And G.S. 8-53 provides that notwithstanding a claim of privilege on the part of the patient, the presiding judge of superior court may compel the physician or surgeon to disclose communications and information obtained by him "if in his (the judge's) opinion the same is necessary to a proper administration of justice." In such case the judge shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. *Sawyer v. Weskett, supra; State v. Newsome,* 195 N.C. 552, 143 S.E. 187. The judge, in the exercise of discretion and by the same authority, may follow the same procedure and admit hospital records in evidence.

It seems to us that the privilege statute, when strictly applied without the exercise of discretion on the part of the judge, is more often unjust than just. We are generally in agreement with the following comment: "Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth, . . . Ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases, — on policies of life insurance, where . . . misrepresentations of . . . health are involved; . . . for corporal injuries, where the extent of plaintiff's injury is at issue; and testamentary actions, where . . . mental capacity is disputed." Wigmore on Evidence, 3d Ed., Vol. VIII, s. 2380, p. 814. Our Legislature intended the statute to be a shield and not a sword. It was careful to make provision to avoid injustice and suppression of truth by putting it in the

power of the trial judge to compel disclosure. Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done. The Supreme Court cannot exercise such authority and discretion, nor can it repeal or amend the statute by judicial decree. If the spirit and purpose of the law is to be carried out, it must be at the superior court level.

The case at bar vividly illustrates the anomalous situation in which a trial judge may be placed by failure to exercise the authority and discretion given by the statute. There had been tendered, but excluded, hospital records tending strongly to show that the insured, nineteen days after she had applied for insurance and five days after issuance of the policy, was suffering from cirrhosis, chronic pancreatitis, tubular nephrosis and chronic alcoholism. Yet in instructing the jury as to plaintiff's contentions, the judge said: ". . . (T)he plaintiff . . . says and contends that there isn't any evidence here of any falsity at all; that the hospital is supposed to get you well; that that's what you go there for, and that many people have just as good health, have better health after they have made some trips to the hospital and they have found the trouble, than they have ever had before. . . ." Thus the court in view of the evidence admitted and heard by the jury felt compelled to suggest, on behalf of plaintiff, that insured was in good health at the time she applied for insurance, and that her admissions to the hospital (five in four years) were immaterial. Yet evidence was available and at hand that insured was suffering from a complication of serious chronic diseases. What is said here is not intended, and it may not be taken, as any reflection upon or criticism of the eminent, conscientious and learned jurist who tried the case. His integrity is beyond question. He may well have excluded the hospital records because he thought them to be hearsay and for lack of a former ruling by this Court as to the admissibility of hospital records.

On this record and in the absence of a finding by the trial court that, in its opinion, the admission of the hospital records was necessary to a proper administration of justice, we are compelled to hold that their exclusion was not error.

Defendant challenges the following portion of the charge: ". . . (T)he defendant says and contends that where false statements are made that are *material statements,* that it has a bearing upon the issuance of the policy, if those are made in the application, and that if false statements are made by the insured and the insurance company has no knowledge of it and it develops that they were false, that a policy was issued based upon false statements, that they shouldn't be held liable for it and should not have to make any payments on a condition of that kind."

From this instruction the jury may well have concluded that it had the duty of passing upon the materiality of insured's answers to the questions in the application concerning her health. This is not the case. "In an application for a policy of insurance, written questions relating to health and written answers thereto are deemed material as a matter of law. *Tolbert v. Insurance Co.*, 236 N.C. 416, 419, 72 S.E. 2d 915. The inquiry for the jury is whether or not insured made the statement and whether or not it was false." *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 673, 119 S.E. 2d 614. It is true that the questioned instruction was given as a contention, but a misstatement of pertinent law must be held prejudicial even though the misstatement is made in stating the contentions. *Harris v. Construction Co.*, 240 N.C. 556, 561 82 S.E. 2d 689.

Plaintiff's evidence was insufficient to establish her right to double indemnity, but she ought not to be deprived of the right to establish that fact if she can. Plaintiff's witness testified: "I was not present when the blow was administered. I don't know whether the blow was inflicted through another person, or in a fight, or what the circumstances were of that, only through what they said, that she fell coming up the steps. Of my own personal knowledge, I do not know how the blow got there." This is all the evidence with respect to insured's injury. This is insufficient to show bodily injury sustained solely through external, violent and *accidental means*. Furthermore, in the charge the court did not anywhere explain the term "accidental means."

New trial.

HIGGINS, J., concurring in the result: The record requires a new trial. However, I am unable to agree that G.S. 8-53 makes inadmissible properly authenticated hospital records in so far as they show clinical findings and diagnoses. The majority opinion makes out a better case for admitting the records than it does for excluding them.

The basis for exclusion is laid in a New York statute passed 134 years ago and copied by North Carolina 77 years ago: "No *person* duly authorized to *practice physic* or surgery shall be required to disclose any *information he* may have acquired, etc." (emphasis added) The equipment of a person duly authorized to practice physic consisted of a thermometer, a pair of tooth pullers, and probably a stethoscope. His method of diagnosis consisted of some thumping around over the body and a most detailed inquiry into the patient's complaints. Boneset tea was up-to-date medication. Methods now common to every hospital were as unknown as the back side of the moon.

Even in 1908, when this Court wrote the *dictum* in *Smith v. Lum-*

ber Company, some of the cities had hospitals operated by a small staff and with meager equipment. The practitioner of physic had become a doctor. His treatment usually took place in the home. His training and instruments were greatly improved. He carried a most interesting case of small bottles, some containing tablets and powders, others liquids of many colors. Still, much detailed inquiry preceded the diagnosis and treatment. If the patient was fortunate enough to get to a hospital, the family physician usually conferred with the staff and passed on what information he had acquired. However, the only record the family doctor kept was a memorandum in a little vest pocket notebook showing the balance due for the treatment.

What a difference today! It is a matter of common knowledge that hospitals are staffed by medical, surgical, technological experts, and research specialists who serve as members of a team in diagnoses and treatment of human ills and injuries. The X-ray, the fluoroscope, the electrocardiograph, and the test tube show the patient's condition. Except in mental cases the examination may begin by this question to the patient: Where is the pain and how long have you had it? Otherwise the machines and the scientific tests tell the story. What they say becomes the hospital record. The diagnosis is the evaluation of the findings.

Should such a record be kept from a court charged with the duty of ascertaining the truth about a subject's physical condition?

The law of evidence is never frozen. *Justice Connor* had something to say on this subject in 1905 in a case involving the admission of a "train sheet" in evidence. *Insurance Co. v. R.R.,* 138 N.C. 42, 50 S.E. 452: "The question is of first impression in this State. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence or the decisions of this Court, at the same time recognizing and keeping in view the duty of the Court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial, and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important practical affairs. The law of evidence, based upon certain more or less well-defined general rules, evolved from experience, has been molded by judicial decision and legislative enactment into a system having for its end and purpose, and believed to be adapted to, the discovery of truth in judicial proceedings. Mr. Greenleaf says: 'In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is that there

is no reasonable doubt concerning them.' Professor Thayer says: 'The law of evidence is the creature of experience rather than logic.' "

To me, the exclusion of hospital records is as out-of-date as the bustle, asafoetida, and the tomahawk. The statute does not require the exclusion unless a modern hospital is *a person duly authorized to practice physic,* and then only as to information *he* may have acquired.

PARKER, J., authorizes me to say that he shares the views here expressed, and joins in this opinion.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF THE ESTATE OF MAUD RANKIN WALES, AND SARAH WALES BRYANT v. LEO HEARTT BRYANT, JR.; MONTFORD WALES BRYANT AND LEO HEARTT BRYANT, III, MINORS; MARGARET RANKIN RHODES; WINNIFRED RANKIN HUNSUCKER; JAMES THOMAS RANKIN; AND MONICA MONTGOMERY RANKIN, A MINOR; AND THE UNBORN CHILDREN OF SARAH WALES BRYANT.

(Filed 2 May 1962.)

1. Appeal and Error § 21—

Where the sole exception and assignment of error is to the judgment, and no error appears on the face of the record proper and the findings are sufficient to support the judgment, the judgment will be affirmed.

2. Wills § 33—

Where the beneficiary of a life estate in realty and personalty is the sole child of the widowed testatrix, and the will makes no provision for the vesting of the remainders after the life estates, the beneficiary, surviving the testatrix, takes the fee in the realty and the absolute gift in the personalty to the exclusion of collateral kin, since the remainders vest in her as heir and distributee of testatrix.

3. Executors and Administrators § 31— Family settlement held not to adversely affect rights of infants and was fair and in accordance with testatrix' intent.

The will bequeathed personalty one-half to testatrix' daughter for life and the other one-half to be paid the daughter's children when they attained specified ages. The will further provided that the income from the personalty left the grandchildren should be reinvested and become a part of the corpus unless the daughter needed the income "very badly." The family settlement approved by the court provided that the personalty should be held in two separate trusts, the daughter to receive the income from the one for life, with discretionary power of the trustee to use the corpus to meet any emergencies affecting her health and welfare, with remainder over after the daughter's life estate for the benefit of the

grandchildren, and the other trust to be held for the grandchildren with discretion in the trustee to use any portion of the income therefrom for the daughter if she became in absolute need thereof for her welfare or maintenance, and discretion in the trustee to expend any portion of the net income from that trust needed for the support, maintenance, and education of any grandchild, with further provision that the trust for the grandchildren should terminate on a specified date. Both the will and the family agreement provided like limitations over upon the contingency of the death of any grandchild without issue prior to the termination of the trust. *Held:* The family agreement was favorable to the infants and contingent beneficiaries, and judgment approving the family agreement is affirmed.

4. Wills § 29—

The possibility that a daughter of testatrix might have children after reaching the age of 53 years is insufficient to affect the validity of a trust on the ground that it made no provision for any child which might be born after that date.

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

MOORE, J., dissenting.

APPEAL by plaintiff bank from *McConnell, Special Judge,* October Term 1961 of GASTON.

This is a civil action instituted by plaintiffs to obtain a declaratory judgment for the purpose of obtaining a determination of certain questions that have arisen in the administration of the estate of Maud Rankin Wales, and for the interpretation of her last will and testament, which interpretation is necessary to determine the ownership of certain property contained in the estate of said testatrix.

When this cause came on for hearing in the court below, all parties being duly represented waived a jury trial and agreed that the matter should be heard and determined both as to the facts and the law by the trial judge. The court considered the pleadings, heard the evidence, arguments of counsel, found the facts and concluded that a proposed family settlement is for the best interest of all parties concerned, including all present, prospective and contingent beneficiaries, and will prevent dissipation and exhaustion of the estate through long and expensive legal proceedings, and will in fact more nearly accomplish the general intent of the testatrix as expressed in her will.

Maud Rankin Wales, late of Gaston County, North Carolina, died on 28 October 1960, leaving a holographic will consisting of eleven unnumbered paragraphs, which will was duly filed and probated in the office of the Clerk of the Superior Court of Gaston County, North Carolina, on 1 November 1960.

The Trust Department of the National Bank of Commerce of Gastonia, North Carolina, was named in said will as Executor, and on

or about 18 October 1960, the National Bank of Commerce was merged with and became a part of the First Union National Bank of North Carolina, with its principal office in Charlotte, North Carolina.

Plaintiff Sarah Wales Bryant is the daughter and only child born to the late Maud Rankin Wales, and is the mother of defendants, Montford Wales Bryant, who is a minor and was seven years old at the time of the institution of this action on 15 May 1961, and Leo Heartt Bryant, III, who is a minor and was four years of age when this action was instituted.

The parts of the last will and testament of Maud Rankin Wales essential to a disposition of this appeal are as follows:

"Revoking all other wills made by me, it is my will that after my debts, if any, have been paid, the first thing to be done is to give my grandson, Leo Heartt Bryant, III and any other children that may be born to my daughter, Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) property valued the same as that my late husband, Montford Bacon Wales, and I gave our grandson, Montford Wales Bryant. The value of this gift is to be determined by the value of Montford Wales Bryant's stock at the date of my death. Montford Wales Bryant's stock is now in the possession of Leo Heartt Bryant, Jr., 842 Wellington Road, Winston-Salem, North Carolina.

" * * *

"Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) is to be given all cash that I have for her personal use only.

"Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) is to receive for her life all real estate that I own and the income from it. If necessary or expedient from a tax standpoint this property may be sold and the money reinvested for her use. I strongly advise against selling the farm on which I live as it is becoming more valuable for a real estate development unless Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) is in dire need. If she is in dire need, the house in which I live, with lot 110 feet front and 275 feet deep should be sold first for not less than $40,000.

"Of the remaining stocks that I own, I want half of them to go to Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) for her life and half of them to be divided equally between her children. I want one-half of these stocks to be given them when they are 21 years old and one-half when they are 30 years old. Unless Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) needs the income from these stocks very badly, the dividends from these stocks are to be reinvested from the date of my death and held until the children reach the age of 21 years.

"In the event that Sarah Wales Bryant (Mrs. Leo Heartt Bryant,

Jr.) does not survive me, it is my will that my estate be divided equally between her children. If either or any of these children should die without leaving descendants, the property which is received from me, shall go to his surviving brothers or sisters. If none of these children leave descendants, the property is to be equally divided between my nieces, Margaret Rankin Rhodes of Lincolnton, North Carolina, Winifred Rankin Hunsucker of Hickory, North Carolina, James Thomas Rankin of Gastonia, North Carolina (nephew) and Monica Montgomery Rankin of Beaufort, South Carolina, or their descendants.

"It is my desire to take care of my beloved daughter, Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) first and under all eventualities to keep my property in the hands of my descendants, if any.

"In case the children of Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) do not live as long as she does, she is to receive the property which I have willed them for her life if they die without descendants or without brothers or sisters. * * *"

Grady B. Stott was duly appointed guardian *ad litem* for Montford Wales Bryant and Leo Heartt Bryant, III; James B. Garland was appointed guardian *ad litem* for Monica Montgomery Rankin, a minor; and Verne E. Shive was appointed guardian *ad litem* for the unborn children of Sarah Wales Bryant. All other parties are *sui juris*.

The court, upon the facts found, adjudged: (1) That Sarah Wales Bryant was the owner in fee simple of all real estate owned by Maud Rankin Wales as of her death; (2) that the First Union National Bank of North Carolina is the duly qualified and acting Executor of the estate of Maud Rankin Wales, and directed it to administer said estate in accordance with the terms and provisions of the family settlement agreement, which agreement was approved by the court and attached to the judgment as an exhibit and adjudged to be a part thereof and legally binding upon all parties to the proceeding.

The court below further held that the contingent beneficiaries named in the will of the testatrix, to wit, Margaret Rankin Rhodes, Winnifred Rankin Hunsucker, James Thomas Rankin and Monica Montgomery Rankin, and the party defendant Leo Heartt Bryant, Jr., are not heirs, legatees, or devisees of the estate of Maud Rankin Wales, and neither of them have any right, title or interest in said estate.

The judgment and family settlement agreement provide for the Executor to distribute to Sarah Wales Bryant, for the sole use and benefit of Leo Heartt Bryant, III, the sum of $1,020.00, and to Sarah Wales Bryant the cash left by Maud Rankin Wales in the sum of $1,562.46, all household furnishings and personal effects owned by Maud Rankin Wales, and her 1956 Pontiac automobile.

The court further held that, upon the completion of the administration of the estate, which consists of real estate of the approximate value of $53,400.00; stocks of the approximate value of $114,971.01; bonds and other personalty of the approximate value of $22,119.33; cash in the amount of $1,562.46, a total approximate value of $192,052.80, all remaining stocks or other intangible personal items shall be held by the First Union National Bank of North Carolina as Trustee for the purposes and subject to the limitations, terms and provisions and conditions set forth in the family settlement agreement.

The family settlement agreement, in sum and substance, requires the Trustee to set aside and hold separately one-half of said stocks and properties for the benefit and use of Sarah Wales Bryant during her lifetime, said trust to be known as "Trust A." All net income from Trust A shall be paid to Sarah Wales Bryant so long as she shall live, and the Trustee may pay to her so much of the principal of Trust A as the Trustee in its sole discretion deems necessary to meet any emergencies affecting her health or welfare. The net income from Trust A shall be paid to Sarah Wales Bryant as often as convenient, but at least quarterly.

The remaining one-half of said stocks and properties shall be set aside and held separately for the use and benefit of the natural children, now born or born to Sarah Wales Bryant prior to 1 July 1981, in a trust to be known as "Trust B." Trusts A and B shall be administered as separate trusts.

Upon the death of Sarah Wales Bryant, Trust A shall terminate and so much of the principal assets then remaining in said trust shall be distributed as follows: (1) If Sarah Wales Bryant dies prior to 1 July 1981, with a natural child or children then living, such assets shall become a part of Trust B and administered in accordance with the terms thereof, or (2) if Sarah Wales Bryant dies after 1 July 1981, and a natural child or children of hers is then living, or the issue of a natural child of hers is then living, then to such natural child or children of hers, share and share alike, or to such issue of the child or children of any such then deceased child of hers to take the share their parent would have taken if then living, or (3) if Sarah Wales Bryant dies either before or after 1 July 1981, without a natural child of hers nor issue of a natural child of her surviving her, then to the heirs of Sarah Wales Bryant in accordance with the then intestate laws of the State of North Carolina.

The family settlement agreement further provides: "(c) Except as hereafter authorized to be paid and distributed, the net income from Trust B shall be retained for the future benefit of the natural children of Sarah Wales Bryant, now born, or hereafter born during the exist-

ence of this Trust B, and any such sum not so paid and distributed shall annually become a part of the principal and corpus of Trust B; provided, however, the Trustee may pay all or any portion of the net income from Trust B to Sarah Wales Bryant if the Trustee in its absolute discretion at any time determines she is in absolute need thereof for her welfare, support or maintenance, or if the Trustee in its absolute discretion determines that Sarah Wales Bryant is not in need of any such net income, it may in its absolute discretion pay or expend all or any portion of the net income from Trust B needed for the support, maintenance or education of any natural child of Sarah Wales Bryant, but if the Trustee in so doing should in its absolute discretion expend more of such income on the support or education of one such natural child of hers than on another of such natural children, such excess shall not be in any way charged to any such natural child's interest in the Trust but shall be treated as a general charge and expenditure against the income of Trust B.

"Trust B shall terminate on July 1, 1981, or at such time prior to July 1, 1981, as Sarah Wales Bryant dies without a natural child of hers then living, and on the termination of Trust B so much of the property and principal then remaining in said Trust B shall be distributed as follows: (1) if there is a natural child or children of Sarah Wales Bryant then living, or the issue of a natural child of hers then living, then to such natural child or children of hers, share and share alike, or to such issue, the child or children of any such then deceased natural child of hers to take the share their parent would have taken if then living, or (2) if there is not a natural child or children of Sarah Wales Bryant then living nor the issue or (of) a natural child of hers then living, and Sarah Wales Bryant is then living, then the same shall go and become a part of Trust A and shall be administered in accordance with the terms thereof, or (3) if there is not a natural child or children of Sarah Wales Bryant then living nor the issue of a natural child of hers then living nor is Sarah Wales Bryant then living, then to the heirs of the natural children of Sarah Wales Bryant in accordance with the then intestate laws of North Carolina.

"(d) 'Net Income' for the purpose of distribution from Trust A or Trust B shall be any income received by such Trust from the properties thereinafter paying, or providing for the payment of, all taxes, fees and expenses involved in the administration or preservation thereof, and to this end the Trustee shall have the right to determine what portion of such income shall be net income and what and when any such portion of such income shall revert to principal."

From the judgment entered, the Executor appeals, assigning error.

Mullen, Holland & Cooke for plaintiff appellant and for plaintiff appellee.

Grady B. Stott, guardian ad litem for appellees Montford Wales Bryant and Leo Heartt Bryant, III (in propria persona).

Verne E. Shive, Guardian ad litem for appellees, the unborn children of Sarah Wales Bryant (in propria persona).

James B. Garland, Guardian ad litem for appellee Monica Montgomery Rankin (in propria persona).

Garland & Eck for appellees Margaret Rankin Rhodes, Winnifred Rankin Hunsucker and James Thomas Rankin.

DENNY, C.J. The only exception and assignment of error is to the judgment. Therefore, unless error appears on the face of the record proper, or the findings of fact are insufficient to support the judgment entered, the judgment will be affirmed. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25; *Trust Co. v. Buchan*, 256 N.C. 142, 123 S.E. 2d 489; *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.

It is adjudged in the judgment entered in the court below and provided in the family settlement agreement incorporated therein that Sarah Wales Bryant is the owner in fee simple of all the real estate owned by Maud Rankin Wales at her death.

The testatrix in her will devised to Sarah Wales Bryant a life estate only in her real property. There being no devise of the remainder, and the will having no residuary clause, the remainder in said real property passed as undevised property under the law of intestacy to Sarah Wales Bryant, the only child of the testatrix. *Williamson v. Williamson*, 232 N.C. 54, 59 S.E. 2d 214. The only contingency that could possibly have given Margaret Rankin Rhodes, Winnifred Rankin Hunsucker, James Thomas Rankin, and Monica Montgomery Rankin an interest in the real estate of the testatrix never occurred, since Sarah Wales Bryant survived her mother, the testatrix.

Therefore, we concur in the judgment entered below with respect to the title of the real estate of which the testatrix died seized. The life estate and remainder having become vested in Sarah Wales Bryant, she is the fee simple owner of said real estate. *Lee v. Lee*, 216 N.C. 349, 4 S.E. 2d 880; *Trust Co. v. Watkins*, 215 N.C. 292, 1 S.E. 2d 853.

The remaining question for determination is whether or not the children, in *esse* and unborn, of Sarah Wales Bryant have been properly protected under the terms of the family settlement agreement.

The testatrix provided for the disposition of the major portion of her estate in the following language: "Of the remaining stocks that I own, I want half of them to go to Sarah Wales Bryant (Mrs. Leo Heartt

Bryant, Jr.) for her life and half of them to be divided equally between her children. I want one-half of these stocks to be given them when they are 21 years old and one-half when they are 30 years old. Unless Sarah Wales Bryant (Mrs. Leo Heartt Bryant, Jr.) needs the income from these stocks very badly, the dividends from these stocks are to be reinvested from the date of my death and held until the children reach the age of 21 years." This provision was the chief source of the confusion and uncertainty which led to the family settlement agreement.

Under the bequest of one-half the remaining stocks to Sarah Wales Bryant for her life, without any disposition or bequest of said stocks to become effective upon the death of Sarah Wales Bryant, it would seem that Sarah Wales Bryant, under the statute of distribution, became the sole owner thereof upon the death of the testatrix. However, under the family settlement agreement, these stocks are put in trust and Sarah Wales Bryant will only get the income therefrom with the provision that the Trustee may pay to her so much of the principal of said trust as the Trustee in its sole discretion deems necessary to meet any emergency affecting her health or welfare. At the death of Sarah Wales Bryant, the principal remaining in the trust created for her benefit goes to her children. If she has no surviving children or issue of her children surviving at her death, then the assets of the trust will be distributed to the heirs of Sarah Wales Bryant in accordance with the then intestate laws of the State of North Carolina.

Under the terms of the will of Maud Rankin Wales, it is doubtful that any child born to Sarah Wales Bryant after the death of the testatrix would share in the bequest of the stocks to the children of Sarah Wales Bryant. Other provisions in the will, however, indicate an intent on the part of the testatrix that any child or children born to Sarah Wales Bryant after the death of the testatrix, should share in the estate. But, under the terms of Trust B, set up in the family settlement agreement, any child born to Sarah Wales Bryant on or before 1 July 1981, will share in the bequest of these stocks and any other assets included in the trust.

While there is a possibility that a child or children may be born to Sarah Wales Bryant after 1 July 1981, it is a mere possibility and not a probability. According to the record, Sarah Wales Bryant will be 53 years of age in 1981, and the possibility of her having a child after that time is so slight, as borne out by human experience, we will not disapprove the trust based on this mere possibility. *Trust Co. v. Allen,* 232 N.C. 274, 60 S.E. 2d 117; Strong's North Carolina Index, Vol. IV, Wills, Section 29, page 510, *et seq.*

We would have preferred for the discretion of the Trustee under

Trust B, in making any disproportionate expenditure of the income of said trust on any one child, to have been limited to an emergency affecting the health of such child. However, since the children of Sarah Wales Bryant are to receive the assets remaining in Trust A at the death of Sarah Wales Bryant, if any, and all the principal assets of Trust B must be kept intact for the benefit of the beneficiaries of Trust B, we hold that the interest of the children have not been impaired in any respect by the family settlement agreement.

The judgment below simply approves and orders compliance with a family settlement agreement. When such settlements are fairly made and carry out the intent of the testator as gathered from the will, and do not adversely affect the rights of infants, they will be approved. *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Bank v. Hendley,* 229 N.C. 432, 50 S.E. 2d 302.

In *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713, *Barnhill, J.,* later *C.J.,* said: "Family settlements, when fairly made, are favorites of the law. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. These statements in varying forms are to be found in many of our decisions. * * * But when a testamentary trust is the subject matter of the agreement, there are material limitations upon their application.

"(1) The will creating a trust is not to be treated as an instrument to be amended or revoked at the will of devisees or to be sustained *sub modo* only after something has been sweated out of it for the heirs at law. The power of the court is exercised not to defeat or destroy, but to preserve, it."

In our opinion, if any right has been surrendered in the family settlement agreement under consideration in this case, the surrender has been made by Sarah Wales Bryant in favor of her children.

The judgment of the court below is

Affirmed.

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

MOORE, J., dissenting. I do not agree that the so-called Family Settlement approved by the court below and in the majority opinion should be sustained.

"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." *Carter v. Kempton,* 233 N.C. 1, 5, 62 S.E. 2d 713.

It is suggested that the family settlement is favorable to the infants. I do not find it so. There is a definite possibility that their trust estates will be decreased thereby and the rights of possible contingent remaindermen will be cut off entirely.

From the findings of fact in the court below and the inventory appearing in the record, the assets of the estate are: real estate, $53,400.00, subject to the lien of a deed of trust of unspecified amount; stocks, $114, 971.01; bonds, $4,800.00; promissory note, $15,145.33; automobile, $405.00; household goods, $1769.00.

The settlement provides that the executor shall pay all debts of testatrix's estate, the amount secured by the deed of trust, inheritance and estate taxes, costs of administration, costs of this action, attorneys fees and allowances for guardians *ad litem,* from the remaining intangible property and any income from personalty which has accrued since testatrix's death. This means that the encumbrance against the land will be borne by the personal estate, and the land, the automobile, household goods, and cash of $1,562.46 (all belonging to Mrs. Bryant) will bear no part of the debts, taxes, expenses of administration, court costs and attorneys fees. In the absence of accurate information, it seems that the family settlement, by this provision, will invade the stocks from which the trust for the infants will be set up.

It is contended that, at the death of Mrs. Bryant, the assets remaining in the trust created for her will accrue to the infants, and their estates will thereby be enhanced. This is a possibility, but it is unlikely that there will be anything left in that trust for the trustee is given *absolute* discretion by the family agreement to turn over to her any part or all of the corpus of this trust to meet any emergency affecting her health or *welfare.* And the word, "welfare," is undefined in the settlement agreement.

The settlement also gives the trustee the *absolute* discretion to pay over to Mrs. Bryant all or any portion of the income from the trust set up for the infants, if it determines at any time she is in absolute need thereof for her *welfare,* support or maintenance. This provision, in my opinion, is far in excess of the provision made in the will.

Furthermore, the trustee is authorized to expend sums for the support and education of the children without regard to equality. This is directly contrary to the will.

The courts should not abdicate their authority and shirk their responsibilities to supervise and preserve the estates of the infants by giving absolute and sole discretion to a trustee.

Moreover, the settlement arbitrarily postpones the enjoyment of a portion of the trust property as to the two infants *in esse,* and accelerates their enjoyment as to the rest. As to unborn children, it either

accelerates their interests or cuts them off altogether. It is possible that it will amount to a confiscation of the interests of contingent remaindermen.

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. *Keesler v. Bank*, 256 N.C. 12, 20, 122 S.E. 2d 807. No such necessity exists here.

FRANCES M. GRIFFIN, ADMINISTRATRIX OF THE ESTATE OF COLEY GRIFFIN v. HOWARD ROGER PANCOAST AND HOWARD ROGER PANCOAST, JR.

(Filed 2 May 1962.)

1. Automobiles § 54f—

Where plaintiff offers no evidence in support of the allegation that the automobile was registered in the name of defendant, the plaintiff cannot benefit by the presumption of agency created by G.S. 20-71.1.

2. Parent and Child § 7—

Ordinarily a parent is not liable for the negligent acts of his minor child.

3. Automobiles § 55—

The family purpose doctrine relates to agency and obtains when the parent controls or has the right to control the operation of the car by his minor child, and whether the parent or the child owns the car is relevant only insofar as it indicates the right to control its operation.

4. Same—

Evidence to the effect that defendant parent did not know that his son was the owner of the automobile in question until after the purchase was consummated, and that the parent never exercised any control over the use or manner of operation of the car by his son, is insufficient to raise the issue of the parent's liability for the son's operation of the car under the family purpose doctrine, notwithstanding evidence that at least a part of the purchase price and operating expenses were obtained from money furnished by the parent.

5. Automobiles § 33—

A pedestrian crossing an intersection of streets as defined by G.S. 20-38(1) has the right of way when there are no traffic control signals at the intersection, notwithstanding that the intersection has no marked crosswalks for pedestrians.

6. Same—

A pedestrian crossing a street between intersections at a place where

there is no marked crosswalk must yield the right of way to vehicular traffic. G.S. 20-174(a).

7. Same—

A pedestrian and a motorist, in accordance with which is given the statutory right of way, have the right to assume that the other will obey the rules of the road and accord the right of way to the one having that privilege.

8. Same; Automobiles § 46—

An instruction to the effect that a pedestrian has the right of way when he is crossing at a street intersection not having traffic control signals only if there is a marked crosswalk at the intersection is erroneous, and a repetition of the erroneous instruction, even though given in regard to an issue not answered by the jury, may be considered on the question of prejudicial effect in emphasizing the error.

9. Appeal and Error § 42—

Where an erroneous instruction as to the law in regard to one issue is repeated in regard to a subsequent issue, a correction of the error by the court solely in regard to the subsequent issue may not erase the prejudicial effect of the erroneous instruction on the prior issue.

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

APPEAL by plaintiff from *Patton, J.*, September 18, 1961 Schedule B Civil Term of MECKLENBURG.

Plaintiff seeks damages for wrongful death and for hospital expense and pain suffered by her intestate when struck by an automobile operated by Howard R. Pancoast, Jr. (hereafter designated as defendant).

To support her claim she alleges these facts: Defendant was driving an automobile registered in the name of Howard R. Pancoast (hereafter designated as parent) and kept by him as a family purpose car. Defendant was operating the automobile as agent for parent. Defendant was driving the automobile southwardly on Graham Street in Charlotte. Graham Street is intersected by Stonewall Street. There are neither lights controlling traffic nor marked crosswalks at the intersection. Her intestate, crossing Graham Street at the intersection from east to west, was within a few feet of the sidewalk on the west side of Graham Street when he was struck by the automobile operated by defendant at an unlawful rate of speed. Defendant failed to keep a lookout or to control his vehicle or to give any warning of his approach to the crossing. He could and should have seen plaintiff's intestate crossing the street and could, by the exercise of reasonable care, have avoided intestate.

Defendants denied plaintiff's allegations of negligence, denied that defendant was the agent of parent, alleging that defendant was the

owner of the automobile. In addition they pleaded contributory negligence on the part of intestate in that he attempted to cross the street not at the intersection but at a point not marked as a crosswalk, entering the street without looking to see if the movement could be made in safety.

The parties stipulated that Graham Street runs in a northerly and southerly direction. Stonewall Street intersects Graham Street and runs in an easterly and westerly direction. There is no traffic control device at the intersection of Graham and Stonewall Streets. There are no marked pedestrian walkways at the intersection. Graham Street is approximately forty feet wide, with four traffic lanes, two for northbound traffic and two for southbound. Stonewall Street is approximately twenty-four feet in width east of the intersection and twenty feet in width west of the intersection. There are no marked traffic lanes on Stonewall Street, but it is a two-way street, one for westbound traffic, the other for eastbound. The maximum speed limit in the area is 35 m.p.h.

At the conclusion of the evidence, parent's motion for nonsuit was allowed. The court submitted issues to determine the negligence of defendant, contributory negligence of intestate, last clear chance, and damages. The jury answered the issue relating to defendant's negligence in the negative. Judgment was entered thereon, and plaintiff appealed.

Bradley, Gebhardt, Delaney and Millette for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman and Bailey Patrick, Jr., for defendant appellees.

RODMAN, J. Plaintiff offered no evidence to support her allegation that parent was the registered owner of the automobile operated by defendant. Because of that failure, she cannot benefit by the presumption of agency created by G.S. 20-71.1.

To establish her allegation that parent was responsible for the operation under the family purpose doctrine, she called parent as an adverse witness. He testified defendant, his son, was twenty years old when intestate was struck; that defendant was then a student at Davidson College; witness, from his earnings, maintained a joint bank account with his wife; she had authority to use this bank account for defendant's support and provide him with an allowance; defendant worked during his summer vacations; he had money of his own; he had his own bank account; parent did not know defendant was the owner of an automobile until after the purchase was consummated; parent never exercised any control over the use or manner of operation

of defendant's car; defendant never sought permission from parent to use the car; defendant may have used some of the money provided by parent in purchasing the automobile or in purchasing gas and oil for its use; parent had an automobile of his own which he used for business purposes, and maintained at his residence in High Point another automobile which he kept for the use of his family—his wife, a daughter, and defendant; defendant, while at college, kept his car at Davidson.

A parent is ordinarily not liable for the negligent acts of his minor child. *Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598; *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096.

In the early history of automobiles when they were kept primarily for the enjoyment of the family, an apparent exception was engrafted on this general rule. Liability was imposed on the owner for the negligent use of a motor vehicle kept and maintained by a parent for the pleasure and use of the members of his household. This apparent exception is based on the theory that the member of the household operating the vehicle is doing so as the agent of the owner and subject to his control. Liability predicated upon the negligent use of such an automobile is merely an application of the rule of *respondeat superior.*

The law applied to motor vehicles so owned and used acquired the name of family purpose doctrine. Seemingly it was first recognized in this State in *Linville v. Nissen, supra.* There liability was denied because the agent was acting contrary to express direction. His use was unauthorized.

The family purpose doctrine is an established part of the law of this State. What the plaintiff must allege and prove to bring the doctrine into play has been repeatedly stated. *Manning v. Hart,* 255 N.C. 368, 121 S.E. 2d 721; *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427; *Elliott v. Killian,* 242 N.C. 471, 87 S.E. 2d 903; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603; *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742. To impose liability under the doctrine it is essential to establish that the party on whom liability would be imposed actually or impliedly authorized the use of the vehicle. It must be subject to his control. The test is not who owns the vehicle but control or the right to control. Since ownership presumptively indicates the right to control, it is frequently stated as one of the elements necessary for the application of the doctrine. But one may in fact exercise control and direct the use of property without in fact being the owner.

Plaintiff relies on *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398, and *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87. Those cases held that liability could be imposed upon a parent for the negligent

operation of a motor vehicle, title to which was vested in his minor child, when in fact the parent exercised control of the motor vehicle. Here plaintiff has failed to show that parent ever exercised or attempted to exercise control over the use of the automobile by defendant. The court correctly concluded plaintiff's evidence was insufficient to hold parent responsible for the operation of the automobile owned by defendant.

Plaintiff asserts error in the court's charge entitling her to a new trial as to defendant.

Her evidence is sufficient to establish these facts; Intestate walked north on the east side of Graham Street until he reached Stonewall Street. There he turned west to cross Graham Street. North of the intersection a railroad crosses Graham Street at grade. Defendant was traveling at a speed in excess of 35 m.p.h. when he crossed the railroad. As he crossed the railroad he lost control of his car, struck the curb, came back into the west lane, and without reducing his speed, struck intestate, when intestate was within two or three feet of the sidewalk at the southwest intersection of the street.

The evidence for defendant tends to fix his speed at less than the maximum and to establish the fact that defendant at all times had control of his vehicle. It is also sufficient to support defendant's allegation that intestate, at the time he was struck, was not crossing Graham Street at its intersection with Stonewall, but the collision took place some twenty or thirty feet south of the intersection, that intestate stepped from the west sidewalk of Graham Street into the southbound lane of traffic at a time when defendant's automobile was only ten to fifteen feet from him.

There was no evidence of a marked crosswalk anywhere on South Graham Street. The point of collision was therefore important in fixing the rights and duties of the parties.

Part 11, c. 20, of our General Statutes fixes the relative rights of pedestrians and motorists. In the absence of signals controlling traffic, the relative rights are prescribed by G.S. 20-173 and 174.

There were neither traffic signals nor marked crosswalks at the intersection of Stonewall and Graham Streets; nor were there marked crosswalks on Graham Street south of the intersection of Graham and Stonewall Streets. If intestate was crossing at the intersection, as defined in G.S. 20-38(1), of Graham and Stonewall Streets, he had the right of way. G.S. 20-173. That right was not affected by the failure to mark a place at the intersection for pedestrians to use in crossing. *Keaton v. Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93; *Gaskins v. Kelly*, 228 N.C. 697, 47 S.E. 2d 34. On the other hand, if intestate was not injured at the intersection but was struck when he stepped into

Graham Street at some point between Stonewall Street and the next southern intersection, defendant would have the right of way. G.S. 20-174(a); *Holland v. Malpass,* 255 N.C. 395, 121 S.E. 2d 576; *Grant v. Royal,* 250 N.C. 366, 108 S.E. 2d 627; *Hodgin v. Implement Co.,* 247 N.C. 578, 101 S.E. 2d 323. This right of way would, of course, be subject to the provisions of G.S. 20-174(e).

Both pedestrian and motorist have the right to assume the other will obey the rules of the road and accord the right of way to the one having that privilege. *Gamble v. Sears,* 252 N.C. 706, 114 S.E. 2d 677; *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

Appellant assigns as error portions of the charge relating to intestate's privilege in crossing Graham Street. The court said: "Now, under the law as the Court understands it and interprets it, at an intersection where there are no traffic controls, signals, in operation at the time, and a person walking crosses the street either in a marked crosswalk — and there is no evidence in this case that there is any marked crosswalk anywhere there — or an unmarked crosswalk, then that the pedestrian has the right of way, and it would be the duty of the operator of the motor vehicle to yield the right of way to the pedestrian; *but where a pedestrian is crossing a street or a roadway at a point other than a marked crosswalk, then the pedestrian is required to yield the right of way to vehicular traffic on the street or highway . . .*"

The language of the statute, G.S. 20-174(a), is: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk *or within an unmarked cross-walk at an intersection* shall yield the right-of-way to all vehicles upon the roadway." (Emphasis added)

The italicized portion of the charge omits the italicized portion of the statute and because of the omission contradicts the preceding quoted portion. The prejudicial error in the italicized portion of the charge is emphasized by the stipulation: "There are no marked pedestrian walk ways at said intersection."

The statement that the motorist has the right of way when the pedestrian is crossing at a place other than a marked crosswalk is not limited to that portion of the charge quoted above. After the court had charged with respect to the duty imposed on defendant by G.S. 20-174(e), he said: "Nothing else appearing, though, where they are crossing at an unmarked crosswalk, the motorist has the right of way, and it is the duty of the pedestrian to yield the right of way."

In charging on the second issue, the court said: "Now, it was the duty of Coley Griffin to exercise ordinary care for his own safety;

and if you find from this evidence that he, in crossing South Graham Street, was crossing it at a point other than a marked crosswalk, then it was his duty to exercise ordinary care before he entered the street, to look both ways, and if the defendant's vehicle was in close enough proximity in the exercise of ordinary care to have been seen, it would have been his duty to remain where he was and yield the right of way to the defendant's car approaching on the street . . ."

It is true the portion of the charge just quoted was directed to the issue of contributory negligence, an issue not answered by the jury, and to that extent not prejudicial to defendant; but prejudice lies in the reiteration given the earlier statement that the motorist has the right of way unless the pedestrian is using a marked crosswalk and in failing to inform the jury that the marked crosswalks have reference only to crossings which the governing authority has provided for pedestrians between intersections.

After the court had completed his charge, counsel for defendant said: "In connection with the second issue, it was my recollection that the Court did not put an unmarked crosswalk on the same status as a marked one. I think you inadvertently used the words marked crosswalk and didn't also say unmarked." The court then said: "Let me try to clarify that once and for all, one more time. If I have got my tongue tangled up before this, disregard it. Where there is a marked crosswalk or an unmarked crosswalk at an intersection, then a pedestrian crossing that has the right of way over a motorist, but where a pedestrian crosses a road or street at a point other than at a marked crosswalk or within an unmarked crosswalk at an intersection, the motorist has the right of way . . ."

Where a judge has erroneously instructed the jury, he undoubtedly has the right, in fact, it is his duty, when the error is called to his attention, to correct it by accurately informing the jury what the law is. If the subsequent instruction is sufficient to clearly point to the error previously committed and state the law in such manner that the jury cannot be under any misapprehension as to what the law is, the error previously committed will not warrant a new trial. *Barnes v. House,* 253 N.C. 444, 117 S.E. 2d 265; *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650; 3 Am. Jur. 635.

Here the court was specifically requested to correct his charge as it related to the second issue. No reference was made to the first issue submitted for the purpose of determining the negligence of defendant. A careful reading of the charge leaves us with the impression, and we therefore hold, that it was not sufficient to explain the law arising on

the evidence in this case in the manner contemplated by G.S. 1-180. *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380.

As to Howard Roger Pancoast

Affirmed.

As to Howard Roger Pancoast, Jr.

New trial.

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

FIRST-CITIZENS BANK & TRUST COMPANY, EXECUTOR-TRUSTEE OF THE ESTATE OF FRANK B. KLEIN, v. ELIZABETH KLEIN WILLIS, HOWERTON KLEIN COOPER, JUDITH HOWERTON COOPER, MINOR; GILBERT GARTH COOPER, JR., MINOR; FRANK KLEIN WILLIS, MINOR; CONSTANCE KLEIN WILLIS, MINOR; ELIZABETH CARROLL WILLIS, MINOR; FRANCIS CRAIG WILLIS, MINOR; JOHN L. CRUMP, GENERAL GUARDIAN OF HENRIETTA M. KLEIN.

(Filed 2 May 1962.)

1. Wills § 60—

G.S. 30-1, requiring that a widow's dissent from the will of her husband be filed within six months, is a statute of limitations which does not extinguish the right but limits the time within which it may be enforced.

2. Limitation of Action § 11—

Where an infant or insane person has no guardian at the time of the accrual of a cause of action, the statute of limitations, in instances in which the incompetent does not have title to realty, begins to run when a guardian is appointed or the disability is removed, whichever first occurs. G.S. 1-17.

3. Wills § 60—

Where an incompetent widow is without a guardian at the time of the death of her husband, her right to dissent from his will is barred after six months from the date of the appointment of a guardian, and, the will being of record, the guardian's contention that he had no knowledge of the will is immaterial.

4. Same—

The fact that the husband's will leaves nothing to his widow does not alter the necessity that her dissent from the will be filed within the time limited.

APPEAL by defendant John L. Crump from *Walker, S.J.,* at Special August-September 1961 Term of CARTERET.

Civil action for a declaratory judgment. Plaintiff is the executor-trustee under the will of Frank B. Klein. The defendants are the beneficiaries named in his will, and John L. Crump, general guardian of Henrietta M. Klein, the insane widow of Frank B. Klein.

From the pleadings, upon demurrer, the following facts appear: On 28 August 1947, the testator Frank B. Klein qualified as guardian of his mentally incompetent wife, Henrietta M. Klein, and served as her guardian until his death on 22 November 1953. His will dated 31 August 1948, was probated in common form on 1 December 1953. He devised his entire estate, consisting solely of personal property, to the plaintiff Bank & Trust Company to hold in trust and administer for 12 years for the benefit of certain grandchildren, then to be divided equally between two of his daughters. Testator made no provision for his insane wife but said in Item 10 of his will: "Neither am I unmindful of my dear wife, Henrietta, whose mental condition is such as to require constant hospitalization in a government hospital erected by a beneficent government and operated for the benefit of those whose misfortune it is to be confined therein. However, I am fully informed by competent medical authorities, in whom I have absolute confidence, that she will not regain her normal faculties or ever be restored to sanity. Such being the case, it seems to be folly on my part to undertake to create a fund or to set aside any property, or property value, for her benefit."

On 9 December 1953, John L. Crump qualified as the legal guardian of Mrs. Klein who is still insane and he is presently acting as her guardian. Under the terms of the will there has been no distribution of the estate which consists of personalty still in the hands of the plaintiff as trustee.

On 1 February 1961, the plaintiff instituted this action for declaratory judgment to guide it in making a distribution of the estate. The complaint posed a number of questions, but only one is involved in this appeal.

The complaint alleged, *inter alia*, that no dissent had been filed to the will by the widow or in her behalf, and that her right to dissent is now barred by G.S. 30-1.

The answer of the guardian filed 4 April 1961, admitted his qualification on 9 December 1953, and that no formal dissent had been filed to the will. He alleged that he had no knowledge of the will until 21 February 1961; that because the widow received nothing under the will she was not required to file a dissent; that he now dissents from the will for her and requests the court to allot to the widow "her lawful rights in said estate."

When the cause came on to be heard the plaintiff and the other de-

fendants "demurred *ore tenus* to the response of John L. Crump, general guardian of Henrietta M. Klein". The demurrer was sustained and the defendant appealed.

George H. McNeill for First-Citizens Bank & Trust Company, appellee.

Harvey Hamilton, Jr for defendant appellees.

George W. Ball for defendant Crump appellant.

SHARP, J. At the time the will of Frank B. Klein was probated on 1 December 1953, the mentally incompetent widow had had no guardian since the death of her guardian-husband on 22 November, 1953. On 9 December 1953, her present guardian was appointed. The question is whether his failure to dissent to the will of her husband within six months of the date of his qualification thereafter constituted a bar to her right to dissent to the will and to participate in his estate.

G.S. 30-1 as written during the periods of time involved in this suit, provided: "Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant, or insane, she may dissent by her guardian."

G.S. 30-1 is a statute of limitations. It extinguishes no right but limits the time in which a widow may enforce the right the law gives her to participate in her husband's estate. *Hinton v. Hinton,* 61 N.C. 410; *Perkins v. Brinkley,* 133 N.C. 86, 45 S.E. 465. A widow of sound mind would have no right to dissent after six months from the probate of her husband's will because, as the court has said, "There must be some term of time applicable to the claim of every right within which it must be sued for. The policy of the law will not permit any demand to exist in perpetuity, or indefinitely, unless legally asserted." *Cook v. Sexton,* 79 N.C. 305.

If Mrs. Klein had had no guardian prior to 4 April 1961, the date on which he attempted to dissent for her, the statute of limitations could not have run against her right because G.S. 1-17 provides, with certain exceptions which need not be considered here, that "A person entitled to commence an action * * * who is at the time the action accrues * * * insane * * * may bring his action within the times herein limited after the disability is removed.

In *Whitted v. Wade,* 247 N.C. 81, 100 S.E. 2d 263, construing G.S.

30-1 and G.S. 1-17 together, the Court held that an insane widow, continuously under disability from the probate of her husband's will on 22 July 1952, and without guardian until 7 August 1956, was entitled to dissent through her guardian on 7 August 1956, and to have her dower allotted to her in the lands of her deceased husband with an accounting of rents and profits. In the *Whitted* case the guardian filed a dissent on behalf of the widow on the date of his appointment. The instant case is distinguishable in that the widow of Frank B. Klein was represented by a guardian for over seven years after the probate of her husband's will before he attempted to assert her right to dissent. The will was a public record in the office of the clerk of Superior Court which appointed him her guardian and there is no allegation that he was deceived, misled, or deterred from dissenting by any person whomsoever.

In North Carolina the rule is that the statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. 1-17, whichever shall occur first. *Culp v. Lee,* 109 N.C. 675, 14 S.E. 74; *Nunnery v. Averitt,* 111 N.C. 394, 16 S.E. 683; *Johnson v. Ins. Co.,* 217 N.C. 139, 7 S.E. 2d 475; *Lineberry v. Mebane,* 219 N.C. 257, 13 S.E. 2d 429; *Rowland v. Beauchamp,* 253 N.C. 231, 116 S.E. 2d 720.

In *Cross v. Craven,* 120 N.C. 331, 26 S.E. 940, it was said that the rule laid down in *Culp v. Lee, supra,* had no application to actions for the recovery of realty when the legal title is in the person under disability. In that case, however, the person under disability had no legal title to the land involved. In the instant case we are not concerned with realty. The entire Klein estate is personalty.

Johnson v. Ins. Co., supra, was an action upon an insurance policy. Plaintiff was injured on 20 May 1929. Thereafter he was committed to the State Hospital as an insane person and a guardian was appointed for him on 21 March 1933. On 7 November 1933, he was adjudged sane. He instituted this action on 28 November 1936. The Insurance Company plead the three-year statute of limitations which, it contended, began to run during the guardianship. The plaintiff contended that C.S. 407 (now G.S. 1-17) preserved the right of action in the plaintiff intact when relieved of the disability of insanity notwithstanding the guardianship. The Court, while deciding the case on another ground and conceding that there was support for the plaintiff's position in some States and in the Federal courts, said: "But a different rule obtains in North Carolina, and, we think with reason. The policy

of repose which underlies statutes limiting the time in which actions may be brought would be imperfectly expressed if these statutes did not apply to all those who might bring such actions, and actions which might be brought in their behalf. On that theory, the representation of the ward by the guardian should be complete as to actions which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office * * * A qualification must be made as to suits for realty, where the legal title is in the ward. *Culp v. Lee* (1891), 109 N.C. 675, 14 S.E. 74. Where this obstacle to a suit by the guardian does not arise, ordinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute. *Cross v. Craven* (1897), 120 N.C. 331, 26 S.E. 940. Exposure to a suit by the guardian— one which was within the scope of both his authority and duty— for a sufficient length of time, would constitute a bar to the action of the ward."

Rowland v. Beauchamp, 253 N.C. 231, 116 S.E. 2d 720, involved the right of a minor plaintiff, represented by a next friend, to bring a second suit within one year after the appeal from a judgment of nonsuit in the first suit had been dismissed. Holding that G.S. 1-25 permitted the suit and speaking for the Court, *Parker, J.*, said: "In North Carolina, contrary it seems to the general rule in most jurisdictions, the rule, except in suits for realty where the legal title is in the ward, is that the statute of limitations runs against an infant as to all rights of action, 'which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office.' *Johnson v. Ins. Co.*, 217 N.C. 139, 7 S.E. 2d 475, 128 A.L.R. 1375; Annos. 6 A.L.R. 1689 et seq., and 128 A.L.R. 1379 et seq."

Prior to 1849 a widow in North Carolina was required to dissent from her husband's will in person; it could not be done for her by either an attorney or a guardian. In that year the statute was passed allowing the guardian of an incompetent widow to dissent for her. *Lewis v. Lewis*, 29 N.C. 72; *Hinton v. Hinton*, 28 N.C. 274; 35 N.C. Law Review, 520-521.

While the personal disability of insanity remained with the widow of Frank B. Klein when the guardian was appointed for her on 9 December 1953, the disability to dissent was removed. We therefore hold that the statute began to run against her right to dissent from that date and she is now barred. To hold otherwise would frequently preclude the settlement of estates during the lifetime of an insane spouse. Mrs. Klein is still insane; she will probably be insane until her death.

As the Maryland Court said in *Kernan v. Carter, et al,* 104 Atl. 530, 535, a case which also involved the right of an insane widow to dissent after the time limited: " * * * While in individual cases some hardship may result, it would be vastly more disastrous if settlements of estates are to be kept in uncertainty for years, probably throughout the lives of insane widows * * *." The Court held that the dissent must be within the time fixed by the statute.

First National Bank of Kansas City v. Schaake, et al, 240 Mo. App. 217, 203 S.W. 2d 611, involved a factual situation similar to the instant case. The Missouri statute allowed a widow twelve months instead of six in which to dissent. At the time of her husband's death on 5 September 1943 Mrs. Schaake was insane and represented by a guardian. Because of erroneous legal advice the guardian did not attempt to dissent until almost two years after the will was probated. In denying the right the Court pointed out that the statute specifically authorized the guardian to act for the widow, and that the statute allowing the widow twelve months to make her election was a statute of limitations. The Court said: "While the statute by fixing the time at twelve months from probate of will does not precipitate or require a hurried decision, it was evidently the purpose of the legislature to prescribe a limit to its exercise, and not to grant an indefinite period during which purchasers and creditors could acquire rights as sacred and just as the wife's, and which it would be inequitable to disturb. * * * If it be held that a court of equity can make an election for an insane widow in a suit which was filed one year after the period of election has expired, then it could be done in a suit filed ten or twenty years after the time expired. Such a proposition would leave the title to real estate in all such cases in a state of uncertainty and chaos. No purchaser could be certain of the validity of his title. We do not believe the law contemplates or will countenance any such uncertainty. The law gives the insane widow adequate protection when it provides that the guardian may make an election for her * * * ."

The appellant guardian contends that a will which gives a widow nothing provides nothing from which she can dissent, and she is therefore not required to comply with G.S. 30-1. This argument is specious. A widow who is disinherited by her husband's will has the choice of acquiescing in his wishes and receiving nothing, or of dissenting from his will and taking the share of his estate which she would have received had he died intestate. If she received nothing under the will she has all the more reason to dissent from it. The necessity of expediting the closing of estates would seem also to dispose of this argument. G.S. 30-1 as written during the periods involved here sets no minimum or maximum as a condition for dissent; the widow must dissent to the

will of her husband as provided by law, or she assents. Although the widow received nothing in the will of her husband the failure of her guardian to dissent for her within six months of his qualification barred her right of dissent at the end of that period. To hold otherwise would, in our opinion, add this case to "the quicksands of the law." *Lea v. Johnston,* 31 N.C. 15.

The judgment of the lower court is

Affirmed.

WILLIE VERNON FOX v. WILLIAM LEE HOLLAR, R. J. SHELL AND SON, A CORPORATION, LILLIE MAE COMBS, AND RUDOLPH BOBBY ARNETTE.

(Filed 2 May 1962.)

1. Automobiles § 46; Trial § 33; Pleadings § 28—

It is not error for the trial court to fail to charge upon aspects of negligence in the operation of an automobile when the allegations in regard thereto are not supported by evidence, or upon aspects of negligence presented by the evidence but which are not supported by allegation, since allegation and evidence must correspond.

2. Automobiles § 13—

The failure to equip a vehicle with chains within the first eight to ten miles after snow has begun to fall cannot be considered evidence of negligence.

3. Same—

The mere fact that a vehicle traveling five to ten miles per hour on snow skidded as the driver was attempting to turn right, without more, is not evidence of negligence.

4. Trial § 21—

Upon motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to him, giving him the benefit of every favorable inference that can be legitimately drawn therefrom, and defendant's evidence which tends to support plaintiff's claim must be assumed to be true and considered, but defendant's evidence which contradicts that of plaintiff or tends to establish a different set of facts must be ignored.

5. Automobiles § 41d— Evidence of negligence in following preceding vehicle too closely under circumstances held to raise issue for jury.

Evidence tending to show that defendant was following another vehicle on the highway which was fast becoming covered with snow, that the driver of the preceding vehicle gave a signal for a right turn about 50 feet from an intersection, that as the preceding car started to turn,

it skidded and collided with a vehicle approaching from the opposite direction, and that the driver of the following car, which was only 15 to 20 feet behind the preceding car when it began to turn, was unable to avoid hitting the preceding car, *is held* sufficient to be submitted to the jury on the question of whether the driver of the following car was traveling more closely than was reasonable and prudent under the circumstances.

6. Automobiles § 15—

The violation of the statutory requirement that the driver of a motor vehicle shall not follow another more closely than is reasonable and prudent with regard to the speed of the vehicles, the traffic, and the condition of the highway, is negligence *per se* and is actionable when the proximate cause of injury.

7. Damages § 3—

Plaintiff passenger was injured when the car in which he was riding was successively hit by two other cars. The jury found that his injuries were not proximately caused by any negligence on the part of two of the drivers. *Held:* Plaintiff may no longer recover on the theory that his injuries were the result of successive, joint, and concurrent torts, and may recover from the third driver only for those injuries resulting solely from the collision between the car in which he was a passenger and the car of such defendant.

APPEAL by plaintiff from *Crissman, J.*, at September 1961 Civil Term of IREDELL.

Plaintiff received personal injuries in a three-car collision. He seeks to recover damages from the operators of the vehicles involved.

The plaintiff's evidence tends to show that on 2 March 1960, at about nine o'clock A. M., he was a passenger in the Hudson automobile being driven by the defendant Lillie Mae Combs at a speed of some ten to fifteen miles an hour in a northerly direction on Highway #16 approaching its intersection with rural paved road No. 1800.

The defendant Rudolph Bobby Arnette, operating a Chevrolet automobile, had been following immediately behind the Combs car, "right up on the bumper", for about one-quarter of a mile. It was the intention of defendant Combs to turn east into Highway No. 1800, and plaintiff's destination was the home of his brother about 300 yards from the intersection on Highway No. 1800. As the two automobiles approached the intersection they were meeting the oil truck of the defendant R. J. Shell & Son, Inc., which was being operated by the defendant Hollar at a speed of from forty to fifty miles an hour. It was snowing hard, and there was from one to two inches of snow on the road. It had begun to snow when plaintiff was eight to ten miles from the intersection. About fifty feet from the intersection the defendant Combs put on her signal lights for a right turn and at ten to twenty feet from

the intersection, when she started to turn, she gave a hand signal for five to six feet. As the Combs car started to turn to the east at from five to ten miles on hour, with the Arnette car fifteen to twenty feet behind it, the Combs car started to slide to the left and crossed the center of the road. At that time the oil truck was within five feet of her in the southbound lane. The truck and the Combs car collided in the center of the highway. The Combs car slid from two to two and one-half feet in the snow, and at about the same time the Arnette car hit the right rear fender of the Combs car, turning it around in the highway and knocking it into the ditch. The three cars hit at about the same time. In the collision the plaintiff sustained serious injuries.

The evidence for the defendants Hollar and Shell & Son, Inc., tended to show that snow was just beginning to stick to the pavement as the oil truck approached the intersection at a speed of from thirty to thirty-five miles an hour; that when it was about fifty feet from the intersection, the Combs car came head on into the truck's lane; that Hollar applied brakes, got as far as he could to the right without going over a fill, and brought the truck almost to a standstill; that the left front of the Combs car collided with the left front of the truck at a time when her entire automobile was in the west lane for southbound traffic; that the truck stopped momentarily before going down the bank, and the Combs car stopped in the west lane headed down the bank over which the truck went; that the Arnette car, a blue Chevrolet, was sitting in the middle of the intersection headed west; that after the collisions there was blue paint on the right-hand side of the Combs car; that there were no marks on the front of the Arnette car, but there was one on the left rear fender.

The defendant Combs offered no evidence.

Evidence for the defendant Arnette tended to show that where snow covered the road it was from one-fourth to one-half inches deep; that for about one-half a mile he had followed the Combs car at a distance of about ten car lengths and at a speed of from twenty to twenty-five miles an hour, the same speed she was making; that from 75 to 100 feet from the intersection, and when he was six or seven car lengths behind her, he observed the Combs car slowing down and he slowed accordingly; that about thirty-five to fifty feet from the intersection he saw her hand signal when he was six or seven car lengths behind; that about three car lengths from the intersection the Combs car veered to the left and skidded broadside into the lane of the oncoming truck; that Arnette went on the right shoulder of the road, and the Combs car collided with the truck when the truck was almost off the road on the west side; that at the time of the impact, the Arnette car was about four car lengths to the right rear and off the edge of the highway on the

east; that after the impact with the truck, the rear of the Combs car came straight across the highway and collided with the back quarter panel of the Arnette car, leaving a dent in the right rear corner of the bumper and in the quarter panel about eight inches from the back door of the Combs car and some scratches on the fender.

At the close of all the evidence the motion of defendant Arnette for judgment as of nonsuit, made at the conclusion of the plaintiff's evidence, was renewed. The motion was allowed and plaintiff excepted. The jury answered the issues of negligence in favor of the remaining defendants and the plaintiff appealed.

R. A. Hedrick, Jay F. Frank for plaintiff appellant.
Collier, Harris & Collier for defendant Arnette appellee.
Adams & Dearman, C. B. Winberry for defendant Combs appellee.
Raymer & Raymer, John G. Lewis, Jr., for defendants William Lee Hollar and R. J. Shell & Son, appellees.

SHARP, J. The plaintiff assigns as error the failure of the trial judge to instruct the jury as to certain duties which he alleged in the complaint were owed to him by the defendants William Lee Hollar and Mrs. Lillie Mae Combs, the operators of two of the vehicles involved in the three-car collision, and the granting of the nonsuit as to the defendant Rudolph Bobby Arnette, the operator of the third vehicle. We will consider first the assignments of error which relate to the defendants William Lee Hollar and R. J. Shell & Son, Inc.

The trial judge instructed the jury, in effect, that if they found that the defendant Hollar was operating the oil truck on the occasion in question at a speed which was greater than was reasonable and prudent considering the weather, the condition of the highway, and the traffic on it, that such speed would be negligence *per se*, and if they further found that such negligence was one of the proximate causes of the collision which occurred they would answer the issue of negligence as to the defendants Hollar and R. J. Shell & Son, Inc., Yes; otherwise, No. He thus limited the jury's consideration of negligence on the part of these two defendants to the speed of the truck.

In addition to speed the plaintiff alleged that a failure on the part of the defendant Hollar to keep a proper lookout, a failure to have the truck under proper control, and a failure to equip the truck with chains was negligence proximately contributing to the collisions in which he was injured. The plaintiff assigns as error the failure of the judge to instruct the jury upon the duties which he contended defendant Hollar owed to him based on these allegations. However, there was no evidence requiring a charge on these allegations. Alle-

gation without proof is unavailing. *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654. Except for the testimony that the truck approached the intersection at a speed of from forty to fifty miles per hour, these defendants would have been entitled to a nonsuit when the plaintiff rested his case. Speed of forty miles per hour on a highway on which snow is beginning to stick may be excessive. *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734.

Although there was evidence that the collision between the truck and the Combs car occurred about the center of the highway, the complaint contains no allegation that the oil truck ever crossed over the center line to its left. Plaintiff must make out his case according to his allegations and the court cannot take notice of any proof unless there is a corresponding allegation. *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387.

The contention of the plaintiff that the defendant Hollar's speed was excessive under the weather and highway conditions then existing, and that it constituted one of the proximate causes of the resulting collision, was submitted to the jury under instructions to which no error is assigned on that count. The jury's verdict established that the plaintiff was not injured by the negligence of these two defendants. In the trial as to them we find no error.

The judge likewise limited the jury's consideration of negligence on the part of the defendant Combs to the single element of speed. In addition to excessive speed the plaintiff alleged that the defendant Combs, the operator of the car in which plaintiff was riding, was negligent in that she failed to keep a proper lookout, failed to have her car under proper control, and failed "to keep her automobile properly and adequately equipped under the circumstances." If this latter allegation be held to refer to the absence of chains, it cannot be said, under the circumstances of this case, that a failure to put on chains within the first eight to ten miles after snow began to fall was evidence of negligence. There was no evidence that Mrs. Combs failed to keep a proper lookout.

The evidence upon which the plaintiff predicates his case against the defendant Combs is that at a speed of from five to ten miles per hour, while attempting to make a right turn, she skidded into the path of the approaching truck. The judge left it to the jury to say whether or not such speed was excessive considering the weather, the traffic and the amount of snow on the highway. The jury found that it was not. The remaining question in the case against the defendant Combs is whether there was any evidence tending to show a lack of proper control on her part which required the judge to submit that allegation to the jury. We hold there was not.

Cars may skid or slip on roads "without fault either on account of the manner of handling the car or on account of its being there." *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11. Of course, "the skidding of an automobile while being driven on a road or highway, may or may not be due to the fault of the driver. It is only when it was due to the fault of the driver * * * that the driver can be held liable for damages resulting therefrom." *Butner v. Whitlow,* 201 N.C. 749, 161 S.E. 389; *Redden v. Bynum, supra.* The mere fact that the Combs car went into a skid at five to ten miles per hour, without more, is not evidence of negligence. As to the defendant Combs, we find no error in the trial.

We come now to the question of whether the judge erred in granting the motion of defendant Arnette for judgment of nonsuit at the close of all the evidence. The plaintiff alleged a sequence of events on the part of the three defendants which successively, concurrently, and jointly produced the injuries for which he seeks to recover. *Riddle v. Artis, et al,* 243 N.C. 668, 91 S.E. 2d 894. He alleged that the negligence of Arnette in this sequence consisted, *inter alia,* in following the Combs vehicle too closely.

In determining the legal sufficiency of testimony to withstand a motion for compulsory nonsuit after all the evidence on both sides is in, the testimony is interpreted most favorably to plaintiff, and is most strongly against defendant. Furthermore, plaintiff is given the benefit of every inference favorable to him that can be legitimately drawn from such facts. Any evidence presented by defendant which contradicts that of plaintiff, or tends to establish a different set of facts is ignored and all the evidence which tends to support the plaintiff's claim is assumed to be true. *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881.

Subjecting the plaintiff's testimony against Arnette to these rules, it makes out the following case for the plaintiff:

In a snow storm Arnette had been following immediately behind the Combs car for one-fourth mile on a highway which was fast being covered with snow. Although Mrs. Combs had given a right turn signal about fifty feet from the intersection, the Arnette car was only fifteen to twenty feet, less than two car lengths, behind her when she started to turn. After the Combs car went into the skid and collided with the truck, the defendant Arnette was unable to avoid running into it because of his proximity, and he hit her car on the right rear fender causing it to turn around and go into the ditch. The plaintiff testified that "the three cars hit about the same time."

G.S. 20-152 (a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent

with regard to the safety of others and due regard to the speed of such vehicles and the traffic upon and the condition of the highway." A violation of this statute is negligence *per se* and, if injury proximately results therefrom, it is actionable. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184.

Upon the evidence it was for the jury to say whether the defendant Arnette, considering the condition of the highway and the hazards of driving in the snow, was following the Combs car more closely than a reasonably prudent person would have done under the circumstances and, if so, what injury, if any, his negligence proximately caused the plaintiff.

However, plaintiff can no longer proceed upon the theory that his injuries were the cumulative effect of successive, joint and concurring torts; but he is entitled to show, if he can, that negligence on the part of the defendant Arnette proximately caused him injury. He can recover from the defendant Arnette for only those injuries he may have suffered in the collision between the Combs car and the Arnette car. 25 C.J.S. Damages, Sec. 27, p. 493.

As to the defendants Hollar, R. J. Shell & Son, Inc., and Lillie Mae Combs—

Affirmed.

As to the defendant Arnette—

New trial.

BILLY JOE THARPE, BY AND THROUGH HIS NEXT FRIEND, CLERO THARPE, v. PAULINE D. NEWMAN.

(Filed 2 May 1962.)

1. Automobiles §§ 37, 41p; Evidence § 11—

Where it appears that each of two occupants of an automobile had successively driven the car on the night in question, and that the car was involved in an accident which killed one of them, testimony of the survivor as to the identity of the driver immediately preceding the wreck involves their relation *inter se* and constitutes a personal transaction between them within the meaning of G.S. 8-51.

2. Same—

Testimony of the surviving occupant of a car tending to show that the other occupant, killed in the accident, was driving at that time is incompetent in an action by the survivor against the owner of the vehicle, sought to be held liable under the doctrine of agency, since the owner, af-

ter having paid such liability, would have a right of action against the estate of the deceased, and therefore the transaction comes within the spirit if not the letter of G.S. 8-51.

HIGGINS, J., dissents.

APPEAL by plaintiff from *Crissman, J.*, January Term 1962 of WILKES.

Plaintiff alleged he sustained personal injuries January 5, 1961; that his injuries were proximately caused by the negligent operation of a 1954 Ford by Robert Newman, defendant's husband, in which plaintiff was a guest passenger; that Robert Newman, by reason of his negligence, lost control of the car, ran off the road, struck an apple tree and wrecked the car; that defendant was the registered owner of the 1954 Ford; that Robert Newman was operating the 1954 Ford as the agent and servant of defendant; and that the negligence of Robert Newman, in law, is imputable to defendant.

Answering, defendant admitted she was the registered owner of the 1954 Ford. Apart from this admission, she denied all of plaintiff's material allegations. As further defenses she alleged, upon information and belief, that plaintiff was driving the 1954 Ford when the wreck occurred; but, if not, plaintiff was guilty of contributory negligence in failing to protest the negligent operation thereof by Robert Newman.

In January, 1961, when this action was instituted, plaintiff was a minor, being twenty years of age. Robert Newman, whose age is not shown, died as the result of injuries sustained in the wreck.

Witnesses, who came to the scene shortly after the wreck, testified as to the position and condition of the car and of plaintiff and of Robert Newman; that the wreck occurred about 8:30 p.m.; that plaintiff and Robert Newman were the only persons found in or near the wreckage; and that the 1954 Ford, of which defendant was the registered owner, was the automobile involved in the wreck.

Plaintiff testified, without objection, that, about 2:30 p.m. in the driveway of his parents' home, he got into a 1954 Ford with Robert Newman, and that they went to Arnie Walls' (store) and from there to Shepherd's Crossroads.

The court excluded the proffered testimony of plaintiff tending to show these facts: When they left Arnie Walls' store "about 7:00 or 7:30," plaintiff was driving. He drove up the road toward Trap Hill a quarter of a mile, pulled off the road and stopped. He got out of the car, walked around and got in on the other side, at which time "this other guy" started to drive. Thereafter, Robert Newman was the driver. Plaintiff was riding as a passenger on the front seat. Rob-

ert Newman turned the car around and went back down the road. He operated the car at a speed of between seventy and eighty miles per hour and lost control of the car. The car first ran off the paved portion of the road onto the right shoulder, skidded, was pulled back onto the road, went across the road and finally struck an apple tree beyond the left shoulder of the road. Plaintiff excepted to the court's exclusion of this proffered testimony.

As evidence of the alleged agency, plaintiff relied solely on G.S. 20-71.1.

At the conclusion of plaintiff's evidence, the court, granting defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

McElwee & Hall and Richard A. Vestal for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson, W. F. Maready and Allen, Henderson & Williams for defendant appellee.

BOBBITT, J. Apart from plaintiff's proffered testimony, the evidence is deemed insufficient to support a finding that Robert Newman was driving the car when the wreck occurred. Whether the judgment of nonsuit should be affirmed depends upon whether the excluded testimony of plaintiff was competent.

The court, based on G.S. 8-51 and our decisions in *Boyd v. Williams*, 207 N.C. 30, 175 S.E. 832, and *Davis v. Pearson*, 220 N.C. 163, 16 S.E. 2d 655, held plaintiff's testimony would be incompetent if offered in an action by plaintiff against the personal representative of Robert Newman to recover damages for the injuries plaintiff sustained in said wreck. This being so, the court was of opinion that since defendant's liability, if any, arises solely under the doctrine of *respondeat superior*, the estate of the deceased was substantially and adversely affected, and therefore the testimony was incompetent.

In *Boyd v. Williams, supra*, the plaintiff's action was against the administrator of her husband's estate. The plaintiff testified, without objection, that she sustained injuries while a passenger in a car operated by her deceased husband. On appeal, it was held that the plaintiff's further testimony, to which the defendant had objected, which tended to show her husband had operated the car in a negligent manner, was incompetent under G.S. 8-51 (then C.S. 1795) and should have been excluded. It was held that the plaintiff's said further testimony concerned a personal transaction between the plaintiff and her deceased husband.

In *Davis v. Pearson, supra*, the plaintiff's action was against the administrator of the alleged driver of an automobile in which the plain-

tiff was riding. As part of the evidence tending to show the defendant's intestate was the driver, the plaintiff was permitted to testify, over the defendant's objection, that there were only two persons in the car when the accident occurred and that he (the plaintiff) was unable to operate an automobile. A new trial was awarded for error in admitting the plaintiff's said testimony. The opinion states: "While it is true the plaintiff did not testify directly that he was riding in an automobile operated by the defendant's intestate, he did testify that he was riding in an automobile in which there were only two persons, and offered other evidence tending to prove that the defendant's intestate was the other person than himself in the automobile and that he did not operate an automobile and that the defendant's intestate did." It was held that the plaintiff's said testimony concerned a personal transaction between him and the defendant's intestate within the meaning of C.S. 1795.

In *Davis v. Pearson, supra,* emphasis is placed upon that portion of the opinion in *Boyd v. Williams, supra,* in which it is stated that "where the transactions and communications become an essential *or* material link in the chain establishing liability against the defendant, the philosophy of the statute, as interpreted and applied in the decisions, would exclude them from the consideration of the jury."

In *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115, this Court considered, but declined, the appellant's request that we overrule *Boyd v. Williams, supra,* and *Davis v. Pearson, supra.*

Carswell v. Greene, 253 N.C. 266, 116 S.E. 2d 801, involved an action and cross action between the administratrix of Carswell, the driver of one of the two vehicles involved in a collision, and Greene, the driver of the other vehicle. It was held that Greene's testimony as to the manner in which Carswell was driving was competent and properly admitted. This Court, in opinion by *Higgins, J.,* said: "The decisions of this Court have gone a long way in excluding evidence of a surviving passenger in his action against the estate of the deceased driver based on driver negligence. Our cases, however, have never gone so far as to exclude the evidence of a survivor as to what he saw with respect to the operation of a separate vehicle with which he had a collision. A party may testify to substantive facts about which he has independent knowledge not acquired in a communication from nor a transaction with the deceased."

Apart from differences in statutory provisions (see Wigmore on Evidence, Third Edition, Vol. II, § 488), the decisions in other jurisdictions cannot be reconciled. Many decisions turn upon the meaning given the word "transaction." 58 Am. Jur., Witnesses § 250; 97 C.J.S., Witnesses § 215(7); Blashfield, Cyclopedia of Automobile Law and

Practice, Permanent Edition, Vol. 9C, § 6325; Annotation, "Testimony to facts of automobile accident as testimony to a 'transaction' or 'communication' with a deceased person, within dead man statute," 80 A.L.R. 2d 1296 *et seq.*, § 2.

While there is authority *contra*, well considered recent decisions, referring to a similar factual situation, are in accord with *Carswell v. Greene, supra. Harper v. Johnson* (Tex. 1961), 345 S.W. 2d 277; *Shaneybrook v. Blizzard* (Md. 1956), 121 A. 2d 218; *Gibson v. McDonald* (Ala. 1956), 91 So. 2d 679; Annotation, *supra*, § 3. In *Harper v. Johnson, supra, Justice Hamilton* states: ". . . we are unable to say that the statute was ever intended to include the circumstances surrounding an involuntary and fortuitous collision between two motor vehicles driven by two complete strangers."

Comparatively few cases refer to the factual situation considered in *Boyd v. Williams, supra*, and *Davis v. Pearson, supra*, that is, where the action is by an *alleged* passenger against the estate of the *alleged* driver. In accord with our decisions: *Stephens v. Short* (Wyo. 1930), 285 P. 797; *Rogers v. Carmichael* (Ga. 1938), 198 S.E. 318; *Sollinger v. Himchak* (Pa. 1961), 166 A. 2d 531. *Contra: Krantz v. Krantz* (Wis. 1933), 248 N.W. 155; *Christofiel v. Johnson* (Tenn. 1956), 290 S.W. 2d 215; Annotation, *supra*, § 4. In *Krantz*, decision is based on the view that the statute refers to "a mutual transaction between the deceased and the witness who survives, in which both, the survivor, as well as the deceased, actively participated."

It is not admitted, nor does it appear from independent evidence, that Robert Newman was the driver of the 1954 Ford when the wreck occurred. As in *Davis v. Pearson, supra*, whether plaintiff or Robert Newman was the driver is a crucial issue raised by the pleadings. Testimony as to the way and manner in which the 1954 Ford was operated is of no avail unless and until competent evidence tending to show Robert Newman was the driver is offered.

Clearly, plaintiff's proffered testimony to the effect that he, while driving the 1954 Ford, stopped by the side of the road, at which time he and Robert Newman exchanged positions in the car and Robert Newman took over the driving, involved a personal transaction between them in which both participated. It appears from plaintiff's proffered testimony that the two men had been together in the 1954 Ford, off and on, since 2:30 p.m. and that each had driven the car prior to the wreck. Whether plaintiff's proffered testimony to the effect Robert Newman was the driver on the occasion of the wreck is competent must be considered in the light of their transactions preceding the wreck.

It is sufficient to say that, when it appears that a car occupied by

two persons is involved in a wreck, and in their associations preceding the wreck each occupant has operated the car, testimony of the survivor as to what occurred between them, bearing upon the identity of the driver immediately preceding the wreck, involves their relations *inter se* and constitutes a personal transaction between them within the meaning of G.S. 8-51. Under these circumstances, the surviving occupant, in an action against the estate of the deceased occupant, is an incompetent witness as to the identity of the driver immediately preceding and at the time of the wreck.

Under the factual situation here presented, the court, in accord with *Davis v. Pearson, supra,* correctly ruled that the excluded evidence would be incompetent if offered in an action by plaintiff against the estate of Robert Newman.

There remains for consideration whether, if incompetent in an action against the estate of Robert Newman, the excluded evidence is also incompetent as against defendant herein.

This court has held, as pointed out by plaintiff, that G.S. 8-51 does not render an interested witness incompetent to testify "to a transaction between himself and a deceased agent of his opponent." Stansbury, North Carolina Evidence, § 74; *Bailey v. Westmoreland,* 251 N.C. 843, 847, 112 S.E. 2d 517, and cases cited. But this rule has been applied only in factual situations where the deceased agent was not personally liable in respect of the alleged cause of action. It has no application where the liability, if any, of the principal, rests solely on the alleged tortious acts of the agent under the doctrine of *respondeat superior.*

In *Bryant v. Morris,* 69 N.C. 444, plaintiff's action was against a surety on the bond of a deceased constable. The court admitted, over objection, a plaintiff's testimony as to his personal transactions with the deceased constable. The opinion of *Reade, J.,* quoted and applied by *Walker, J.,* in *McGowan v. Davenport,* 134 N.C. 526, 47 S.E. 27, is as follows:

> "If the plaintiff had sued the administrator of the dead constable he could not have testified as to any transaction between him and the deceased so as to affect his estate. C.C.P., sec. 343.
>
> "But the defendant is not sued as administrator, but as surety of the dead constable, and the question is whether the plaintiff can testify as to transactions between himself and the deceased which affect the defendant as his surety. It is said that he ought not to be allowed to do this because whatever he recovers of the defendant as surety the defendant can recover of the estate of the deceased constable.

"This would seem to be so; and therefore to allow the evidence against the surety is to allow it indirectly against the principal, which is the evil meant to be guarded against by the exception in the statute. So that while the objection to the evidence is not within the *letter,* it is within the *spirit* of the statute. *Halliburton v. Dobson,* 65 N.C. 88; *Isenhour v. Isenhour,* 64 N.C. 640. There is error."

The reasoning underlying *Bryant v. Morris, supra,* and *McGowan v. Davenport, supra,* is equally applicable to the present factual situation.

"An implied right to indemnity is also raised in favor of a principal held responsible for injuries to a third person caused by the unauthorized and wrongful or negligent act of his agent." 27 Am. Jur., Indemnity § 19. In accord: *Newsome v. Surratt,* 237 N.C. 297, 300, 74 S.E. 2d 732, and cases cited; *Hayes v. Wilmington,* 243 N.C. 525, 543, 91 S.E. 2d 673, and cases cited. This statement of *Walker, J.,* in *McGowan v. Davenport, supra,* is apposite: "Any testimony therefore which makes against her will, in a material respect and in the same degree, though indirectly, affect her husband's estate. The plaintiff being a party and directly interested in the result, was incompetent to give this testimony." In this connection, see *Kramer v. Morgan,* 85 F. 2d 96; also, *Stephens v. Short, supra.*

We have considered the Missouri decisions, *Freeman v. Berberich,* 60 S.W. 2d 393, and *Grim v. Gargis,* 303 S.W. 2d 43, cited by plaintiff in support of his contention. However, in line with our decisions in *Bryant v. Morris, supra,* and *McGowan v. Davenport, supra,* the conclusion reached is that, under the factual situation here considered, plaintiff's proffered testimony, as to defendant, is within the spirit if not within the letter of G.S. 8-51 and was properly excluded.

Affirmed.

HIGGINS, J., dissents.

THOMAS H. LACKEY, ELI A. LACKEY, JOHN C. LACKEY AND WIFE, HELEN LACKEY; ANNIE LOUISE LACKEY, AND RICHARD F. LACKEY v. THE HAMLET CITY BOARD OF EDUCATION AND THE TOWN OF HAMLET.

(Filed 2 May 1962.)

1. Appeal and Error § 21—

A sole assignment of error to the judgment presents the question whether error of law appears on the face of the record proper, including whether the stipulations and agreed facts are sufficient to support the judgment.

2. Appeal and Error § 49—

The Supreme Court will attempt to reconcile the findings of fact and stipulations so as to uphold, if possible, the judgment predicated upon them, but when the findings and stipulations are basically antagonistic, inconsistent, or contradictory as to material matters, the judgment based thereon must be vacated and the cause remanded. In this case involving construction of a deed, the complaint and the agreed facts referred to a deed executed upon one date and the exhibit was a deed executed on another date, and the record indicated that two separate deeds were executed.

APPEAL by defendant Hamlet City Board of Education from *Gwyn, J.*, in chambers 30 November 1961, RICHMOND County Superior Court.

Action to determine the title to a lot of land in the town of Hamlet heard upon stipulations and agreed facts, the material parts of which are summarized.

On 27 June 1903 E. A. Lackey and wife, Ella M. Lackey, executed and delivered to the School Trustees for the town of Hamlet a deed conveying a lot of land in the town of Hamlet, at that time owned by the grantors in fee, which deed is recorded in Book SSS, page 600, of the Richmond County Registry, and is attached to the stipulations and agreed facts, and made a part thereof. However, the deed attached to the stipulations and agreed facts, and made a part thereof, is dated 3 February 1903, and is as follows:

"THIS DEED, made this 3rd day of February, A.D. 1903 by E. A. Lackey and wife, Ella M. Lackey, of Richmond County and State of North Carolina, parties of the first part, to J. M. Jamison, D. McNair, J. S. Bishop, M. C. Freeman and Dr. H. F. Kinsman, School Trustees for the Town of Hamlet, N. C., and their successors, of Richmond County and State of North Carolina, parties of the second part;

"WITNESSETH, That said parties of the first part, in consideration of Ten Dollars to them paid by said parties of the second part the receipt of which is hereby acknowledged have

bargained and sold, and by these presents do grant, bargain, sell and convey to said School Trustees for the Town of Hamlet, N. C., and their successors and assigns, a certain tract or parcel of land in Marks Creek Township, Richmond County, State of North Carolina, adjoining the lands of Mary C. Henderson, C. C. Smith and others, and bounded as follows, viz:

"Beginning at a stake in the corner of Vance and Henderson Streets and running S. E. with said Vance Street 210 feet to a stake in Mary C. Henderson's line; thence with said Mary C. Henderson's line 210 feet S. W. to a stake in the edge of Washington Street. Thence with said Washington Street parallel with said Vance Street 210 feet to a stake in the corner of Washington and Henderson Streets; thence with said Henderson Street N. E. 210 feet to the beginning corner.

"It is also made a part of this deed that in the event of the school's disbandment (failure) that this lot of land shall revert to the original owners to wit: The said E. A. Lackey and wife, Ella M. Lackey, or their legitimate heirs, but it is also agreed that any and all improvements thereon shall remain the property of the Town of Hamlet, N. C.

"TO HAVE AND TO HOLD the aforesaid lot or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their successors and assigns, to their only use and behoof forever, for school purposes.

"And the said parties of the first part covenant they are seized of said premises in fee and have right to convey in fee simple; that the same is free and clear from all encumbrances, and that they will warrant and will defend the said title to the same against the claims of all persons whomsoever.

"IN TESTIMONY WHEREOF, the said E. A. Lackey and Ella M. Lackey have hereunto set their hands and seals, the day and year first above written.

/s/ E. A. Lackey (SEAL)
/s/ Ella M. Lackey (SEAL)

ATTEST:
/s/ W. H. McDonald"

This does not appear in the stipulations and agreed facts, but does appear in the complaint and the answer of the Hamlet City Board of Education: The complaint alleges that prior to 27 June 1903 E. A. Lackey and wife, Ella M. Lackey, owned a certain lot of land in the town of Hamlet, which is described by metes and bounds, and that they by deed dated 27 June 1903, and recorded in the public registry

of Richmond County, conveyed this lot to the School Trustees for the town of Hamlet and their successors. This deed is attached to the complaint and made a part thereof. Plaintiffs pray that they be declared the owners in fee of the lot of land described in this deed by reason of the reverter provision it contains. Plaintiffs' complaint has no reference to any deed, except the deed dated 27 June 1903. The Hamlet City Board of Education in its answer admits that E. A. Lackey and wife, Ella M. Lackey, by deed dated 27 June 1903 conveyed to the School Trustees for the town of Hamlet a certain lot therein described, and attaches a copy of the deed to its answer, and makes it a part thereof. However, the deed attached to its answer, and made a part thereof, is dated 3 February 1903, and is the deed attached to the stipulations and agreed facts, and made a part thereof. The description of the lot of land conveyed in each deed is identical, and the reverter provision contained in each deed is identical, though the remaining language in each deed is not identical but substantially similar. It would seem that different lots of land were conveyed in these two deeds, and we are supported in our opinion by a resolution adopted by the Hamlet City Board of Education on 7 March 1961 to sell "two tracts of land described in those two deeds recorded in Book SSS at pages 599 and 600, respectively, Richmond County Registry," which resolution is a part of the stipulations and agreed facts, and will be copied verbatim below.

Resuming our summary of the stipulations and agreed facts:

Immediately after the delivery of the deed dated 3 February 1903 the School Trustees for the town of Hamlet erected on the lot conveyed by the deed dated 3 February 1903 a school building for the high school and grammar grades for the school district. This building was used as a public school building for the education of the children of the district until 1922. In 1922 a new high school building was constructed on other land, and the high school was thereafter conducted there. The school building situate on the lot conveyed by the Lackeys by the deed dated 3 February 1903 continued to be used as a public school building for grammar grades until 1 May 1951, when a new building for the grammar grades was constructed on other land. From 1 May 1951 until March 1961 the old school building situate on the lot conveyed by the Lackeys by the deed dated 3 February 1903 was used for storing furniture, school supplies and records. Since March 1961 the Hamlet City Board of Education has ceased to use this lot and the building thereon for any school purpose, though it has kept the building insured and in good repair.

The Hamlet City Board of Education is a body corporate organized and existing under the statutes and laws of the State, is charged by law with the administration and operation of public schools within

the territorial limits of the Hamlet Administrative School Unit, is the duly and legally appointed successor to the School Trustees for the town of Hamlet, has succeeded to and become the owner of whatever estate was conveyed to the School Trustees for the town of Hamlet by the Lackeys' deed dated 3 February 1903, and is at this time operating and maintaining public schools within the Hamlet Administrative School Unit, which includes the territory of Richmond County formerly served by the School Trustees for the town of Hamlet. Public schools within the boundaries of the Hamlet Administrative School Unit have been continuously operated and maintained from and before the year 1903 to the present time by the School Trustees for the town of Hamlet and by their legally constituted successor, the Hamlet City Board of Education.

The Hamlet City Board of Education, all members being present, at a regular meeting on 7 March 1961 unanimously adopted the following resolution:

> "THAT WHEREAS, the Vance Street School property has not been used for classroom purposes since 1951 and said property has been used for storing school supplies, furniture and equipment, from 1951 to the present date; and
>
> "WHEREAS, the upkeep and maintenance of said property and building situate thereon has resulted in a continuing expense to the Hamlet City Board of Education and will continue to result in additional expense and it appears that the storage of said school supplies, furniture and equipment can be had elsewhere at no expense to the Board; and
>
> "WHEREAS, it appears to the best interests of the Hamlet Administrative School Unit to sell said property at public auction as provided by the General Statutes of North Carolina and use the proceeds from the sale of said property, after the payment of all expenses incident to said sale, for school purposes;
>
> "NOW, THEREFORE, BE IT RESOLVED that the attorneys of the Hamlet Administrative School Unit be, and they hereby are instructed and directed to sell those two tracts of land described in those two deeds recorded in Book SSS at pages 599 and 600, respectively, Richmond County Registry, in accordance with the provisions of the General Statutes of North Carolina to the highest bidder, the Board reserving the right to reject the highest bid as by statute provided;
>
> "BE IT FURTHER PROVIDED that the proceeds obtained from said sale, after payment of expenses in connection therewith, be used solely for school purposes of the Hamlet Administrative School Unit."

Pursuant to the resolution, and after due advertisement, the property described in the deed dated 3 February 1903 was offered for sale at public auction on 20 April 1961, when and where one Gulledge became the last and highest bidder. Within due time a raised bid was made, and a resale was had on 18 May 1961, when and where one Stinson became the last and highest bidder in the amount of $3,200.00. The Hamlet City Board of Education at a regular meeting on 6 June 1961 by a unanimous resolution rejected Stinson's bid as being inadequate, and resolved that efforts be made to locate a purchaser for the property at private sale for a price in excess of the public sale bid and in a sum which is an adequate price for the property. The Hamlet City Board of Education is presently endeavoring to sell the property conveyed by the Lackeys' deed dated 3 February 1903, as set forth in the resolution adopted on 6 June 1961, and to use the proceeds from its sale for the operation of the public schools and for school purposes within the territorial and jurisdictional limits of the Hamlet Administrative School Unit.

E. A. Lackey and his wife, Ella M. Lackey, are both deceased, and plaintiffs, except Helen Lackey, wife of John C. Lackey, are their only surviving heirs at law.

Based upon the stipulations and agreed facts, Judge Gwyn entered judgment to this effect: It appears that the Lackeys' deed was made upon a nominal consideration, that the overriding intent of the contracting parties was set forth, though inartfully, in the following language in the deed: "It is also made a part of this deed that in the event of the school's disbandment (failure) that this lot of land shall revert to the original owners to-wit: The said E. A. Lackey and wife, Ella M. Lackey, or their legitimate heirs, but it is also agreed that any and all improvements thereon shall remain the property of the town of Hamlet, N. C.," and that such intent as thus expressed was sufficient to create, and did create a possibility of reverter. It further appears that about March 1961 the Hamlet City Board of Education has ceased to use the property for any school purpose, and therefore the reverter became operative. Whereupon, it is adjudged that plaintiffs, with the exception of Helen Lackey, wife of John C. Lackey, as surviving heirs of E. A. Lackey and wife, Ella M. Lackey, are the owners in fee, and entitled to the possession of the lot of land described in the complaint, subject, however, to the defendant's right to remove any and all improvements thereon.

However, the land described in the complaint is the land described in the Lackeys' deed dated 27 June 1903, although an identical description appears in their deed dated 3 February 1903.

From the judgment, Hamlet City Board of Education appeals.

A. A. Reaves and Bynum & Bynum for defendant appellant, Hamlet City Board of Education.

Jones and Jones for plaintiff appellees.

PARKER, J. It seems clear from the stipulations and agreed facts, as well as from the complaint and answer of the Hamlet City Board of Education, that E. A. Lackey and wife, Ella M. Lackey, conveyed one lot of land to the School Trustees for the town of Hamlet, their successors and assigns, by deed dated 3 February 1903, and another lot of land to the same grantees, their successors and assigns, by deed dated 27 June 1903, although the description of the lots conveyed by the deeds is identical. We are fortified in our assumption by the fact that the resolution adopted by the Hamlet City Board of Education on 7 March 1961, which is set forth verbatim in the stipulations and agreed facts, directed the attorneys of the Hamlet Administrative School Unit "to sell those two tracts of land described in those two deeds recorded in Book SSS at pages 599 and 600, respectively, Richmond County Registry."

The stipulations and agreed facts state that E. A. Lackey and wife, Ella M. Lackey, executed and delivered a deed dated 27 June 1903 to the School Trustees for the town of Hamlet, which deed is attached to the stipulations and agreed facts and made a part thereof, but the deed so attached is the deed from E. A. Lackey and wife, Ella M. Lackey, dated 3 February 1903. According to the stipulations and agreed facts, the school building was erected on the lot of land conveyed by the deed dated 3 February 1903, and that is the lot of land that the Hamlet City Board of Education is now trying to sell. The stipulations and agreed facts do not state that they are trying to sell the lot of land conveyed by the deed dated 27 June 1903, though the resolution of the Hamlet City Board of Education states two tracts of land were to be sold. The stipulations and agreed facts state nothing as to what use, if any, has been made by the grantees of the lot of land conveyed by the deed dated 27 June 1903. A different factual situation may exist as to the use by the grantees of the lot of land conveyed by the deed dated 27 June 1903 from the use by them of the lot of land conveyed by the deed dated 3 February 1903.

The judgment adjudges that plaintiffs by reason of the reverter provision in the deed dated 27 June 1903 are the owners in fee and entitled to the possession of the lot of land described in that deed, but the judgment is based upon stipulations and agreed facts in respect to the lot of land conveyed by the deed dated 3 February 1903.

Plaintiffs' complaint has no reference of any kind to the deed dated 3 February 1903. All their allegations in their complaint are in refer-

ence to the lot of land conveyed in the deed dated 27 June 1903, which they pray the court to decree that they own in fee and are entitled to the possession thereof by reason of the reverter provision contained in the deed.

The sole assignment of error of the Hamlet City Board of Education, the only appellant, is to the judgment. That raises the question whether an error of law appears on the face of the record proper. That includes here the question whether the stipulations and agreed facts are sufficient to support the judgment. *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564; Strong's N. C. Index, Vol. 1, Appeal and Error, sec. 21, where numerous cases are cited.

We are of opinion that the material facts set forth in the stipulations and agreed facts, when considered in connection with the plaintiffs' complaint and the appellant's answer, are in such a state of confusion, inconsistency, and conflict in respect to the two deeds and the lots therein conveyed that we cannot safely and accurately decide the question attempted to be raised on this appeal. A judgment will not be supported by findings of fact or by stipulations and agreed facts which are actually antagonistic, inconsistent, or contradictory as to material matters. *Davis v. Ludlum,* 255 N.C. 663, 122 S.E. 2d 500; 89 C.J.S., Trial, secs. 635 and 636. However, courts endeavor to reconcile findings of fact and stipulations and agreed facts as to material matters which appear to be contradictory, so as to uphold the judgment if possible, but this rule cannot be used to uphold findings of fact or stipulations and agreed facts as to material matters that are really inconsistent with each other. *Bradham v. Robinson,* 236 N.C. 589, 73 S.E. 2d 555; 89 C.J.S., *ibid.* Therefore, it is ordered that the judgment be vacated, and the case be remanded in order that the facts in respect to the two deeds and the two lots therein conveyed may be accurately and truly presented for decision.

Judgment vacated and case remanded.

PETRUS MACHINERY, INC. v. RADIATOR SPECIALTY COMPANY, A CORPORATION.

(Filed 2 May 1962.)

1. Sales § 2—

An agreement to purchase machinery to be reconditioned by the seller at a stipulated price f.o.b. the seller, with right of inspection and thirty days trial by the purchaser, does not entitle the purchaser to reject the machinery delivered if it was the machinery purchased and had been reconditioned in accordance with the terms of the contract, and the purchaser is not entitled to return the machinery without inspection solely because it decided the machinery was too small for its purposes.

2. Appeal and Error § 49—

Where the court fails to find a fact necessary to support its judgment, the judgment must be vacated and the cause remanded, notwithstanding the absence of exceptions to the findings.

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

APPEAL by plaintiff from *Nettles, Emergency Judge,* 4 December Regular Civil Term 1961 of MECKLENBURG.

This is a civil action based on an alleged breach of contract. The plaintiff is an Ohio corporation, with one of its principal offices and places of business in the City of Cleveland, where it is engaged in the sale of machinery of various kinds. The defendant is a North Carolina corporation, with one of its principal offices and places of business in Mecklenburg County, North Carolina, where it is engaged in the manufacture of solder seal for radiators, among other things.

The parties having waived a jury trial, the court, after hearing the evidence for the plaintiff and the defendant, found the following facts:

"a. That the defendant purchased of the plaintiff the two machines described in the complaint, after examination in Cleveland, plaintiff to recondition the machines, the agreed sales price being $1,350.00 f.o.b. Cleveland, Ohio.

"b. That said purchase was subject to purchaser's inspection and thirty days trial use.

"c. That plaintiff reconditioned the machines, shipped them to defendant in crates to Charlotte, defendant receiving said machines on or about May 5, 1959.

"d. Defendant kept machines 21 days, did not uncrate or test machines, defendant inspecting machines; defendant deciding machines were too small for defendant's use.

"e. Defendant tendered machines back to plaintiff, by freight prepaid, but plaintiff refused to accept tender."

Based on the foregoing findings of fact, the trial court concluded as a matter of law:

"a. That the defendant had the right to return the machines for any reason.

"b. That plaintiff's refusal to accept return of the machines was wrongful and a breach of the agreement.

"c. That plaintiff is not entitled to recover of the defendant."

Judgment was entered dismissing the action and charging the plaintiff with the costs to be assessed by the Clerk. The plaintiff appeals, assigning error.

Richard M. Welling for plaintiff appellant.
Levine, Pizer & Goodman for defendant appellee.

DENNY, C.J. The findings of fact by the trial judge do not disclose whether or not the machines delivered to the defendant failed to answer the description set out in the contract or were otherwise defective. If the machines delivered to the defendant were the machines actually purchased by the defendant and inspected by its agent in Cleveland, Ohio, and were reconditioned in accordance with the terms of the contract, then in our opinion the defendant did not have the right to reject and return the machines to the seller merely because it decided they were too small for its use.

The appellant did not except to the findings of fact by the trial court. Even so, in our opinion, the facts found are insufficient to support the court's conclusions of law to which the appellant did except and assigns as error.

In 46 Am. Jur., Sales, Section 442, page 608, it is said: "Where the contract of sale provides for a sale f.o.b. the point of shipment, the title is generally held to pass, in the absence of a contrary intention between the parties, at the time of the delivery of the goods for shipment at the point designated. * * *"

Likewise, it is said in this same authority, Section 443, at page 610: "In general, the fact that the buyer has the right to inspect the goods on arrival at a certain point and reject them for nonconformity to the contract of sale does not itself prevent the passing of the title on delivery to the carrier, if the goods in fact were such as the contract called for. * * *"

The plaintiff in its complaint alleged the defendant purchased the machines delivered. The defendant denied this allegation in its answer. None of the evidence adduced in the hearing below is brought forward and set out in the record. We do have what is purported to be a photostatic copy of the original contract between the parties. How-

ever, it does not appear from the record that such contract was introduced in evidence in the hearing below.

We think the ends of justice require that this cause be remanded to the end that all the facts pertinent to the determination of the issues raised by the pleadings may be found and the conclusions of law drawn therefrom.

The judgment entered below is vacated and the cause is

Remanded.

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

COMMUNITY CREDIT COMPANY OF LENOIR, INC., PLAINTIFF v. ARTHUR R. NORWOOD, DEFENDANT, AND GENERAL MOTORS ACCEPTANCE CORPORATION, INTERVENOR.

(*Filed 2 May 1962.*)

1. Automobiles § 4—

Under the 1961 amendments to G.S. 20-72(b) and G.S. 20-75, the purchaser of a secondhand automobile from a dealer obtains title when the dealer endorses the old certificate of title to him and he applies for a new certificate of title. Title passes as of that time and not when the new certificate of title is actually issued by the Department of Motor Vehicles.

2. Execution § 5—

A judgment creditor obtains a lien on the personalty of the judgment debtor from the time an officer armed with judicial process acts in conformity therewith and thus makes a valid levy. G.S. 1-313(1). If the judgment debtor does not have title at that time, there can be no valid levy.

3. Same; Automobiles § 4; Chattel Mortgages and Conditional Sales § 12— Priority between chattel mortgage and levy under execution.

On the date judgment debtor purchased a secondhand automobile from a dealer and received the old certificate of title endorsed to him and made application for new certificate of title, levy on the automobile was made under execution upon the judgment. Two days later the lien of the purchase money mortgage was filed for registration. G.S. 47-20. *Held:* Under the 1961 amendments to G.S. 20-72(b) and G.S. 20-75, judgment debtor obtained title to the vehicle on the day the execution was levied, and therefore the lien of the levy has priority over the subsequently registered chattel mortgage, provided the levy was valid. The transactions occurred prior to the effective date of the 1961 amendments to

G.S. 20-58.10, rendering unnecessary the registration of a chattel mortgage or other liens upon an automobile.

4. Appeal and Error § 59—

Where the findings of fact are insufficient to support the adjudication of the rights of the parties, the judgment must be vacated and the cause remanded.

APPEAL by plaintiff from *Froneberger, J.*, January 1962 Term of CALDWELL.

On 16 December 1961 General Motors Acceptance Corporation (hereafter designated as intervenor) filed its motion asking that it be permitted to intervene in this action. It based the motion on its assertion of a valid first lien on a Ford automobile which had been advertised for sale for the purpose of satisfying an execution issued on a judgment against defendant Norwood. Touching the validity of the sale advertised to be made, it alleged the sheriff "has a purported execution against Arthur R. Norwood . . . said officer . . . has not until this date made or effected any levy on said vehicle as prescribed by law . . ."

Hearing the motion, Judge Froneberger found these facts: 1. Defendant Arthur R. Norwood traded a 1955 Chevrolet automobile to Tom Brooks Chevrolet Company, Inc., on 27 November 1961, and received therefor a 1958 Ford automobile. 2. Norwood executed a conditional sales contract to his vendor as part payment for the Ford. 3. The original certificate of title to the Ford was forwarded to the Department of Motor Vehicles prior to 13 December 1961. 4. A new certificate of title for the Ford was issued by the Department on 15 December 1961 to "Arthur R. Norwood showing on its face the lien to Tom Brooks Chevrolet Company, Inc." (Actually the certificate of title was issued to Richard Arthur Norwood, but the parties apparently treat Richard Arthur and Arthur R. as the same person.) The certificate of title shows the date of the lien as 11-27-61 and the amount as $1241.37. 5. On 13 December 1961 the sheriff of Caldwell County made a *purported levy* on the Ford under an execution issued on a judgment duly docketed in Caldwell County in favor of plaintiff. (The record does not show the sum which the execution authorized the sheriff to collect.) 6. On 15 December 1961 intervenor, holder in due course of the aforesaid conditional sales contract, caused said contract to be duly recorded in the office of the register of deeds of Caldwell County.

Based on the foregoing findings the court concluded that Norwood did not acquire title to the Ford until 15 December 1961, the date the Department issued the certificate of title to him, which certificate

showed the lien in favor of the dealer-seller for the balance of the purchase price. He thereupon ordered: "That the purported levy and the intended sale of said vehicle on January 27, 1962, be, and the same are hereby declared void and set aside." He further directed the sheriff to surrender the Ford to intervenor.

The parties stipulated the Ford had a fair market value on 13 December 1961, the date on which the purported levy was made, of $1200. Plaintiff excepted to the judgment and appealed.

Hugh M. Wilson for plaintiff appellant.

Hal B. Adams for defendant Norwood and Townsend & Todd by James R. Todd, Jr., for intervenor.

RODMAN, J. The findings, conclusions, and judgment require a determination of the effect of c. 835, S.L. 1961, on prior statutes relating to the registration of motor vehicles which were sold and encumbered between 1 July 1961 and 1 January 1962.

Prior to 1961 the owner of an automobile was required to apply to the Department of Motor Vehicles and obtain a registration for the vehicle before operating it on the highways. G.S. 20-50. He was likewise required to apply to the Department for a certificate of title, showing in his application his name and address, a description of the vehicle sufficient to identify it, his title and all liens thereon, with such additional information as the Department might need to determine if it was entitled to registration. G.S. 20-52. Upon a proper showing the Department issued to the owner a registration card and a certificate of title showing the name and address of the owner, a statement of his title, and all liens or encumbrances thereon. G.S. 20-57. When a registered vehicle was sold the owner was required to endorse and deliver his certificate of title to the purchaser unless sold subject to a lien for the purchase price. G.S. 20-72. If the purchaser executed a lien for the purchase money, the lienee could retain the old certificate, but it was his duty in that event to forward the certificate with a statement of the lien to the Department within twenty days. G.S. 20-72. If the new owner purchased free of encumbrance, it was his duty to make application for transfer of title and registration within twenty days after he made his purchase. If the certificate of title and registration certificate were retained by the lien holder, it was the purchaser's duty to see that these papers were forwarded to the Department within twenty days. G.S. 20-74. A dealer acquiring an automobile for resale was not required to have title to that vehicle registered in his name but he was required to deliver to the purchaser the

registration certificate and title which had been issued to the dealer's vendor and to notify the Department of such sale. G.S. 20-75.

Prior to 1961 a purchaser of a motor vehicle acquired title notwithstanding the failure of his vendor to deliver vendor's certificate of title or vendee's failure to apply for a new certificate. In *Peek v. Trust* Co., 242 N.C. 1, 86 S.E. 2d 745, the court charged: "Now, the law does not prohibit the sale of a motor vehicle without a transfer and delivery of certificate of registration of title; in other words, one can sell a motor vehicle on one day and the title pass, and deliver or transfer the paper certificate of title on a later date." This Court, in approving that instruction, said: "(I)t is observed that the instruction as given is precisely in accord with the decision in *Corporation v. Motor Co.*, 190 N.C. 157; 129 S.E. 414." Similar interpretation was given the statute in *Finance Co. v. Pittman,* 253 N.C. 550, 117 S.E. 2d 423; 32 N.C. Law Review 545.

While purchaser's title was not dependent upon the certificate of title which it was his duty to apply for, he was guilty of a misdemeanor if he willfully failed to apply for a certificate within twenty days after he purchased. G.S. 20-73.

G.S. 20-72(b) was amended by sec. 8, c. 835, S.L. 1961, by adding at the end of that section the following sentence: "Transfer of ownership in a vehicle by an owner is not effective until the provisions of this subsection have been complied with." Sec. 9 made like amendment to G.S. 20-75. The quoted portion of the 1961 Act became effective 1 July 1961. Since 1 July 1961 the purchaser of an automobile does not acquire title until he has complied with the provisions of G.S. 20-72(b) and 75. These sections make it the duty of the purchaser to secure from his vendor the old certificate duly endorsed or assigned and to apply for a new certificate. They do not relate to the duty of the Department to issue a new certificate. What the amendments of 1961 say is: The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate.

If, as appellee argues, the Legislature intended the quoted amendment to mean purchaser acquired no title until the Department issued him a certificate, it would doubtless have said: "Title shall not pass to purchaser until the Department has issued him a new certificate" or some other plain and positive language to that effect. The intent, declared in the preamble, to prevent vendor from using the old certificate to entrap the unwary was effectively accomplished by the language selected by the legislature.

The court found as a fact the certificates of title were forwarded to the Department prior to 13 December 1961. Title therefore vested in the judgment debtor Norwood when the application was made. To

hold that title did not vest until the Department actually issued the certificate would do violence to the language of the statute. It should be noted there is no suggestion in this case that the application for the issuance of a new certificate did not conform to the requirements of the Department. The statute necessarily implies, we think, that the application for a new certificate should be in proper form.

Since the findings establish that Norwood was the owner, on 13 December 1961, it was necessary for the court to determine the priority of the lien asserted by intervenor and the lien claimed by the judgment creditor. Intervenor's lien was filed for registration in Caldwell County on 15 December 1961. As against creditors or purchasers for value, it had no validity prior to the time it was filed for registration. G.S. 47-20.

The word creditors as used in the statute means those who have acquired a lien by judicial process or other means. *Observer Co. v. Little*, 175 N.C. 42, 94 S.E. 526. A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. G.S. 1-234. But he acquires no lien on the personalty until there has been a valid levy. G.S. 1-313(1); *Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. 2d 201. To make a valid levy the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order.

The burden was on intervenor to establish its lien. *Williams v. Williams*, 254 N.C. 729, 120 S.E. 2d 68. The court found the sheriff on 13 December 1961 made "a purported levy." This language negatives a valid levy. The court probably selected the quoted phrase because it was of the opinion that title did not vest in Norwood, the judgment debtor, until 15 December 1961, and since no valid levy can be made on property not owned by the judgment debtor, *Mica Industries v. Penland*, 249 N.C. 602, 107 S.E. 2d 120, the levy was a mere "purported levy." It cannot be said, however, that it definitely appears this was the reason the court used the quoted phrase.

The 1961 Act made extensive changes in the law with respect to the manner in which lienees must give notice of liens on motor vehicles. The certificate of title issued by the Department now fixes the priority of liens. It is no longer necessary to record the mortgage or other lien in the county where the debtor resides. When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate by the Department. These statutory changes took effect on 1 January 1962, G.S. 20-58.10, sec. 6, c. 835 S.L. 1961, and for that reason have no effect on this litigation.

If the officer acted under and as directed by judicial process directed to him when he claims to have seized the car on 13 December 1961, the lien so created would have priority over the lien of intervenor recorded on 15 December 1961. Because the court has not found sufficient facts to determine the rights of the parties, it is necessary that the cause be remanded to the Superior Court for additional findings and for the entry of such judgment as may be warranted on the facts then established. *Petrus Machinery, Inc. v. Radiator Specialty Co., ante,* 85.

The judgment entered below is vacated and the cause Remanded.

BEELER E. CLIFTON v. DELMA TURNER.

(Filed 2 May 1962.)

1. Appeal and Error § 51—

Only the motion to nonsuit made at the close of all the evidence will be considered on appeal. G.S. 1-183.

2. Automobiles § 17—

The driver along a dominant highway is entitled to assume and act upon the assumption, even to the last moment, that the operator of a vehicle along a servient highway will stop in obedience to a duly erected stop sign before entering upon the intersection with the dominant highway.

3. Same—

The driver of a vehicle upon a servient highway is not required to stop at the stop sign duly erected on the servient highway, but is required to stop at a point before entering the intersection at which he may observe traffic on the dominant highway and determine when, in the exercise of due care, he may enter or cross the intersecting highway with reasonable safety. G.S. 20-158.

4. Automobiles § 42g—

Evidence that when plaintiff was some 100 to 200 feet from an intersection with a servient highway he saw defendant's vehicle moving after it had passed the stop sign on the servient highway, and that plaintiff did not slacken his speed and struck defendant's vehicle immediately after it had entered the intersection without stopping and had turned right, *is held* not to disclose contributory negligence as a matter of law, since plaintiff had the right to assume that defendant would stop his vehicle before entering the intersection notwithstanding defendant had passed the stop sign.

5. Appeal and Error § 24—

Ordinarily, an exception to an excerpt from the charge does not challenge the failure of the court to charge further on the same or another aspect of the case.

6. Same—

An exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct.

7. Same—

An exception and assignment of error to the charge as a whole for that the court failed to declare and explain the law arising on the evidence in the case are ineffectual. The exception and assignment of error should point out the particular matters which appellant asserts were omitted.

8. Automobiles § 14—

The statutory provisions relating to passing another vehicle traveling in the same direction, G.S. 20-149, are inapplicable upon evidence which, in plaintiff's version, is to the effect that he collided with defendant's vehicle immediately after defendant had driven into an intersection with a dominant highway without stopping, and, in defendant's version, is to the effect that the accident did not occur at the intersection but beyond it after defendant had turned to his right, and that it was due to plaintiff's excessive speed and failure to maintain a proper lookout because of a coating of frost on plaintiff's windshield.

APPEAL by defendant from *Hall, J.*, January Term 1962 of JOHNSTON.

Action and cross action growing out of a collision on N. C. Highway #50, about fourteen miles north of Benson, North Carolina, on February 16, 1960, about 7:00 a.m., between a 1954 Chevrolet Station Wagon, owned and operated by plaintiff, and a 1950 Ford automobile, owned and operated by defendant. Each owner-operator alleged he sustained personal injuries and property damages as a result of the collision and that the collision was proximately caused by the negligence of the other.

Highway #50 runs north-south. The Cleveland Road intersects Highway #50, extending east therefrom. A stop sign had been erected on the Cleveland Road, facing westbound traffic thereon, seventy-five or one hundred feet east of the intersection.

The weather was clear and cold, the temperature being about eighteen or twenty degrees. Plaintiff was driving north on Highway #50. Defendant, driving west on the Cleveland Road, approached and entered Highway #50 and turned north thereon.

Plaintiff, in support of his allegations, offered evidence tending to show he observed defendant's car on the Cleveland Road; that, when first observed by plaintiff, defendant had passed the stop sign and was

approaching said intersection; that plaintiff, when he first observed defendant's car, was one hundred or two hundred feet from the intersection; that defendant did not stop before entering Highway #50 but came out right in front of plaintiff; that defendant "had not straightened up on the highway" when the right front of plaintiff's station wagon struck the left rear of defendant's car; and that the two vehicles "stuck together" and traveled about one hundred yards before stopping on the right shoulder of the highway.

Defendant, in support of his allegations, offered evidence tending to show the collision occurred four hundred feet or more north of said intersection; that, upon reaching Highway #50, he stopped and looked both ways for traffic thereon; that he had clear vision to his left; that, when he drove onto Highway #50, he saw plaintiff "coming around the curve 3/4 of a mile away"; and that he "got in high gear" and "had gotten up to about 45 miles per hour" when plaintiff's station wagon struck the rear of his car.

The court submitted the issues raised by the pleadings, to wit: "1. Did the plaintiff suffer personal injuries and property damage as a result of the negligence of the defendant as alleged in the Complaint? Answer: Yes. 2. If so, did the plaintiff by his own negligence contribute to his own injury and damages? Answer: No. 3. What amount in damages is the plaintiff entitled to recover? (a) For Property damages? Answer: $500.00. (b) For Personal injury? Answer: $5,000.00. 4. Was the defendant injured and did he suffer property damage as a result of the negligence of the plaintiff as alleged in the Answer? Answer: _____ 5. What amount in damages is the defendant entitled to recover? (a) For property damages? Answer: _____ (b) For Personal injuries? Answer: _____" The jury answered issues 1, 2 and 3, as indicated, and did not reach issues 4 and 5.

Judgment, that plaintiff have and recover of defendant the sum of $5,500.00 and that the costs be taxed against defendant, was entered. Defendant excepted and appealed.

J. R. Barefoot and C. P. Trader for plaintiff appellee.
Wood & Spence for defendant appellant.

BOBBITT, J. Defendant's Assignments of Error Nos. 1 and 2 are based on his exceptions to the overruling of his motions for judgment of nonsuit. The only motion to be considered is that made by defendant at the conclusion of all the evidence. G.S. 1-183; *Spaugh v. Winston-Salem*, 249 N.C. 194, 105 S.E. 2d 610.

The evidence was in sharp conflict as to whether the plaintiff's station wagon struck defendant's Ford immediately after defendant

entered upon Highway #50 or after defendant had proceeded north thereon for a distance of four hundred feet or more. It would seem the jury resolved this critical phase of the controversy in favor of plaintiff.

Defendant contends, even if the collision occurred immediately after defendant entered upon Highway #50, plaintiff's testimony discloses his contributory negligence as a matter of law. In this connection, it is noted that defendant alleged, as a basis for his plea of contributory negligence (and also as a basis for his counterclaim), that plaintiff's negligence consisted, *inter alia,* in operating his station wagon at excessive speed and without keeping a proper lookout. Even so, when considered in context, these allegations, as well as defendant's allegations with reference to plaintiff's negligence in other respects, relate to a collision defendant alleged occurred four hundred feet or more north of the intersection.

Defendant bases his contention largely upon this portion of plaintiff's testimony, elicited on cross-examination, to wit: "When I first saw the Turner car, it was about 50 feet from the intersection. I was 100 to 200 feet away at the time. It had already passed the stop sign and was moving, and I don't know whether he stopped at the stop sign. It went right on out in front of me, and I saw it pulling out. When I first saw the Turner car I was 100 to 200 feet from it. I could then see the stop sign and saw he had already passed it, and I proceeded right on without slowing down. When I struck the Turner car we traveled Northwest toward Raleigh. When the cars stopped they were partly off the highway. I don't have any idea how fast the Turner car was going when I struck it. He was not going fast, he just passed right on out in front of me."

If, as plaintiff testified, defendant had passed the stop sign and was moving towards Highway #50 when plaintiff first saw him, this fact, standing alone, was insufficient to put plaintiff on notice defendant would fail to stop before entering Highway #50.

With reference to G.S. 20-158(a), the legal principles stated below are well established.

". . . the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated high-

way." *Winborne, J.* (later *C.J.*), in *Hawes v. Refining Co.*, 236 N.C. 643, 650, 74 S.E. 2d 17; *King v. Powell*, 252 N.C. 506, 509, 114 S.E. 2d 265; *Peeden v. Tait*, 254 N.C. 489, 119 S.E. 2d 450; *Wooten v. Russell*, 255 N.C. 699, 122 S.E. 2d 603.

G.S. 20-158(a) did not require that defendant stop *where* the stop sign was located. It required that defendant, in obedience to the notice provided by the stop sign, bring his car to a full stop before entering Highway #50 and to yield the right of way to vehicles approaching the intersection on Highway #50. As stated by *Denny, J.* (now *C.J.*), in *Edwards v. Vaughn*, 238 N.C. 89, 93, 76 S.E. 2d 359: "The purpose to be served by placing a stop sign some distance from the intersection of a servient and dominant highway, is to give the motorist ample time to slow down and stop before entering the zone of danger. And when the driver of a motor vehicle stops at a stop sign on a servient highway and then proceeds into the intersection without keeping a lookout and ascertaining whether he can enter or cross the intersecting highway with reasonable safety, he ignores the intent and purpose of the statute, G.S. 20-158. It is the duty of the driver of a motor vehicle on such servient highway to stop at such time and place as the physical conditions may require in order for him to observe traffic conditions on the highways and to determine when, in the exercise of due care, he may enter or cross the intersecting highway with reasonable safety. In many places, stop signs due to the surrounding physical conditions are located at points from which the driver of a motor vehicle cannot get an unobscured vision of the intersecting highway for a sufficient distance to ascertain whether it can be entered or crossed with reasonable safety." It is noted that defendant testified: "You have to drive past the stop sign to see on Highway 50."

If it be conceded, as contended by defendant, that plaintiff, under the circumstances, was negligent in failing "to decrease speed when approaching and crossing an intersection," G.S. 20-141(c), whether such negligence was a proximate cause of the collision was for jury determination under appropriate instructions.

There was ample evidence to support a finding that negligence on the part of defendant proximately caused the collision; and defendant's contention that plaintiff's testimony discloses his contributory negligence as a matter of law is untenable. Hence, defendant's assignments of error, directed to the court's denial of his motions for judgment of nonsuit, are overruled.

Defendant's remaining assignments of error, except formal Assignment No. 7, are based on his exceptions to the court's charge. Assignments of Error Nos. 3, 4, 5 and 6 are based on exceptions taken to extended excerpts from the charge. Defendant fails to point out any

portion of these excerpts he considers erroneous. Rather, he asserts he was prejudiced because these excerpts did not include instructions defendant contends should have been given. "It is elemental that an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Co.*, 242 N.C. 1, 16, 86 S.E. 2d 745; *King v. Powell, supra.* It is also noted that "an exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct." *Powell v. Daniel,* 236 N.C. 489, 493, 73 S.E. 2d 143, and cases cited.

Exception No. 8 is as follows: "The Defendant Appellant objects and excepts to the charge of the Court as a whole, for that the Court did not declare and explain the law arising on the evidence given in the case as it was required to do under the terms and provisions of G.S. 1-180, and particularly with reference to the Second Issue submitted to the jury." Assignment of Error No. 8, based on Exception No. 8, is as follows: "For that the Court erred in failing to charge the jury under the provisions of General Statutes 1-180 and to explain and declare the law arising on all the pleadings in the Complaint and in the Answer, and particularly, it failed to explain and declare the law arising upon the factual situation under General Statutes 20-149."

Exception No. 8 and Assignment of Error No. 8 are broadside, ineffectual and too general and indefinite to present any question of law for decision. *Baird v. Baird,* 223 N.C. 730, 733, 28 S.E. 2d 225; Strong, North Carolina Index, Appeal and Error § 24, Note 283.

Apparently, all of defendant's exceptions and assignments of error directed to the charge relate to a contention by defendant that the court did not, but should have instructed the jury as to the provisions of G.S. 20-149 as related to the contributory negligence issue. Apart from procedural defects, we are of opinion G.S. 20-149 was not applicable to the factual situation disclosed by the evidence. Under plaintiff's version of the collision, defendant's car came into Highway #50 directly in front of him and he could not, in the emergency thus created, turn to his left sufficiently to avoid striking defendant's car. Under defendant's version, plaintiff, on account of a coating of frost on his windshield or otherwise, failed to see defendant's car traveling in the northbound lane and simply crashed into the back of it. With reference to the second issue, the court instructed the jury, *inter alia,* (1) if plaintiff followed defendant's car more closely than was reasonable and prudent, in violation of G.S. 20-152(a), plaintiff would be guilty of negligence *per se,* and (2) that plaintiff would be guilty of negligence if, under the circumstances, he failed to exercise due care to avoid a collision with defendant's car.

Whether *the jury* erred in resolving the issues in favor of plaintiff is not for our determination. Suffice to say, defendant's assignments of error fail to disclose *the court* erred in the manner in which the trial was conducted.

No error.

VIOLA P. PERRY v. R. G. OWENS, JR.

(Filed 2 May 1962.)

1. Abatement and Revival § 4—

Where the pendency of a prior action between the parties does not appear on the face of the complaint, the question of abatement is properly raised by answer. G.S. 1-133.

2. Courts § 14—

A court inferior to the Superior Court has only such jurisdiction as is given it by statute, and such jurisdiction cannot be enlarged by implication, and therefore the fact that such court has jurisdiction of an action does not give it jurisdiction of a counterclaim to such action when the amount demanded in the counterclaim is in excess of the jurisdictional amount of such court.

3. Abatement and Revival § 3—

Where a party institutes action in a county court limited as to jurisdictional amount, he may not assert the pendency of such action as ground for abatement of a subsequent action instituted in the Superior Court of another county, demanding a sum in excess of the jurisdictional amount of the county court, even though otherwise such action could be properly asserted as a counterclaim in the county court, since a plea in abatement must be based on the pendency of an action in a court of competent jurisdiction.

APPEAL by plaintiff from *Walker, Special Judge,* February 26, 1962 Civil Term of WAKE.

Plaintiff, a resident of Wake County, instituted this action May 25, 1961, against defendant, a resident of Gates County but temporarily residing in Chapel Hill, North Carolina, to recover $11,650.00 as damages for personal injuries and property damage proximately caused by a collision in Durham County, North Carolina, on Wednesday, February 1, 1961, about 7:30 p.m., when plaintiff's Chevrolet, operated by plaintiff, struck the rear of defendant's 1960 Plymouth in the middle of the lane for eastbound traffic on Highway #54.

Plaintiff alleges defendant had "placed his car" at the bottom of

a hill, near a creek; that, although it was dark and foggy, defendant had no lights on his car and gave no signal or warning that his car obstructed said lane of traffic; and that the negligence of defendant was the sole proximate cause of the collision and of plaintiff's damages.

Defendant's pleading, captioned "Answer and Plea in Abatement," contains four sections. (1) Answering the allegations of the complaint, defendant admits the collision occurred between plaintiff's car and defendant's car at the time and place alleged by plaintiff but denies all of plaintiff's allegations to the effect that said collision was caused by the negligence of defendant. (2) Under the heading, "Plea in Abatement," defendant alleges he is the plaintiff, and the present plaintiff is the defendant, in a civil action instituted by defendant April 17, 1961, and now pending, in the Durham County Civil Court, in which he is seeking to recover damages (in an amount less than $1,500.00) growing out of the collision referred to in the complaint herein; and that this action, being a subsequent action between the same parties and growing out of the same collision, should be abated. Defendant attached to his answer, as Exhibits A and B, a copy of his complaint and a copy of the summons in said prior action in the Durham County Civil Court. (3) Under the heading, "Counterclaim," defendant alleges that plaintiff's negligence, in particulars set forth, was the sole proximate cause of the collision and of damages sustained by defendant. (In his said counterclaim, defendant alleges the same items of damage set forth in his complaint in the prior action in the Durham County Civil Court.) (4) Under the heading, "Further Answer and Defense," defendant alleges, conditionally, the contributory negligence of plaintiff in bar of plaintiff's right to recover. Defendant prays (1) that this action be abated, (2) that plaintiff recover nothing of defendant, (3) that defendant recover from plaintiff on his said counterclaim, (4) that plaintiff be taxed with the costs, and (5) that he be awarded such other and further relief as may be just and proper.

Plaintiff, in writing, demurred to defendant's said plea in abatement. At the hearing on plaintiff's said demurrer, it was stated by counsel for plaintiff and counsel for defendant in open court that the facts are as stated in defendant's said plea in abatement. This stipulation appears in the case on appeal: ". . . during the argument above referred to counsel for defendant, appellee, offered to consent to a removal of the Durham County action to the Superior Court of either Durham or Wake Counties and for the plaintiff appellant to then file a counterclaim as defendant without objection on the part of defendant appellee herein. Said offer was not commented on by counsel for plaintiff appellant."

The court, being "of the opinion that the plea in abatement is well

taken," ordered, adjudged and decreed "that this action be and it hereby is dismissed and that the costs be taxed against the plaintiff." Plaintiff excepted and appealed.

Everett, Everett & Everett for plaintiff appellant.
Smith, Leach, Anderson & Dorsett for defendant appellee.

BOBBITT, J. The complaint herein contains no reference to the prior action instituted by the present defendant against the present plaintiff in the Durham County Civil Court and now pending in said court. Hence, assuming said prior action "is another action pending between the same parties for the same cause," within the meaning of G.S. 1-127(3), defendant was required by G.S. 1-133 to assert his plea in abatement by answer. *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 399, 72 S.E. 2d 860, and cases cited; *Buchanan v. Smawley*, 246 N.C. 592, 99 S.E. 2d 787; *Wallace v. Johnson*, 251 N.C. 11, 17, 110 S.E. 2d 488; *Demoret v. Lowery*, 252 N.C. 187, 113 S.E. 2d 199.

"The pendency of a prior action between the same parties for the same cause *in a State court of competent jurisdiction* works an abatemen of a subsequent action either in the same court or in another court of the State *having like jurisdiction.*" (Our italics) *McDowell v. Blythe Brothers Co., supra,* and cases cited; *Pittman v. Pittman*, 248 N.C. 738, 104 S.E. 2d 880; *Sales Co. v. Seymour*, 255 N.C. 714, 122 S.E. 2d 605.

"Defendant's plea in abatement is good only if (1) *the plaintiffs herein could obtain the same relief by counterclaim in said prior action,* and (2) a judgment in favor of the plaintiff in said prior action (defendant herein) would operate as a bar to plaintiffs' prosecution of this action. *Cameron v. Cameron*, 235 N.C. 82, 86, 68 S.E. 2d 796, and cases cited." (Our italics) *Hill v. Spinning Co.*, 244 N.C. 554, 557, 94 S.E. 2d 677; *Demoret v. Lowery, supra.*

Clearly, defendant's plea in abatement would be allowed and the present action dismissed if the present defendant had instituted the prior action in the Superior Court of Durham County. *Allen v. Salley*, 179 N.C. 147, 101 S.E. 545; *Johnson v. Smith*, 215 N.C. 322, 1 S.E. 2d 834; *Boney v. Parker*, 227 N.C. 350, 42 S.E. 2d 222; *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892; *Brothers v. Bakeries*, 231 N.C. 428, 57 S.E. 2d 317; *Bullard v. Oil Co.*, 254 N.C. 756, 119 S.E. 2d 910. The defendant in such prior action would have a "complete remedy" by way of counterclaim therein. *Boney v. Parker, supra.*

The crucial question now presented arises from the fact that the present defendant, who was legally entitled to do so, instituted his prior action in the Durham County Civil Court, a court of limited jurisdiction.

The Durham County Civil Court was established under the statute now codified as G.S. Chapter 7, Article 35, and has jurisdiction concurrent with the superior court in tort actions wherein *the amount demanded* does not exceed $1,500.00, exclusive of interest and costs. G.S. 7-372(3). Appeals may be taken therefrom in the manner prescribed to the superior court "for errors assigned in matters of law or legal inference." G.S. 7-378. The statute (G.S. 7-351 through G.S. 7-383) contains no provision for the removal of the entire case to the Superior Court of Durham County upon the filing of a counterclaim wherein the amount demanded by the defendant exceeds $1,500.00, exclusive of interests and costs. *Finance Co. v. Simmons,* 247 N.C. 724, 102 S.E. 2d 119. In this connection, compare the statutory provisions relating to the Municipal-County Court of Guilford County. *Amusement Co. v. Tarkington,* 247 N.C. 444, 450, 101 S.E. 2d 398.

In *Finance Co. v. Simmons, supra,* this Court held, in passing upon "(t)he crucial question presented," that the filing of a counterclaim for an amount in excess of $1,500.00, exclusive of interest and costs, did not oust the jurisdiction of the Durham County Civil Court over the plaintiff's claim and entitle the defendant to a removal of the whole case to the superior court for trial. Here, the defendant in the prior action (plaintiff herein), so far as the present record discloses, has not asserted as a counterclaim therein the cause of action alleged in the present complaint or moved that the whole case be removed to the Superior Court of Durham County for trial. As to the action now pending in the Durham County Civil Court, the record discloses no facts as to proceedings therein, if any, subsequent to the summons and complaint. It appears, therefore, that the prior action is now pending in the Durham County Civil Court for determination of the claim asserted by the plaintiff (present defendant) therein.

The Durham County Civil Court has no jurisdiction except that conferred by the statute under which it was established. Moreover, "the powers of a court of limited jurisdiction cannot be enlarged by implication." *Greensboro v. Black,* 232 N.C. 154, 158, 59 S.E. 2d 621, and cases cited. Hence, the Durham County Civil Court, in which defendant's prior action was instituted and is now pending, has no jurisdiction to hear and determine the cause of action alleged in the complaint herein, whether asserted in an original action or by way of counterclaim.

"Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment. Jurisdiction presupposes the existence of a duly constituted court with control over a subject matter which comes within the classification limits designated by the con-

stitutional authority or law under which the court is established and functions." *Jones v. Brinson,* 238 N.C. 506, 509, 78 S.E. 2d 334, and cases cited; *High v. Pearce,* 220 N.C. 266, 271, 17 S.E. 2d 108, and cases cited.

To invoke the rule adopted by this Court in *Allen v. Salley, supra,* and similar cases, it must appear that the court in which the prior action is pending has jurisdiction to hear and determine the counterclaim and to enter and enforce a judgment thereon. In respect of the cause of action alleged in the complaint herein, a "complete remedy" by way of counterclaim in the prior action is not available to plaintiff because the Durham County Civil Court does not have jurisdiction to hear and determine such counterclaim and to enter and enforce judgment thereon. Hence, the court erred in sustaining defendant's plea in abatement and in dismissing the action.

Questions as to whether the determination of the issues raised by the pleadings in the action first tried, whether the prior or the present action, will constitute *res judicata,* and if so to what extent, in the subsequent trial of the other action, are not presently before us and must await a factual situation on which a decision may be based.

The legal problem here considered is analogous to that posed when, in an automobile collision case, the plaintiff's action for $50.00 or less is instituted before a Justice of the Peace, whose jurisdiction is concurrent with that of the superior court, and the defendant has a cause of action against the plaintiff arising out of the same collision for an amount in excess of $50.00. See "Pleading and Procedure—Counterclaims Exceeding the Jurisdictional Limit of the Court—Remedies," by Daniel L. Bell, Jr., 32 N.C.L.R. 231 *et seq.,* where the writer suggests the desirability of a statutory provision to the effect that, upon the filing of such counterclaim, the entire case be removed to the superior court for trial of the action and counterclaim. Whether such a statute, sufficient to eliminate the legal problem there and here presented, should be enacted, merits the attention and consideration of the General Assembly.

Reversed.

GEORGE DAVID STONE, ADMINISTRATOR OF THE ESTATE OF GRAHAM OTIS STONE, DECEASED, v. GRIFFIN BAKING COMPANY OF GREENSBORO, INCORPORATED.

(Filed 2 May 1962.)

1. Trial § 50—

A motion for a new trial on the ground of misconduct of a juror is ordinarily addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed in the absence of manifest abuse of discretion.

2. Appeal and Error § 46—

Discretionary power imports sound discretion guided by law.

3. Trial § 46—

A juror will not be heard to impeach the verdict, and therefore denial of a motion for a new trial for misconduct of a juror, with request to examine the juror, but without supporting affidavits or other evidence as to the alleged misconduct, or that the alleged misconduct was prejudicial in any way, cannot be held an abuse of discretion.

4. Appeal and Error § 12—

Where the trial court denies a motion for a new trial for misconduct of a juror and enters final judgment from which an appeal is taken, the trial court is *functus officio* and has no authority to hear another motion thereafter made for a new trial for misconduct of the juror, and its order on such motion is a nullity.

5. Appeal and Error § 2—

Even though a matter is not presented by the appeal, the Supreme Court, in the exercise of its discretionary power, may express an opinion upon the question sought to be raised.

6. Trial § 50—

A new trial will not be granted because of a conversation between a juror and a stranger while the case was being tried unless it is shown that movant was prejudiced thereby.

7. Same—

Where it appears that a juror has a conversation with a stranger while the jury was eating at a public place during recess of the cause, but it is not made to appear that the stranger knew or had any interest in the case, and it appears that the conversation had no reference or relation to the case but was a casual conversation in regard to methods of avoiding jury duty, the incident is insufficient as a basis for the exercise of the discretionary power of the trial court to set the verdict aside, injustice or prejudice not having been shown.

8. Appeal and Error § 2—

Where want of jurisdiction is apparent on the record, the Supreme Court will so declare *ex mero motu.*

APPEAL by plaintiff from *Hall, J.*, September 1961 Term of WAKE, and from *Hall, J.*, October 1961 Term of WAKE.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate and for damage to his intestate's automobile allegedly caused by the actionable negligence of defendant. Defendant in its answer denied negligence, pleaded contributory negligence of plaintiff's intestate, and asserted a counterclaim for damage to its truck.

The jury on 28 September 1961 at the September Term found for its verdict that defendant was negligent, as alleged in the complaint, that plaintiff's intestate was contributorily negligent, as alleged in the answer, and did not get to the issues in respect to defendant's counterclaim.

On 29 September 1961, before the signing of the judgment, plaintiff's attorney, as a result of information he received that morning, made a motion before the judge for permission to examine Robert M. Davis, juror No. 6, and also other persons whose names were unknown, relative to an alleged conversation of the juror Davis outside of the courthouse during the recess of court for lunch, and while the trial was in progress, and to set aside the verdict, because of the alleged disqualification of the juror Davis by reason of such conversation.

On 29 September 1961 the judge entered judgment, in accord with the verdict, adjudging that plaintiff recover nothing from defendant, that defendant recover nothing on his counterclaim, and that plaintiff be taxed with the costs. The judgment further recites that plaintiff's motion, as above set forth, was made after verdict and after the jury was discharged, was unaccompanied by substantiating affidavits or other evidence, and was denied.

To the signing of the judgment and to the judgment, and to the denial of his motion for a new trial, plaintiff excepted and appealed to the Supreme Court. Plaintiff was allowed 60 days to prepare and serve case on appeal. Judge Hall signed the appeal entries.

On 6 October 1961 plaintiff filed a written motion in the Superior Court of Wake County to set aside the verdict rendered on 28 September 1961 at the September 1961 Term and to order a new trial for alleged misconduct of the juror Robert M. Davis during the trial, and supported his motion by his affidavit, his wife's affidavit, and the affidavits of Russell V. Stone and Betty M. Thompson, a neighbor. All these affidavits are to this effect: On 28 September 1961, after the evidence had been introduced in the case and before the submission of the case to the jury, the court recessed for lunch. During this recess the affiants went to the Raleigh Diner near the courthouse for lunch. While eating lunch, they saw the juror Robert M. Davis sitting at the

lunch counter drinking coffee, and talking to a big man, whose name they do not know. Davis asked this man: "How do you get out of jury duty?" The affiants phrased his reply in slightly different words, but the substance of the reply in all the affidavits is: Hang the jury and disagree with them, and that way you would not go along with the crowd, and they would not call you back any more to serve on any jury. Plaintiff alone states in his affidavit that the big man stated this also: "A jury is a fixed thing anyway and it is all cut and dried; and I don't know how they do it, but if you are trying a case for $50,000.00, they already know the amount they are going to give before you go into the jury room."

Judge Hall entered an order on 19 October 1961 at the October Term stating:

> "After hearing said motion, and considering the affidavits in support of said motion, and the arguments of Henry M. Whitesides, Attorney for the plaintiff, the Court is of the opinion that the statements and matters referred to in the affidavits did not unduly influence the jury, and it appears from the affidavit of the plaintiff that the plaintiff had this information before the verdict, and did not present the information to the plaintiff's attorney or the Court before the verdict;
>
> "IT IS NOW ORDERED That said motion be disallowed, and the verdict of the jury herein rendered shall stand."

From this order, plaintiff appealed.

Henry M. Whitesides for plaintiff appellant.
William Joslin and Samuel H. Johnson for defendant appellee.

PARKER, J. Plaintiff has one assignment of error, and that is to the denial by the court of his motion made at the September 1961 Term, before the judgment was signed, to examine the juror Robert M. Davis and to set aside the verdict and order a new trial, and to the judgment entered at that term, and to the order entered at the subsequent October 1961 Term denying his motion to set aside the verdict and order a new trial, because of the misconduct of the juror Davis.

The granting or denial of a motion for a new trial because of the misconduct of a juror is generally regarded as resting in the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a manifest abuse of such discretion, or as sometimes stated, unless it is clearly erroneous. *Lewis v. Fountain,* 168 N.C. 277, 84 S.E. 278; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d

19; *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1; Annotation 64 A.L.R. 2d, sec. 14, p. 185 *et seq.*, where many cases from many jurisdictions are cited; 39 Am. Jur., New Trial, sec. 101, Contact between third person and juror.

The discretion with which a trial court is vested, when applied to a court of justice, means, as Lord Mansfield said, "sound discretion guided by law." *Rex. v. Wilkes,* 4 Burr. 2527, 98 English Reports, Full Reprint, 327, 334; *Sykes v. Blakey,* 215 N.C. 61, 200 S.E. 910.

"It is firmly established in this State that jurors will not be allowed to attack or to overthrow their verdicts, nor will evidence from them be received for such purpose." *Lumber Co. v. Lumber Co.,* 187 N.C. 417, 121 S.E. 2d 755. "The rule is a salutary one. If it were otherwise, every verdict would be subject to impeachment." *In re Will of Hall, supra,* N. C. Reports page 88, S.E. 2d page 13.

Judge Hall was correct in denying plaintiff's motion at the September 1961 Term to examine the juror Davis. Certainly, Judge Hall's denial of his motion to examine other persons in respect to the alleged misconduct of the juror Davis did not prejudice plaintiff, for the simple reason that plaintiff did not even know who the witnesses were he wanted to examine. Further, Judge Hall did not abuse his discretion in denying plaintiff's motion made at the September 1961 Term for a new trial for the alleged misconduct of the juror Davis, because plaintiff offered no supporting affidavits or other evidence as to the alleged misconduct of the juror Davis, or that he was in any way prejudiced by the alleged misconduct of the juror Davis. Judge Hall's judgment at the September 1961 Term is affirmed.

The judgment entered by Judge Hall at the September 1961 Term was a final one, from which plaintiff appealed to the Supreme Court. This appeal from the final judgment *eo instante* took the case out of the jurisdiction of the Superior Court. There was no withdrawal of the appeal by plaintiff, therefore, Judge Hall at the subsequent October 1961 Term was *functus officio* to consider the motion made by plaintiff at that term for a new trial because of the alleged misconduct of the juror Davis, and his order made at that term is a nullity. *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492; Strong's N. C. Index, Vol. 1, Appeal and Error, sec. 12. See *Purcell v. R. R.,* 119 N.C. 728, 737.

However, while we must hold that Judge Hall's order entered at the October 1961 Term is a nullity, we will nevertheless, as was done in *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, "exercise our discretionary power to express an opinion upon the question which the

plaintiff attempts to raise" by his appeal from Judge Hall's order rendered at the subsequent October 1961 Term denying his motion for a new trial for the alleged misconduct of the juror Davis.

This is said in 39 Am. Jur., New Trial, sec. 101:

> "The rule sustained by the great weight of authority is that a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for new trial by the accused in a criminal case as well as of applications made in civil actions. Clearly, conversation between a juror and a third person which is of a harmless character, unrelated to the matter in issue, and not tending to influence or prejudice the jury in their verdict, will not afford cause for a new trial. . . . and if a trial is really fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. Generally speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge."

See an exhaustive Annotation 64 A.L.R. 2d pp. 158-231, entitled "Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal."

There is nothing in the evidence to indicate that the unknown big man with whom the juror Davis had a conversation in the Raleigh Diner had any relationship of any kind with defendant, or even knew there was such a corporation, or had any interest in the subject matter of plaintiff's suit, or the outcome of the trial. There is nothing to indicate that this unknown big man knew that there was such a case, or that Davis was a juror in the trial of the case, or that the case was being tried. The conversation of this unknown big man with Davis was in a public eating place, in the presence, at least, of plaintiff, his wife, and two other persons, and had no reference or relation to the case in which Davis was a juror. The conversation was casual, and related solely to a not unusual topic of conversation, and that is, how to avoid jury service. There is nothing in the conversation to indicate there was any intention on the part of this unknown big man to in-

fluence the judgment or action of Davis as a juror. It is manifest, the conversation did not influence Davis' action as a juror, because he did not hang the jury. There is nothing in the evidence to suggest that defendant prompted the conversation of the unknown big man with the juror Davis, or that any injustice or prejudice was done to plaintiff. Clearly, the conversation between the unknown big man and the juror Davis was of a harmless character, and afforded no basis for the trial judge to exercise his discretion to set aside the verdict and order a new trial, even if all the evidence before us had been presented to Judge Hall at the September 1961 Term before the signing of the judgment at that term.

Judge Hall's order entered at the October 1961 Term is a nullity. "Where such defect of jurisdiction is apparent the court will of necessity so declare it *ex mero motu.*" *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Bailey v. McPherson, supra.*

The order entered at the October 1961 Term will be vacated. The judgment entered at the September 1961 Term is

Affirmed.

DON R. SMITH, BY HIS NEXT FRIEND, PANSY S. SMITH v. MELVIN C. NUNN, T/A LIBERTY FARMS AND GARDENS, AND DEARL F. LOVE.

(Filed 2 May 1962.)

Automobiles §§ 41e, 42e—

Evidence tending to show that a truck was stopped at night without lights opposite the driveway of the truck owner, blocking both lanes of the highway, that two cars, both with lights on, were being driven at speeds of 55 to 60 miles per hour along the highway, the one closely following the other, that the driver of the first car passed the truck by driving to the right on the shoulder of the road, and that the following car crashed into the rear of the truck, *is held* to raise the issue of the negligence of the operator of the truck for the determination of the jury, G.S. 20-129, G.S. 20-156, and not to show contributory negligence as a matter of law on the part of the driver of the following car.

APPEAL by plaintiff from judgment of nonsuit entered by *Walker, S.J.,* at the September 1961 Civil Term, RANDOLPH Superior Court.

Civil action to recover for personal injury the plaintiff, by his next friend, alleged he sustained as a result of a collision between his 1960 Chevrolet and a 1956 Ford truck owned by the defendant Melvin C. Nunn and operated by the defendant Dearl F. Love. The accident oc-

curred about 6:45 on the morning of December 19, 1960, on N. C. Highway 49 near Liberty, in Randolph County.

The defendants filed separate answers, denied negligence on the part of Love, and alleged that the plaintiff was engaged in a speed or racing contest, was following too closely to the vehicle in front, and his negligence, in fact, caused the collision. The defendant Nunn filed a counterclaim for damages to the truck.

The plaintiff was severely injured. He has no recollection of the accident. His witness, Ferree, however, testified the accident occurred about 40 minutes before sunrise. Ferree was driving in front. Smith was following, about four or five car lengths behind. Both the witness and Smith were driving with lights; Smith's were on low beam. "I was driving between 55 and 60. Don (Smith) was driving the same speed. . . . Highway 49 . . . is paved and approximately 22 feet in width. . . . I was about 100 feet away from the truck when I first saw it. It was sitting diagonally across the highway; had both lanes blocked. There was more of the truck in the left lane going north. I didn't see any lights on the truck. I was proceeding northward."

After he saw the truck which was opposite the driveway into the defendant Nunn's farm, Ferree turned to the right on the shoulder of the road, missed the truck but hit a power pole before he was able to get back in the highway. Smith crashed into the rear of the truck, receiving serious injuries. The defendant Love was in the truck. Nunn admitted ownership of the truck and the agency of Love.

At the close of the plaintiff's evidence, the court entered judgment of compulsory nonsuit. The plaintiff appealed.

Ottway Burton, Linwood T. Peoples for plaintiff appellant.
Coltrane and Gavin, By: W. E. Gavin for defendants, appellees.

HIGGINS, J. The evidence presents an issue, only in minor degree, variant from what has become a familiar motif. Whose fault? Ordinarily, parking on the highway without lights 40 minutes before sunrise is unlawful. G.S. 20-129; *Williamson v. Varner,* 252 N.C. 446, 114 S.E. 2d 92. Before entering a public highway from a private driveway, the operator of a motor vehicle is required to exercise due care to see that the intended movement can be made in safety. G.S. 20-156.

The plaintiff's evidence presents a jury question as to the defendant's negligence in parking upon or entering the highway. Contributory negligence does not appear as a matter of law, though the evidence of speed and following too close to the vehicle in front does likewise present an issue for the jury. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184.

The judgment of nonsuit is

Reversed.

CLINE *v.* OLSON.

CARL C. CLINE AND MYRTLE CLINE PATTERSON, EXECUTORS OF THE ESTATE OF ANNIE S. CLINE v. GRACE CLINE OLSON AND HUSBAND N. O. OLSON; CARL C. CLINE AND WIFE ARTIE E. CLINE; RUTH CLINE PATTERSON AND HUSBAND O. A. PATTERSON; MARY CLINE TROUTMAN AND HUSBAND R. G. TROUTMAN; MYRTLE CLINE PATTERSON AND HUSBAND ALBERT B. PATTERSON; NANNIE CLINE HENDRICKS AND HUSBAND T. F. HENDRICKS; CHARLIE J. CLINE AND WIFE WILLIE EDWARDS CLINE; HERMAN FORD LIPE AND WIFE RUBENIA HARRINGTON LIPE; BILLY PRICE LIPE AND WIFE EDITH CHILDRESS LIPE; RAY CLINE LIPE AND WIFE LOWISE BARRIER LIPE; MABEL ELIZABETH SEAGRAVES AND HUSBAND WILLIAM CLAYTON SEAGRAVES; MARIE FELKER AND HUSBAND JOHNNY BELK FELKER; GENE CLAVIN LIPE AND WIFE FANNIE ELIZABETH DEAL LIPE; ROSS IDDINGS LIPE AND WIFE SHIRLEY JEAN LIPE; BENNY RICHARD LEFLER; MAX BROWN LIPE; JOYCE ANN LIPE; RONNIE WAYNE LIPE; ELMER G. CLINE AND WIFE ERMALEE CLINE; MARGARET CLINE MORRIS; CATHERINE CLINE WAGONER AND HUSBAND GAITHER WAGONER; LUCILLE CLINE; A. A. LINKER, ADMINISTRATOR OF THE ESTATE OF JAMES B. CLINE; EARL M. CLINE AND WIFE DARLENE CLINE; LEE P. CLINE AND WIFE IRENE CLINE; RAY H. CLINE AND WIFE HAZEL CLINE; R. F. CLINE AND WIFE MARGARET CLINE; ANNIE CLINE KELLER AND HUSBAND TROY KELLER; BILLY R. CLINE AND WIFE THELMA CLINE; SUE CLINE KANIPE AND HUSBAND BOBBY KANIPE; GRADY R. CLINE; MAGGIE COOK; AND KELLER REFORMED CHURCH, AND ALL OTHER UNKNOWN LEGATEES OF THE SAID ANNIE S. CLINE, DECEASED.

(Filed 2 May 1962.)

1. Appeal and Error § 4—

The executors, in their official capacity, are not parties aggrieved by a judgment construing the will and adjudicating the rights of the beneficiaries, since the judgment is not adverse to them or the estate.

2. Judgments § 29—

Persons not parties to an action and not represented therein are not bound by the judgment rendered therein.

APPEAL by plaintiffs and by defendants Grady R. Cline, Joyce Ann Lipe and Ronnie Wayne Lipe and any unknown heirs of Annie S. Cline, Paul B. Cline, and Lillie C. Lipe, by their guardian *ad litem*, J. Maxton Elliott, from *Walker, Special Judge*, November Term 1961 of CABARRUS.

This is an action for the purpose of obtaining an interpretation of the last will and testament of Annie S. Cline pursuant to the provisions of the Declaratory Judgment Act, G.S. 1-253 through G.S. 1-267.

It appears from the record that J. Maxton Elliott was appointed as guardian *ad litem* for Grady R. Cline, Joyce Ann Lipe and Ronnie Wayne Lipe, who are minors without general or testamentary guard-

ian, and to represent "any unknown heirs of Annie S. Cline, Paul B. Cline, and Lillie C. Lipe, as well as any other individuals not appearing as parties who may have an interest herein."

Annie S. Cline died on 9 April 1959, leaving a last will and testament and a codicil thereto which have been duly admitted to probate in the office of the Clerk of the Superior Court of Cabarrus County, North Carolina. The plaintiffs are the duly qualified and acting executors of the estate of Annie S. Cline.

The items of the will in controversy and which were construed by the court below, are as follows:

"2. I give, devise and bequeath to my children — Grace Oleson (sic), Carl C. Cline, Paul B. Cline, Lillie Lipe, Ruth Patterson, Mary Troutman, Myrtle Patterson, Nannie Hendrix and Charlie Cline — all of my real and personal property to be divided equally between them according to the value of the same, share and share alike.

"3. Should any of my above-named children die without leaving issue or bodily heirs, then their share shall revert to my other living heirs."

Paul B. Cline died testate on 12 June 1949, and Lillie C. Lipe died intestate on 17 September 1957. Paul B. Cline was survived by twelve children, all of whom are now living except a son, James B. Cline, who died intestate on 2 September 1959, survived by his widow, Lucille Cline, but not by any child or children. Lillie C. Lipe was survived by eleven children, all of whom are now living.

The court below held that the last will and testament of Annie S. Cline, deceased, vested a fee simple title in the children of the said Annie S. Cline and in the children of the predeceased children of Annie S. Cline, *per stirpes,* and directed the executors of the last will and testament of Annie S. Cline, deceased, to administer said estate and distribute the assets thereof under the will of Annie S. Cline as interpreted by the judgment.

The appeal entries are as follows: "The plaintiffs and defendants Joyce Ann Lipe, Ronnie Wayne Lipe, and Grady R. Cline, by their guardian ad litem J. Maxton Elliott, except to the ruling of the court on the judgment * * *, and give notice of appeal to the Supreme Court of North Carolina, further notice waived."

The attorneys for the plaintiffs, and J. Maxton Elliott as guardian *ad litem* for Grady R. Cline, Joyce Ann Lipe, Ronnie Wayne Lipe and any unknown heirs of Annie S. Cline, Paul B. Cline and Lillie C. Lipe, purport to stipulate and agree that the record proper shall constitute the case on appeal; that the court was properly organized and the parties were duly before the court; that summons was duly issued and served upon the defendants; and that all pleadings were duly verified.

It is not made to appear in the record, however, that the guardian *ad litem* or the attorneys for the plaintiffs were authorized to bind the defendants who were not represented by counsel and who filed no answer, by stipulation or otherwise.

Plaintiffs appeal, assigning as error the judgment of the court below.

Williams, Willeford & Boger for plaintiff appellants.
No counsel contra.

PER CURIAM. No answer was filed on behalf of any of the defendants except an answer by the guardian *ad litem* on behalf of Grady R. Cline, Joyce Ann Lipe and Ronnie Wayne Lipe, and any unknown heirs of Annie S. Cline, Paul B. Cline, and Lillie C. Lipe.

The guardian *ad litem* in his answer admitted each and every allegation of the complaint except the allegations in paragraph four thereof, to the effect. "That the defendants include all of the devisees and legatees of the said Annie S. Cline and all others who may be affected by a decision on the matters herein set forth." The guardian *ad litem* in answering paragraph four alleged that he did not have sufficient knowledge or information to form a belief as to the allegations and therefore denied the same.

There is nothing in the record, except the appeal entries, to indicate any intention on the part of the guardian *ad litem* to appeal from the judgment entered below. The guardian *ad litem* entered no exception, nor did he set out any assignment of error in the case on appeal; neither did he file a brief in this Court. Moreover, the only assignment of error set out in the record was made on behalf of the plaintiffs in their capacity as executors. The plaintiffs, executors, are named defendants in this action in their individual capacity, but they do not appeal in such capacity.

Certainly the judgment entered below was not adverse or prejudicial to the plaintiffs as executors, or to the estate of Annie S. Cline, and no appeal having been taken from the judgment entered by them as individual defendants, it follows that the plaintiffs are not aggrieved parties. *Dickey v. Herbin,* 250 N.C. 321, 108 S.E. 2d 632.

It is impossible to ascertain from the record whether or not the parties named as defendants herein were served with process, or whether or not all necessary parties were made parties. Hence, the judgment is binding only as to the parties who were duly before the court. We hold, however, that the cause is not before us on its merits and this opinion will not constitute a precedent thereon.

The judgment below is binding on the parties only to the extent hereinbefore indicated. The appeal must be dismissed. *Dickey v. Herbin, supra.*

Appeal dismissed.

RUBY POSTON v. LATTIE SEWELL AND JAMES JUNIOR POSTON.
AND
THURMAN STROUD v. LATTIE SEWELL AND JAMES JUNIOR POSTON.
AND
VONNIE BELLE ANDERSON v. LATTIE SEWELL AND JAMES JUNIOR POSTON.

(Filed 2 May 1962.)

Automobiles §§ 41f, 43—

The evidence in this action by passengers tended to show that the driver, wishing to turn left into a driveway, stopped his car to permit oncoming traffic to pass, and that a car approaching from the rear crashed into the stopped vehicle. The evidence further tended to show that the driver approaching from the rear could have seen the stopped vehicle for some 300 feet. *Held:* The evidence discloses that the negligence of the driver striking the rear of the stopped car was the sole proximate cause of the accident, and under the circumstances, any failure of defendant driver to have given the proper signal before stopping could not have been a proximate cause of the collision.

APPEALS by plaintiffs from *Hall, J.*, January 1962 Civil Term of JOHNSTON.

The three plaintiffs, passengers in a 1952 Pontiac operated by defendant Poston, sustained personal injuries on November 7, 1959, about 8:00 p.m., when a 1950 Oldsmobile operated by defendant Sewell overtook and struck the rear of the Poston Pontiac. The collision occurred on U. S. Highway #301, about six-tenths of a mile north of the Town of Four Oaks, North Carolina.

Each plaintiff instituted a separate action to recover damages, alleging the collision and his (her) injuries were proximately caused by the joint and concurrent negligence of defendants Sewell and Poston. By consent, the three actions were consolidated for trial.

Evidence was offered by plaintiffs and by defendants. At the conclusion of all the evidence, plaintiffs submitted to judgments of voluntary nonsuit as to defendant Sewell; and the court, allowing the motions of defendant Poston therefor, entered a judgment of involuntary nonsuit as to defendant Poston in each of the three cases.

Each plaintiff excepted and appealed; and, on appeal, each plaintiff sets forth as his (her) only assignment of error the judgment of involuntary nonsuit in his (her) action.

Wellons & Wellons and James R. Pool for plaintiffs, appellants.
Wood & Spence for defendant Poston, appellee.

PER CURIAM. Uncontradicted evidence tends to show: U. S. Highway #301 runs north-south. The paved portion thereof is twenty-four feet wide, with a ten-foot shoulder on each side. A private driveway, west of and at right angles to the highway, leads to the home of defendant Poston. Both north and south of said driveway, there is a "slight upgrade" of the highway. Traveling north, a motorist crosses the crest of the highway about three hundred feet south of said driveway. Defendant Poston, who was going to his home, had been driving north "about 35 to 40 miles an hour." He slowed down "for a distance of 300 or 400 feet," then stopped in the northbound lane, with the wheels of his car turned left towards the entrance to said private driveway. "(A) second or two" after he had stopped in this position to allow southbound traffic to pass, the Sewell Oldsmobile struck the rear of the Poston Pontiac and knocked it into the southbound lane where it collided with a southbound (Sessoms) car.

The alleged facts on which plaintiffs base their allegations of negligence against defendant Poston are that he stopped his automobile on the main traveled portion of the highway without giving any signal or timely warning of his intention to stop and without ascertaining that he could do so in safety. (Two of the plaintiffs alleged defendant Poston brought his car to a sudden stop.) The complaints contain no allegations that defendant Poston was driving without proper lights.

Defendant Sewell, the operator of the 1950 Oldsmobile, and his wife, a front seat passenger therein, were called as witnesses by plaintiffs. Both testified they saw no signal or other lights on the Poston car. Sewell testified that he, driving north, crossed the crest of the highway at a speed of forty to forty-five miles per hour; that he was blinded by the lights of a southbound car; that he did not see the Poston car or put on brakes before striking it. Mrs. Sewell testified she saw the Poston car "(w)hen (they) came over the hill."

While evidence for defendant Poston may not be considered in passing on his motions for judgments of nonsuit, it seems appropriate to say that it tends to show the lights on his car, including the blinker light indicating a left turn, were burning; that, while he was stopped, one southbound car passed him; and that, just as another southbound (Sessoms) car was about to pass him, the Sewell car crashed into the

rear of his Pontiac. Plaintiff Ruby Poston testified the Pontiac was in good condition and "(i)f there was anything wrong with the lights on (their) car, (she) didn't know it."

The evidence, including the testimony of the plaintiffs, is in direct conflict with the allegation that defendant Poston *suddenly* stopped his Pontiac car. True, the testimony of the Sewells, when considered in the light most favorable to plaintiffs, was to the effect there was no signal light for a left turn or other lights burning on the Pontiac. Even so, Mrs. Sewell's testimony that she saw the Pontiac "(w)hen (they) came over the hill," suffices to show that Sewell, by the exercise of due care, could and should have seen it. In our view, Sewell's negligence in failing to observe the Pontiac and in failing to reduce his speed and stop before crashing into the Pontiac must be considered the sole proximate cause of the collision. Hence, the judgments of involuntary nonsuit are affirmed.

Affirmed.

CHARLES I. JOHNSON, SR. v. LIBBY HILL SEAFOOD RESTAURANTS, INCORPORATED.

(Filed 2 May 1962.)

1. Negligence §§ 37a, 37b—

A prospective purchaser of fish who is invited into the owner's truck for the purpose of inspecting iced fish transported in boxes, is an invitee of the truck owner and therefore the owner is under legal duty to exercise reasonable care to keep the inside of the truck in reasonably safe condition for the use for which it was designed, but the truck owner is not an insurer of the invitee's safety and the doctrine of *res ipsa loquitur* does not apply to a fall by invitee as he was leaving the truck.

2. Negligence § 37f—

Evidence tending to show that a prospective purchaser of fish, after inspecting the iced fish in boxes, transported in the owner's truck, was leaving the inside of the truck, illuminated only from light coming in the open door, when he tripped over the handle of a shovel protruding from between boxes, that he put his foot out to catch himself and hit what he supposed was ice, and fell to his injury, *is held* insufficient to make out a *prima facie* case of negligence against the truck owner.

APPEAL by plaintiff from *Gambill, J.*, 6 November 1961 Civil Term of RANDOLPH.

Action *ex delicto* to recover damages for personal injuries.

Defendant in its answer denied negligence, and pleaded contributory negligence of plaintiff.

Plaintiff's evidence shows: He was employed by R. A. Parks as manager, buyer and meat cutter for that department in his food store in the town of Robbins. His duties included the buying of fish. On Thursday of each week for nearly a year defendant's same truck loaded with fish had come to Parks' store to sell fish, and once a week during that period he went into the truck to look at, pick out, and buy fish for Parks' store. Every time he went into the bed of the truck, the truck had in it boxes of fish, the fish were iced, and the bed of the truck was wet from melted ice. He was very familiar with the truck.

About 11 a. m. o'clock on 23 April 1959 defendant's same truck loaded with fish for sale came to Parks' store. It was a covered truck with two doors on the back, and had no windows. The truck inside was about seven feet high and about 72 inches wide. It had double doors opening from the outside to the left. The total width of both doors was about five feet. The inner lining of the doors consisted of rusty tin, which had broken loose. The bed of the truck was three or three and a half feet from the ground. Inside the truck on this morning were 15 or 18 boxes of fish packed in ice. These boxes of fish were about 2½ feet long, 18 inches high, 18 inches wide, and each one contained about 100 pounds of fish. The boxes of fish were stacked on each side of the truck two or three feet high. In the bed of the truck was a bucket and hand truck which he saw.

An employee of defendant asked him to "come out and see" the fish. He went out and got in the truck, and picked out 100 pounds of fish. While an employee of defendant was picking up the fish to carry in the store, he turned around to go out of the truck. In going out his left foot caught on the handle of a shovel defendant used to put ice on the fish in the boxes, and he started to fall. He put his foot out to catch himself, and hit what he supposed was ice. Both feet went out from under him, and he started sliding out of the back of the truck. As he was sliding out, he grabbed a piece of rusty tin on the back of the truck over the hinge that had broken loose, which caught his hand and scooped it out. He slid out of the truck and onto the ground in a sitting position. In the fall his back was injured. When he got in the truck, he did not see the shovel. When he stumbled over the handle of the shovel, he was within about 30 to 36 inches from the back of the truck. The handle of the shovel was sticking out between boxes of fish, and high enough to catch his foot. He did not see the shovel until he tripped over it. The truck was not artificially lighted inside, but there was daylight enough inside for him to see and pick out the fish.

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

Ottway Burton and Linwood T. Peoples for plaintiff appellant.

Jordan, Wright, Henson & Nichols and Karl N. Hill, Jr., By Karl N. Hill, Jr., for defendant appellee.

PER CURIAM. Plaintiff's evidence shows that he was an invitee in defendant's truck to select and buy fish, and, therefore, defendant was under a legal duty to exercise reasonable care to keep the inside of his truck, where the fish were, reasonably safe for the use for which it was designed and intended, for plaintiff, a customer. However, defendant was not under an insurer's liability in this respect. The doctrine of *res ipsa loquitur* has no application to this case. *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461; *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652.

When plaintiff entered the bed of the truck there was ample daylight for him to see and select the fish he wanted to buy. He never saw the shovel until he tripped over it. In going out of the truck he tripped over it, and for the first time saw the handle of the shovel sticking out between boxes of fish. The evidence is silent as to whether the handle of the shovel was sticking out when he entered the truck. If it had been, it seems plaintiff would have seen it. There is no evidence as to how long the handle of the shovel had been sticking out between the boxes of fish, or who put it there. Plaintiff had entered this truck every week for nearly a year to select and buy fish. He knew the fish were iced and the floor of the truck was wet from melted ice. He must have known pieces of ice would be on the bed of the truck. When plaintiff entered the truck, he saw a bucket and hand truck. A shovel in the truck was large enough to be easily seen, and was not a hidden or concealed peril.

Considering the indubitable fact that this truck was designed and intended for hauling iced fish in boxes for sale, it seems to us that it was not within the reasonable foresight of the defendant that some injury would result from the condition of the inside of the truck, as shown by plaintiff's evidence, to anyone entering it to select and buy fish.

A consideration of all the evidence in the light most favorable to plaintiff, as we are required to do in passing on a motion for judgment of involuntary nonsuit, impels us to the conclusion that plaintiff has failed to make out a *prima facie* case of actionable negligence against defendant. The judgment of involuntary nonsuit is

Affirmed.

MYRTLE JONES v. MAGGIE BEATRICE OVERMAN SAUNDERS AND HUSBAND, BRYAN SAUNDERS.

(Filed 2 May 1962.)

1. Appeal and Error § 19—

Assignments of error should disclose the errors relied on without the necessity of going beyond the assignments themselves.

2. Deeds § 7—

The registration of a deed, even though done after the death of grantor, creates a rebuttable presumption that it was signed, sealed, and delivered by the grantor, and where the deed reserves a life estate in the grantor, such presumption is not rebutted by evidence that, after its execution, grantor listed and paid taxes on the land, and that, the deed not having been recorded, easement was obtained for a power line from the grantor, and that after grantor's death, grantee, the daughter of grantor, made statements that she did not know "how things were," and handed a sealed envelope to her sister saying, "here is what papa left for you," there being no evidence that the statements had reference to the deed.

APPEAL by plaintiff from *Walker, S.J.,* September 1961 Term of RANDOLPH.

This is a civil action to have a deed set aside and declared void for non-delivery.

The complaint in pertinent part alleges in substance: Plaintiff and *feme* defendant are daughters of C. S. Overman who died 28 February 1957. On 6 March 1957, after Overman's death, *feme* defendant caused to be recorded in the public registry of Randolph County a deed from Overman to her, dated 26 March 1947, reciting a consideration of $500 and purporting to convey Overman's homeplace situate in Columbia Township, Randolph County, containing 65 acres. The deed had never been delivered but was found by *feme* defendant after her father died.

Defendants, answering, admit the kinship of the parties and the recordation and contents of the deed, but deny the other material allegations of the complaint.

At the close of plaintiff's evidence the court allowed defendants' motion for nonsuit, and entered judgment dismissing the action.

Plaintiff appeals.

Ottway Burton and Linwood T. Peoples for plaintiff.
Coltrane & Gavin for defendants.

PER CURIAM. This case was here at the Spring Term 1961. *Jones v. Saunders,* 254 N.C. 644, 119 S.E. 2d 789. In the former record there was considerably more evidence both of delivery and non-delivery of the deed than appears in the present record.

The assignments of error based on the exclusion of testimony do not properly present the questions involved. They do not comply with the requirements of Rules 19(3) and 21 of the Rules of Practice in the Supreme Court. 254 N.C. 797, 803. They are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are. *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Armstrong v. Howard,* 244 N.C. 598, 94 S.E. 2d 594; 1 Strong: N. C. Index, Appeal and Error, s. 19, p. 90.

The evidence tends to show: *Feme* defendant lived with her father at the homeplace until 1951 when they moved elsewhere; her mother had died in 1941 and her father did not remarry. She and her father lived together at other locations until his death. They lived with plaintiff at Ramseur from 1951 to 1956. *Feme* defendant married male defendant in 1955, and in 1956 she and her father moved to the home provided by her husband. Plaintiff married in 1921 and left the homeplace and did not live there any more. The deed in question was executed and acknowledged by the father on 26 March 1947 while he was living at the homeplace. The deed purported to reserve to the grantor a life estate. It was recorded after grantor's death. Shortly after grantor's death *feme* defendant handed plaintiff an envelope and said, "Here is what papa left for you." Thereafter, she said to plaintiff, "Maggie, you may think I know how things were fixed, but God in heaven knows I didn't know a thing about it." There was never any mention of the deed. The father had granted to Randolph Electric Membership Corporation an easement in 1949, and listed the property for taxes in his own name each year until he died.

We think the court was correct in granting nonsuit. The probate and registration of a deed gives rise to the rebuttable presumption that it was signed, sealed and delivered by the grantor. This is true even if the deed is registered after the death of the grantor. *Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732. Nowhere in the evidence, including that which was excluded, is there any specific reference to the deed, other than the admission of the deed itself in evidence. The purported statements of *feme* defendant are so indefinite as to leave in the realm of conjecture the subject of conversation. The listing of taxes by one who supposes he has reserved a life estate is not inconsistent with prior delivery of a deed for the remainder interest. Since the deed in question was not of record, it is not strange that the Membership Corporation obtained its easement from the one with *record* title. Plaintiff's evidence was insufficient for submission to the jury on the issue of nondelivery.

No error.

MARVIN R. CAUBLE v. ROBERT HILL.

(Filed 2 May 1962.)

APPEAL by plaintiff from *Gambill, J.*, October 1961 Term of ROWAN.

This action was begun 8 September 1960. The complaint alleges defendant, on 16 December 1959, negligently backed his Chevrolet station wagon into plaintiff's 1949 Cadillac automobile. The collision occurred on a parking lot when defendant, moving from a parked position, backed into plaintiff's automobile traveling on the parking lot. He alleges property damage and personal injuries resulting from the collision. He seeks to recover $500 for damages to his automobile and $50,000 for personal injuries and medical expenses incurred.

Defendant, by answer, admitted the collision was caused by his negligence. He also admitted: ". . . the plaintiff's automobile was slightly damaged as a result of the collision . . ." He specifically denied plaintiff's allegation with respect to personal injury.

The court submitted one issue to the jury which was answered as follows: "What damage, if any, has the plaintiff suffered as the proximate result of the negligence of the defendant (a) For personal injuries? Answer: 'None' (b) For property damages? Answer: $229.00" Plaintiff moved to set the verdict aside. The court denied the motion and entered judgment that plaintiff recover from defendant the sum of $229.00 with interest from 25 October 1961 and costs. Plaintiff appealed.

George R. Uzzell and Robert M. Davis for plaintiff appellant.
Linn & Linn by Stahle Linn, Jr. for defendant appellee.

PER CURIAM. Plaintiff was fifty-six years old when the collision occurred. He had been retired by his employer because of a heart attack sustained in 1955. He was drawing retirement benefits. He received a disability discharge from service for injury to his right foot. He was earning $25 to $30 per month prior to the collision.

He testified when his car "was struck by the automobile of the defendant, my car was knocked over to the left approximately seven inches and the bottom part of my body followed. The top part of my body more or less stood still. When the car came back in place it hit me on the left shoulder, knocking me the other way and gave me a twist." He then described the pain and suffering he experienced beginning immediately following the collision, increasing in intensity, necessitating numerous treatments by physicians, reducing to zero his already impaired earning capacity. He testified that he had asked

for an estimate of the damage to his car and received an estimate of $229.00.

Dr. Carr, one of the doctors who treated plaintiff, testified to plaintiff's physical condition including his heart trouble and the trouble with his spine. His testimony was to the effect that plaintiff's condition at the time of trial could be due to an injury sustained in the collision or to the earlier injury sustained by plaintiff.

Defendant, testifying about the force of the collision, said the only injury to his car was a broken tail light. He described the injury to plaintiff's car and exhibited a photograph to show a mere scratch of the paint on the right side.

The case presents no legal problem, merely a question of fact. Did defendant, by negligently backing into plaintiff's car, inflict personal injuries on plaintiff?

The court gave full and accurate instructions on this question. He was impartial in stating the contentions of the parties. At the conclusion of the charge he inquired if either party desired further instructions. Neither party responded.

The exceptions and assignments of error do not present any question justifying discussion. The jury, in performing its duty, determined the facts contrary to plaintiff's contention.

No error.

D. G. MELTON v. GEORGE DAVID CROTTS.

(Filed 9 May 1962.)

1. Automobiles § 41e—

Plaintiff's evidence tending to show that defendant stopped his car partially on the hard surface after a flat tire, and that the car was thus stationary on the highway without lights when it was struck by the car driven by plaintiff's agent, who did not see the stationary vehicle in time to avoid the collision because of the lights of an approaching car, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to comply with G.S. 20-134.

2. Automobiles § 9—

The driver of a vehicle stopped or parked on a highway at night is under duty to light his vehicle as required by G.S. 20-134 and G.S. 20-129, which duty is not affected by G.S. 20-161, relating to parking on highways, and the failure to light a vehicle stopped or parked on a highway at nighttime as required by the statute is negligence.

3. Automobiles § 42d—

Evidence tending to show that plaintiff's driver was operating plaintiff's vehicle at a lawful speed at nighttime, that before the headlights of plaintiff's car had picked up defendant's car, which was stopped partially on the paved portion of the highway without lights, plaintiff's driver lowered the beam of his headlights because of an approaching vehicle, and that plaintiff's car had not passed the approaching vehicle when it collided with the rear of the stationary car, *is held* not to establish the single conclusion that plaintiff's driver was negligent.

4. Trial § 33—

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case.

5. Automobiles § 9—

Where plaintiff relies upon the fact that defendant stopped or parked his vehicle on the highway without leaving a clear and unobstructed width of not less than fifteen feet of highway opposite the standing vehicle, the burden is upon plaintiff to prove defendant's violation of G.S. 20-161(a), and where defendant relies upon the fact that his vehicle was disabled so as to render it impossible to avoid stopping and temporarily leaving such vehicle partially on the hard surface of the highway, defendant has the burden of bringing himself within the provisions of G.S. 20-161(c).

6. Same—

The provisions of G.S. 20-161(c), which limit the provisions of G.S. 20-161(a) by permitting the stopping or parking of a vehicle partially on the hard surface of the highway without leaving at least fifteen feet of the hard surface for the passage of traffic, provided such vehicle is disabled so that it is impossible to move it, must not be given a literal construction, and it is not required that a vehicle be absolutely impossible to move in order for the proviso to apply, but only that it not be reasonably practical under the circumstances to move the vehicle, which is ordinarily a question for the jury upon the facts of each case.

7. Same; Automobiles § 46—

Where defendant's evidence is to the effect that he stopped his vehicle on the highway because of a flat tire, that although he drove the vehicle as near as possible to the ditch on the right shoulder he was unable to get the vehicle entirely off the hard surface at that place, and that the nearest place in defendant's direction of travel at which the vehicle could be stopped entirely off the hard surface was some 1000 to 1500 feet distant, it is the duty of the court to instruct the jury upon the provisions of G.S. 20-161(c).

APPEAL by defendant from *Riddle, S.J.*, January 1962 Special Civil Term of DAVIDSON.

Plaintiff was injured about 8:30 p.m. 20 December 1957 when his automobile, operated by his agent, collided with defendant's auto-

mobile. Plaintiff seeks compensation for the injuries to person and property then sustained. To support his right to recover he alleged: Plaintiff was traveling east on a road known as Junior Order Home Road. Defendant's car was stopped or parked on that road, headed east, at a point about 400 feet west of its intersection with N. C. Highway 8. Defendant's car occupied most of the southern (right) lane of travel. It had no lights on it, nor had flares or other warning devices been placed to notify the traveling public of the hazard thus created. Defendant's car was a dark green color. As plaintiff's car approached the intersection, another car turned from N. C. 8 into the Junior Order Home Road, headed west. Thereupon the headlights on that car and on plaintiff's car were dimmed. The absence of lights on defendant's car, coupled with lights from the car in the north lane approaching plaintiff, prevented the driver of plaintiff's car from seeing defendant's vehicle until too late to avoid the collision. The basis of defendant's liability is the alleged parking or stopping without lights as required by G.S. 20-129 and 20-134 and stopping in such manner as to leave less than fifteen feet of the highway open to traffic, contrary to the provisions of G.S. 20-161.

Defendant admitted the collision occurred at the time and place stated by plaintiff. He alleged he was traveling east on the Junior Order Home Road, which is paved with tar and gravel to a width of eighteen feet. It has dirt shoulders about one and one-half feet wide on each side. When about 400 feet from N.C. 8, he had a flat tire. He pulled as far on his right side of the road as permitted by the road ditch. This left not more than two feet of his vehicle on the paved portion of the highway. The front and rear lights on his car were burning. In addition his turn lights were operating, indicating a left turn. These lights were adequate to meet the requirements of G.S. 20-129, and to give notice of the presence of defendant's car. He stopped to replace the deflated tire with a spare and was preparing to do so when the collision occurred. Plaintiff's driver was not keeping a lookout and did not have control over his vehicle, which was moving at an unlawful rate of speed. The negligence of plaintiff's driver was the sole cause of the collision, but if not the sole, then a contributing cause of the collision. Additionally he asserted a counterclaim based on his allegations of the negligence of plaintiff's driver.

The court submitted the usual issues of negligence, contributory negligence, and damage arising on the pleadings.

The jury answered the issue as to defendant's negligence in the affirmative, plaintiff's contributory negligence in the negative, and assessed plaintiff's damage. Having answered the first three issues in

plaintiff's favor, the jury did not answer the issues relating to plaintiff's liability to defendant.

Judgment was entered on the verdict and defendant appealed.

Beamer Barnes for plaintiff appellee.
Walser and Brinkley by Walter F. Brinkley for defendant appellant.

RODMAN, J. Appellant's motion for nonsuit was overruled. He asserts this ruling was erroneous for two reasons: First, there was no evidence to show defendant was negligent; second, the evidence suffices to establish plaintiff's contributory negligence as a matter of law.

G.S. 20-129 says: "Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise . . . shall be equipped with lighted front and rear lamps . . . subject to exemption with reference to lights on parked vehicles as declared in s. 20-134."

G.S. 20-134 requires lights visible for 500 feet on front and rear of any vehicle parked or stopped on a highway "except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway."

Plaintiff testified that defendant's car was stopped with its right rear wheels off the hard-surfaced portion of the road, that a little over half of defendant's car was on the hard-surfaced portion, there were no lights on defendant's car. It was dark.

Caswell, driver of plaintiff's car, testified: "There were no lights emitting from any source from the defendant Crotts' automobile before I struck it. There were no flares stationed or otherwise emitting any light up and down the highway from the defendant's car at anywhere."

Hall, who had turned from N. C. 8 to the Junior Order Home Road and was meeting plaintiff's car, testified: "I saw a car coming. I dimmed my lights, he dimmed his, along as we approached one another, he hit something. It was the back of Mr. Crott's car, but I didn't see the car myself until Mr. Melton had already contacted it. You couldn't tell much what color Mr. Crotts' car was. It hadn't been cleaned up in a good while. It was some shade of green . . . I would say at least two-thirds of Mr. Crotts' car was parked on the highway. Mr. Crotts was headed east toward Highway #8. He was on his right side traveling east. There were no lights visible on the parked car belonging to Mr. Crotts. The parking lights were turned on while

I had gone to call the ambulance. There were no lights visible on the defendant's car before the accident happened and there were no flares."

Plaintiff's evidence was sufficient to support a finding that defendant did not comply with the provisions of G.S. 20-134. Such a violation is negligence. *Scarborough v. Ingram,* 256 N.C. 87; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Bumgardner v. Allison,* 238 N.C. 621, 78 S.E. 2d 752; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *United States v. First-Citizens Bank & Trust Co.,* 208 F. 2d 280; 5A Am. Jur. 487.

G.S. 20-161 regulates parking on highways. It does not purport, except as to trucks, trailers, and semitrailers, to define what means the owner of a vehicle stopped on the highway shall use to notify others using the highway of his presence. It does not conflict with nor reduce the obligation imposed on the operator of a vehicle stopped or parked on the highway at night to light his vehicle as required by G.S. 20-134 and G.S. 20-129. To the extent that *Meece v. Dickson,* 252 N.C. 300, 113 S.E. 2d 578, may be construed as conflicting with what is here said, it is overruled.

Does the evidence suffice to show plaintiff's contributory negligence as a matter of law warranting a nonsuit? On that question the evidence tends to show these facts: Plaintiff's car came into the Junior Order Home Road some 900 or 1000 feet west of the scene of the collision. His car did not exceed a speed of 30 to 35 m.p.h. When Hall, driving the westbound car, turned from N. C. 8 onto the Junior Order Home Road, both cars dimmed their headlights. The headlights on plaintiff's car had not picked up defendant's car before Hall turned from N. C. 8. Plaintiff and Hall had not passed when the collision occurred. Hall was traveling at a speed of 20 to 25 m.p.h. When Cassell first observed Hall's car as it turned from N. C. 8, Cassell reduced his speed. Cassell said he saw the Crotts car a second or two before the collision. Plaintiff, in fixing the distance the Crotts car was seen before the collision, said: "(I)t wasn't but a short distance; it wasn't too far; it was about 10 or 12 feet, somewhere along there, in my estimation." The dark color of defendant's car and the black road tended to absorb the lights from the approaching vehicles rather than to reflect it. It was, of course, the duty of plaintiff's driver to exercise caution and to keep a proper lookout for other vehicles on the highway. The evidence is insufficient to establish the single conclusion that plaintiff's driver was negligent. *Scarborough v. Ingram, supra; Keener v. Beal, supra; Thomas v. Motor Lines, supra; Privette v. Lewis,* 255 N.C. 612, 122 S.E. 2d 381; *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825; *Burchette v. Distributing Co.,* 243 N.C. 120, 90 S.E. 2d 232; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276.

If the jury should find that defendant did not have his vehicle lighted as required by statute, and such failure was the proximate cause of the collision, and should further find plaintiff was not contributorily negligent, he would be entitled to recover. It follows that the court properly refused to allow the motion to nonsuit.

Plaintiff does not limit his right to recover to defendant's failure to display lights. He pleads an additional negligent act, to wit, the violation of G.S. 20-161. Subsec. (a) of that statute, so far as pertinent to this case, reads: "No person shall park or leave standing any vehicle . . . upon the paved . . . portion of any highway . . . when it is practicable to park or leave such vehicle standing off of the paved . . . portion of such highway: Provided, in no event shall any person park or leave standing any vehicle . . . upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon . . ."

The provisions of subsec. (a) are limited by subsec. (c), which reads as follows: "The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved . . . portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position." All of the evidence tends to show the collision occurred some 400 or 500 feet west of N.C. 8. The Junior Order Home Road was in a cut. The banks on each side are four or five feet high. Next to the bank is a ditch. The distance between the bank-ditch and the pavement was not sufficient to take care of defendant's car when he stopped. This condition existed for some distance to the west of the point where defendant stopped, all the way east to N.C. 8, and for some distance on N. C. 8 before a place could be found where a car could be parked without a portion of the car extending over on the paved area of the road. The distance from point of collision to an adequate parking area was variously estimated at 1000 to 1500 feet. The evidence was plenary that defendant stopped because of a punctured tire. There was conflict in the evidence as to the distance defendant's car extended over the paved part of the highway and the portion of the highway left open for traffic. Plaintiff's evidence tended to show that such area was less than fifteen feet. Defendant's evidence would fix the area as more than fifteen feet.

The court charged: "If you find by the evidence and by its greater weight that on the occasion in question that the defendant was parked on a public highway at night, and that he failed and neglected to remove his motor vehicle from the traveled portion of the highway so as to leave a clear and unobstructed width of not less than 15 feet upon

the main-traveled portion of the highway opposite said motor vehicle in violation of General Statutes 20-161; and such violation was the proximate cause or one of the proximate causes of the damage and injury complained of, then it would be your duty to answer the first issue YES." Defendant excepted to the foregoing instruction. He also excepted to the failure of the court to refer to and explain defendant's rights accorded by subsec. (c).

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. *Rodgers v. Thompson,* 256 N.C. 265; *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523.

The quoted portion of the charge, so far as it went, is a correct statement of the law. The burden rested on plaintiff to show that defendant had violated the statute. Defendant, if he would escape the consequences of his violation, had the burden of bringing himself within the provision of subsec. (c). Hence we are confronted with the questions: Were the facts in this case sufficient to require the court to inform the jury of the provisions of subsec. (c) and to apply its provisions to the facts of this case? In other words, was a puncture and flat tire at a point where the operator of a motor vehicle could not get off the highway for several hundred feet sufficient to warrant him in stopping to change tires, leaving a part of his vehicle on the paved part of the highway?

Plaintiff relies on *Lambert v. Caronna,* 206 N.C. 616, 175 S.E. 303, to support his contention that subsec. (c) has no application to the facts of this case. In that case plaintiff was injured when his car collided in the nighttime with defendant's car, parked without lights on the paved portion of the highway to repair a flat tire. There, as here, the parties were in disagreement whether there were lights on defendant's car and the width of the area left open for travel. In that case the collision occurred on a heavily traveled highway. There, as here, the court charged with respect to the duty of a motorist under subsec. (a), but it did not relate that duty to the provisions of subsec. (c).

There the factual similarity of the cases stop. Plaintiff alleged in that case that defendant had eleven feet of shoulder on which he could park. The evidence with respect to the availability of an area for defendant to park off the paved portion of the highway appears in the report on p. 619. The evidence was: "Without any doubt they (the shoulders) were wide enough to drive a car on and get all four wheels completely off without any drop to the side. I would say they were approximately 8 feet wide." On that evidence this Court said: "We see no error in the exclusion of (c) in the charge. The entire evi-

dence of defendant was that he had a 'flat tire,' a 'puncture.' The tire was deflated and it was necessary for him to stop, in so doing, he should have complied with the rule of the road (a), *supra,* the evidence in no way brought him under the provisions of (c). No one testified the Pontiac was disabled in any manner except by a flat tire, *or that it could not have been stopped so as to leave fifteen unobstructed feet for the passage of the Chrysler. The defense below was that 15 or more feet were in fact left clear on the hard surface.*" (Emphasis supplied.)

It will be observed the Court gave two reasons for sustaining the failure to charge with reference to subsec. (c): (1) The evidence disclosed ample room for the defendant to get off the paved portion; (2) the defendant at the trial had not asserted he was entitled to the protection of subsec. (c) but rested his defense on his assertion that plaintiff in fact had more than fifteen feet of unobstructed road on which to travel. A party may not shift his ground of defense in the Superior Court to a new one first asserted in this Court. *Doub v. Hauser,* 256 N.C. 331; 1 N.C. Index p. 69, note 13.

In *S. v. McDonald,* 211 N.C. 672, 191 S.E. 733, defendant was charged with manslaughter in leaving his truck parked on the paved portion of the highway without lights. A guest in another car was killed when that car ran into the parked truck. There the evidence was that the truck was heavily loaded. A tire blew out. He drove about thirty feet and stopped on the right shoulder of the highway, going as far on the shoulder as he could with safety. He turned the lights of his vehicle on. He then went to seek help but was unable to get any help until the next day. During the night his battery ran down, leaving the vehicle without lights. On this evidence *Connor, J.,* said: "There was no evidence at the trial of this action which showed or tended to show that the defendant violated either of said statutes when he left his truck parked or standing on the highway about 10:30 o'clock on the night of 13 December 1936."

What construction should be given to subsec. (c)? Should it be given a literal construction or should it be construed to permit a motorist acting as a prudent person having due regard to the safety of others to make repairs to his vehicle reasonably necessary for its operation in a normal manner even though such repairs may necessitate the use of a portion of the paved part of the highway, leaving less than fifteen feet of paved area open to travel?

Several States have statutes containing the provisions of our statute (G.S. 20-161 (a) and (c)) or substantially similar provisions. The Supreme Court of Alabama, when called upon to interpret their statute, said in *Capital Motor Lines v. Gillette,* 177 So. 881: "(W)e

deem it of importance to clearly define the law applicable to stopping vehicles on the highways in general, even temporarily. . . .

"Section 70(a) intends to keep an open highway, free of standing cars on the paved road, or at all events, an open zone of fifteen feet. A passing vehicle may be expected at any moment, as this case sadly demonstrates. The law aims to conserve life and limb by keeping the road open as defined.

"Subdivision (c) of same section deals with temporary stops in these words: (The court then quotes what is our subsec. (c))

"Quite clearly, even in case of a blowout or other car trouble necessitating a temporary stop, subdivision (a) must be complied with, if it can reasonably be done. . . .

"To take a temporary stopping without our statute, it must be 'for a necessary purpose,' and under such conditions that 'it is impossible * * * to avoid leaving such vehicle in such position,' that is, occupying traveled portion of the highway, or not leaving the clearance declared in section 70(a). 'Impossible' is to be construed in a reasonable practical sense.

"The Law of the Road in Alabama is: When stopping a motor vehicle on a highway, voluntarily or from necessity, no matter how long it is expected to remain standing, the driver should turn out, and provide a clearance of fifteen feet, if practical to do so. He should not stop his car on the highway at a point where this cannot be done except for reasonable cause. In the latter case, he should get out of such position as soon as practical."

The Supreme Court of Minnesota, interpreting subdivision (c) of their statute, said in the case of *Geisen v. Luce,* 242 N.W. 8: "The words 'such position' at the end of section 2720-24, subd. (c), must not be construed as meaning that, if possible for the car to have been moved at all, it would be beyond the protection of the statute. 'Such position' refers back to the words, 'on the paved or improved or main traveled portion of any highway.' The provision that the car must be so disabled 'that it is impossible to avoid . . . temporarily leaving such vehicle in such position' cannot be applied only to cases literally. It cannot always mean that it must be 'impossible' to slightly move the car in order to make subdivision (c) applicable. It is difficult to imagine an automobile on the highway so disabled that it would be literally impossible for a man not to be able to move it at all. We think the Legislature never intended to have such literal construction applied to this statute. We are of the opinion that the word 'impossible' must be construed as meaning that the car must be disabled to the extent that it is not reasonably practical to move the car so as to leave such 15 feet for the free passage of other cars. This construction seems to

be consistent with the holdings of other courts; and under such circumstances the provision that 15 feet shall be left for free passage of other vehicles is not applicable."

We think the interpretation given by the Supreme Courts of Alabama and Minnesota to their statutes is a proper interpretation of our statute, and we so hold.

Whether a puncture or blowout is such disablement of a motor vehicle as to justify the driver in stopping partially on the paved portion of the highway is ordinarily a question for the jury unless the facts are admitted. Defendant's claim of protection by virtue of subsec. (c) must be tested by the facts of each case. *Putnam v. Bowman,* 195 A. 865; *Tibbetts v. Dunton,* 174 A. 453; *Kelly v. Locke,* 198 S.E. 754; *Andraski v. Gormley,* 87 N.W. 2d 818; *Kline v. Johannesen,* 24 N.W. 2d 595; *Smith v. Pust,* 6 N.W. 2d 315; *Lund v. Springsteel,* 246 N.W. 116; Anno. Parking Regulation-Disabled Vehicle, 15 A.L.R. 2d 920-922; 5A. Am. Jur. Automobiles, sec. 407; 2A. Blashfield, Cyc. of Automobile Law, Perm. Ed., sec. 1195.

If plaintiff has established a violation of subsec. (a) and defendant relies on subsec. (c), he must carry the burden of justifying his act in stopping at a proper place and for a permissible period of time.

The facts depicted by defendant's evidence are, in our opinion, sufficient to require a statement from the court of defendant's right as well as his duty under the provisions of subsec. (a) as modified by subsec. (c) of G.S. 20-161. The failure to charge was error for which there must be a

New trial.

CARLSTON F. TAYLOR v. JUNE W. TAYLOR.

(Filed 9 May 1962.)

1. Divorce and Alimony § 13—

The husband is not entitled to absolute divorce on the ground of two years separation if the separation was due to his wilful abandonment of his wife, but that the separation was due to abandonment is an affirmative defense which the wife must allege and prove by the greater weight of evidence. G.S. 50-6.

2. Same; Evidence § 19—

Where, in the husband's action for divorce on the ground of two years separation, the wife pleads the husband's prior conviction of abandon-

ment relating to the same separation, the husband's admission of the fact of his conviction, without appeal, is a bar to his action for divorce.

HIGGINS, J., dissenting.

APPEAL by plaintiff from *Phillips, J.*, October 23, 1961 Term of FORSYTH.

Civil action, instituted by plaintiff under G.S. 50-6, for absolute divorce. As ground for divorce, plaintiff alleged he and defendant, his wife, separated June 18, 1958, and thereafter, continuously, lived separate and apart from each other. Answering, defendant admitted plaintiff's said allegation but alleged "said separation was brought about and has continued due to the willful bandonment of the defendant by the plaintiff. . ."

For a further answer and defense, and as a cross action for alimony without divorce under G.S. 50-16, defendant alleged, *inter alia*, that plaintiff, on June 18, 1958, "willfully and unlawfully and without just cause or provocation on the part of the defendant, abandoned the plaintiff and her minor children and completely separated himself from them without providing adequate support for them in accordance with his means and condition in life." In addition, she alleged that, on September 3, 1958, in the Municipal Court of the City of Winston-Salem, North Carolina, plaintiff was tried on a criminal warrant charging his abandonment and nonsupport of his wife and their three children; and that said court adjudged plaintiff guilty of said criminal charge and pronounced judgment. She attached to her pleading a copy of the minutes of said Municipal Court relating to said criminal prosecution.

In reply, plaintiff denied the allegations in defendants' said further answer, defense and cross action, with this exception: Plaintiff admitted he was found guilty of abandonment and nonsupport of defendant in said Municipal Court on September 3, 1958, but alleged he "then denied his guilt and pleaded not guilty and still contends that he was not guilty of abandonment and non-support . . ."

At trial, after the jury had been impaneled and pleadings read, defendant moved for judgment on the pleadings dismissing plaintiff's action. Thereupon, the court entered judgment, which set forth as a finding of fact "(t)hat it is contended and admitted by counsel for both plaintiff and defendant in open court that no appeal was taken from the conviction of the plaintiff in the Municipal Court of the City of Winston-Salem upon the charge of willful abandonment and nonsupport of the defendant."

The court "concluded as a matter of law that the plaintiff, having

admitted the defendant's plea in bar, cannot maintain an action for an absolute divorce based upon the facts which constitute the defendant's plea in bar . . ."

Thereupon, the court adjudged "that the plaintiff's action for an absolute divorce be and the same is hereby dismissed upon the pleadings filed in this cause." The judgment contained these further provisions: (1) Plaintiff was ordered to pay $150.00 to defendant's counsel as a fee for his services to defendant; (2) at defendant's request, defendant's cross action for alimony without divorce was dismissed "as a voluntary nonsuit in said cause"; (3) it was ordered that plaintiff pay the costs. Plaintiff excepted to the judgment and appealed.

Fred M. Parrish, Jr., for plaintiff appellant.
W. Scott Buck for defendant appellee.

BOBBITT, J. Plaintiff alleged that he and defendant lived together as husband and wife from their marriage on June 12, 1948, until their separation on June 18, 1958, and that they lived separate and apart *continuously* from June 18, 1958, until this action was instituted. These allegations show affirmatively there was only one "separation," namely, the "separation" on June 18, 1958, and dispel any suggestion that plaintiff and defendant lived together thereafter. Thus, it appears the prosecution and conviction of plaintiff in the Municipal Court of the City of Winston-Salem on September 3, 1958, on a criminal warrant charging that he wilfully abandoned defendant and their children without providing adequate support for them, necessarily relates to the "separation" on June 18, 1958, on which plaintiff relies as a basis for his action for absolute divorce on the ground of two years separation.

Where the husband sues the wife under G.S. 50-6 for an absolute divorce on the ground of two years separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's wilful abandonment of his wife. *Johnson v. Johnson,* 237 N.C. 383, 385, 75 S.E. 2d 109, and cases cited; *Pruett v. Pruett,* 247 N.C. 13, 25, 100 S.E. 2d 296, and cases cited. In such case, the burden of proof is on the defendant (wife) to establish her said affirmative defense. *Taylor v. Taylor,* 225 N.C. 80, 83, 33 S.E. 2d 492; *McLean v. McLean,* 237 N.C. 122, 125, 74 S.E. 2d 320. She must do so by the greater weight of the evidence. *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540.

The said Municipal Court was a court of competent jurisdiction. Plaintiff could have, but did not appeal from his conviction and the judgment entered thereon. The issue raised by plaintiff's plea of not guilty in said criminal prosecution is the identical issue raised by

plaintiff's denial of defendant's alleged affirmative defense or plea in bar. The only difference is that in the criminal prosecution the State had the burden of proving defendant's guilt beyond a reasonable doubt.

The question is whether plaintiff's admitted conviction in said criminal prosecution bars his right to maintain this action. More fully stated, the question is whether plaintiff can maintain an action for absolute divorce on the ground of two years separation when, in the criminal prosecution, it was established that the "separation" on which he relies was caused by his criminal conduct in wilfully abandoning his wife and children without providing adequate support for them.

In *Reynolds v. Reynolds,* 208 N.C. 428, 181 S.E. 338, the defendant, as a bar to the plaintiff's action for absolute divorce on the ground of two years separation, pleaded the plaintiff's conviction in a court of competent jurisdiction of the crimes of assault and battery upon his wife and the wilful abandonment of his wife and their children. The trial court ruled that the defense pleaded was not a bar to the plaintiff's right to maintain the action and excluded the evidence offered by the defendant to prove her alleged affirmative defense or plea in bar. Upon the defendant's appeal from a judgment of absolute divorce, this Court held "(t)here was error in declining to hear the defendant's plea," and set aside the verdict and judgment and remanded the cause for another hearing. *Stacy, C.J.,* speaking for this Court, stated: "To say that civil rights enforceable through the courts, may inure to one out of his own violation of the criminal law, *and against the very person injured,* would be to blow hot and cold in the same breath, or, Janus-like, to look in both directions at the same time. The law is not interested in such double dealing or slight-of-hand performance; it sets its face like flint in the opposite direction." (Our italics)

In *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333, the judgment dismissing the plaintiff's action for absolute divorce on the ground of two years separation was sustained. In the preliminary statement by *Barnhill, J.* (later C.J.), this appears: "At the hearing the evidence tended to show that the plaintiff had been indicted and convicted of the crime of abandonment and nonsupport of his wife and his children begotten of her during coverture." The fourth issue, answered, "Yes," was as follows: "4. Has the said separation of husband and wife been due to the criminal and unlawful acts of the husband, as alleged in the answer?" The record shows that Judge Grady, who presided at the trial, instructed the jury as follows: "The record of the criminal proceeding in the Recorders Court in Pitt County has been offered in evidence; all of this evidence being certified to by the Clerk of the Superior Court of Pitt County, to the effect that Claud L. Brown was convicted in the Recorders Court of abandonment, and that a sus-

pended sentence was placed upon him. Gentlemen, he would not be permitted to contradict the record which has been offered in evidence, and therefore I charge you that you will answer the fourth issue YES, so I will answer it for you, gentlemen, if you desire me to you will please raise your hand. (Jurors all raised their hands)." Thus, in substance, the court held that the plaintiff's conviction in the criminal prosecution constituted a bar to the plaintiff's action as a matter of law.

Reference to the record in *Briggs v. Briggs,* 215 N.C. 78, 1 S.E. 118, discloses that, in the criminal prosecution on the 1938 warrant referred to therein, Briggs, the plaintiff, was adjudged not guilty of the criminal abandonment of his wife; and *the plaintiff* was relying upon *his acquittal* in said criminal prosecution. "The great weight of authority supports the rule that a judgment of acquittal is not effective under the doctrine of res judicata in later civil proceedings, and does not constitute a bar to a subsequent civil action involving the same subject matter." 30A Am. Jur., Judgments § 474; *Edwards v. Jenkins,* 247 N.C. 565, 568, 101 S.E. 2d 410. In a criminal action, an acquittal, while it denotes the failure of the prosecution to establish the defendant's guilt beyond a reasonable doubt, does not affirmatively establish the defendant's innocence.

Plaintiff relies on *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104, an action for wrongful death, in which the plaintiff alleged that, in a criminal prosecution for the murder of his intestate, the defendant was convicted of the crime of manslaughter. This Court held that the defendant's motion to strike these allegations should have been allowed because evidence in support thereof would have been incompetent.

Decision in *Trust Co. v. Pollard, supra,* is based on "(t)he general and traditional rule supported by a great majority of the jurisdictions . . . 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 . . ." However, in *Trust Co. v. Pollard, supra,* the opinion of *Parker, J.,* after citing and discussing *Eagle, Star and British Dominions Ins. Co. v. Heller* (Va.), 140 S.E. 314, 57 A.L.R. 490, hereafter referred to as *Heller,* clearly states that we then reserved, until confronted by a factual situation presenting the question, whether "a convicted criminal" may assert rights based on the criminal conduct for which he was convicted.

In *Heller,* plaintiff's conviction of having wilfully burned his stock of goods with intent to injure the insurer, was held a bar to his action to recover under a fire insurance policy upon the same stock of goods. The Virginia Supreme Court of Appeals, in a notable and well reason-

ed opinion by *Prentis, P.*, took the view that, to adhere to the general and traditional rule under such circumstances, "would be a reproach to the administration of justice."

With reference to factual situations similar to that considered in *Heller*, there are three lines of decision: (1) Decisions in accord with the general and traditional rule to the effect that the judgment in the criminal case is neither a bar nor admissible as evidence. *Interstate Dry Goods Stores v. Williamson* (W. Va.), 112 S.E. 301; *Girard v. Vermont Mut. Fire Ins. Co.* (Vt.), 154 A. 666. (2) Decisions to the effect that the judgment in the criminal case is not conclusive but is admissible in civil actions as *prima facie* evidence of the facts on which the conviction rests. *Schindler v. Royal Ins. Co.* (N.Y.), 179 N.E. 711. (3) Decisions such as *Heller*, which hold that judgment in the criminal case is conclusive and bars the convicted person from relitigating the issue determined therein. *Austin v. United States*, 125 F. 2d 816. In this connection, see Wigmore on Evidence, Third Edition, Vol. V, § 1671(a); Virginia Law Review, Vol. XXXIX, pp. 995-1011.

In an article discussing *Heller*, S. Sharp, now a member of this Court, stated this conclusion: "The instant case is against the weight of authority but is supported by reason and a number of well considered cases." 6 N.C.L.R. 334. We agree. Moreover, *Heller* is in accord with *Reynolds v. Reynolds, supra*, and *Brown v. Brown, supra*.

As in *Heller*, our decision is limited to a factual situation where the plaintiff is seeking to profit from criminal conduct for which he has been prosecuted and convicted. We are of opinion, and so hold, that, where plaintiff has been convicted of having wilfully abandoned his wife without providing adequate support for her, his said conviction is a bar to his action for absolute divorce grounded on the "separation" involved in the criminal prosecution.

Technically, the parties in the criminal prosecution were different. Even so, the issue was identical, and the plaintiff, in the criminal action, had his day in court with reference to such issue. Compare *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655, and cases cited. While the conduct for which plaintiff was convicted constitutes an offense against society, such conduct was made criminal to afford protection to the wilfully abandoned wife. In such criminal prosecution, the wife, although not technically a party, is the person upon whose testimony the State, in large measure, must rely; and the criminal prosecution is based on and arises from the rights and obligations subsisting between the prosecutrix (wife) and the defendant (husband).

It is noted: As an exception to the rule that a judgment of absolute divorce terminates all rights arising out of the marriage, it is provided that "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." G.S. 50-11. In the event plaintiff obtains an absolute divorce, it would seem that defendant's right to support would terminate notwithstanding plaintiff's said conviction and the judgment imposing a sentence suspended on condition that he make specified payments for the support of *his wife*.

The conclusion reached is that plaintiff's said conviction bars his right to obtain an absolute divorce on the facts alleged in his complaint. Hence, the judgment of Judge Phillips is affirmed.

Affirmed.

HIGGINS, J., dissenting. The plaintiff here was the defendant in the case of *State v. Taylor* in the Municipal Court of Winston-Salem. He entered a plea of not guilty to the charge of abandoning his wife, the present defendant. The judge of the municipal court entered a verdict of guilty. From the judgment imposed, the defendant (plaintiff here) did not appeal.

This Court is now holding the judgment of the municipal court is *res judicata* as to abandonment and a bar to plaintiff's right to proceed in this divorce action. The first requisite to a valid plea of *res judicata* is identity of parties. *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125; *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688; *Leary v. Bank*, 215 N.C. 501, 2 S.E. 2d 570. In the criminal case the State of North Carolina was the plaintiff. Mrs. Taylor may have been a witness, but she was not a party. *Res judicata* binds parties — not witnesses.

I think the plea in bar should have been overruled. The defendant, of course, would be entitled to her opportunity before the jury. The plaintiff's admission was not of guilt, but that he was convicted by the court. I vote to reverse.

BONNIE GREEN COWART v. DOUGLASS M. HONEYCUTT.

(Filed 9 May 1962.)

1. Torts § 7; Pleadings § 8½—

A release defeats plaintiff's entire cause of action and therefore a plea of release is a plea in bar.

2. Pleadings § 8½; Trial § 8—

The trial court has the discretionary power to order that a plea in

bar to plaintiff's entire right to maintain the action be tried prior to the trial on the merits.

3. Appeal and Error § 3—

Adjudication that the release for personal injury signed by plaintiff was obtained by fraud does not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void, is premature and must be dismissed.

4. Appeal and Error § 2—

Even though an appeal is dismissed as fragmentary and premature, the Supreme Court, in the exercise of its discretionary power, may express an opinion on the question sought to be presented.

5. Torts § 7; Fraud § 1—

A release from liability is vitiated by fraud in the same manner as any other instrument, and fraud vitiates the entire instrument and not merely that part to which the fraudulent misrepresentation relates.

6. Torts § 7; Fraud § 11—

Inadequacy of consideration, if not gross, is alone insufficient to set aside an instrument for fraud, although it is properly considered with other evidence upon the issue, but if the inadequacy of consideration be so gross as to shock the moral sense, it may alone be sufficient to warrant the submission of the issue to the jury.

7. Torts § 7; Fraud § 5—

The failure of a party to read an instrument will not preclude him from attacking the instrument for fraud if he is prevented from reading it by some artifice or misrepresentation which would be relied upon by a reasonably prudent man under the circumstances, since the law does not require a person to deal with everyone as a rascal.

8. Same; Fraud § 11— Evidence held sufficient to raise the issue of whether release was procured by fraud for determination of jury.

Plaintiff was a passenger in a car driven by her husband and was injured when defendant drove his car into the rear thereof. The evidence tended to show that the husband gave a postdated check for the repairs to his car, that the adjustor for defendant's insurer thereafter procured plaintiff and her husband to sign a release upon payment of the amount the husband had incurred for the repairs and the care and hospitalization of plaintiff, by representing that the release was solely for the husband's expenses and did not affect plaintiff's claim for damages for personal injuries. The evidence further tended to show that plaintiff had finished the fifth grade at school but could not read well. *Held:* Defendant's contentions that although plaintiff's signature to the release was obtained by a false representation of a material fact which was relied upon by plaintiff, plaintiff, as a matter of law, was required to read the instrument before signing it and was not justified in relying upon the representation, is untenable, since whether a reasonably prudent

man, under similar circumstances, would have signed the instrument without reading it, is a question for the determination of the jury.

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

APPEAL by defendant from *Patton, J.*, October 1961 Civil Term of MECKLENBURG.

Action *ex delicto* instituted by plaintiff in January 1960 to recover damages for personal injuries sustained on 28 December 1956, while riding as a passenger in an automobile owned and driven by her husband, and allegedly caused by the negligence of defendant in driving his automobile into the back of her husband's automobile standing in a line of traffic at a street intersection in the city of Charlotte.

Defendant in his answer denied he was negligent, and by way of further answer and defense alleged plaintiff on 22 February 1957 had executed a release of all claims and damages suffered by her in the collision, and he pleaded such release in bar of plaintiff's action. Included in defendant's answer was a cross-action against plaintiff's husband, John W. Cowart, as an alleged joint tort-feasor for contribution pursuant to G.S. 1-240.

Pursuant to G.S. 1-240 the court entered an order making John W. Cowart an additional party defendant. He filed an answer denying negligence on his part in the operation of his automobile.

Plaintiff filed a reply admitting execution of the release, and pleading fraud and deceit in its procurement, and inadequacy of consideration.

Defendant filed a rejoinder denying the allegations of plaintiff's reply as to fraud and deceit and inadequacy of consideration.

On 16 August 1961 Hobgood, J., presiding over a special civil term of court in Mecklenburg County in the exercise of his discretion entered an order, on motion of defendant, directing that the issue raised as to the validity of the release be tried separately, and prior to the trial of the issues in respect to negligence and damages.

At the trial before Judge Patton this one issue was submitted to the jury, and answered as appears:

> "Was the execution of the Release dated February 22, 1957, procured by fraud, as alleged in plaintiff's Reply filed in this case?
> "Answer: Yes."

From the judgment entered in accord with the verdict declaring the release null and void and setting it aside, defendant appeals.

Kennedy, Covington, Lobdell & Hickman, by R. C. Carmichael, Jr., for defendant appellant.

Hedrick, McKnight & Parham, by Philip R. Hedrick for plaintiff appellee.

PARKER, J. Defendant's plea of a release is a plea in bar going to plaintiff's entire cause of action, and if established by proof, would defeat and destroy her action altogether. *McAuley v. Sloan,* 173 N.C. 80, 91 S.E. 701; *Bank v. Evans,* 191 N.C. 535, 132 S.E. 563; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Watkins v. Grier,* 224 N.C. 339, 30 S.E. 2d 223; *Gillikin v. Gillikin,* 248 N.C. 710, 104 S.E. 2d 861.

Judge Hobgood in the exercise of his discretion had the power under the circumstances here to enter an order that the plea in bar going to plaintiff's right to maintain her cause of action should be tried prior to trial on the merits of plaintiff's alleged cause of action. *Gillikin v. Gillikin, supra; DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; *McAuley v. Sloan, supra.*

After the jury was impanelled and sworn the parties entered into these stipulations: One. On 22 February 1957 plaintiff had a claim against defendant arising out of a collision on 28 December 1956 between an automobile operated by defendant and an automobile operated by her husband, John W. Cowart, in which she was riding as a passenger. Two. On 22 February 1957 plaintiff and her husband executed the release pleaded by defendant as a bar to plaintiff's action.

The jury found by its verdict that the release was procured by fraud, as alleged in plaintiff's reply.

Defendant has one assignment of error: The trial court erred in denying his motion for judgment of nonsuit made at the close of all the evidence. Defendant in his brief states the question to be decided is this: "Should a nonsuit have been granted on the ground that there was not sufficient evidence of actionable fraud to take the case to the jury?"

The Court said in *Yerys v. Insurance Co.,* 210 N.C. 442, 187 S.E. 583: "An appeal from a judgment sustaining a plea in bar is not regarded as premature. *Royster v. Wright,* 118 N.C. 152, 24 S.E. 746; *Bethell v. McKinney,* 164 N.C. 71, 80 S.E. 162."

If the jury had answered the issue No, the judgment entered upon the verdict would have been a final judgment disposing of plaintiff's action, and undoubtedly she would have the right to appeal. The judgment here is not a final one disposing of the action, and presents the question whether defendant may appeal at once, or must he note his exception and appeal from the final judgment, if there is one against him. This question is not raised by plaintiff.

The judgment here is not a final judgment which disposes of the case as to all the parties, leaving nothing to be judicially determined between them in the trial court. Only the issue as to the release has been tried. Whether plaintiff was injured by the alleged negligence of the defendant remains for trial. No adverse adjudication has been

made which defendant cannot bring forward by an exception and appeal from a final judgment against him, if there should be one. The elimination of defendant's plea in bar cannot prejudice him in the subsequent trial of the issues of negligence and damages, nor does it destroy, or impair, or seriously imperil some substantial right of his.

The appeal here is fragmentary and premature. In consequence, it falls under the ban of the general rule forbidding fragmentary appeals, and must be dismissed. *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311; *Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 375; *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925; *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54; *Yates v. Insurance Co.,* 176 N.C. 401, 97 S.E. 209; *Yates v. Insurance Co.,* (same case), 173 N.C. 473, 92 S.E. 356; *Chambers v. R. R.,* 172 N.C. 555, 90 S.E. 590; *Shelby v. R. R.,* 147 N.C. 537, 61 S.E. 377; *Martin v. Flippin,* 101 N.C. 452, 8 S.E. 345; *Arrington v. Arrington,* 91 N.C. 301; *Hines v. Hines,* 84 N.C. 122.

While this appeal must be dismissed as fragmentary and premature, we will nevertheless, as was done in *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, and in *Yates v. Insurance Co.,* 173 N.C. 473, 92 S.E. 356, exercise our discretionary power to express an opinion upon the question which defendant attempts to raise by his fragmentary and premature appeal.

Plaintiff's evidence is as follows: Her husband's automobile was damaged in the collision. He gave City Chevrolet Company a postdated check for $205.14 to repair the damage. As a result of the collision the door handle and arm rest of the automobile in which she was riding struck her across the back. That night she suffered pain, and next morning went to the hospital. Dr. Page X-rayed her, gave her medicine for pain, and told her to go home. She went home, went to bed, and used a heat lamp. She has been to the hospital, to doctors, and she was not better when the release was signed. She has bought and taken medicine for pain.

A few days after the collision she and her husband were contacted by Robert Gardner, an adjuster for Nationwide Mutual Insurance Company, who was representing defendant. She and her husband talked with Gardner by telephone on several occasions. She and her husband saw Gardner on 22 February 1957, the day the release was signed, at her home. She testified: "He asked us if we were ready to settle up our claim and my husband had talked with him before that and on that same day before he come out there about my trouble, that I was still having a lot of pain, and he said that didn't make no difference because this wasn't concerning me any way. He told him that this wasn't concerning my injuries, that it was concerning the expense because my husband had told him about the check [postdated] and it

was getting up close to that time and we had doctor's and hospital bills and all that and he said that was just to pay his expense up to date."

In the conversation with Gardner in their home her husband itemized for him the expenses he had had. He had paid his niece $126.00 for staying seven weeks with his wife after the collision, $20.00 for going to the mountains for his niece and carrying her back, $49.00 for his niece's board while she was with his wife, cost of repair to his automobile $205.14, hospital expenses for his wife $50.25, Dr. Page's bill $30.00, a total amount of $480.39. The release recites the payment to plaintiff and her husband of the sum of $480.39.

Plaintiff further testified: "After we had gone over those items, we talked settling expenses my husband had been out. I didn't get anything. There wasn't anything paid to me. Of course, I signed the checks and the papers, but he said that wasn't concerning mine whatsoever. Mr. Gardner produced this paper I referred to. The first time I seen the paper it was all ready for our signature and that is all I noticed, was just the check marks for us to sign. It was filled out when he laid it on the table for me to sign. . . . I did not read that piece of paper before I signed it. He did not read it to me. As to why I signed that paper then, well I was taking him at his word, because I can read, but a lot of things I don't understand when I do read, and I took him at his word. . . ."

Her husband testified: "I don't know right off what else he did in regard to assuring me that he could settle my claim without settling hers. He went and made a phone call. . . . After he made the call, he hung up and suggested that we do what he just told me, pay my expenses and leave it open on my wife. Leave my wife's claim open."

Plaintiff's husband finished the 5th grade at school, but he cannot read very well.

Defendant states in his brief: "In the light most favorable to the plaintiff, the evidence shows that there was a false representation of a material fact which was relied upon by the plaintiff. However, the defendant contends that the evidence, even when taken in the light most favorable to the plaintiff, establishes as a matter of law that the plaintiff was not justified in relying upon the representations and that her reliance thereon was not reasonable."

The general principle that fraud vitiates every act applies to releases. Annotation 117 A.L.R., 1032 *et seq.*

The Court said in *Watkins v. Grier, supra*:

> "An injured person, who can read, is under the duty to read a release from liability for damages for a personal injury before

signing it. Hence, where such a person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that at the time of signing he did not know its purport, unless his failure to read it was due to some artifice or fraud of, or chargeable to the party released."

"If a misrepresentation amounting to fraud is made as to any matter embraced in the release the instrument is vitiated as a whole, and not merely as to the matter to which the misrepresentation relates; every portion and clause of a release voidable for fraud in its inception is unenforceable and not binding." 76 C.J.S., Release, p. 651.

Mere inadequacy of consideration alone is insufficient to set aside a release. *Maynard v. R.R.*, 251 N.C. 783, 112 S.E. 2d 249. However, where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence in the case to determine the existence or not of fraud in procuring the release, but will not, standing alone, justify setting aside a release on the ground of fraud. But if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issue relating to fraud. *Causey v. R. R.*, 166 N.C. 5, 81 S.E. 917, L.R.A. 1915E 1185, Ann. Cas. 1916C 707; *King v. R. R.*, 157 N.C. 44, 72 S.E. 801, 48 L.R.A. (N.S.) 450; *Knight v. Bridge Co.*, 172 N.C. 393, 90 S.E. 412; 76 C.J.S., Release, p. 656.

No question of ratification or estoppel is presented here for the very simple reason that defendant has neither *allegata* nor *probata* to such effect.

Plaintiff's evidence would permit, but not compel, a fair-minded jury to find from the evidence: One, that plaintiff's failure to read the release before signing it was due to Robert Gardner telling her that the release or paper wasn't concerning her injuries, but was just to pay her husband's expenses up to date. Two, that this was a representation or concealment of a material fact, which was untrue in fact and that Gardner knew it to be untrue. Three, that such a statement by Gardner was reasonably calculated to deceive plaintiff. Four, that such statement was made by Gardner with intent to deceive plaintiff and to influence her to sign the release. Five, and which did in fact deceive plaintiff, and that plaintiff actually relied upon the false representation of such material fact in the manner contemplated or manifestly probable, and thereby suffered damage by signing the release for an inadequate consideration, or no consideration. *Ward v. Heath, supra.*

Defendant in his brief admits that there was evidence of a false representation of a material fact which was relied upon by plaintiff, but

contends plaintiff as a matter of law was not justified in relying upon such representation, and her reliance was not reasonable. Such a contention is without merit. Our reply to such contention is this:

> "In *Gray v. Jenkins,* 151 N.C. 80, 65 S.E. 644, this Court said: 'The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man or else trade and commerce could not prosper.' " *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811.

Defendant offered evidence tending to show there was no fraud or deceit in the procurement of the release. However, the conflicting evidence presented an issue of fact for the jury.

We are of opinion that the court was correct in submitting the case to the jury. The appeal must be dismissed as fragmentary and premature.

Appeal dismissed.

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

KENNETH EARL SMITH, A MINOR, BY HIS NEXT FRIEND, MRS. ELOISE SMITH v. GOLDSBORO IRON & METAL COMPANY AND CLAUDIE WARRICK.

(Filed 9 May 1962.)

1. Automobiles § 9—

Neither G.S. 20-134 nor G.S. 20-161 applies to a vehicle parked on a street which is not a part of a State highway but is in a residential district of a city.

2. Automobiles § 6—

While the violation of a safety statute or ordinance is negligence, it is actionable only if the proximate cause of injury.

3. Evidence §§ 20, 54—

A party introducing in evidence a portion of his adversary's pleading is bound thereby.

4. Automobiles § 41e—

Plaintiff introduced evidence that defendant's truck was parked on a

street in the residential section of a city in violation of a municipal ordinance prohibiting parking in such area. Plaintiff's evidence also disclosed that vehicles customarily were parked at the place in question, that plaintiff knew of such custom, and that plaintiff, blinded by the lights of an oncoming vehicle, drove some 200 feet and collided with the rear of the parked vehicle. *Held:* The evidence fails to disclose any causal connection between defendant's violation of the ordinance and the accident in suit.

5. Automobiles § 42d—

Plaintiff's evidence tending to show that he struck the rear of a vehicle parked on a street in the residential section of a municipality some 200 feet from the intersection at which plaintiff entered the street, and that plaintiff, blinded by the lights of an approaching vehicle which had turned into the street, did not see the parked vehicle until a moment before he crashed into its rear, *is held* to disclose contributory negligence as a matter of law, since plaintiff either drove "blind" for 200 feet, or, if the aproaching car turned into the street after plaintiff did, plaintiff should have seen the parked vehicle before being blinded by the lights of the approaching car.

APPEAL by plaintiff from *Stevens, J.*, October Term 1961 of WAYNE.

This is a civil action for personal injuries growing out of a collision between a motor scooter driven by plaintiff, Kenneth Earl Smith, and a truck parked on the east side of Kornegay Street in the City of Goldsboro, North Carolina, on 2 August 1957, at approximately 12:30 a.m. The truck involved in the collision was owned by the corporate defendant and at the time of the accident was parked in front of the home of its employee, Claudie Warrick, also a defendant in this action.

The testimony of Kenneth Earl Smith may be summarized as follows: That he was, on 2 August 1957, 18 years of age; that when he was two years old he lost the sight of his left eye, and at 16 years of age he lost three fingers from his left hand; that he had been driving a motor scooter since the age of twelve but had never applied for an operator's license and did not have a license to operate the motor scooter at the time of the accident; that the motor scooter he was driving at the time of the accident was equipped with a headlight; that he could see an object the size of a man at 200 feet or more; that on the night in question he had visited with friends in Seymour Johnson Homes and left shortly after midnight; that enroute to his home he took a right turn from Mulberry Street onto Kornegay Street and proceeded north on that street with the intention of turning left at the corner of Kornegay and Ashe Streets; that "As I approached the intersection of Kornegay and Mulberry Street, I estimate my speed was 20 miles per hour. I slowed as I came to the intersection of Mulberry and Kornegay Street and made a right turn on Kornegay. As I turned

off of Mulberry to Kornegay I went a short distance and a car headed into Ashe Street headed south blinded me as I proceeded to meet the car and the car came toward me. Immediately after the car lights passed me I was blinded and struck the truck. As I was proceeding along Kornegay Street and meeting the car going southwardly I could see approximately 20 feet. I was traveling in my right-hand side of the traffic lane. It would be very difficult for me to say how close I was to the truck I struck when the lights of the car I was meeting passed me. * * * I did not have time to apply my brakes. I struck the left rear corner of the truck. As I saw the truck I immediately decided to turn to my left to miss it. The truck did not have any lights of any sort on it to my knowledge. I struck the left corner of the truck with my head. The blow immediately knocked me unconscious."

On cross-examination the plaintiff testified: "I had gotten into Kornegay Street and traveled some little distance before I saw the other car turn (from Ashe Street into Kornegay Street). * * * When it made its turn I saw the lights from that vehicle and at that time I had proceeded some distance into Kornegay Street.

"At no time before I hit the truck did I see it but for a split second. * * * I could see a man the entire length of Kornegay Street if he was walking across the street, and if any other object was moving I could see with my light the entire length of the block of Kornegay Street. * * *

"I slowed the scooter down; how much I could not say because I did not have a speedometer. I don't know how fast I was going. The truck I ran into was facing Ashe Street and I ran into the rear of it. I don't know how far over on the right-hand side of Kornegay Street it was parked." There were street lights at or near the intersections of Mulberry and Kornegay and Kornegay and Ashe Streets.

The plaintiff's evidence further tends to show that he was familiar with Kornegay Street. He testified: "I knew it was customary for automobiles to be parked on the right side. I had driven down that street coming from Mulberry, or coming from Ashe, many times. I have seen vehicles parked on the right-hand side in the daytime and in the nighttime when I have been through there."

Lloyd Howard, a resident of 209 North Kornegay Street, testified: " * * * The truck that had been struck was parked on the right of Kornegay Street (headed toward Ashe Street). I don't know the make or model. It was just a closed-in body." This witness, on cross-examination, testified: "I was the first one that went to the scene of the accident. * * * I couldn't say whether the rear wheels were up on the curb of the street that night; but that was the usual procedure. I had seen the truck parked there before and had seen it parked in the

past in this manner. I don't particularly recall that particular night. * * * There were no cars parked on the east side of Kornegay Street south of the truck to Mulberry Street. * * * To my knowledge there has never been a sign on the east side prohibiting parking. * * *." In response to a question whether the truck had reflectors on the rear of it, the witness said: "I don't remember about that."

The plaintiff introduced in evidence an ordinance of the City of Goldsboro prohibiting the parking of trucks on the public streets in residential sections of the City of Goldsboro, except for the purpose of travel and transportation, loading and unloading passengers and freight, and except for temporary parking in case of emergency involving a mechanical breakdown necessitating repairs to any such vehicle.

The evidence further establishes the fact that Kornegay Street is a hard surface street approximately 21 feet in width and 432 feet in length from the northern line of Mulberry Street to the southern line of Ashe Street; that signs are posted prohibiting the parking of vehicles on the west side of Kornegay Street and that the Street is in a residential area of the City of Goldsboro and is not a part of the State Highway system; that defendant Warrick's property on Kornegay Stret is 243.5 feet north of the northern line of Mulberry Street.

At the close of plaintiff's evidence the defendants' motion for judgment as of nonsuit was allowed and judgment was entered dismissing the action. Plaintiff appeals, assigning error.

J. Faison Thomson, Jr.; Jones, Reed & Griffin for plaintiff appellant.

Taylor, Allen & Warren; John H. Kerr, III, for defendants appellee.

DENNY, C.J. The plaintiff's action is based solely and exclusively on the alleged negligence of defendant Warrick in parking the truck of the corporate defendant on a residential street in the City of Goldsboro in violation of an ordinance of said City and the provisions of G.S. 20-129.1, G.S. 20-134 and G.S. 20-161.

There is no affirmative evidence tending to show that the truck of the corporate defendant did not have reflectors on the rear thereof, as required by G.S. 20-129.1 (a), or that the truck was not otherwise equipped as required by said statute.

G.S. 20-134 provides: "Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in section 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of five hundred

feet to the front of such vehicle, and projecting a red light under like conditions from a distance of five hundred feet to the rear * * *." This section is inapplicable to a motor vehicle parked in a residential district in a city or town on a street which constitutes no part of the highway system. Neither do the provisions of G.S. 20-161 apply to parking in such districts. According to the stipulations entered into in the trial below, Kornegay Street does not constitute any part of the highway system.

Therefore, as we construe the pleadings in this case, the question for determination is simply this: Was the parking of the corporate defendant's truck on a residential street in violation of an ordinance of the City of Goldsboro, a proximate cause or one of the proximate causes of plaintiff's injuries?

It is said in Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 4, Part 2, Permanent Edition, Section 2591, page 79, *et seq.*: "Under the rules stated in the foregoing sections, violations of traffic regulations create liability for injuries proximately caused thereby, but the fact that, while the driver of a motor vehicle is violating a statute or ordinance relating to the rules of the road or use of the street by motor vehicles, injuries are inflicted or sustained, does not create cause of action for the injuries inflicted, * * * unless such violation was the proximate cause of the injury," citing *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311; *Morgan v. Carolina Coach Co.,* 225 N.C. 668, 36 S.E. 2d 263; *Ervin v. Cannon Mills,* 233 N.C. 415, 64 S.E. 2d 431.

It is further said in this section: "Whether a violation of an ordinance or statute is regarded as negligence per se is immaterial in the application of the above rule, as there is the same necessity for the application of the doctrine of proximate cause in an action based on the violation of a statute or ordinance as in the ordinary negligence case, and the rules for determining proximate cause are the same on the issues of negligence at common law and of negligence as the result of failure to observe a statutory duty," citing *Taylor v. Stewart,* 172 N.C. 203, 90 S.E. 134; *Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849.

In *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825, this Court pointed out that even though the violation of an ordinance be negligence *per se,* it must be the proximate cause or one of the proximate causes of the injury in order to be actionable.

The rule is stated concisely in 5A Am. Jur., Automobiles and Highway Traffic, Section 403, at page 480: "In order to predicate liability on the ground of negligence in parking in violation of a statute or traffic regulation, that negligence must have been a proximate cause."

In the case of *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E. 180, wherein the defendant violated ordinances of the City of Greensboro by: (1) driving an ice truck without a license; (2) parking the truck at an angle rather than exactly parallel; and (3) backing away from the curb rather than moving forward, this Court said: "All of the decisions of this State since *Ledbetter v. English*, 166 N.C. 125, 81 S.E. 1066, concur in the view that the violation of an ordinance or of a statute designed for the protection of life and limb, is negligence *per se*. Notwithstanding, the same decisions do not permit recovery for the mere violation of the statute, unless there was a causal relation between the violation and the injury."

It is alleged in plaintiff's complaint that the defendant Warrick, agent, servant and employee of the corporate defendant, carelessly, negligently, and unlawfullly parked the corporate defendant's truck upon a paved street a distance from the edge of the pavement in violation of the General Statutes of North Carolina and in violation of the ordinances of the City of Goldsboro. However, the plaintiff introduced in evidence a portion of paragraph 5 of the defendants' answer, as follows: "It is admitted that when the motor scooter on which the plaintiff was riding reached a point on said Kornegay Street in front of the home of Claudie Warrick it collided with a motor truck owned by the defendant Goldsboro Iron & Metal Company, which at the time was parked on the extreme right-hand side of the street with its right rear wheel resting on the curb of the sidewalk."

The plaintiff having introduced the above portion of defendants' answer in evidence, he is bound thereby with respect to the manner in which the truck involved was parked. *Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578.

The evidence in this case is to the effect that it was customary to park cars on the east side of Kornegay Street both in the daytime and at night. Furthermore, plaintiff testified that he was familiar with this practice.

There is a vast difference in leaving an unlighted vehicle parked on the traveled portion of a highway and in parking on a street in a residential area where vehicles are customarily parked. In our opinion, the plaintiff's evidence fails to show that the parking of the corporate defendant's truck on Kornegay Street was the proximate cause or a proximate cause of the plaintiff's injury, and we so hold.

On the other hand, if it be conceded that defendant Warrick was guilty of negligence in parking the corporate defendant's truck on Kornegay Street in violation of the pleaded ordinance of the City of Goldsboro prohibiting such parking in the residential areas of Goldsboro, nevertheless the contributory negligence of the plaintiff is mani-

fest from his own testimony. *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735.

In the last cited case Robert H. McKinnon testified that he ran in a "blinded area" for two or three seconds, at a speed of 35 miles an hour and for a distance of 100 feet — other witnesses put it at 100 yards or 400 feet — when he was completely blinded by the lights of approaching cars and could see nothing in front of him except the right-hand edge of the road. While he was so blinded he ran into the rear of a slowly moving or stalled truck which was being operated without rear lamps as required by G.S. 20-129. On this evidence *Stacy, C.J.*, speaking for the Court, said: "Both his vision and his prevision seem to have failed him at one and the same time. Such is the stuff of which wrecks are made. The conclusion seems inescapable that the driver of the McKinnon car omitted to exercise reasonable care for his own and his companion's safety, which perforce contributed to the catastrophe. This defeats recovery * * *."

If the plaintiff herein was within 200 feet of the parked truck before the car turned into Kornegay Street, according to plaintiff's own testimony, he could have seen the parked truck. If, however, he was more than 200 feet from the parked truck when he was blinded by the lights of the approaching car, then he traveled more than 200 feet while blinded when he could not and did not see the parked truck, according to his testimony, but "a split second" before he hit it, just as the approaching car passed him. *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884; *McKinnon v. Motor Lines, supra; Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Morris v. Transportation Co.,* 235 N.C. 568, 70 S.E. 2d 845; *Morgan v. Cook,* 236 N.C. 477, 73 S.E. 2d 296.

The judgment of the court below in granting defendants' motion for judgment as of nonsuit will be upheld.

Affirmed.

ROY GARNER v. CLEGG KEARNS.

(Filed 9 May 1962.)

1. Sales § 5—

In order for the seller's representations to constitute a warranty, the purchaser must have relied upon them, and where the purchaser testifies that he examined the parts and equipment purchased before he bought them, he may not rely upon the seller's representations as to value as constituting a warranty.

2. Sales § 13—

The buyer may not assert his right to recover for shortage of parts and equipment purchased when he uses some of the parts and equipment for almost a year before making inventory, and waits for almost two years after the purchase before complaining of any shortage.

APPEAL by defendant from *Gambill, J.*, at September 1961 Term of MONTGOMERY.

This is a civil action for the recovery of the balance alleged to be due on an executed contract for the sale of an automobile agency.

Plaintiff's evidence tended to show that after several months of negotiations, and after defendant had inspected the property involved, on 15 March 1957, he sold to defendant his Pontiac agency in the town of Biscoe "as a going business, lock, stock and barrel" for $20,000, $10,000 down and the balance within two years with interest at five per cent; that contemporaneously therewith General Motors transferred to defendant the Pontiac franchise, an "exclusive agency for all Montgomery County, the biggest portion of Moore, and the vicinity of Seagrove," which had been plaintiff's; that plaintiff delivered to the defendant the key to the premises which defendant thereafter occupied without rent until he moved the parts to his place of business in Star in the Fall; that although defendant was requested to move the equipment from plaintiff's building, he left it there after plaintiff rented it and expressly authorized the tenant to use it; that when it was due, defendant paid plaintiff the first year's interest of $500, and six months later he allowed plaintiff to credit him with $500 in an automobile trade; that it was not until about two years after the sale that defendant first complained of any shortage in the parts or equipment and refused to pay the balance due. Plaintiff instituted this action to recover $9,500 with interest from 15 March 1958.

In his answer to the complaint the defendant admitted that he took over the plaintiff's Pontiac agency and that he had paid him $11,000. He denied that a complete agreement had been reached as to the balance of the purchase price and alleged that it was to be determined upon an inventory. He further alleged that plaintiff had told him that in the property to be purchased for $20,000 were parts worth between $6,000 and $7,000 and equipment and fixtures worth $12,000; that the tangible property he received was worth only $2,700, and that he was entitled to recover the difference between $2,700 and the $11,000 paid plaintiff, or $8,300.

On the trial the defendant testified that he had bought the agency for $20,000. He said "That was the price; I'm not denying it." He further testified that he had been in the automobile business for about 30 years; that before he bought the business he had looked at the

articles in question and would say they had a value of $4,000 but, he said, "No inventory was made and I did not check closely enough." His evidence was that he made the first inventory some time about the first of 1958, almost a year after he bought the business; that although he found out that the parts were short, he did not go to plaintiff about the matter then. He testified: "Actually there was not as much there as I thought there was, to tell the truth." His parts man from time to time used some of the parts which defendant had purchased from the plaintiff, and in August 1957 moved them from Biscoe to Star but they were not then inventoried.

At the close of defendant's evidence plaintiff's motion for judgment of nonsuit as to the defendant's counterclaim was allowed. The defendant excepted. Issues were submitted to the jury and answered as follows:

1. Did the plaintiff and the defendant on the 15th day of March, 1957, enter into a verbal contract for the purchase and sale of the Pontiac Automobile Agency, as alleged in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,500, less interest.

From judgment on the verdict defendant appealed, assigning as error the nonsuit of his counterclaim.

David H. Armstrong for plaintiff appellee.
Garland S. Garris for defendant appellant.

PER CURIAM. In his answer the defendant denied that he agreed to pay plaintiff $20,000 for his Pontiac agency; in his evidence he admitted it. In his pleadings the theory of defendant's counterclaim appeared to be a partial failure of consideration; on the trial his theory apparently changed to the breach of an express warranty of value. He can sustain the counterclaim on neither theory.

"Breach of warranty in a sales contract is an affirmative plea, whether as a defense or grounds for the recovery of damages, and the burden is on one who asserts it to establish it by the greater weight of the evidence." *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592. For the plaintiff's statements to have constituted a warranty the defendant must have relied upon them. *Smith v. Alphin,* 150 N.C. 425, 64 S.E. 210. His evidence shows that he did not.

Defendant testified that he had examined the parts and equipment in question before he bought the agency and that his opinion as to their value was infinitely lower than the one he said plaintiff had expressed.

After taking over the plaintiff's business as a going concern, the

defendant used at least some of the parts and equipment which came with it for almost a year before he made an inventory and for almost two years before he complained of any shortage. Upon this evidence he may not now assert a counterclaim for a shortage against the plaintiff who is seeking to recover the purchase price. *Parker v. Fenwick,* 138 N.C. 209, 50 S.E. 627.

The judgment of the court below is

Affirmed.

LARRY McBRIDE, BY HIS NEXT FRIEND, J. R. McBRIDE v. NORTH CAROLINA STATE BOARD OF EDUCATION AND THE GUILFORD COUNTY BOARD OF EDUCATION.

(Filed 9 May 1962.)

1. Administrative Law § 4; State § 5f—

Where the record fails to show any appeal from the order of the Industrial Commission in a proceeding under the State Tort Claims Act as permitted by G.S. 143-293, the Superior Court obtains no jurisdiction, and such defect cannot be supplied by a recital in the judgment of the Superior Court that the judgment was rendered upon an appeal in accordance with the statute.

2. Appeal and Error § 1—

Where the Superior Court has no jurisdiction, the Supreme Court can acquire none by appeal.

APPEAL by plaintiff from *McConnell, S.J.,* January 15, 1962 Civil Term of GUILFORD, Greensboro Division.

Larry McBride, son of J. R. McBride and a student at Bessemer High School in Greensboro, seeks compensation as permitted by art. 31, c. 143 of the General Statutes for injuries alleged to have resulted from the negligence of Harold Manning Evans.

The claim is filed "against N. C. Board of Education; Guilford County Board of Education, Administrative Unit, for damages resulting from the negligence of Harold Manning Evans, a teacher in Bessemer High School." The claim is based on the asserted negligence "of State employee in Bessemer High School, Greensboro, N. C., on February 4, 1960."

The claim was heard by Deputy Commissioner Shuford. At the hearing Guilford County Board of Education demurred for want of jurisdiction in the Industrial Commission to hear and determine its liability. The deputy commissioner sustained the demurrer, pointing

out that the only instance in which the Industrial Commission could hear tort claims against county or city boards of education was for injuries resulting from the negligent operation of school buses as permitted by G.S. 143-300.1.

The hearing commissioner found: "On February 4, 1960, plaintiff was a fifteen-year old, ninth grade student, who attended a high school in Guilford County. On such day plaintiff took approximately one tablespoonful of sodium peroxide from an unlocked cabinet in the classroom of Harold M. Evans, a teacher at the school. . . . Harold M. Evans was not in the room at the time plaintiff took the chemical from the cabinet." The remaining findings establish these facts: Plaintiff intended to experiment with the chemical at his home. He knew it would burn when exposed to water. Plaintiff, at home, engaged in play, became sweaty, placed his hand in his pocket containing the chemical. It exploded. He sustained severe burns described in detail in the findings. Plaintiff incurred medical expenses of $1637 and sustained permanent and serious disfigurement.

The hearing commissioner, after finding facts, said: "While plaintiff apparently contends that Harold Manning Evans was an employee or agent of the defendant State Board of Education, there was no evidence presented at the hearing concerning whether or not the school teacher was an employee or agent of the State Board of Education, or of anyone else. No finding of fact is, therefore, made concerning the employment status of Harold Manning Evans, in that no evidence was adduced concerning such subject." To this statement plaintiff excepted.

Based on his findings the deputy commissioner concluded: "There has been no showing of any negligence upon the part of an employee or agent of the defendant North Carolina State Board of Education." Plaintiff excepted to this conclusion. Based on the conclusion the commissioner dismissed the claim.

On appeal from the hearing commissioner to the full Commission, it adopted as its own the findings of fact and conclusions of law of the hearing commissioner and affirmed his order of dismissal. The record does not show any exception taken by plaintiff to the findings or conclusions of the full Commission nor to the order of dismissal, nor does it show that an appeal was taken from the order of the Commission.

The only thing in the record even suggestive of an appeal from the Industrial Commission to the Superior Court is the recital in the judgment signed by Judge McConnell on 17 January 1962 that it was heard "upon an appeal from the Full North Carolina Industrial Commission, in accordance with the provisions of Section 143-291 et seq. of the General Statutes of North Carolina . . ." Judge McConnell af-

firmed the order of the full Commission. Plaintiff excepted to the judgment entered by Judge McConnell and appealed to this Court.

Comer and Comer by Wm. E. Comer for plaintiff appellant.

Attorney General Bruton and Assistant Attorney General Moody and Harold D. Coley, Jr., of Staff for State Board of Education.

Douglas, Ravenel, Josey & Hardy by John W. Hardy for Guilford County Board of Education.

PER CURIAM. Plaintiff conceded on oral argument here he could not maintain his claim against Guilford County Board of Education. This concession was properly made. Art. 31, c. 143, of the General Statutes has no application with respect to acts of employees of city or county administrative units. They may, by taking liability insurance, waive their governmental immunity and hence be held liable for the torts of their employees to the extent authorized by G.S. 115-53. Plaintiff makes no contention that he is entitled to recover under the provisions of that statute.

The record fails to show any exception to the findings, conclusions, and order of the Industrial Commission dismissing plaintiff's claim or an appeal taken as permitted by G.S. 143-293. Because of such failure the Superior Court was without jurisdiction to hear plaintiff's claim. *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379; *Mason v. Commissioners of Moore,* 229 N.C. 626, 51 S.E. 2d 6; *Higdon v. Light Co.,* 207 N.C. 39, 175 S.E. 710; *S. v. Johnson,* 109 N.C. 852. The recitals in Judge McConnell's judgment do not suffice to supply the record deficiencies.

Since the Superior Court was without jurisdiction, this Court did not acquire jurisdiction to hear plaintiff's claim by exception to and appeal from the judgment of that court. *Adams v. College,* 248 N.C. 674, 105 S.E. 2d 68; *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314.

Appeal dismissed.

HERBERT H. TOWE v. TOMLINSON OF HIGH POINT, INCORPORATED.

(Filed 9 May 1962.)

Negligence § 34—

Evidence tending to show that plaintiff fell on ice some 12 to 18 inches wide across the sidewalk, which ice had formed from water draining from the driveway on defendant's property, is held insufficient to establish

negligence on the part of defendant in failing to provide drainage, knowingly maintaining its driveway so as to cause water to concentrate in excessive quantity on the sidewalk, or in failing to take any precaution to prevent the formation of ice on the sidewalk.

APPEAL by plaintiff from *Olive, J.*, 6 November Civil Term 1961 of GUILFORD (High Point Division).

This is a civil action instituted by plaintiff to recover for personal injuries allegedly resulting from the negligence of defendant.

The plaintiff's evidence tends to show that defendant's furniture plant is located on West High Street in High Point, North Carolina. Plaintiff, a citizen and resident of Mount Airy, Surry County, North Carolina, was an employee of defendant and lived at Puckett's Boarding House, 414 West High Street, about one and one-half blocks west of defendant's plant, the boarding house being on the same side of the street on which the furniture plant is located.

On Monday, 4 January 1960, the plaintiff, in company with three other employees of the defendant, left the boarding house about 6:45 a.m. for the defendant's plant to report for work. They walked along the public sidewalk which ran all the way from the boarding house to the furniture plant along the south side of West High Street, except for a space where Dalton Street crosses West High Street.

After crossing Dalton Street going east, the first building on the south side of West High Street is a big stone house on the corner which is owned by the defendant. The next building going east is defendant's furniture plant. Between the house and the furniture plant is a driveway. The distance from the east curb of Dalton Street to the west edge of the driveway is 137 feet. Along the south edge of the sidewalk east of Dalton Street there is a stone retaining wall. The wall is three feet six inches high. The driveway is unpaved. Where the driveway crosses it the sidewalk is partly flat and partly slanted; the flat part is nearest the driveway and the slanted part nearest the street. The slanted part of the sidewalk is two feet nine inches wide and the width of the flat part is two feet five inches where the driveway crosses the sidewalk. The driveway is upgrade as it goes south. The curb on West High Street is six inches high. Six inches from the west edge of the driveway there is a utility pole set in the sidewalk. The sidewalk west of the driveway between the curb and the wall, including the curb five inches wide, is five feet five inches wide. Between the utility pole and the wall the sidewalk is four feet wide. The nearest street lights to the driveway are those at the Dalton-High Street intersection, 159 feet west of the driveway and east of the driveway over West High Street 143 feet away. No illumination was provided at the driveway by the two street lights on the morning of 4 January 1960.

The evidence further tends to show that the house on the lot on the corner of West High Street and Dalton Street had two downspouts which emptied in the yard. The property on which the driveway is located was purchased by the defendant in 1953. There have been no changes made on the lot or the driveway since the property was purchased by the defendant.

There is evidence tending to show that water ran down the driveway and across the sidewalk at times for a day or two after a rain. On the morning of plaintiff's injury and just prior thereto, part of the sidewalk had ice on it. The sidewalk was free of ice and water except for about twelve to eighteen inches which was wet on the west side of the driveway. There is no evidence tending to show the source from which this water came. The weather was below freezing, and as the plaintiff approached the driveway, he was walking with his hands in his pockets. Plaintiff and one Don Puckett were walking together. Puckett moved on ahead of plaintiff when they reached the point between the utility pole and the retaining wall; plaintiff dropped behind Puckett, and then as he undertook to catch up with him he stepped on the ice and fell and suffered a broken leg.

This action is predicated upon (1) the failure of defendant to provide proper drainage for its driveway so as to prevent an unusual and unnatural concentration of water on the public sidewalk; (2) knowingly maintaining said driveway so as to cause water to concentrate in excessive quantities upon the sidewalk, thereby increasing the danger of ice being formed on the public sidewalk in freezing weather; and (3) failure to take any precautions to prevent the formation of ice on the sidewalk.

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

Haworth, Riggs, Kuhn & Haworth for appellant.
James B. Lovelace for appellee.

PER CURIAM. In our opinion, the evidence disclosed by the record herein is insufficient to show an accumulation and diversion of water to an extent necessary to impose liability therefor or to establish actionable negligence on the part of the defendant.

The ruling on the defendant's motion for judgment as of nonsuit will be upheld.

Affirmed.

DORIS P. SOSSAMAN v. LYLES CHEVROLET COMPANY.

(Filed 9 May 1962.)

Negligence § 37f—

Evidence tending to show that a customer was injured in entering the premises through a small door, cut in a large overhead garage door, when the spring of the small door caused it to close with force and catch her foot after her body had cleared the entrance, is held insufficient to show any actionable negligence on the part of the owner of the premises.

APPEAL by plaintiff from *Walker, S.J.*, 11 September Civil Term 1961 of GUILFORD (High Point Division).

Plaintiff instituted this action to recover damages for personal injuries which she sustained on 24 November 1959, about 8:15 A. M. when she fell on the defendant's premises while there for the purpose of making a monthly payment on the station wagon which she and her husband had previously purchased from the defendant. Their installment contract had been assigned without recourse to the General Motors Acceptance Corporation but, as an accommodation to its customers, defendant permitted them to make their payments to G. M. A. C. at the garage where the vehicle was purchased. On the morning in question it was sprinkling rain and plaintiff had neither umbrella nor raincoat. She parked her station wagon directly in front of the large door of the Service Department so that she could run in without getting wet. The large door was of the overhead folding type about eighteen feet wide and twelve feet high. It was composed of six rows of panels. The bottom three rows were wooden panels; the next two rows were glass windows, and the top row was also of wood. On the left side of the large door, just below the first row of windows and in the lower three panels, was a small door about twenty-five inches wide and sixty inches high. The bottom of this smaller door was about five inches from the bottom of the larger door and these five inches constituted the "riser" of the smaller door.

The plaintiff got out of the station wagon with her payment check in her hand. The large door was down and the smaller door within it was closed. As she faced it, the handle to the small door was on her left. Above this handle, near the top of the small door, was the word PULL. This door was kept closed by an outside coil spring about the middle of the door on the right side opposite the handle. One side of the spring was attached to the small door and the other to the stationary panels in the larger door.

Plaintiff easily opened the small door with her right hand. With her right foot she stepped over the riser, cleared it, and then let go of the door with her hand "to check it, the speed of the door," with her

left foot. The door came to with force, catching her left foot between the riser and the door. She testified that it twisted her around causing her to fall on her left hip. In the fall she sustained injuries which left the left leg shorter than the right. The President of the defendant corporation, called as an adverse witness by the plaintiff, testified that there were four other such door assemblies on the garage premises that they had been installed by the general contractor in accordance with the architect's specifications at the time the building was constructed in May 1957; and that, to his knowledge, no one had ever before fallen while using the smaller door within the larger folding door.

At the close of the plaintiff's evidence defendant's motion for judgment as of nonsuit was allowed. The plaintiff excepted and appealed.

Silas B. Casey; Haworth, Riggs, Kuhn & Haworth for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter for defendant appellee.

PER CURIAM. It is not necessary to decide whether plaintiff's status at the time of her injury was that of an invitee or a licensee, a question debated at length in the briefs, because there is a total lack of any evidence of negligence in the construction and maintenance of the door in which plaintiff fell. The owner of a garage, store, or other place of business is not an insurer of the safety of those who go upon his premises for the purpose of doing business with him, and the doctrine of *res ipsa loquitur* is not applicable. *Watkins v. Taylor Furnishing Company*, 224 N.C. 674, 31 S.E. 2d 917. Before plaintiff could recover she would have had to establish actionable negligence on the part of the defendant. This she did not do.

The judgment as of nonsuit is

Affirmed.

STATE v. CHARLES JAMES HAUSER.

(Filed 9 May 1962.)

1. Criminal Law § 101; Larceny § 7—

Defendant's confession that he had stolen the goods in question, corroborated by the finding of the goods, identified as having been stolen, in the trunk of his car, *is held* sufficient to withstand motion to nonsuit.

2. Criminal Law § 79; Searches and Seizures § 1—

Where a defendant consents to the search of the trunk of his car and

there is no evidence of coercion or duress, the articles found as the result of the search are competent in evidence notwithstanding that at the time defendant gave his consent to the search he was under arrest.

3. Criminal Law § 156—

An exception to the charge must specifically point out the portion of the charge challenged.

APPEAL by defendant from *Johnston, J.*, January 8, 1962 Term of GUILFORD.

This is a criminal action in which defendant was tried on an indictment charging the theft of goods, of the value of $378.97, from defendant's employer, Justice Drug Company, in violation of G.S. 14-74. The jury returned a verdict of guilty. From judgment imposing an active prison sentence, defendant appeals.

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

J. Kenneth Lee for defendant.

PER CURIAM. Defendant did not testify, and offered no evidence.

The evidence for the State tends to show: Defendant, at the time of his arrest, was an employee of Justice Drug Company, wholesale druggists. He was a section chief, and was in charge of one of the ten sections in the store. It was his duty to stock the shelves from the warehouse, and fill orders for goods from his section. He had been employed by Justice Drug fourteen years. On 8 October 1961 he was stopped by a police officer for speeding and failing to observe a stop sign. When he refused to give information necessary for filling out a citation, the officer placed him under arrest and impounded his car. The officer's suspicions were aroused by defendant's explanations as to certain articles found in the car. The officer asked for the key to the trunk of the car so he could search it; defendant said his wife had the key. When defendant removed the articles from his pockets at the police station, preparatory to being committed, he took a set of keys from his pocket and admitted it contained the trunk key. The officer asked if he might search the trunk and defendant agreed. Defendant was permitted to call his wife, who did not answer; he then called and talked to a friend. He was again asked if the officer might search the trunk of the car, and he again consented. In the trunk the officer found two large boxes containing patent medicine and other merchandise. City detectives showed defendant the contents of the boxes, and he admitted having taken a portion of them from Justice Drug. At the request of the detectives he picked out and separated from the

others the articles he had taken from Justice Drug. According to his estimate they had a value of $324.84. He later admitted the theft of the articles to an official of Justice Drug, and explained how and why he had stolen them. The goods pointed out by defendant were of the type and make sold by Justice Drug Company.

The evidence is sufficient to withstand defendant's motion for nonsuit. *State v. Wilson,* 101 N.C. 730, 7 S.E. 872. Defendant's extrajudicial confession is corroborated by independent evidence as to all elements of the crime.

After hearing evidence on the *voir dire,* in the absence of the jury, the court ruled that the search of the car trunk was made with the consent of defendant, the seizure of the goods found there was lawful, and testimony with respect thereto and such of the goods seized as were identified as the property of Justice Drug Company were competent and admissible as evidence. The ruling is sustained. The fact that defendant was under arrest at the time consent was given does not render the consent involuntary. There is no evidence of coercion or duress. *United States v. Kidd,* 153 F. Supp. 605 (W. D. La. 1957); *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501, cert. den. 351 U.S. 919.

The exception to the charge fails to point out specifically the part of the charge challenged, is a broadside exception and is ineffectual. *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513.

No error.

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

(Filed 9 May 1962.)

APPEAL by propounders from *Hobgood, J.,* September-October 1961 Term, COLUMBUS Superior Court.

The background of this case is set forth in a former appeal reported in 254 N.C. 90, 118 S.E. 2d 17. Judge Hobgood conducted the inquiry to ascertain whether Winifred B. Fuller and Bernard J. Baggett had notice of, or participated in, the caveat proceeding. After hearing much evidence, including unequivocal denial of notice by appellees, Judge Hobgood found as a fact: "That Winifred B. Fuller and Bernard J. Baggett were not cited or given any notice whatsoever with respect to the caveat proceeding filed on November 14, 1955, and had no knowledge thereof." The court adjudged: "That as to Winifred B. Fuller

and Bernard J. Baggett, and each of them, the judgment entered . . . November 9, 1955, probating in common and solemn form the paper writing purporting to be the last will and testament of Sara B. Cox, shall be, and the same is hereby vacated and set aside. This the 4th day of October, 1961."

The propounders excepted and appealed.

D. Jack Hooks, D. F. McGoughan, Jr., Powell & Powell, W. B. Rogers, for propounders, appellants.

J. B. Eure, Jordan, Wright, Henson & Nichols, Rodman & Rodman, John A. Wilkinson for caveators, appellees.

PER CURIAM. Judge Hobgood conducted a hearing and made findings of fact as directed by this Court in the former opinion. That opinion, as supplemented by Judge Hobgood's findings and judgment, becomes the law of the case. The order upon which the present appeal is taken is

Affirmed.

HETTIE H. TART v. ATLAS M. REGISTER, THELMA BRYANT JERNIGAN, AND CAROLYN FAYE JERNIGAN, MINOR, AND L. M. CHAFFIN, GUARDIAN AD LITEM.

AND

VIVIE J. FLOWERS v. ATLAS M. REGISTER, THELMA BRYANT JERNIGAN, AND CAROLYN FAYE JERNIGAN, MINOR, AND L. M. CHAFFIN, GUARDIAN AD LITEM.

(Filed 23 May 1962.)

1. Appeal and Error § 38—

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

2. Pleadings § 2—

The complaint should contain a concise statement of the ultimate facts to which the pertinent legal or equitable principles are to be applied, and should not allege mere evidentiary facts required to prove the existence of the ultimate facts.

3. Automobiles § 8—

Before making a left turn it is required that a motorist give the statutory signal and that he first ascertain that the movement can be made in safety, G.S. 20-154(a), and the failure to observe either of the statutory

requirements constitutes negligence as a matter of law, which is actionable if the proximate cause of injury.

4. Same; Automobiles §§ 35, 41h— Allegations and evidence held sufficient on question of negligence in making turn without first ascertaining that movement could be made in safety.

Plaintiffs' allegations and the evidence favorable to them were to the effect that one defendant before attempting to make a left turn gave the statutory signal the proper distance before attempting the turn, and that as she began the turn she was struck by the car driven by the other defendant, who was attempting to pass her at the intersection, and that the first defendant proceeded to make the left turn when she saw or, in the exercise of reasonable care, should have seen that the other defendant was driving at a dangerous rate of speed and was going to overtake and pass her, and the evidence further tended to show that the first defendant was advertent to the car approaching from her rear and that she ceased looking in her rear view mirror when about a hundred feet from the intersection and proceeded to make the turn in disregard of the oncoming vehicle and in reliance on having given the turn signal. *Held:* Defendant's demurrers and motions to nonsuit on the ground that the allegations and evidence disclosed that the collision was due solely to the negligence of the driver of the car attempting to pass at the intersection, were properly overruled.

5. Negligence § 8—

If the acts of two parties operating independently of each other join and concur in producing the injury complained of, each is liable therefor jointly and severally as joint *tort-feasors.*

6. Same—

One defendant may not rely upon the acts of another to insulate his negligence when such acts transpire prior to or simultaneously with his own acts, since the principle of insulating negligence refers to conduct subsequently occurring.

7. Appeal and Error § 51—

Only the motion to nonsuit made at the close of all of the evidence is presented for review, and in passing upon the question all of the evidence favorable to plaintiffs, whether offered by plaintiffs or defendants, is to be considered.

8. Automobiles § 40; Evidence § 39—

Declarations of passengers in a car, immediately before the driver thereof attempted to make a left turn, that a car was approaching from the rear at a fast pace and that the driver "better not turn" or the other car would "hit us" are competent as spontaneous declarations admissible as *pars res gestae,* and testimony of such declarations is also competent to rebut the driver's allegations that the passengers were guilty of contributory negligence in failing to warn the driver of the approaching danger.

9. Trial § 17—

One defendant may not object that the other defendant was permitted

to introduce evidence relevant and competent in support of his allegations when the court properly restricts such evidence to the question of that defendant's liability.

10. Infants § 6—

While the courts are alert to protect the rights of minors, whether represented by guardians or not, and will scan with extra care all records affecting the interests of minors, the appointment of a guardian *ad litem* for a minor is not jurisdictional, and whether a judgment against an infant will be vacated because the infant was not represented by a guardian *ad litem* must be determined on the facts of each particular case on the basis of whether the infant was duly protected in his rights and property.

11. Same—

The fact that a guardian *ad litem* for a minor defendant was not appointed until after verdict does not require that the verdict be set aside and a new trial ordered when the trial court finds upon competent evidence that the interests of the minor had been fully and amply protected by the attorney for defendants to the same extent as if a guardian *ad litem* had been appointed at the outset.

12. Appeal and Error § 40—

A new trial will not be granted for mere technical error which could not have affected the result.

13. Automobiles § 55—

The test of whether a parent is liable for the operation of an automobile by a minor child under the family purpose doctrine depends upon the parent's control or right to control the use of the automobile and not upon ownership.

14. Same—

Evidence that the car in question was a gift to the child but was registered in the mother's name, that the child paid for the operation and upkeep of the car and used it in going to work and for other purposes, and had the right to use the car without her mother's permission, but that the child lived in the home of her parents and usually told her mother where she was going if her mother was present, etc., *is held* sufficient to be submitted to the jury on the parent's liability under the family purpose doctrine.

15. Damages § 9—

Hospital and doctor's bills of an injured passenger, paid under the automobile medical payments insurance clause of a policy for which defendant paid the premium, should be deducted in ascertaining the damages recoverable by the passenger, and when the jury has been permitted to include such medical expenses in ascertaining the amount of damages, the judgment will be modified so as to allow a credit for the amount paid under the policy, notwithstanding that such payment was not predicated upon the negligence of insured.

APPEAL by defendants Thelma Bryant Jernigan and Carolyn Faye Jernigan from *Carr, J.*, October 1961 Civil Term of HARNETT.

This appeal involves two civil actions which were consolidated for the purpose of trial. Plaintiffs seek to recover damages for personal injuries suffered by them in a collision of automobiles allegedly caused by the actionable negligence of defendants.

The collision occurred about 12:30 A.M. on 20 December 1960 at the intersection of U. S. Highway 301 and a rural dirt road about two miles north of the city of Dunn. The dirt road runs east and west; Highway 301 runs north and south. Highway 301 is straight and level for a considerable distance in both directions from the intersection, is 20 feet wide and has 6-foot shoulders on each side. The speed limit is 55 miles per hour. The weather was clear and the highway dry. Plaintiffs were guest passengers in a Chevrolet automobile being driven southwardly by defendant Carolyn Faye Jernigan. The Chevrolet was approaching the intersection at a speed of 25 to 30 miles per hour. About 200 feet or more north of the intersection Carolyn turned on the mechanical turn signal, preparatory to making a left turn into the dirt road at the intersection. Defendant Atlas M. Register was also driving south, in a Ford automobile, and was following and overtaking the Chevrolet. He was travelling at a high rate of speed, at least 60 miles per hour. Notwithstanding an intersection sign about 150 yards north of the junction, and double yellow lines in the highway beginning about even with the intersection sign, Register pulled to his left and attempted to pass. He collided at or near the intersection, in the east lane, with the Jernigan car which was turning left. The Jernigan car came to rest against an embankment southeast of the intersection. There was a skid mark 121 feet long, starting 4 feet and 6 inches east of the yellow line and leading up to the Register car. Plaintiffs were injured and taken to the hospital. The Chevrolet in which plaintiffs were riding was registered in the name of Thelma Bryant Jernigan, mother of Carolyn Faye Jernigan (age 19).

Plaintiffs instituted separate actions. In each, Register and the Jernigans, mother and daughter, were sued jointly.

The jury answered issues submitted, and found that plaintiffs were injured by the negligence of Atlas M. Register and Carolyn Faye Jernigan, and that Carolyn Faye Jernigan was operating the Chevrolet as agent of Thelma Bryant Jernigan "under the family purpose doctrine." It awarded damages to each plaintiff in the amount of $10,000. Judgments were entered in accordance with the verdicts.

Defendant Register does not appeal. Defendants Jernigan appeal and assign errors.

Dupree, Weaver, Horton & Cockman for defendants Jernigan, appellants.

Wilson & Bain and Wiley F. Bowen for plaintiffs, appellees.

MOORE, J. Appellants make nineteen assignments of error based on fifty-seven exceptions. Many of the exceptions and assignments are not brought forward in their brief, and these are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810. Of those brought forward in the brief, several merit discussion.

(1) Appellants demurred to the complaints on the ground that they do not state sufficient facts to constitute causes of action as to defendants Jernigan in that "it appears upon the face of the complaint(s) that the sole proximate cause of the motor vehicle collision . . . was the negligence of defendant Atlas M. Register." The demurrers were overruled. Appellants in apt time moved for nonsuits. The motions were overruled. The demurrers and motions for nonsuit will be considered together since some of the principles of law decisive of the demurrers apply also to the motions for nonsuit.

Appellants contend that the purported allegations of actionable negligence as to them are mere conclusions of the pleader and are inconsistent with and repugnant to the factual allegations which show that Register's negligence was the sole proximate cause of the collision. They assert, in summary, that the complaints allege that Carolyn Faye Jernigan gave a lawful turn signal and was making a lawful turn when Register, travelling at a high and dangerous rate of speed, crossed a double yellow line, attempted to pass at an intersection where passing was unlawful, and ran into the Jernigan car. They further assert that there is no allegation that Register sounded his horn, blinked his lights, or did anything which would give notice — at a time when effective action might be taken by driver Jernigan — that he would unlawfully attempt to pass. Appellants contend, therefore, that the pleaded conclusions that Carolyn Faye Jernigan failed to control her vehicle, failed to keep a reasonable lookout, and had timely notice of Register's movements are unsupported by factual allegations, do not sufficiently allege negligence on the part of defendants Jernigan, and the demurrers should have been sustained.

We do not agree with appellants' estimate of the sufficiency of the complaints. The pertinent allegations of the complaints, in summary, except where quoted, are: Notwithstanding the fact that Carolyn Faye Jernigan "had her blinker light on, indicating she was going to make a left turn, she proceeded to make the left turn when she saw or, by the exercise of reasonable care, should have seen that the said Atlas M. Register was operating his . . . automobile at a high and

dangerous rate of speed and was going to overtake and pass her, and she knew or, by the exercise of reasonable care, should have known that said turn or movement could not be made in safety, and that she had ample time and notice to avoid said collision by the exercise of due care." She was operating the car without keeping a proper lookout. Plaintiffs' injuries were caused by the joint and several acts of defendants, which combined and concurred in proximately producing such injuries.

It is only required that a complaint contain a concise statement of the ultimate facts constituting the cause of action. *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337. It should not allege the evidentiary facts required to prove the existence of the ultimate facts. *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660. Only facts to which the pertinent legal or equitable principles of law are to be applied should be stated. *Truelove v. R. R.*, 222 N.C. 704, 24 S.E. 2d 537.

The complaint does not, as suggested by appellants, allege both a lawful and an unlawful turn on the part of driver Jernigan. G.S. 20-154(a) provides in part that "The driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety, and . . . shall give a signal as required in this section. . . ." The statute imposes two duties upon a motorist intending to turn, (1) to see that the movement can be made in safety, and (2) to give the required signal when the operation of any other vehicle may be affected. 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. *Mitchell v. White*, 256 N.C. 437, 124 S.E. 2d 137; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538. "Performing the requirement of giving appropriate . . . signals does not necessarily relieve the driver of a motor vehicle of the duty also to make proper observation of the movement of vehicles approaching from the rear. . . ." *Ervin v. Mills Co.*, 233 N.C. 415, 420, 64 S.E. 2d 431. "The giving of a turn signal indicates the intention of the signaler to make the indicated turn and requires other motorists involved to observe caution and use reasonable care, but it does not vest in the signaler an absolute right to make the turn immediately, regardless of circumstances. The signaler must first ascertain that the movement can be made in safety." *Eason v. Grimsley*, 255 N.C. 494, 121 S.E. 2d 885. An allegation that the proper turn signal was given does not support the conclusion that the signaler thereby acquired the right to make an uninterrupted turn, or that the turn made pursuant thereto was lawful. The complaints in the instant case sufficiently allege the ultimate fact that Carolyn

Faye Jernigan turned without having first ascertained that the movement could be made in safety. It was not required that the complaints allege in detail all of the evidentiary facts which would have put her on notice that turning was perilous if she had heeded them.

"There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors." *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690. Acts transpiring prior to or simultaneously with the alleged negligent act of defendant cannot be relied upon by defendant to insulate his negligence, since the principle of insulating negligence refers to acts and conduct subsequently occurring. *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915.

There was no error in overruling the demurrers, and the motions for nonsuit were properly denied. Defendants offered evidence, so the only motions for nonsuit to be considered are those made at the close of all the evidence. And the evidence, whether offered by plaintiffs or defendants, must be taken in the light most favorable to plaintiffs. *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541.

The evidence tends to show: When Carolyn Faye Jernigan was about 200 feet from the intersection she turned on the mechanical blinking device giving a left turn signal; it made a clicking noise in the car. Plaintiff Flowers looked back and saw the lights of a car which was maintaining a high rate of speed. It was coming fast, and was beginning to "careen" to the left side of the highway. It "wasn't too far" back. Mrs. Flowers said: "Faye, you had better not turn, for if you do that car will hit you." Faye replied: "He had better not, because I have got on my signal light." Plaintiff Tart looked back and said: "There sure is one coming fast; you had better not turn, he will hit us." At this time the Jernigan car was 100 feet from the intersection and still in the west lane. Faye (according to her testimony) was aware that there was a car behind, looked in her rear-view mirror when about 100 feet from the intersection, but did not continue looking because she "had given . . . signal long enough that (she) thought the person behind . . . was supposed to have control of the car." When about 25 feet from the intersection she turned left, but did not reach the dirt. The cars collided in the east lane.

It is true that G.S. 20-154(a) does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger. Only reasonable care must be exercised in determining that the movement may be made in safety. *Cooley v.*

Baker, 231 N.C. 533, 58 S.E. 2d 115. The record clearly shows that Register was negligent, and it is true that a driver on the highway is under no duty to anticipate the negligence of other users of the highway. *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849. But Miss Jernigan was aware that a car was following. Both plaintiffs warned her of the perilous circumstances; she looked in the rear-view mirror and could have observed the circumstances. Thus she was, or, in the exercise of due care, should have been forewarned of the danger of making a turn. There was time to take protective action. Yet, she ceased to continue looking in the mirror. No car was approaching from the opposite direction. From her actions and her declaration at the time, it is clear that she was relying solely upon the efficacy of the signal she had given, which she had no right to do. *Eason v. Grimsley, supra.* Under the evidence, favorable to plaintiffs, the inference is permissible that Miss Jernigan looked in her rear-view mirror 100 feet before reaching the intersection, but did not look any more, and therefore failed to keep a reasonable lookout (*Gasperson v. Rice,* 240 N.C. 660, 83 S.E. 2d 665), and that she failed to exercise reasonable care to ascertain whether or not she could turn in safety, and that such omissions proximately caused any injuries suffered by the plaintiffs. The evidence conforms to and supports the allegations of the complaint.

(2). Appellants assign as error the action of the court below (a) in admitting in evidence, over their objections, the testimony of plaintiffs, quoted above, that they warned driver Jernigan if she turned the Register car would hit hers, and (b) in restating this evidence in the charge while recapitulating the evidence, giving plaintiffs' contentions, and applying the law to the facts. This assignment of error is not sustained.

When a startling or unusual incident occurs, the exclamations of a participant concerning the incident, made spontaneously and contemporaneously and without time for reflection or fabrication, are admissible as *pars res gestae.* Stansbury: North Carolina Evidence, s. 164, pp. 346-348; *Woods v. Roadway Express, Inc.,* 223 N.C. 269, 25 S.E. 2d 856. The challenged evidence was otherwise competent because it fixed Miss Jernigan with notice of possible peril against which she was under duty to guard, and bore directly upon the issue of her negligence. Moreover, it was competent to rebut the allegations of appellants' answers which state that plaintiffs were "guilty of negligence which proximately caused and contributed to any injury which (they) may have received in the collision in that (they) rode and continued to ride in the car while it was being so operated without protest or remonstrance; that (they) failed and neglected to keep a proper lookout for (their) own safety; and that (they) failed and neglected to

warn the defendant Carolyn Faye Jernigan of the approaching danger which (they) saw or, in the exercise of reasonable care, should have seen." Thus, appellants by their pleadings laid the foundation for admission of this testimony.

(3). Defendant Register, over objection of appellants, was permitted to testify that Miss Jernigan put on a turn signal but turned it off before reaching the intersection, leading him to believe she did not intend to turn. In this we find no error.

Register, in his answer, denied that Jernigan gave any signal or warning of her intention to turn. It is true that plaintiffs do not rely on a failure to give a turn signal and actually allege that the signal was given. A careful reading of the charge will show that the judge applies this testimony only in giving the contentions of defendant Register. The charge once alludes to this evidence in giving the plaintiffs' contentions, but the court explains that "Plaintiffs contend that you should find that she (sic) was operating the signal." There was no request to limit the jury's consideration of the evidence, but the court carefully and deftly limited its application to the proper sphere of competency.

(4). At the time of the trial and entry of judgment defendant Carolyn Faye Jernigan was a minor without general or testamentary guardian. After verdict, but before judgment was entered, it was discovered that no guardian *ad litem* had been appointed to represent her in these suits. A motion had been lodged by defendants to set aside the verdicts, as contrary to the weight of the evidence, and for a new trial. "Hearing on these motions was by consent of counsel for all parties continued until the November Term . . . in Johnston County." Pending the hearing on these motions, Judge Carr appointed a guardian *ad litem* for Miss Jernigan on 25 November 1961. The guardian *ad litem* filed his reports on 29 November 1961. In the final judgments on 2 December 1961 Judge Carr found facts, based on the reports of the guardian *ad litem,* and they are paraphrased in part and quoted verbatim in part as follows:

> "The Court finds as a fact that Franklin T. Dupree, Jr. is a competent attorney and that he vigorously defended this action in the trial before the jury, and that he has done everything that would have been done in the defense of said minor if a guardian *ad litem* had been appointed and that her interest up until this time has been properly and adequately protected."
>
> The guardian *ad litem* made a thorough investigation of the pleadings and of the facts surrounding the defense of said actions, reported his findings, adopted the pleadings filed in the case on

behalf of the minor, and requested that Mr. Dupree, attorney, continue to represent the minor and the guardian *ad litem* until the action is finally terminated.

"The Court finds as a fact from the report of said guardian *ad litem* that the interests of said minor have been fully and amply protected and to the same extent as if a guardian *ad litem* had been appointed at the time said action was instituted. . . ."

The minor appellant questions the jurisdiction of the court to appoint a guardian *ad litem* for her after verdict and thereafter to enter a valid judgment against her and the guardian.

The question has not heretofore been expressly decided in this jurisdiction. In an action to vacate a deed of gift, a plaintiff, father of minor defendants, was appointed guardian *ad litem, nunc pro tunc,* for them. It was held that he was disqualified to serve because of his colorable adverse interest, and that his appointment was "fatal error which cannot be cured by any evidence of good faith or want of injustice." By way of *obiter dictum* it was stated that the minors are entitled to protection "at every stage of the proceeding; and we cannot approve of an order appointing a guardian *ad litem nunc pro tunc.*" *Ellis v. Massenburg,* 126 N.C. 129, 35 S.E. 240. Infants, who were parties to an action for construction of a will, were served with summons, and their interests fully represented and their rights fully considered in Superior Court, but on appeal to Supreme Court it was discovered that no guardian *ad litem* had been appointed for them. The Supreme Court appointed such guardian pursuant to the general provisions of the Revisal, s. 1545, *nunc pro tunc,* and declared it would be vain and useless to remand the case for rehearing below. *Perry v. Perry,* 175 N.C. 141, 95 S.E. 98.

The basic principles in this area of the law, almost universally followed, are stated thus: "While the appointment of a guardian ad litem for an infant defendant is not jurisdictional in the sense that failure to make such appointment deprives the court of power to act and renders such judgment void, a judgment rendered against an infant in an action in which he was not represented by a guardian ad litem or a general guardian is erroneous, and can be overthrown by writ of error coram nobis, or by motion in the same court, or by proper appellate proceedings, at least where the want of such representative affects the substantial rights of the infant." 27. Am. Jur., Infants, s. 121, p. 842.

In the case at bar, we hold that the belated appointment of the guardian *ad litem* does not affect the court's jurisdiction. The failure to appoint at the stage of the action contemplated by the statute

(G.S. 1-65.1) was error. Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not. *Trust Co. v. Buchan,* 256 N.C. 142, 152, 123 S.E. 2d 489. And this Court will scan with extra care all records affecting the interests of minors. Whether a new trial will be ordered for failure to appoint a guardian *ad litem* will depend upon the circumstances of the particular case as to whether the infant or infants have been fully protected in their rights and property. "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 or harmful." 1 Strong: N. C. Index, Appeal and Error, s. 40, p. 118. In the present record it affirmatively appears, both from the facts found by the judge below and a careful examination of the record as a whole, that the interests of the minor, Carolyn Faye Jernigan, have been fully and amply protected and to the same extent as if a guardian *ad litem* had been appointed at the outset. A new trial will not be awarded for failure to appoint in apt time.

(5). The court submitted the following issue: "Was the defendant Carolyn Faye Jernigan operating the 1954 Chevrolet of Thelma Bryant Jernigan as the agent of Thelma Bryant Jernigan, that is as a member of the family of Thelma Bryant Jernigan, under the family purpose doctrine, as alleged . . .?" The jury answered in the affirmative. Appellants excepted to the submission of the issue, and contend that the evidence was insufficient to support a finding of agency under the family purpose doctrine.

The evidence as to the ownership, control and use of the Jernigan car is in substance as follows: The Chevrolet was given to Carolyn Faye Jernigan by her mother, Thelma Bryant Jernigan, and her uncle as a graduation gift. It was registered in her mother's name because Faye was a minor. Faye used it in driving to and from her work at Wellon's Candy Company, and for other purposes. She has always lived in the home of her parents and has kept the car there; she earned wages and helped with household expenses as she saw fit, but in no definite regular amount. She bought gasoline and oil for the car and paid for its upkeep. She did not ask her mother's permission to use the car, but usually told her mother where she was going if her mother was present at the time. She still "minds" her mother, but has the right to use the car without her mother's permission. Her mother has a car of her own, but "the car that's closest to the road is the one that" her mother drives "or that she (Faye) drives." Faye was not on any business for her mother at the time of the collision, but was returning from work — on the "night shift."

"Ordinarily, a cause of action based solely on the family purpose

doctrine is stated by allegations to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge and approval of the owner of the car." *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427. Liability under the family purpose doctrine is not confined to owner or driver. It depends upon control and use. *Goode v. Barton,* 238 N.C. 492, 497, 78 S.E. 2d 398; *Matthews v. Cheatham,* 210 N.C. 592, 598, 188 S.E. 87.

Elliott v. Killian, 242 N.C. 471, 87 S.E. 2d 903, is factually analagous to the case at bar. The automobile was being driven at the time of the accident by the infant defendant. The car was registered in his father's name. It was insured in the name of the father — the premium had been paid three times, once by the father, twice by the son. The son lived in father's home as a member of the family. The father never refused to let his son use the car when he wanted to. The infant defendant's mother and sister had ridden with him in the car. He paid about two-thirds of the purchase price of the car, and his father signed a note for the balance and paid some on the note — also "stood for" repairs, and drove the car on occasion. Title was taken in the father's name because the son was a minor. The Court discusses applicability of G.S. 20-71.1, but concludes: "If plaintiff had not had the benefit of the above statute, it would seem that she has sufficient evidence to carry her case to the jury. *Matthews v. Cheatham, supra; Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398." For analagous cases from other jurisdictions see: *Stevens v. Van Deusen,* 241 P. 2d 331 (N.M. 1951); *Pooliet v. Box,* 246 P. 2d 1050 (N.M. 1952); *Robinson v. Ebert,* 39 P. 2d 992 (Wash. 1935); *Hanson v. Eilers,* 2 P. 2d 719 (Wash. 1931).

The evidence is sufficient to take the instant case to the jury on the family purpose doctrine, and appellants' exception is not well taken.

(6). Hospital and doctor's bills incurred by plaintiff Flowers because of injuries received in the collision, in the amount of $395.25, were paid under automobile medical payments insurance coverage on the Jernigan car, which coverage obligated the insurer to pay these expenses irrespective of any tort liability on the part of defendants Jernigan. Over objection of appellants, plaintiff Flowers was permitted to testify that she incurred these expenses, and the jury was permitted to consider them in awarding damages. Appellants contend that it was error to permit her to recover double damages in this amount.

In recent years insurers have issued comprehensive automobile liability policies which, in addition to the liability clause for payment on

behalf of insured any tort liability within policy limits, contain a medical payment clause obligating insurer to pay directly to persons injured, irrespective of negligence, medical expenses incurred by reason of the operation of the described automobile. An additional premium is collected on account of the medical payment clause.

By the great weight of authority a person injured by reason of the operation of an automobile insured under such comprehensive policy may recover under both the liability clause and the medical payment clause, even though it amounts to a double recovery of medical expenses. *Dumas v. United States Fidelity and Guaranty Co.*, 125 S. 2d 12 (La. 1960); *Bordelon v. Great American Indemnity Co.*, 124 S. 2d 634 (La. 1960); *Warren v. Fidelity Mutual Insurance Co.*, 99 S. 2d 382 (La. 1957); *Distefano v. Delta Fire and Casualty Co.*, 98 S. 2d 310 (La. 1957); *Severson v. Milwaukee Automobile Insurance Co.*, 61 N.W. 2d 872, 42 A.L.R. 2d 976 (Wis. 1953); *Southwestern Fire and Casualty Co. v. Atkins*, 346 S.W. 2d 892 (Tex. 1961); 8 Appleman: Insurance Law and Practice, s. 4896, pp. 349-353. The holdings are the same in cases where insurer is not a party and where defendant is the named insured and payor of the premiums. *Long v. Landy*, 171 A. 2d 1 (N.J. 1961); *Gunter v. Lord*, 132 S. 2d 488 (La. 1961); *Truitt v. Gaines*, 199 F. Supp. 143 (D. Del. 1961).

In the *Distefano* case (which overruled an earlier Louisiana case, *Hawayek v. Simmons*, 91 S. 2d 49) insurer had previously paid, as in the instant case, medical expenses, and it was held that plaintiff could also recover these expenses under the liability clause. The court reasoned as follows:

> "(Insurer's) responsibility under its liability coverage depended upon its insured being shown negligent; its responsibility under its Medical Payments Coverage had nothing to do with negligence at all.
>
> "A claim based on the liability feature of the policy is a tort claim; a claim based on the medical payments feature of the policy is a claim sounding in contract.
>
> "If (insurer) had two separate policies, one granting liability coverage and one granting Medical Payments Coverage, that would be no different than the situation as it presently exists where both coverages are furnished under the same policy."

But under a policy containing a provision that the amount payable pursuant to its general liability clause should be reduced to the extent of payments made under the medical expense features of the contract, it was held that double recovery for medical expenses would not be

allowed. *Bowers v. Hardware Mutual Casualty Co.*, 119 S. 2d 561 (La. 1960.)

In the instant case the insurance policy is not a part of the record. The provisions of the policy are not before us. Indeed, it may contain a provision such as that involved in the *Bowers* case. But regardless of this, the trend of decision in this jurisdiction is contrary to the majority rule on the facts presented in the case at bar. *Jordan v. Blackwelder,* 250 N.C. 189, 108 S.E. 2d 429. Defendant paid the premium — both premiums — and thereby provided financial protection for those injured in the use of her car. Admittedly, if she had no insurance coverage, there could only be one recovery of medical expenses incurred by a guest passenger. If double recovery can be had when she is insured, it is not by reason of one claim sounding in tort and the other in contract, as suggested, but solely by reason of the provisions of the insurance contract. In our opinion it was not within the contemplation of the contracting parties that there should be a double recovery of medical expenses. It was intended that injured parties have minimal protection (medical payments) where negligence is not involved, and full protection (to the limits of the policy) and no more, where negligence is involved. It is manifestly inequitable for plaintiff to recover twice against the same defendant, even though payment was in part voluntary. Consider the hypothetical, but quite probable, case where recovery is in excess of insurance limits, or a case where medical payments are provided by insurance and financial responsibility provided from defendant's personal assets; a court in such instances could not in good conscience sustain a double recovery for medical expenses. Our single recovery ruling in this case is to be limited to factual situations materially the same as the one here presented.

Appellants are entitled to a credit of $395.25 against the recovery of plaintiff Flowers in this case, and the judgment below will be modified so as to allow this credit; as thus modified the judgment is affirmed.

In the trial of plaintiff Tart's action, no error.

Judgment in plaintiff Flowers' action, modified and affirmed.

VIOLA RICHARDS DONNELL AND HUSBAND, FLOYD DONNELL v. WILLIAM R. HOWELL.

(Filed 23 May 1962.)

1. Divorce and Alimony § 1; Judgments §§ 18, 21—

Jurisdiction of the marital status is necessary to give the courts of a state jurisdiction to alter such status by decree of divorce, and where the parties, according to their stipulation, perpetrated a fraud on the jurisdiction of the court, the wife by falsely alleging domicile within that state for the period required by its statutes and the husband by waiver or admission of such domicile, so that the decree of divorce rendered by such court is void under its laws for want of jurisdiction, the decree may be collaterally attacked by the husband in an action in this State in which the fraud on the jurisdiction of the foreign court is made to appear of record.

2. Divorce and Alimony § 25; Judgments § 16—

Where, in the wife's action for divorce in another state, the husband files answer and waiver admitting the false and fraudulent allegations of the wife that she was a resident of that state, but the husband does not appear in person or by counsel in that state, *held* in an action instituted in this State for partition of lands upon the ground that the divorce decree constituted the parties tenants in common, the husband is not estopped to attack the divorce decree, since the wife was not misled or deceived and did not act to her detriment in reliance upon any representation or act of the husband, and since to permit the divorce decree to stand would be an offense against public morals and good conscience.

3. Actions § 5—

The courts will grant relief to a party *in pari delicto* if the refusal of such relief would result in a condition contrary to public policy or against public morals or good conscience.

4. Constitutional Law § 26—

Where a decree of divorce is obtained in another state by connivance of the parties in perpetrating a fraud on the jurisdiction of the court by falsely making it appear that the plaintiff was a resident of that state, such decree is not entitled to full faith and credit under Art. IV § 1, of the Constitution of the United States, and, there being no adjudication of the residence of the parties in any adversary manner by the court rendering the divorce decree, a court of this State, in an action properly instituted here, is not bound by the findings of the divorce forum as to the jurisdictional fact of domicile, but may find for itself that no domicile in fact existed in the foreign state.

APPEAL by petitioners from *Phillips, J.*, 6 November 1961 Civil Term of SURRY.

Petition for partition sale of real property.

The petition alleges in substance:

All the tracts or parcels of land set forth with particularity in fourteen numbered paragraphs of the petition were conveyed to petitioner,

Viola Richards Howell, and respondent, William R. Howell, during the time of their marriage to each other, thereby vesting title in them as tenants by entirety. The *feme* petitioner obtained an absolute divorce from respondent in March 1961. As a result of such absolute divorce the *feme* petitioner and respondent hold title to all the aforesaid real property as tenants in common. *Feme* petitioner has since intermarried with the male petitioner, Floyd Donnell. A greater aggregate price can be realized if all the tracts of land are sold each as a separate unit. Wherefore, petitioners pray for a partition sale.

We summarize the essential allegations of respondent's answer: It denies that the *feme* petitioner is legally divorced from respondent, for the reason that the divorce granted to the *feme* petitioner by a court in the State of Alabama in March 1961 is null and void, because at the time of the divorce the *feme* petitioner was a *bona fide* resident of Surry County, North Carolina. It denies that the *feme* petitioner and respondent hold title to the real property described in the petition as tenants in common, but avers that they are still lawfully married to each other, and hold title to all the real property described in the petition as tenants by entirety, except the real property described in paragraph nine of the petition, which they have sold. The answer contains a further and a second answer and defense which we summarize, so far as essential to this appeal: *Feme* petitioner and respondent as partners own and operate a drug store at Dobson, and each one is entitled to receive one-half of this business. Situate in the residence owned by *feme* petitioner and respondent as tenants by entirety is household and kitchen furniture of the value of $6,731.22, which is the individual property of respondent, and the rest of such furniture there is owned jointly by them.

Wherefore, respondent prays that all the real property owned by *feme* petitioner and respondent as tenants by entirety be held intact by them as tenants by entirety, until one or the other obtains a valid divorce, and then the court shall appoint a commissioner to sell the real property; that a receiver be appointed to take over the drug store, and to sell the household and kitchen furniture, and pay respondent $6,731.22, and divide the remainder equally between them.

Feme petitioner filed a reply. We summarize its essential allegations: Respondent entered a general and personal appearance in the action for absolute divorce she instituted against him on 3 March 1961 in the circuit court of Lee County, Alabama, by signing an answer waiving all summons, notice, process, order and decrees in the case, and admitting himself, a resident of North Carolina, to the jurisdiction of the court, admitting that *feme* petitioner is a *bona fide* resident of Lee County, Alabama, and she attached copies of the papers in that case

to her reply, and makes them a part thereof. Her bill of complaint alleges she "is a resident of the State of Alabama and has been as such time as required by law." Respondent by participating in the divorce action is estopped to deny the validity of the divorce decree rendered therein. The decree of absolute divorce rendered by the circuit court of Lee County, Alabama, is valid in that State, and is entitled to full faith and credit in the State of North Carolina.

The parties agreed that this special proceeding should be heard by Judge Phillips upon facts stipulated by the parties, and facts found by the judge. We summarize only those which are essential to a decision of this appeal, because many of the lengthy findings of fact are irrelevant, so far as this appeal is concerned:

Counsel for the petitioners and respondent stipulated that both the *feme* petitioner and the respondent were residents of Surry County, North Carolina, at the time *feme* petitioner instituted an action for divorce in the State of Alabama in March 1961. They further stipulated that *feme* petitioner was a resident of Surry County, North Carolina, and respondent was a resident of Stanly County, North Carolina, at the time this special proceeding was instituted in May 1961. *Feme* petitioner and respondent were lawfully married to each other on 15 August 1944 in South Carolina, and lived together as husband and wife until October 1960. On 3 March 1961 *feme* petitioner instituted an action for absolute divorce against respondent in the circuit court of Lee County, Alabama. On 7 March 1961 the circuit court of Lee County, Alabama, entered a decree granting *feme* petitioner an absolute divorce from respondent. This judgment provided that neither *feme* petitioner nor respondent shall marry again, except to each other, until sixty days after the divorce decree. After the rendition of the divorce decree *feme* petitioner returned to North Carolina, and married the male petitioner the same month, March 1961. Judge Phillips made lengthy and detailed findings of fact in respect to a waiver signed by respondent and filed in the records of the divorce action in the Alabama court, which it is not necessary to set forth on this appeal, and concluded the waiver did not subject respondent to the jurisdiction of the Alabama court, and further concluded that the divorce decree rendered by the Alabama court in the *feme* petitioner's divorce action was null and void and not entitled to full faith and credit in the courts of the State of North Carolina, because respondent was not subject to the jurisdiction of the Alabama court by reason of the purported waiver.

Whereupon, Judge Phillips adjudged and decreed that the decree of absolute divorce rendered by the circuit court of Lee County, Alabama, is null and void and not entitled to full faith and credit in

the courts of the State of North Carolina, that *feme* petitioner and respondent have never been lawfully divorced, and are still husband and wife, and that the title to the real property described in the petition is held by *feme* petitioner and respondent as tenants by entitrety.

From the judgment, petitioners appeal.

Barber & Gardner, By Carroll F. Gardner for petitioner appellants.
Blalock and Swanson, By C. Orville Light for respondent appellee.

PARKER, J. Counsel for the petitioners and respondent stipulated before Judge Phillips that both the *feme* petitioner and the respondent were residents of Surry County, North Carolina, at the time *feme* petioner instituted an action for divorce in the circuit court of Lee County, Alabama, in March 1961. The action was instituted on 3 March 1961. *Feme* petitioner in her bill of complaint in the divorce action alleged she "is a resident of the State of Alabama and has been as such time as required by law"—a false allegation according to her stipulation in the instant case before Judge Phillips. Respondent in his answer filed in the divorce case admitted "the complainant is a *bona fide* resident citizen of Lee County, Alabama"—a false admission according to his stipulation in the instant case before Judge Phillips. She alleged in her bill of complaint as the ground for divorce "that on to-wit: February 28, 1960 the Respondent voluntarily abandoned her bed and board without just cause or reason and has remained away from the bed and board of Complainant voluntarily and continuously since said date." A false allegation according to an unchallenged finding of fact that *feme* petitioner and respondent lived together as husband and wife until October 1960. The final decree of absolute divorce was entered by the Alabama court on 7 March 1961. Thereafter *feme* petitioner returned to North Carolina, and married Floyd Donnell in March 1961. She is now a resident of Surry County, North Carolina, and respondent a resident of Stanly County, North Carolina.

The first question for decision is: Did the Alabama court under the laws of the State of Alabama have jurisdiction over the marital status of the parties, when neither was domiciled in Alabama, and when both perpetrated a fraud on that court by falsely representing to it in the bill of complaint and answer that *feme* petitioner "was a resident of the State of Alabama and has been as such time as required by law," when in truth and in fact according to their stipulation before Judge Phillips both *feme* petitioner and respondent were residents of Surry County, North Carolina, at the time *feme* petitioner instituted the action for divorce in the Alabama court.

Title 34, section 27, Code of Alabama, 1940, 1955 Cumulative Pocket Part, reads:

> "FOR ABANDONMENT, TWELVE MONTHS' RESIDENCE TO BE PROVED.—No bill can be filed for a divorce on the ground of voluntary abandonment, unless the party applying therefor, whether husband or wife, has been a bona fide resident citizen of this state for twelve months next preceding the filing of the bill which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

Title 34, section 29, Code of Alabama, 1940, 1955 Cumulative Pocket Part, reads:

> "IF DEFENDANT A NONRESIDENT, A YEAR'S RESIDENCE BY PLAINTIFF MUST BE PROVED.—When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

The Supreme Court of Alabama said in *Gee v. Gee,* 252 Ala. 103, 39 So. 2d 406, Rehearing Denied 31 March 1949: "It is firmly established by our decisions that residence in our divorce statutes means domicile."

In *Jennings v. Jennings,* 251 Ala. 73, 36 So. 2d 236, 3 A.L.R. 2d 662, both husband and wife resided in South Carolina. The wife sued in Alabama, and in her bill of complaint alleged she was a resident of South Carolina. The husband appeared and answered, admitting he was a resident of South Carolina and submitted himself to the jurisdiction of the Alabama court. When the case came on for hearing on the merits, the trial judge dismissed the bill on the ground that the court had no jurisdiction. The Supreme Court of Alabama affirmed. In its opinion it quoted Title 34, section 29, Code of Alabama, 1940, which we have quoted above, and stated: "This case involves the power of the legislature to authorize a decree of divorce in this state when the parties are personally before the court, but reside in another state." In its opinion the Alabama Supreme Court said:

> "Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law. *William v. North Carolina,* 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R.

1366; *Bell v. Bell,* 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804; *Andrews v. Andrews,* 188 U.S. 14, 23 S. Ct. 237, 47 L. Ed. 366; *Sherrer v. Sherrer,* 68 S. Ct. 1087, 1097; *Wilkes v. Wilkes,* 245 Ala. 54, 16 So. 2d 15. See also The Alabama Lawyer, Volume eight, p. 37. This is true because domicile in the state gives the court jurisdiction of the marital status or the res which the court must have before it in order to act. Nelson on Divorce and Annulment, Vol. 2, p. 632; Schouler Divorce Manual p. 21; Kennan on Residence and Domicile p. 450; Keezer on Marriage and Divorce p. 73 et seq.; 27 C.J.S. Divorce, § 71, p. 633. The domicile of one spouse, however, within the state gives power to that state to dissolve the marriage. *Williams v. North Carolina,* 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273; neither party here is a resident of Alabama. Jurisdiction of the res is essential because the object of a divorce action is to sever the bonds of matrimony, and unless the marital status is before the court, the court cannot act on that status. Authorities *supra.* Furthermore it is recognized that unless one of the parties has a residence or domicile within the state, the parties cannot even by consent confer jurisdiction on the courts of that state to grant a divorce. 17 Am. Jur. p. 273.

"'* * * The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. * * *' *Andrews v. Andrews, supra* [188 U.S. 14, 23 S. Ct. 244].

* * * * * *

"While we appreciate the need for comity between the states and feel that a state can have no legitimate concern with the matrimonial status of two persons who do not reside within its territory, why cannot the legislature make the enactment in which we are here concerned? To this we say that the legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature. 19 C.J. p. 26, 27 C.J.S. Divorce, § 71. In *The People v. Dawell,* 25 Mich. 247, 12 Am. Rep. 260, 273, the court aptly said:

"'* * * Will it be seriously claimed that any State might enact a law that citizens of other States might be divorced at pleasure in its courts, by simply applying in person for the decree? Would not every other State be likely to protest, with emphasis and indignation, that any such law was an invasion of their sovereignty, and an attempt, by indirect methods, to control the domestic relations of their citizens? But if such a law could not be valid, how can it be truly said, that a court, whose authority cannot

possibly be broader than that of the State which created it, had "jurisdiction of the parties by the voluntary appearance of the defendant," when such voluntary appearance could no more bring the subject-matter of the suit within the jurisdiction of the court than in ejectment it could bring the land from a distant state, and enable the court to pass upon the right to its possession. * * *'

"An act to be valid must be within the legislative jurisdiction of the enacting state. 59 C.J. p. 21; *Foster v. Glazener,* 27 Ala. 391. Here the statute seeks to act on a status which is beyond the boundaries of the state. That it cannot do."

In *Hartigan v. Hartigan,* 272 Ala. 67, 128 So. 2d 725, filed 30 March 1961, Helen Hartigan filed a bill for divorce in the circuit court charging her husband, John Hartigan, with voluntary abandonment. She alleged in the bill she was a *bona fide* resident of Birmingham, Jefferson County, Alabama, and had been for more than one year next preceding the filing of the bill, and that respondent was a resident of the same county. Respondent filed an answer and waiver in which he admitted the jurisdictional facts, but denied the other material allegations of complainant, and agreed that the case "may be carried forward to its final determination and decree of divorce issued without other notice to respondent." He signed the answer and waiver in the presence of a witness. The divorce decree incorporated a property settlement and payment of alimony by respondent to complainant, based upon an agreement between them purporting to have been signed by both parties and filed with the bill and answer. On 17 June 1960 John Hartigan filed a petition in the circuit court of Jefferson County praying for a modification of the 1954 divorce decree so as to eliminate the requirement that he pay Mrs. Hartigan alimony of $60 per week, due to certain financial grounds as changed circumstances. On 7 and 8 July 1960 Mrs. Hartigan filed an answer asking enforcement of the decree, and a petition for citation of contempt on the ground he was delinquent on his alimony payments. The proceeding was heard before Judge Bailes. In the hearing before Judge Bailes the following facts were established without objection: Mrs. Hartigan testified that she had never resided in Alabama and had never been in Alabama before she instituted her divorce action there, and that John Hartigan had never lived in Alabama, that her trip to Alabama had been agreed upon between her and her husband in New York, and that she came to Alabama to get the divorce. Judge Bailes, on his own motion, entered a decree setting aside the 1954 final decree of divorce on the ground that it was procured by fraud on the court, was illegal, null

and void and dismissed the petition of both parties. The Supreme Court of Alabama affirmed. In its opinion it said:

> "The rule is stated in 49 C.J.S. Judgments § 421, p. 824, as follows:
>
> " 'Even though a judgment is valid on its face, if the parties admit facts which show that it is void, or if such facts are established without objection, the case is similar to one wherein the judgment is void on its face and is subject to collateral attack.'
>
> Other cases applying this rule are *Welch v. Morris,* 49 Idaho 781, 291 P. 1048; *Griggs v. Venerable Sister Mary Help of Christians,* Mo. App., 238 S.W. 2d 8; *Meyer v. Meyer,* 333 Ill. App. 450, 77 N.E. 2d 556; *Gibson v. Gibson,* 193 Or. 139, 237 P. 2d 498, 501. In the last cited case, the court said 'Irrespective of whether plaintiff is in a position to attack the decree awarding alimony to defendant, such decree cannot stand because we have repeatedly held that where a void decree is brought to the attention of the court, it is the duty of the court on its own motion to vacate the same.'
>
> "The facts in the instant case fall squarely within the above rule. When Mrs. Hartigan took the stand in 1960, and testified as to the facts upon which the 1954 decree was based, she did so without objection on the part of her husband. He cross-examined her, thereby waiving any objection he might have had. Thus the undisputed facts, before the court without objection, showed that the original decree by the same court in a matter between the same parties was void for the lack of jurisdiction. The parties had voluntarily reappeared before the court and made the supervening invalidity apparent on the face of the record.
>
> "Under such circumstances, the court correctly vacated the original decree.
>
> * * * * * *
>
> "We think the court was authorized to vacate the 1954 decree in order to protect the integrity of its judicial proceedings.
>
> "Here, the fraud was not perpetrated against the other party, it was solely against the court."

The Court further said:

> "We come now to the most difficult aspect of this case. While the record proper does not so show, the briefs before us are in agreement that at the present time Mr. Hartigan has remarried and probably has a child by that marriage. This and other states have recognized that a question of public policy is involved.
>
> * * * * * *

"It is almost universally held that the remarriage of a party to a divorce does not deprive a court of the power to set aside the decree or that, as it is often said, the remarriage is not itself a sufficient reason for refusing to vacate or set aside the decree. 12 A.L.R. 2d 156; 17 Am. Jur., Divorce and Separation, § 517, p. 613.

" 'A divorce decree or judgment granted by a court without jurisdiction of the subject matter or of the person should be set aside.' 27A C.J.S. Divorce § 169 c., p. 684.

"We quote from *Murphy v. Murphy*, 200 Ark. 458, 140 S.W. 2d 416, 418. Murphy and his wife lived in Missouri and the court in Arkansas did not have jurisdiction of either the subject matter or the wife when the divorce decree was granted. Murphy remarried. The court said:

" 'Murphy was, therefore, never a resident of this State, and, as the court below properly found, a fraud was practiced upon the court in procuring the divorce in this State.

* * * * * *

" '* * * Such divorces have a "mail-order" appearance, and we shall not hesitate to set them aside, even though the divorced party shall have remarried before we have that opportunity; and, however innocent the second wife may be, we cannot permit such frauds to be practiced upon the courts of this State.

" 'At Section 469 of the chapter on Divorce and Separation in 17 American Jurisprudence, page 384, it is said that "Divorce decrees may be set aside because of fraud even though the rights of innocent third persons are thereby prejudiced, and hence, the petition need not allege that no such rights have intervened."

* * * * * *

" 'The parties to this litigation—all of them—appear to have been trifling with the jurisdiction of our courts, and we know nothing to do with them except to spew them out and to have done with them; and to leave them where they were, so far as we are concerned, when the jurisdiction of our courts was first invoked.'

"Not only is it conclusive that the 1954 divorce decree was void for want of jurisdiction of the subject matter in Alabama, but it is not entitled to full faith and credit in other jurisdictions.

"The Federal Supreme Court is the final arbiter when the question of full faith and credit is raised under Art. IV, Sec. 1 of the Constitution of the United States. *Williams v. State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279. Not overruled in *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092 89 L. Ed. 1577. And that court has held that a court in whose

territorial jurisdiction neither spouse had a bona fide domicile has no jurisdiction to render a divorce decree and such decree will not be binding either in the state of its rendition or in any other state in which the question might arise. *Bell v. Bell,* 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804; *Andrews v. Andrews,* 188 U.S. 14, 23 S. Ct. 237, 47 L. Ed. 366."

In *Sapos v. Plame,* 272 Ala. 76, 128 So. 2d 524, 30 March 1961, the Court held that the subsequent marriage of the wife did not in and of itself show that the husband is estopped from attacking the divorce decree by a bill of review to set it aside for fraud.

It seems to be indubitable from the stipulation of the parties before Judge Phillips that both the *feme* petitioner and respondent were residents of Surry County, North Carolina, at the time *feme* petitioner initiated an action for divorce in a circuit court of the State of Alabama on 3 March 1961, and that the Alabama court, if presented with such stipulation, would determine that the final divorce decree rendered *feme* petitioner from respondent in that court on 7 March 1961 was void for want of jurisdiction. Certainly, it is void according to the law in this State. *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29.

While a void divorce decree cannot be legalized by act of the parties, Freeman on Judgments, 5th Ed., Vol. 3, 1925, section 1438, is respondent by filing an answer and waiver, but not appearing in person or by counsel, in the divorce suit in the Alabama court estopped to deny the final divorce decree rendered therein, as alleged by *feme* petitioner in her reply? *Feme* petitioner by fraud invoked the jurisdiction and power of the Alabama court for the purpose of securing important rights from respondent by its divorce decree, and having obtained by fraud a final divorce decree she seeks to uphold the divorce decree and enjoy its fruits by having a partition sale of all real property conveyed to her and respondent as tenants by entirety, on the ground that by reason of the Alabama divorce she and respondent hold title to this property as tenants in common. There is no evidence children have been born from the second marriage of *feme* petitioner to Floyd Donnell.

It seems clear that there is no true estoppel here. *Feme* petitioner knew all the material facts, she knew she and respondent were not residents of Alabama, but were residents of Surry County, North Carolina, at the time she instituted her divorce action and four days later procured there a final decree of divorce, she was not misled or deceived, and she did not act to her detriment in reliance on any representation or deed of respondent when she got what she apparently wanted—a new husband the same month she procured her decree of

final divorce. *Smith v. Smith,* 72 Ohio App. 203, 27 Ohio Ops. 79, 38 Ohio L. Abs. 531, 50 N.E. 2d 889; *Garman v. Garman,* 102 F. 2d 272, 122 A.L.R. 1317; *Lynn v. Lynn,* 302 N.Y. 193, 97 N.E. 2d 748, 28 A.L.R. 2d 1335, cert. denied 342 U.S. 849, 96 L. Ed. 640; *Cook v. Cook,* 116 Vt. 374, 76 A. 2d 593. Respondent joined with her in perpetrating a fraud on the Alabama court, but it would seem he has enjoyed no fruits by virtue of the divorce decree; he has not remarried. He assails the validity of the Alabama divorce only when *feme* petitioner brings him into the North Carolina court where he resists her efforts to enjoy the fruits of an Alabama divorce, which she obtained by a fraud perpetrated on the Alabama court.

In *Levine v. Levine,* 262 Ala. 491, 80 So. 2d 235, the Supreme Court of Alabama held that where a wife received $20,000 by terms of settlement agreement, which was made a part of and merged with divorce decree, and she did not tender to her husband any portion of the sum she received, nor had she paid any portion of such money into court or offered to do so, her retention of monetary benefits of divorce decree, while seeking to have decree nullified on ground court did not have jurisdiction, precluded her from equitable relief she sought. The Court said:

> "We simply hold that this complainant because of her conduct, as reflected by the bill of complaint, has closed the doors of the equity court to herself and we in no way impinge on our well-settled rule that the Alabama courts have no jurisdiction over the marital status of the parties if neither was domiciled in Alabama. Citing authorities.
>
> "Rachel Levine having plucked the goose in 1949, seeks to get her fingers into a new crop of feathers in 1953."

See also *Fairclough v. St. Amand,* 217 Ala. 19, 114 So. 472, and the comment on that case and the *Levine* case in *Hartigan v. Hartigan, supra.*

"Although the parties are shown to have been *in pari delicto,* the court will grant relief to one of them if its forbearance will be productive of an offense against public morals or good conscience." 19 Am. Jur., Equity, p. 332; *Smith v. Smith, supra;* 17 Am. Jur., Divorce and Separation, sec. 541; *Hogan v. Hogan,* 320 Mass. 658, 70 N.E. 2d 821.

If a court should forbear to grant relief to respondent here in the face of their stipulation before Judge Phillips to the effect that the final divorce decree *feme* petitioner obtained from the Alabama court was secured by the perpetration of a fraud upon the Alabama court, it would be an offense against public morals and good conscience, a reflection upon the integrity of the court, and productive of perjury.

"It is a matter of common knowledge that every year thousands of unhappily married persons, unable to obtain divorces at home, visit one or another of these five states in search of marital freedom. It is equally well known that the need for proof of domicile leads to perjury in a vast number of instances." *Wheat v. Wheat*, 229 Ark. 842, 318 S.W. 2d 793. Respondent is not estopped to challenge the validity of the final divorce decree rendered by the Alabama court for lack of jurisdiction and it would seem that the Alabama Supreme Court under its decisions would so hold under the facts here, as we do in the present case.

We now come to the full faith and credit clause of the Federal Constitution, Art. IV, section 1. This clause is now construed to mean that a foreign decree of divorce rendered in a state in which neither of the parties had a *bona fide* domicile is not required to be recognized in another state under the full faith and credit clause of the Federal Constitution, and that the court of another state is free to go behind the findings of the foreign divorce court as to the jurisdictional fact of domicile in the divorce forum, and find for itself, contrary to the finding of the foreign divorce court, that no domicile in fact existed in the foreign state to entitle the foreign decree to extraterritorial recognition, *Williams v. State of North Carolina*, 325 U.S. 226, 89 L. Ed. 1577, 157 A.L.R. 1366 (reh. den. 325 U.S. 895, 89 L. Ed. 2006); *Esenwein v. Pennsylvania*, 325 U.S. 279, 89 L. Ed. 1608, 157 A.L.R. 1396, with an exception set forth in *Sherrer v. Sherrer*, 334 U.S. 343, 92 L. Ed. 1429, 1 A.L.R. 2d 1355, and *Coe v. Coe*, 334 U.S. 378, 92 L. Ed. 1451, 1 A.L.R. 2d 1376. In both the *Sherrer* and *Coe* cases, although the service was constructive (by mail), there was a personal appearance by the defendants in the foreign divorce forum and they were represented by counsel at the hearing—in the *Sherrer* case, a denial in the answer of the allegations of residence in the plaintiff's complaint, without contest of the same on trial, and in the *Coe* case, an express admission as true, in the answer, of the allegations of residence in the plaintiff's complaint, without contest of the same at trial. Opportunity was thus present, unlike in the *Williams* and *Esenwein* cases, for them to raise the issue of lack of jurisdictional requirement of domicile, although they did not in fact avail themselves of that opportunity at the trial. The Court held this was sufficient to render *res judicata* and conclusive the finding of the divorce court as to jurisdictional fact of domicile within the state, which is binding upon the courts of other states in which the decree is attacked on the ground of lack of jurisdiction over the matrimonial *res* or of lack of domicile in the divorce forum.

The *Sherrer* and *Coe* decisions do not validate or require extra-

territorial recognition of foreign divorces under all cicumstances. The fundamental requirement that domicile within the territorial bounds of the divorce court of at least one of the parties to the divorce suit is of the very essence and prerequisite of jurisdiction over the matrimonial *res* is not dispensed with—on the contrary it has been reaffirmed in those cases. It seems certain that the essential prerequisite is here to stay, even if the Court in the future should go beyond the limits fixed in the *Sherrer* and *Coe* cases. See Annotation 1 A.L.R. 2d 1385 — 1412 — Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicile, since *Williams* decision, and particularly Article III, section 8—Effect of *Sherrer* and *Coe* cases.

In *Staedler v. Staedler*, 6 N.J. 380, 78 A. 2d 896, 28 A.L.R. 2d 1291, the New Jersey Supreme Court said:

> "We are firmly of the opinion that the principles of the *Sherrer, supra,* and *Coe, supra,* cases only apply to a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is an opportunity to make a voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits, and that once an election has been made by the defendant under such circumstances and conditions that then and then alone can the judgment of the court be *res judicata* and the full faith and credit clause operate for the advancement of justice rather than for the perpetration of a fraud."

The *Sherrer* and *Coe* cases are not applicable here, because respondent was not personally present at, and did not participate by himself or an attorney, in the trial in the Alabama court, when that court rendered its final decree of divorce in favor of *feme* petitioner. Under the stipulated fact by the parties here to the effect that they perpetrated a gross fraud upon the Alabama court in representing that she was a resident of Alabama when she and respondent were residents of Surry County, North Carolina, the divorce decree rendered by the Alabama court is null and void under the laws and decisions of the Supreme Court of Alabama for lack of jurisdiction and is not entitled to full faith and credit under the provisions of the Federal Constitution in the courts of North Carolina.

In re Biggers, 228 N.C. 743, 47 S.E. 2d 32, relied on by plaintiff is clearly distinguishable. In that case no gross fraud was perpetrated on the court in Florida, as was done on the Alabama court by stipulation of the parties here.

The judgment of the able and experienced trial judge is correct and is affirmed, although his conclusion of law upon which he based it is

on the wrong ground. He should have based his judgment upon a conclusion of law that the final divorce decree rendered by the Alabama court was null and void for lack of jurisdiction under the laws of the State of Alabama by reason of the stipulation the parties made before him to the effect *feme* petitioner and the respondent were residents of Surry County, North Carolina, when she instituted the divorce action in the circuit court in Alabama and when four days later that court entered its decree of final divorce, and that the parties by such stipulation admitted they perpetrated a gross fraud upon the Alabama court.

Affirmed.

WADE C. GRAHAM v. WINSTON COCA-COLA BOTTLING COMPANY.

(Filed 23 May 1962.)

1. Food § 1; Evidence § 16—

In an action to recover for injuries received from the explosion of a bottled carbonated beverage resulting when the carton containing the drinks fell eight inches to the concrete floor, evidence of explosions of other bottles prepared by the same manufacturer is incompetent when the evidence does not show that such other bottles exploded after such bottles had fallen or received any impact, since in such instances the evidence fails to show the explosion of other bottles was under substantially similar circumstances.

2. Food § 1; Trial § 38— Charge held to have given special instructions requested insofar as necessary to the facts of the case.

In an action to recover for injuries resulting from the explosion of a bottled corbonated beverage, the charge of the court giving in substance plaintiff's requested instructions in regard to the duty of defendant to exercise due care not to charge its bottles with gas at a pressure so as to render them dangerous to handle in the usual and customary manner, and the duty to inspect and remove from public exposure defective bottles which would increase the probability of explosion from internal pressure, is held under the facts of this particular case not prejudicial in failing to give further instructions requested that defendant's use of modern machinery and appliances such as are in general and approved use would not *ipso facto* exculpate defendant from liability.

3. Food § 1; Trial § 33—

In this action to recover for injuries resulting from the explosion of a bottled carbonated drink, plaintiff's evidence was to the effect that the bottle exploded as a result of a mild impact over an internally damaged spot on the inside of the bottle. The court's instruction on the duty

of defendant not to charge the bottles with internal pressure so great as to make them dangerous in ordinary handling and defendant's duty to inspect the bottles and not to put into commerce a bottle internally defective so as to increase the probability of explosion from the internal pressure, *is held* not subject to the objection that it limited the jury's consideration to explosion from internal pressure alone.

4. Negligence § 28—

In this action to recover for injury resulting from the asserted negligence of defendant, contributed to by the acts of a stranger to the action, the court's charge *is held* to have correctly instructed the jury that defendant would be liable if defendant were guilty of negligence constituting a proximate cause of the injury, or one of them.

5. Appeal and Error § 40—

The burden is upon plaintiff to show error which is prejudicial or harmful.

APPEAL by plaintiff from *Johnston, J.*, 20 November 1961 Term of FORSYTH.

Action *ex delicto* to recover damages allegedly caused by the explosion of a bottle of Coca-Cola due to defendant's negligence.

This is a summary of the material allegations of fact of the complaint:

Defendant is engaged in the business of bottling and distributing Coca-Cola in the Winston-Salem area for retail sale. The drink Coca-Cola is a combination of syrup of Coca-Cola and carbonated water, which was, and is, injected into glass bottles by a complex machine under defendant's control. When the bottle was filled, this machine closed it by a metal cap, heavily crimped, to keep its contents air-tight. This machine, at times, discharges excessive gas into a bottle, which exerts excessive internal pressure on such a bottle. Weather and temperature conditions increase the inner pressure. The bottles used by defendant, and particularly the bottle which exploded and injured plaintiff, had been used many times by defendant, had been subjected to pressure by the filling machine, had been thrown back and forth on trucks for delivery to retail trade, and frequently through jostling became chipped or deteriorated, thus making the bottle weaker and more likely to explode.

After the bottles are filled, defendant puts them in wooden crates holding 24 bottles of Coca-Cola each. These crates are carried by push trucks to motor trucks and thrown thereon. These trucks travel over rough roads, and the bottles are frequently exposed to sunlight and heat. When the crates of Coca-Cola are delivered to the retail trade, an agent of defendant takes a crate in each hand, and frequently drops

them, which was done in the delivery of the bottle of Coca-Cola that injured plaintiff.

On 14 January 1959, and prior thereto, plaintiff operated a small retail grocery store in the city of Winston-Salem, and, among other articles, offered for sale bottled Coca-Cola furnished him by defendant. Prior to 14 January 1959, the date of plaintiff's injuries, defendant placed in his store display cases owned by it, whereon six-bottle cartons of Coca-Cola were put, and defendant placed thereon the carton containing the bottle of Coca-Cola which exploded and injured him. The cartons are so arranged on the display case that there are three Coca-Cola bottles on each side of the carton. The bottles stand upright with their caps above the carton and beneath the carton's handle. The bottles, because of the rough edge of the caps, are easily caught in the clothing of a passer-by. The display case was situate in the immediate proximity of the meat display counter.

About 10:30 p.m. o'clock on 14 January 1959 a woman customer in plaintiff's store, after having made her selection at the meat display counter, turned to leave, and the hem of her coat caught some portion of one of the six-bottle cartons of Coca-Cola on its display case, which pulled off the carton causing it to fall eight inches to the floor. When plaintiff a few seconds later reached to pick up the carton of Coca-Cola, one bottle exploded, blowing off the neck of the bottle and leaving a long, jagged glass, which embedded itself deeply in his flesh, and severed his tendons, nerves, and muscles in his right leg.

About the time plaintiff was injured, Rosavelle Witter and Spencer Davis, merchants operating stores near plaintiff's store, were victims of exploding Coca-Cola bottles sold and delivered by defendant. Prior to plaintiff's injury, and since, innumerable bottles of Coca-Cola sold by defendant have exploded. These explosions and injuries and the cause thereof were well known to defendant, but it still continues to make, deliver and sell its product.

Plaintiff's injuries were proximately caused by defendant's negligence in the following respects: It failed to inject into the bottle of Coca-Cola a proper mixture of carbonated gases and water. It failed to inspect or to use bottles of sufficient strength to withstand necessary pressure. It failed to use precaution in handling and displaying its Coca-Cola, subjecting the bottle of Coca-Cola to nearby heat. The bottles, because of their wear, jostling and handling, had become weakened. The bottle did not fall a sufficient distance or receive a sufficient jar to break, if it had been in proper condition, but due to its weakened condition, excessive gas, and atmospheric changes, which defendant knew, the bottle exploded.

Plaintiff, by permission of court, filed an amendment to his com-

plaint, which we summarize: The bottle that exploded and injured plaintiff was a defective bottle, and that defendant by reason of its negligence in failing properly and adequately to inspect this bottle, and discover its defective condition and remove it from delivery, permitted it to be placed in plaintiff's store, where it exploded proximately causing plaintiff's injuries.

Defendant in its answer admits that it bottles and distributes Coca-Cola in the Winston-Salem area, that on the day plaintiff was injured, and prior and subsequent thereto, it delivered bottled Coca-Cola to plaintiff's store, that it left a display case in plaintiff's store, that the crates of bottled Coca-Cola were and are delivered by trucks, but denies the other allegations of the complaint. Its answer alleges a further answer and defense, which we summarize: If plaintiff was injured as he alleges, and if the bottle was dropped to the floor by plaintiff or some third party, then the negligence of plaintiff or such third person caused plaintiff's injuries. When the bottle dropped to the floor, plaintiff did not exercise due care for his own safety, and defendant pleads plaintiff's contributory negligence as a defense. If plaintiff's injury did not result from his negligence, then the sole proximate cause of his injuries was the negligence of a third party. If plaintiff and a third party were not negligent, then plaintiff's injuries resulted from an unavoidable accident.

Plaintiff offered evidence to the following effect: The six-bottle cartons of Coca-Cola were displayed in his store for sale on a display case furnished by defendant, and situated therein, substantially as alleged in his complaint. About 9:45 p.m. o'clock on 14 January 1959 Pauline Webb, a customer in his store, wearing a long coat, was leaving the meat counter, when her coattail caught a six-bottle carton of Coca-Cola on the bottom of the display case, and pulled it onto the cement floor—a fall of about eight inches. Pauline Webb started to pick it up, plaintiff told her he saw it fall, and he would pick it up. Plaintiff walked over to pick it up, and when he started to pick it up and was about three feet away, one bottle exploded and glass from the top of the bottle entered his leg and caused the injuries he complains of. The bottle that exploded and injured him was delivered by defendant, and put on the display case the day before it exploded.

Roosevelt Whitten operates a grocery store in Winston-Salem, and buys bottled Coca-Cola from defendant. During the first part of 1959, about an hour after defendant had delivered Coca-Cola at his store, one bottle in a six-bottle carton exploded. This bottle had no fall, it exploded sitting in the rack.

Spencer Davis testified in substance: In 1957, 1958, 1959 and 1960 he sold in his business in Winston-Salem bottled Coca-Cola he bought

from defendant. In January or February 1959 he was putting Coca-Cola bottles in his ice box, and one exploded.

Dr. Andrew Dingwall, a consulting scientist, who was found by the court to be an expert in the field of fracture analyses of beverage bottles and glass containers, testified in substance: On 23 May 1961 he examined the broken bottle whose explosion injured plaintiff. The origin of the break is underneath the cap. Once the location of the origin of the break has been found, the next problem is to determine the nature of the fracture pattern. The fracture pattern is indicative of the force that caused the bottle to break. He then testified in detail, illustrating his testimony by diagrams, as to fracture patterns, and as to the fracture pattern of the broken Coca-Cola bottle in the present case. He expressed his opinion that the explosion of the Coca-Cola bottle in the instant case was not due to internal pressure, but that it was caused by a mild impact over an internally damaged spot on the inside of the bottle. If the impact is delivered immediately over or very close to a point of internal damage, such as internal scratching or abrasion, the ability of the bottle of Coca-Cola to withstand impact may be reduced very greatly, as much as 90%. The broken bottle here was manufactured in 1958, and had been used more than once by reason of the fact its bottom had a scuffed appearance. It is the practice of the Coca-Cola Bottling Industry to use bottles more than once.

Dr. Dingwall testified on cross-examination: "This bottle, if it hadn't struck the floor or had some kind of an impact, would not have broken from internal pressure. It wouldn't have broken at all unless it had an impact."

Other evidence offered by plaintiff, some of which was excluded by the court on objection by defendant and which form the bases of some of plaintiff's assignments of error, will be set forth in the opinion.

Defendant offered as a witness Professor H. E. Fulcher, who is a professor emeritus of physics at Davidson College, and was found by the court to be an expert in the field of physics and bottle fracture. He examined the broken bottle of Coca-Cola here, and it had no internal scratching visible even with ten magnifications. From his examination he found this bottle was broken by impact. He testified: "I formed the definite opinion from my experience and from my examination of this bottle that the cause of the breakage of the bottle was an impact; there is no internal scratching, so far as I can tell."

Defendant's evidence further tended to show: The bottles it uses meet the standard specifications of all Coca-Cola bottles. It uses modern bottling equipment, made by the same company which manufactures for other bottlers over the country. A majority of the bottles

it uses have been used before. When the used bottles are brought in they are inspected. Then they go into a soaker, and from there are put on a conveyor, and examined again before going into the washing machine. After that the bottles are inspected by two persons to see if there are any bottles not suitable to be filled. From there they go to the filler, where they are subjected to a pressure of about 125 pounds from the top of the bottle, and are filled with the Coca-Cola syrup and carbonated water, and then they go to the crowner, where they are subjected to pressure to crimp the crown on the bottle. The internal pressure is about 40 to 50 pounds at the time of filling. After the bottles leave the crowner, they go into electric eyes, where, if there is anything as much as a grain of sand or a crack in the bottle, that would deflect the rays of the electric eyes, and the bottle would be thrown out. Defendant knows of no method of inspecting bottles known to the trade, which is not used by it. It is constantly looking for cracked and scuffed bottles, because it doesn't want unsightly bottles on the trade. It throws away 25 to 50 cases a day of bottles, because they are badly scratched or unsightly.

Two issues were submitted to the jury: Negligence and damages. The jury answered the first issue (negligence), No.

From a judgment that plaintiff recover nothing from defendant, and taxing him with the costs, he appeals.

Elledge and Mast by David P. Mast, Jr., and Clyde C. Randolph, Jr., for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Ralph M. Stockton, Jr., and W. F. Maready for defendant appellee.

PARKER, J. Sam Martin, a witness for plaintiff, operates a grocery store in Winston-Salem, and bought bottled Coca-Cola from defendant in January 1959 for retail sale. He had no trouble in January. Plaintiff assigns as error that the court, on motion of defendant, excluded from the jury his testimony to the following effect: He has had bottles of Coca-Cola purchased from defendant to explode every summer until this last summer; he had them to explode in July and August 1958.

Plaintiff further assigns as error the exclusion by the court from the jury, on motion of defendant, of the testimony of Jacqueline Canady to the following effect: In February 1960 she reached with her left hand in the refrigerator in her home in Winston-Salem and removed a bottled Coca-Cola from the regular racks on the inside of its door. She turned and placed it on the cabinet, and it exploded. One side of the bottle seemed to have disintegrated. The cap was still at-

tached. The index finger on her left hand was badly cut by the explosion, and finally was amputated. The exploded bottle was purchased by her either from the A. & P. Store on Stratford Road or Mount Tabor.

Plaintiff also assigns as error the exclusion by the court, on motion of defendant, of the testimony of Jack F. Canady, husband of Jacqueline Canady, to the following effect: When he arrived home after his wife was injured by the explosion of a bottle of Coca-Cola, he examined the broken bottle. He saw on the bottle the words "Winston-Salem," or some abbreviation of "Winston-Salem." He made a report and claim for his wife's injury to the Claims Adjusting Division of Coca-Cola Bottling Company in Atlanta, Georgia, and a settlement was made for his wife's injury. He also made a report of her injury to defendant.

In cases where damages are sought for injuries caused by the explosion of a bottle of beverage, the law is well settled in this jurisdiction that it is competent for plaintiff to show that other bottles filled by the same bottler under substantially similar conditions and sold by it at about the same time have exploded under "substantially similar circumstances and reasonable proximity in time," as authorizing a permissible inference that the bottler has not exercised that degree of care required of him under the circumstances. *Dail v. Taylor,* 151 N.C. 284, 66 S.E. 135; *Cashwell v. Bottling Works,* 174 N.C. 324, 93 S.E. 901; *Enloe v. Bottling Co.,* 208 N.C. 305, 180 S.E. 582; *Ashkenazi v. Bottling Co.,* 217 N.C. 552, 8 S.E. 2d 818; *Davis v. Bottling Co.,* 228 N.C. 32, 44 S.E. 2d 337; *Styers v. Bottling Co.,* 239 N.C. 504, 80 S.E. 2d 253.

Plaintiff's allegations and proof are that the bottle of Coca-Cola here was in a carton with five other bottles of Coca-Cola, which was pulled off the display case by the long coat of Pauline Webb, and fell about eight inches to a cement floor, where it exploded. All of plaintiff's evidence tends to show that the bottle here exploded not by reason of internal pressure alone, but it exploded by reason of internal pressure, when the bottle fell eight inches to the cement floor and received "a mild impact" "over an internally damaged spot on the inside of the bottle." The excluded testimony of Sam Martin as to the explosions of bottles of Coca-Cola in his store in the summertime does not show the circumstances under which the bottles exploded. There is no evidence that the bottles in his store fell to the floor, or received any blow. In our opinion, and we so hold, the bottles of Coca-Cola purchased by Sam Martin did not explode under "substantially similar circumstances" as did the bottle in the present case,

so as to make evidence of their explosions competent with the rule above stated.

Even if we assume, though we do not concede it (*Elledge v. Bottling Co.*, 252 N.C. 337, 113 S.E. 2d 435), that the evidence of the Canadys authorizes a permissible inference that the bottle of Coca-Cola that exploded and cut Jacqueline Canady's finger was bottled and distributed by defendant, it did not explode under "substantially similar circumstances" as did the bottle here, so as to make the evidence of its explosion competent. The court properly excluded the testimony of Jack F. Canady that he made a report of his wife's injury to defendant, and that he made a report and claim for his wife's injury to the Claims Adjusting Division of Coca-Cola Bottling Company in Atlanta, Georgia, and a settlement was made for his wife's injury. Wigmore on Evidence, Third Ed., Vol. 4, p. 32; 31 C.J.S., Evidence, sec. 292. See also Jones on Evidence, Civil and Criminal, Fifth Ed., Vol. 2, sec. 392.

The four assignments of error as to the exclusion of the testimony of Sam Martin, Jacqueline Canady, and Jack F. Canady are overruled.

The remainder of plaintiff's assignments of error relate to the charge, except the 14th, which is formal.

Plaintiff's assignments of error, numbers 5 through 9, are to the failure of the court to give in form or in substance five prayers for special instructions. The first three prayers for special instructions are:

> REQUEST #1: "The installation by the defendant of modern machinery and appliances, such as is in general and approved use, does not IPSO FACTO exculpate the defendant from liability. The standard of vigilance required of the defendant is due care, i.e., commensurate care under the circumstances. The defendant owed to plaintiff the duty not to put into his hands a bottle charged with gas that was dangerous to handle in the usual and customary method."
>
> REQUEST #2: "It is not incumbent upon plaintiff to show what precautions the defendant should take. That duty devolved upon the defendant who would be liable for negligence in putting dangerous goods upon the market without sufficient precautions to make them safe. What is the best protection is a matter which the defendant must ascertain and use."
>
> REQUEST #3: "If such defects as internal abrasions occur in used beverage bottles and substantially reduce the ability of the bottles to withstand impact and to withstand normal handling, it becomes the duty of the bottler to make appropriate tests before

the bottles are refilled, and if such tests are not commercially practicable, the bottles should not be reused."

The trial court, *inter alia,* charged as follows:

"The defendant in bottling and marketing bottles of Coca-Cola had the duty to use due care to not excessively charge the bottles of Coca-Cola with carbonic acid gas so that in normal handling and reasonable rises in temperature the bottles would not explode from internal pressure, and to use due care to examine, inspect and test the bottles to discover and remove from public exposure any defective bottles liable to cause or increase the probability of an explosion from internal pressure. The court instructs you, members of the jury, that if the defendant bottled and sold to the plaintiff bottles of Coca-Cola and failed to use due care to not excessively charge the bottles of Coca-Cola with carbonic acid gas so that in normal handling and reasonable rises in temperature the bottles would not explode from internal pressure, or failed to use due care to examine, inspect and test the bottles and to discover and remove from public exposure defective bottles liable to cause or increase the probability of an explosion from internal pressure, then such would constitute negligence on the part of the defendant; and if such was the proximate cause or a proximate cause of injuries to the plaintiff, then such would constitute actionable negligence. . . .

"The Court instructs you that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff to so satisfy you, that the defendant bottled and sold and delivered to the plaintiff a bottle of Coca-Cola contained within Plaintiff's Exhibits 2 and 3, and that the bottle was defective in that it had scratching and abrasions on the interior surface of the bottle, and the defendant failed to use due care to not excessively charge the bottle of Coca-Cola with carbonic acid gas, so that in the normal handling and reasonable rises in temperature the bottle would not explode from internal pressure; or failed to use due care to examine, inspect and test the bottle to discover that the bottle was defective because of such interior scratching and abrasions and liable to cause or increase the probability of explosion from internal pressure, and that such was the proximate cause or a proximate cause of the plaintiff's injuries, then it will be your duty to answer the first issue YES."

The first three prayers for special instructions were given in substance by the court in its charge, as set forth above, except that the

court did not charge that "the installation by the defendant of modern machinery and appliances, such as is in general and approved use, does not *ipso facto* exculpate the defendant from liability." While that is a correct statement of the law, *Styers v. Bottling Co., supra,* we do not consider the failure of the court to charge this under the facts here sufficiently prejudicial to warrant a new trial.

Defendant assigns as errors in respect to the parts of the charge above quoted, that the court "limited the jury's consideration to explosions 'from internal pressure' rather than instructing them with regard to explosions caused by mild impact in the course of normal handling, as indicated by plaintiff's evidence," and further "that his Honor failed to instruct the jury that defendant had the duty to provide plaintiff with a beverage bottle of sufficient strength to withstand mild impact in the course of normal handling." These are assignments of error numbers 10 and 11.

Plaintiff's evidence is clear and uncontradicted to the effect that the bottle here, if it had not struck the floor or had some kind of an impact, would not have broken from internal pressure; it would not have broken at all, unless it had had an impact; the mild impact was delivered over an internally damaged spot on the inside of the bottle. The pulling of a carton of six bottled Coca-Colas from a display case, so that it falls eight inches to a cement floor is not normal handling. The court, when it applied the law to the facts on the first issue, charged in part: "The Court instructs you that if the plaintiff has satisfied you by the greater weight of the evidence, . . . that the defendant bottled and sold and delivered to the plaintiff a bottle of Coca-Cola . . . , and that the bottle was defective in that it had scratching and abrasions on the interior surface of the bottle, and the defendant . . . failed to use due care to examine, inspect and test the bottle to discover that the bottle was defective because of such interior scratching and abrasions and liable to cause or increase the probability of explosion from internal pressure, and that such was the proximate cause or a proximate cause of the plaintiff's injuries, then it will be your duty to answer the first issue Yes." The court did not limit the charge to "internal explosions," as contended by plaintiff. The assignments of error numbers 10 and 11 are not sustained.

Plaintiff's assignment of error number 13 is that the court failed to charge that in the event the jury should find that both defendant and Pauline Webb were negligent, and that the negligence of each was a contributing proximate cause of plaintiff's injuries, they should answer the first issue (negligence), Yes.

The trial court gave the jury a full and correct definition of the

rules of negligence and proximate cause, to which plaintiff does not except, and then charged as follows:

> "Now, members of the jury, under the law of this State there may be one proximate cause of an injury; there may be two proximate causes; for that matter there may be more than two proximate causes. These may originate from the same source, or they may originate from entirely separate and distinct sources; and yet, if they unite, concur and combine to proximately cause injury to some person, then the author of each would be liable to the person injured, and such person at his election could sue either or all for such injury."

Later the trial court charged as follows:

> "You are further instructed that if a customer in the store of the plaintiff caused bottles of Coca-Cola to fall to the floor, creating an impact on the bottles, and that such was the sole proximate cause of the plaintiff's injury, then the defendant would not be liable; if the sole cause of the plaintiff's injury was the breaking of a bottle of Coca-Cola by external force, that is by an external impact, then the defendant would not be liable."

Later on the trial court in applying the law to the evidence on the first issue (negligence) charged in substance as above set forth that if the defendant was guilty of negligence, as detailed in the charge, and that such negligence "was the proximate cause or a proximate cause of the plaintiff's injuries, then it will be your duty to answer the first issue Yes."

While the charge might have been more precisely formulated, yet studying the charge in its entirety we are of opinion, and so hold, that the jury must have understood from the charge, that if Pauline Webb was negligent and defendant was negligent and their negligence concured in contributing proximately to plaintiff's injuries, then the defendant would be liable.

Plaintiff's assignments of error numbers 8 and 9—refusal to give plaintiff's 4th and 5th prayers for special instructions, and assignment of error number 12—failure to charge, have been examined, and are overruled. They merit no discussion.

Plaintiff has not carried the burden of showing error sufficiently prejudicial to warrant a new trial. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657.

No error.

WESLEY L. WAGNER, MINOR, BY HIS NEXT FRIEND, MARGARET WAGNER v. BRADY L. EUDY AND ARCHIE L. EUDY, BY HIS GUARDIAN AD LITEM, BRADY L. EUDY.

AND

LANE WAGNER v. BRADY L. EUDY AND ARCHIE L. EUDY, BY HIS GUARDIAN AD LITEM, BRADY L. EUDY.

(Filed 23 May 1962.)

1. Automobiles § 41c—

Testimony held sufficient to support finding that defendant was operating his car on the left side of the highway and collided with a vehicle approaching from the opposite direction, and therefore the evidence required the submission of the issue of negligence to the jury irrespective of any other aspect of negligence.

2. Automobiles § 49—

Evidence held insufficient to show contributory negligence as a matter of law on the part of a passenger in riding in an automobile with a driver whose view of the highway was partially obstructed by frost on the windshield.

3. Automobiles § 55—

Evidence held sufficient on the question of the father's liability under the family purpose doctrine for the negligent operation of the vehicle by his minor son.

4. Appeal and Error §§ 31, 54—

Where appellants in apt time serve their case on appellees, and appellees file exceptions on the ground that the court's charge contained therein was only a fragment of the charge as actually given, and the trial court, upon appellants' request to settle the case finds that the charge appearing in the record was fragmentary because of the inability of the reporter to hear and take down the charge as given, but that the court could not then reconstitute the charge, a new trial will be awarded, since appellant, without fault, is entitled to have the appellate court have before it for review instructions to which he has aptly entered exceptions.

HIGGINS, J., dissenting.

PARKER, AND BOBBITT, JJ., join in dissent.

APPEAL by defendants from *Gambill, J.*, August 1961 Term of CABARRUS.

Wesley Wagner, seventeen-year-old son of Lane Wagner, occupant of an automobile owned by Brady Eudy, was injured about 7:00 a.m., 30 December 1959, when the Eudy car, operated by Archie Eudy, minor son of Brady Eudy, collided with a car owned and operated by Larry Hammill. The collision occurred near the crest of a hill. The Hammill car was traveling east, the Eudy car, west.

Wesley Wagner seeks damages for personal injuries sustained by him. Lane Wagner seeks compensation for loss of services of his son and medical expenses incurred on account of his son's injuries. To support their rights to recover, they allege: The Eudy automobile was a family purpose car used on the morning of the collision by the son with the consent of his father and as agent of the owner; the Eudy car was on the south, or driver's lefthand side of the highway when it collided with the Hammill automobile; Archie Eudy was operating the car on the wrong side of the road in violation of secs. 146 and 148 of c. 20 of the General Statutes; not only did he drive on the wrong side of the road, but he negligently failed to keep a proper lookout.

Defendants denied the allegations of negligence, denied that Archie Eudy was the agent of his father, and as an additional defense pleaded contributory negligence of Wesley Wagner.

The causes were consolidated for trial. Defendants moved for nonsuit. The motions were overruled, and issues of negligence, contributory negligence, agency, and damages were submitted to the jury. The issues of negligence and agency were answered in the affirmative, contributory negligence in the negative. Damages for the son's injuries were fixed at $10,000, and $265 was awarded the father.

Judgments were entered on the verdicts. Defendants excepted and appealed. Defendants were allowed ninety days from 31 August 1961 to serve case on appeal, and plaintiffs sixty days thereafter to serve countercase or file exceptions.

Webster S. Medlin for plaintiff appellees.

Hartsell, Hartsell & Mills by William L. Mills, Jr. and J. Maxton Elliott, and Williams, Willeford & Boger by John Hugh Williams for defendant appellants.

RODMAN, J. The evidence tending to fix the place where the collision occurred came from the Highway patrolman who was called to investigate the collision. Notwithstanding seeming inconsistencies in his testimony, we are of the opinion and hold it was sufficient to support a findng by the jury that Archie Eudy was operating his car to the left of his center of the highway, and this violation of the rules of the road was the proximate cause of the collision. This evidence, sufficient to require a finding of defendants' negligence, obviates the necessity of determining whether there was any evidence to support the allegation that the driver failed to keep a proper lookout.

As we read the complaints, plaintiffs do not allege negligence in operating with the windshield so covered with frost as to obstruct the driver's view; nor does defendants' evidence compel the conclusion

that Wesley Wagner was contributorily negligent in riding in a vehicle in which the driver could not see because of the frost on his windshield. This was likewise a question to be resolved by the jury.

There was evidence from which the jury could find that the Eudy automobile was a family purpose car, used at the time by the minor son of the owner with the owner's consent.

The court properly overruled the motions made by each defendant to nonsuit.

The official court reporter for Cabarrus County was present at the trial of and reported this case. She transcribed the evidence and the court's charge as she heard and understood it.

On 24 November 1961 appellants served their case on appeal on counsel for appellees. This service was in due time. The case served included a narrative statement of the testimony based on the reporter's transcript. It included the court's charge as taken by the reporter. It showed the exceptions taken by appellants to the court's rulings, to the charge as given, and to the failure of the court to charge on material aspects of the case. It contained a grouping of assignments of error as required by the rules of this Court. On the same day appellants served their case on appeal, counsel for plaintiffs and defendants stipulated and agreed "the foregoing statement of defendants' case on appeal and record as served upon the plaintiffs' attorney on the 24th day of November 1961, shall constitute the record and case on appeal, except for the charge of the Court, to which the plaintiffs are allowed the authorized time within which to serve countercase or exception if they so desire."

The charge appearing in appellant's statement of the case on appeal is insufficient to meet the requirements of G.S. 1-180, which imposes on the judge the duty to declare and explain the law arising on the evidence in the case. One of appellants' exceptions and assignments of error is directed to this failure of the judge to perform his duty.

Both by statute, G.S. 1-282, and by the terms of the stipulation it was the duty of appellees, if dissatisfied with appellants' statement of the case on appeal, to file a countercase or specific amendments to appellants' statement. If appellees file a countercase or specific amendments to appellants' statement of the case on appeal, appellants have fifteen days in which to accept the amendments or, if not willing to accept them, to call on the court to settle the disagreement. G.S. 1-283.

Appellees did not file exceptions to the case on appeal supplying what they claimed were the deficiencies in the court's charge or their version of the charge as given. Instead, they filed on 9 January 1962 a petition with Judge Gambill in which they said: ". . . during the latter part of November 1961, your petitioner was furnished with a

copy of the transcribed portion of the Court's charge to the jury, at which time your petitioner advised his Honor about the charge. The Court Reporter has transcribed only a very small portion of the Court's charge to the jury, a copy of which is attached hereto. The Court Reporter advises that she was unable to take down the charge. . . . That your petitioner is currently confronted with the preparation of a countercase on appeal that will reflect the Court's charge to the jury." The petitioner concluded with a prayer "that his Honor prepare a charge in the above captioned cases based upon the transcript of testimony and the issues presented in order that the charge may be included in the record on appeal with the express understanding that it is to represent the Court's opinion of the original charge." Attached to the petition was a transcript of the court's charge prepared by the court reporter from her notes.

On 15 February 1962 appellees filed exceptions to appellants' statement of the case on appeal. This was after the time allowed them in which to file a countercase or serve exceptions; but since the parties make no contention about the time in which to file the countercase or exceptions, it may be assumed that time to file exceptions was extended. As the basis for their exception, appellees say: "That the plaintiffs except to that portion of the record on appeal which is entitled, 'Judge's Charge To Jury,' on the grounds that it does not in fact include all of the Judge's Charge to the Jury but includes only a small fragmentary portion of the Judge's Charge, and therefore, the plaintiffs respectfully request that the court strike from the record on appeal that fragmentary portion of the Judge's Charge as has been included in the defendant's record on appeal purportedly as the 'Judge's Charge To Jury.' "

On 21 February 1962 the presiding judge, in response to appellants' request, fixed 28 February 1962 as the time to settle the case on appeal. On that date he signed an order stating: ". . . it is found that the record is in order except with respect to the portion of the record entitled 'Judge's Charge to Jury.' The court finds that the portion of the Court's Charge in the case as appears in the record is fragmentary and only constitutes a small portion of the Charge. It is ordered that the 'Judge's Charge to Jury' be revised to read, 'A portion of Judge's Charge to Jury.' " The order recites that before the judge started his charge to the jury his attention was called to the fact that the reporter seemed to have difficulty in hearing him. Thereupon he moved closer to the reporter. There was no further suggestion during his charge that the reporter did not hear and was not able to take his charge. The order then says: "The Court further is of the opinion that

it would be unfair to the parties concerned in this action for the Court to undertake to prepare a new Charge as a part of the record in this case, therefore, declines to prepare such Charge."

The litigant who loses is entitled to have the appellate court know what law the trial court told the jury was controlling on the facts of the case. To assure a litigant this right, the Legislature, with the adoption of the Code of Civil Procedure, gave him the right, by request made in apt time, to compel the trial judge to reduce his charge to writing, signed and filed as a part of the court record. G.S. 1-182.

The duty so imposed tended to reduce materially the number of cases which could be disposed of in a given time. Hoping to correct this loss of time without sacrificing accuracy, the Legislature, in 1913, directed county commissioners at the request of trial judges to employ a court stenographer charged with the duty "to well, truly, and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with section five hundred and thirty-six of the Revisal of one thousand nine hundred and five." (G.S. 1-182)C. 69 P.L. Extra Session 1913. The basic provisions of this statute were brought forward in each subsequent codification of our laws. C.S. 1461; G.S. 7-89.

Notwithstanding changes in phraseology since the adoption of the 1913 Act, we think the purpose of the original Act, i.e., to preserve an accurate record of the trial, remains.

With the adoption of the 1913 statewide statute and similar local statutes and an improvement in accurately reporting the events of a trial, requests that judges write out their charges have materially decreased. Today such a request is almost unknown.

It would indeed be unfortunate if trial counsel should come to feel that it was necessary to revert to requests to trial judges to write out their charges to be sure they could present to the appellate court an accurate statement of the trial court's charge to the jury.

The judge, when called on to settle a case on appeal, is not bound by the stenographic transcript of the trial. If he is convinced there is error in the transcript, he may correct it to speak the truth if his recollection of the events and what was said and done is sufficient for him to do so. If convinced of error but without recollection sufficient to supply the deficiencies or otherwise correct the error, he should refuse to settle the case on appeal for that reason.

The court's findings with respect to the events of the trial bring this appeal in a category of frequent occurrence prior to the use of official court reporters. The rule then uniformly applied was to award a new trial where, as here, appellant had been diligent in seeking a review,

but the court, for some cause not attributable to appellant, such as the loss of his notes, was unable to certify a correct and accurate statement of the errors of which appellant complained. The language of *Merrimon, J.*, in a similar factual situation, should, we think, be applied to this case. He said: "It must be taken that the *data*, necessary to enable the judge to settle the case upon appeal, cannot be supplied. He declares he cannot settle it for the lack of such information. The appellant has been reasonably diligent in his efforts to prosecute his appeal upon its merits, and is unable to do so by no fault of his own. He ought not, therefore, to suffer prejudice. In such a case the only remedy is to grant a new trial, and this will be done." *Burton v. Green*, 94 N.C. 215. Further illustration of the rule may be found in *McGowan v. Harris*, 120 N.C. 139; *Ritter v. Grimm*, 114 N.C. 373; *Clemmons v. Archbell*, 107 N.C. 653; *Jones v. Holmes*, 83 N.C. 108; *Simmons v. Andrews*, 106 N.C. 201; *Owens v. Paxton*, 106 N.C. 480; *Comrs. v. Steamship Co.*, 98 N.C. 163; *Chauncey v. Chauncey*, 153 N.C. 12, 68 S.E. 906; *Arrington v. Arrington*, 114 N.C. 115; *Hinton v. Greenleaf*, 115 N.C. 5; *Turner v. Gas Co.*, 171 N.C. 750, 87 S.E. 970; *Coleman v. Hood, Comr. of Banks*, 208 N.C. 430, 181 S.E. 280; *Chozen Confections, Inc. v. Johnson*, 220 N.C. 432, 17 S.E. 2d 505; *S. v. Powers*, 10 N.C. 376; 39 Am. Jur., New Trial, sec. 154; 3 Am. Jur. Appeal and Error, sec. 667.

Except for the judge's findings that he could not, in fairness to the parties, reconstitute his charge as actually given, we would remand the case to the court to settle the case on appeal; but it would be unseemly to remand in view of the court's statement that he cannot now correctly state his charge to the jury. For the reasons given there must be a

New trial.

HIGGINS, J., dissenting. I am unable to agree the defendants make a sufficient showing to entitle them to another trial. As to the cause of the accident, the plaintiff offered two witnesses. Wesley L. Wagner testified he was a guest passenger in the Eudy Ford. At the time he entered the vehicle the windshield was covered with frost except for a small circular space in front of the driver. The plaintiff offered to remove the frost but the defendant driver assured him he had an adequate view. Further down the road the defendants' vehicle and a Chevrolet driven by Hammill collided head-on. The plaintiff received serious injuries. The highway patrolman testified the debris and the marks where the vehicles came together were in approximately the middle of the road which was 28 feet wide. The defendants did not offer evidence.

The judge charged the jury. The court reporter was present, apparently taking the charge in shorthand. At the conclusion of the charge the judge made inquiry if counsel had any request for further instruction. Neither side made a request. The jury found for the plaintiff on all issues. The defendants gave notice of appeal. The court made an order allowing 90 days for service of the case and 60 days for exceptions or countercase.

The court reporter made an affidavit, "that the Judge talked so rapidly and in such a low tone of voice that it was impossible for her to hear and clearly understand what he was saying, and it was impossible thereafter for her to translate his charge; that William L. Mills, Jr., attorney for the defendant, was sitting nearby and the Court Reporter indicated to him that she was not able to hear and understand the Judge, whereupon Mr. Mills interrupted the Court and stated that he did not believe the Reporter was getting his charge." *There was no complaint the jury did not hear.* The court had the stenographer move closer and proceeded with the charge.

Eighty-six days after the trial the defense counsel served his case on appeal which included, *as the charge,* such fragments thereof as the reporter was able to salvage from her notes. With knowledge at the time the charge was delivered that the reporter was likely to come up with an inaccurate and incomplete record, counsel did nothing to ascertain how much the stenographer had taken. It does not appear at what stage of the charge the reporter made her complaint — not to the court — but to defense counsel. How soon after the trial defense counsel found out about the actual condition of the reporter's notes does not appear. He should have done so immediately. Counsel never notified the judge of the reporter's failure but attempted to place upon the plaintiff the onus of securing a proper record or suffer the consequences the majority now visits upon him.

What is the defendant's complaint about the charge? The general one when specifics are absent. Failure to comply with G.S. 1-180. (a) Failure to review the evidence; (b) failure to declare and explain the law arising on the evidence; (c) failure to give equal stress to the contentions. The latter does not involve the evidence because the defendant did not have any.

Did the judge charge incorrectly? And, if so, in what respect? There is a presumption he charged correctly until a record — not a fragment — but a complete record indicates to the contrary. Counsel sat before the judge and heard the charge. He offered only the incomplete notes of the reporter. He has never until this day attempted to offer more. Any deviation from a correct charge should have impressed him sufficiently so that he could recall more than the (a), (b), and (c) now

relied on. The maneuvering after the trial was on the plaintiff's motion. The judge might well have said to plaintiff's counsel, What are you squawking about? You won the case.

The cases cited in support of a new trial without exception hold that the appellant must free himself from laches before he can claim the benefit of an incomplete record. Counsel for the defendant and the reporter knew from the time the charge was given that the record of it would probably be incomplete. We are not shown one single move initiated by defendant's counsel to have the defects supplied. The parties do not request the trial judge to state what he charged on negligence, or proximate cause, or burden of proof, or any other proposition of law. A busy judge, six months after a trial, is requested to rewrite the entire charge.

On the merits, the few sentences of material evidence by the plaintiff and the patrolman as to how and why the accident occurred, leave the impression that objections (a), (b), and (c) to the charge are insignificant. The issues and the uncontradicted evidence thereon are simple, direct, and clearcut. Nothing appears to indicate the jury was confused. The defendants demand a new trial. They have done too little to justify a demand for so much.

PARKER and BOBBITT, JJ., join in this dissent.

G I SURPLUS STORE, INC., A CORPORATION; MECKLENBURG SURPLUS COMPANY, A CORPORATION; CLARK'S CHARLOTTE, INC., A CORPORATION; AND ATLANTIC MILLS OF N. C., INC., A CORPORATION; ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY NORTH CAROLINA GENERAL STATUTE #14-346.2, PLAINTIFFS v. J. CLYDE HUNTER, SHERIFF OF MECKLENBURG COUNTY; JOHN HORD, CHIEF, CHARLOTTE POLICE DEPARTMENT; AND G. A. STEPHENS, CHIEF, MECKLENBURG COUNTY RURAL POLICE DEPARTMENT, DEFENDANTS.

(Filed 23 May 1962.)

1. Constitutional Law §§ 24, 30—

The term "law of the land" as used in Art. I, § 17, of the Constitution of North Carolina, is synonymous with "due process of law" as used in the Fourteenth Amendment to the Federal Constitution.

2. Constitutional Law § 11—

A statute enacted in the exercise of the police power to protect or promote the health, morals, safety or general welfare of the public must have a rational, real, or substantial relation to the accomplishment of

such purpose, and arbitrary or unnecessary restrictions upon lawful activities do not come within the police power.

3. Constitutional Law § 14—

The General Assembly, in the exercise of the police power, has the authority to enact, or to confer upon municipal corporations the power to enact, regulations proscribing all secular activities on Sunday and to prescribe exceptions thereto, provided the execptions are not arbitrary, unreasonable, and discriminatory.

4. Appeal and Error § 1—

The Supreme Court, in passing upon the constitutionality of a statute, will consider only the grounds specifically brought into focus by the parties.

5. Constitutional Law § 30; Criminal Law § 1—

A statute creating a criminal offense must be sufficiently explicit to inform a person of ordinary intelligence with reasonable precision of what acts are proscribed.

6. Same; Constitutional Law §§ 12, 14—

G.S. 14-356.2 proscribes the sale or offering for sale on Sunday only those articles falling within specified categories, with exceptions from the specified categories of "novelties, toys, souvenirs, and articles necessary for making repairs and performing services," without guides or standards for determining under what circumstances articles within the specified categories should be considered novelties, toys, or souvenirs and without defining the nature of the repairs or the character of the services which should come within the exceptions, and therefore the statute is unconstitutionally vague, uncertain, and indefinite.

7. Same; Statutes § 4—

Where a statute prohibits the sale or offering for sale of merchandise within certain categories, with exceptions referring to merchandise within the same categories, and the exceptive provisions are so vague as to be void, the prohibitory provisions cannot be upheld as a valid part of the statute, since the prohibitory and exceptive provisions are interrelated and inseparable parts of the same act.

8. Constitutional Law § 4; Injunctions § 5—

While injunction does not ordinarily lie to restrain the enforcement of a statute, the remedy will lie to prevent the denial of fundamental property or personal rights in violation of constitutional guarantees.

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

APPEAL by plaintiffs from *Pless, J.*, November 7, 1961 Term of MECKLENBURG.

This is a class action, instituted by the four named plaintiffs in behalf of themselves and all others similarly situated, to restrain defendants, the chief law enforcement officers of Charlotte and of Meck-

lenburg County, North Carolina, from making arrests for alleged violations of Chapter 1156, Session Laws of 1961, which provides:

"AN ACT TO PROHIBIT CERTAIN BUSINESS ACTIVITIES ON SUNDAY.

"*The General Assembly of North Carolina do enact:*

"Section 1. Article 44 of Chapter 14 of the General Statutes is amended by adding a new Section immediately following G.S. 14-346.1, to be designated as G.S. 14-346.2, and to read as follows:

" 'G.S. 14-346.2. Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, excluding novelties, toys, souvenirs, and articles necessary for making repairs and performing services, shall, upon conviction thereof be fined or imprisoned in the discretion of the court.

" 'Each separate sale or offer to sell shall constitute a separate offense.'

"Sec. 1.5. The governing board of any incorporated city or town may, by resolution, exempt said city or town from the operation of this Act. The county commissioners in any county by resolution may exempt all or any portions of the unincorporated area of the county from the operation of this Act.

"Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 3. This Act shall become effective October 1, 1961.

"In the General Assembly read three times and ratified, this the 22nd day of June, 1961."

Each of the four named plaintiffs (a) is a North Carolina corporation; (b) engages in retail and wholesale merchandising business; (c) has a store and place of business in Charlotte; (d) engages in its said business on Sunday and sells on Sunday the articles of merchandise referred to in said statute; (e) derives from its sales each Sunday "a substantial dollar volume of business."

The governing body of the City of Charlotte has taken no action to exempt said City from the operation of said statute; and the County Commissioners of Mecklenburg County have taken no action to exempt the unincorporated area of the County, or any part thereof, from the operation of said statute.

Plaintiffs, for reasons considered in the opinion, alleged the said statute is unconstitutional and therefore void; that they have no adequate remedy at law; and that, unless defendants are restrained, they will suffer irreparable damage and injury by a multiplicity of arrests and criminal prosecutions.

When the cause came on for hearing as to whether a temporary restraining order theretofore issued should be continued in effect until a final hearing, defendants demurred to the complaint on the ground the statute is valid and therefore the complaint did not allege facts sufficient to constitute a cause of action.

After hearing, the court was of the opinion and held (a) "(t)hat the unconstitutionality of the Statute has not been shown beyond a reasonable doubt, and the demurrer is hereby sustained," and (b) "(t)hat the equitable arm of the Court should not be used to restrain its enforcement." Thereupon, judgment dissolving the temporary restraining order, dismissing the action and taxing plaintiffs with the costs, was entered. However, the court, stating that "(u)nless the temporary order is continued in effect until the case can be determined by the Supreme Court of North Carolina, it would impose upon the defendants a substantial burden in innumerable prosecutions, result in a substantial addition to the criminal docket, and . . . entail considerable expense to the plaintiffs," was of the opinion "that this is a case in which G.S. 1-500 should apply," and permitted the temporary restraining order to remain in full force and effect pending determination of plaintiffs' appeal to the Supreme Court on condition that plaintiffs give bond.

Plaintiffs gave bond as required, excepted to the judgment and appealed therefrom.

Boyle, Alexander & Wade and Cannon & Wolfe for plaintiffs, appellants.

John T. Morrisey, Jr., Dockery, Ruff, Perry, Bond & Cobb and G. H. Warlick for defendants, appellees.

BOBBITT, J. Plaintiffs assert, as their sole ground of attack, that the 1961 Act is "unconstitutionally vague, uncertain and indefinite, in violation of Article I, Section 17, of the North Carolina Constitution and the due process clause of the Fourteenth Amendment to the Federal Constitution."

The term, "law of the land," as used in the cited provision of the North Carolina Constitution, is synonymous with "due process of law," as used in the cited provision of the Federal Constitution. *S. v.*

Ballance, 229 N.C. 764, 769, 51 S.E. 2d 731, 7 A.L.R. 2d 407, and cases cited; *S. v. Parrish,* 254 N.C. 301, 303, 118 S.E. 2d 786.

Before considering the ground of attack drawn into focus by plaintiffs' pleading and brief, it seems appropriate to advert to certain well-established principles of constitutional law.

"Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *S. v. Ballance, supra,* and cases cited. However, "(a)rbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State." *S. v. Warren,* 252 N.C. 690, 693, 114 S.E. 2d 660, and cases cited. "If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare." *S. v. Ballance, supra; Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851, and cases cited; *S. v. Brown,* 250 N.C. 54, 108 S.E. 2d 74, and cases cited; *S. v. Williams,* 253 N.C. 337, 117 S.E. 2d 444.

Municipal ordinances, enacted in the exercise of legislative power conferred by the General Assembly, "prohibiting the pursuit of *all occupations generally* on Sunday, except those of necessity or charity, have been uniformly held constitutional in this jurisdiction." (Our italics) *S. v. McGee,* 237 N.C. 633, 638, 75 S.E. 2d 783, and cases cited. The ordinance considered in *S. v. McGee, supra,* similar to those considered in prior cases, provided "(i)t shall be unlawful to conduct, operate or engage in, or carry on within the City of Charlotte on the Sabbath Day, called 'Sunday,' *any* business," (Our italics) with exceptions thereafter set forth; and it was held that the exceptions were not arbitrary, unreasonable or discriminatory.

The provisions of the 1961 Act, now G.S. 14-346.2, proscribe, when engaged in on Sunday, conduct which, at all other times, is lawful. The purpose of the 1961 Act, according to the caption, is "to prohibit *certain business activities* on Sunday." (Our italics) To effectuate its declared purpose, the 1961 Act provides that any person, firm or corporation who, on Sunday, engages in the business of selling or who sells or offers for sale, at retail, any articles of merchandise included within the specified categories, except novelties, toys, souvenirs, and articles necessary for making repairs and performing services, "shall, upon conviction thereof be fined or imprisoned in the discretion of the court." It provides further that "(e)ach separate sale or offer to sell shall constitute a separate offense."

Unlike ordinances and statutes such as the ordinance considered in

S. v. McGee, supra, the 1961 Act imposes no general ban on business activities on Sunday but applies solely to "certain business activities," to wit, the sale and the offering for sale, *at retail,* of merchandise within the specified categories. The sale, *at wholesale,* of merchandise within the specified categories is not proscribed. Nor does the statute affect in any manner the selling or offering for sale of merchandise or other property not included in the specified categories.

Questions suggested by a consideration of the 1961 Act, but not raised by plaintiffs, include the following: Is the classification of the articles that may *not* be lawfully sold or offered for sale on Sunday arbitrary, unreasonable or discriminatory? Does the 1961 Act manifest a legislative determination that the acts proscribed thereby are inimical to the public health, morals, order, safety or general welfare, when authority is granted to local governing bodies to exempt from its provisions areas subject to their authority? Since it *regulates trade,* is the 1961 Act a general law within the meaning of Article II, Section 29, of the Constitution of North Carolina, *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888, when local governing bodies are authorized in effect to repeal it with reference to areas subject to their authority?

We do not pass upon any of the questions posed in the preceding paragraph. The only question for decision on this appeal is whether the 1961 Act is unconstitutional and void on the ground on which plaintiffs attack it. *Hudson v. R. R.,* 242 N.C. 650, 667, 89 S.E. 2d 441.

In *Connally v. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322, the applicable rule is stated by *Mr. Justice Sutherland* as follows: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

". . . the terms of a criminal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to its penalties, and no one may be required, at the peril of life, liberty, or property to guess at, or speculate as to, the meaning of a penal statute." 22 C.J.S., Criminal Law § 24(2) (a); 16A C.J.S., Constitutional Law § 580; 14 Am. Jur., Criminal Law § 19; Wharton's Criminal Law and Procedure, Vol. 1, § 18; *S. v. Hales,* 256 N.C. 27, 122 S.E. 2d 768, and cases cited therein. True, reasonable certainty is sufficient; and this Court in

S. v. Hales, supra, held the provisions of the statute then under consideration sufficiently definite to inform "a person of ordinary intelligence with reasonable precision of the acts it prohibits."

A statute, enacted in Missouri and also in Kansas, after declaring "(e)very person who shall expose to sale any goods, wares or merchandise, . . . on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars," provided it "shall not be construed to prevent the sale of any drugs or medicines, provisions or *other articles of immediate necessity.*" (Our italics)

In *S. v. Katz Drug Company* (Mo. 1961), 352 S.W. 2d 678, the court held the State's evidence made a case for the jury; that certain of the articles sold by the defendant did not come within the exemption of "articles of immediate necessity"; that, while no comprehensive general definition of "articles of immediate necessity" was given, "articles *immediately necessary* to carry on work of *necessity* would surely be included"; (Our italics) and that, when so construed, the statute was not unconstitutional and void on the ground of vagueness and uncertainty.

In *S. v. Hill* (Kan. 1962), 369 P. 2d 365, the court said: "But the phrase 'or other articles of immediate necessity' has no objective meaning. There is no common, generally-understood meaning to this all-embracing term. It becomes meaningful only when applied to a specific article purchased under varying circumstances, which leaves open the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can adequately guard against. It could mean a variety of things to many different people. What may be an article of immediate necessity for one person to purchase on Sunday may be completely immaterial and even unwanted by another. Thus, whether an article is of immediate necessity depends solely upon the subjective judgment of one person based upon that of another. The phrase is so general and indefinite as to embrace not only acts properly and legally punishable, but those which are lawful and not punishable." It was held that the statute was "so vague, indefinite and uncertain that it fails to inform men of common intelligence what conduct on their part will render them liable to its penalties; that they must guess at its meaning and differ as to its application, and that it provides no reasonable definite standard of guilt which apprises them of the nature and cause of the accusation against them in violation of section ten of the bill of rights of the constitution of Kansas, and the fourteenth amendment to the constitution of the United States which provides that no state shall deprive any person of life, liberty or property without the due process of law."

In *McGowan v. Maryland* (1961), 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101, cited by defendant, the Supreme Court of the United States considered a Maryland statute prohibiting, throughout the State, the Sunday sale of all merchandise, with exceptions set forth. While attacked primarily on other grounds, it was asserted that a statutory provision exempting the Sunday retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks, etc., in Anne Arundel County, was unconstitutionally vague. With reference thereto, *Mr. Chief Justice Warren* said: "We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. (Citation) Under these circumstances, there is no necessity to guess at the statute's meaning in order to determine what conduct it makes criminal. (Citation) Questions concerning proof that the items appellants sold were customarily sold at, or incidental to the operation of, a bathing beach or amusement park were not raised in the Maryland Court of Appeals, nor are they raised here. Thus, we cannot consider the matter. (Citation)"

Since the 1961 Act imposes no general ban on business activities or upon the sale or offering for sale of articles of property other than those in the specified categories, the exceptive provisions necessarily refer to articles within the specified categories. Under what circumstances may articles within the specified categories be considered novelties or toys or souvenirs? Under the exceptive provisions, articles of merchandise in the specified categories may be sold or offered for sale if and when necessary for making repairs and performing services. Obviously, "hardware, tools, paints, building and lumber supply materials" are necessary for use in making repairs. Too, they are necessary and in frequent use in the performance of services. Indeed, under particular circumstances, most, if not all, of the merchandise within the specified categories may be necessary for the performance of services. Neither the nature of the repairs to be made nor the character of the services to be rendered is defined. Nor is there any reference to the time when such repairs are to be made or services performed.

In our view, what is stated in *S. v. Hill, supra,* quoted above, is particularly applicable to our 1961 Act; and the conclusion reached is that its provisions are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Hence, we are of opinion, and so decide, that, as contended by plaintiffs, the 1961 Act is unconstitutionally vague, uncertain and indefinite.

Defendants suggest, citing *S. v. Medlin,* 170 N.C. 682, 86 S.E. 597. that the exceptive provisions of the 1961 Act might be declared void, thus leaving the prohibitory provisions intact and in full force. Suffice to say, the prohibitory provisions and the exceptive provisions refer to the same articles of merchandise and are interrelated and inseparable parts of the 1961 Act.

Defendants cite *Carolina Amusement Co. v. Martin* (S.C. 1960), 115 S.E. 2d 273, and *Mandell v. Haddon* (Va. 1961), 121 S.E. 2d 516. We have read and considered, with interest and profit, the excellent opinions in these cases. However, the statutes considered and questions presented differ materially from our 1961 Act and the question presented with reference thereto on this appeal.

In view of the conclusion reached, we need not consider plaintiffs' further contention that the 1961 Act is "unconstitutionally vague, uncertain and indefinite," for the reason it fails, in terms, to declare the prohibited acts "unlawful," and fails, in terms, to specify whether a violation thereof is a misdemeanor or a felony.

"Undoubtedly, it is the well established general rule that the constitutionality of an Act cannot be challenged in a suit to enjoin its enforcement. (Citations) However, the exception to the rule is as well established as the rule itself. (Citation) An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees. (Citations)" *Roller v. Allen, supra; Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406.

It is noted that Judge Pless, for the reasons stated in his order, continued the temporary restraining order in effect pending decision on this appeal; and that defendants now join with plaintiffs in asking that the Court now pass upon the constitutionality of the 1961 Act. Under the circumstances, this Court deems it appropriate to do so.

Having reached the conclusion that the 1961 Act is "unconstitutionally vague, uncertain and indefinite," the judgment of the court below, but not the order continuing the temporary restraining order in effect pending decision on this appeal, is reversed; and the cause is remanded for judgment in accordance with the law as stated herein.

Reversed and remanded.

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

MARJORIE C. DAVIS, ADMINISTRATRIX OF THE ESTATE OF JETTIE LEE CROMER CARROLL, DECEASED v. ROXIE N. JESSUP, ADMINISTRATRIX OF THE ESTATE OF RUFUS CRUISE SAMUEL, DECEASED.

AND

C. O. CARROLL, ADMINISTRATOR OF THE ESTATE OF WILLIAM LEWIS CARROLL, DECEASED v. ROXIE N. JESSUP ADMINISTRATRIX OF THE ESTATE OF RUFUS CRUISE SAMUEL, DECEASED.

(Filed 23 May 1962.)

1. Trial § 8—

The court has discretionary power to consolidate actions to recover for the deaths of the driver and passenger in one automobile against the estate of the driver of the other car involved in the collision, and the act of the court in so doing will not be disturbed in the absence of a showing of prejudice.

2. Automobiles § 25; Highways § 2—

The authority of the State Highway Commission to promulgate special speed restrictions by the erection of proper signs along the highway, G.S. 20-141(d), extends to State highways within the territory of a municipality and to territory annexed by a municipality, and therefore where the State Highway Commission has posted a speed limit of 35 miles per hour along a highway approaching an intersection within territory annexed by municipality, such special speed restriction is effective.

3. Negligence § 8—

The independent act of one *tort-feasor* will not insulate the negligence of another if such intervening act and resultant injury could have been reasonably foreseen and expected by the author of the primary negligence, and the question of intervening negligence is ordinarily one for the determination of the jury.

4. Automobiles §§ 17, 43— The question of insulating negligence held for determination of jury on evidence in this case.

The evidence tended to show that the driver of one vehicle approached a "Y" intersection on his right at a speed of some 50 miles per hour, that special speed restrictions of 35 miles per hour had been posted on the approach to the intersection, and that immediately before he reached the intersection a vehicle traveling in the opposite direction pulled out of a line of traffic and attempted to turn left into the intersecting highway, resulting in the collision in suit. *Held:* The evidence does not warrant nonsuit on the ground of the intervening negligence of the driver of the car turning left into the intersection, since such act could have been reasonably foreseen and expected.

5. Automobiles § 50—

Testimony elicited on cross-examination of the administratrix of a minor that the minor handled her own pay check as she saw fit and was purchasing the car in question with her own money, and drove it wherever she wanted to, is sufficient to amount to an admission that the intestate was the owner of the vehicle, notwithstanding the vehicle was registered

in the name of her father, so as to raise a presumption that while she was riding therein with her husband driving on a joint interprise, he was her agent, and, nothing else appearing, such presumption warrants an instruction to the effect that his negligence would be imputed to her as a matter of law.

APPEAL by plaintiffs from *Preyer, J.*, 25 September Term 1961 of FORSYTH.

These actions arose out of a collision between a 1960 Valiant automobile driven by plaintiff C. O. Carroll's intestate, William Lewis Carroll, and a 1953 Ford automobile driven by the defendant's intestate, Rufus Cruise Samuel. Plaintiff Marjorie C. Davis' intestate, Jettie Lee Cromer Carroll, was a passenger in the Valiant automobile at the time. The accident occurred at the intersection of U. S. Highway 311, also known as North Main Street Extension, and Old Winston Road in the City of High Point, North Carolina, at approximately 11:30 a.m. on 20 May 1960. Rufus Cruise Samuel and Jettie Lee Cromer Carroll died almost instantly from injuries sustained in the accident, and William Lewis Carroll died some nine hours later.

These actions were consolidated for trial over objections by the plaintiffs.

William Lewis Carroll and Jettie Lee Cromer Carroll were married in High Point approximately 30 to 45 minutes prior to the accident resulting in their deaths. After their marriage they proceeded northwardly on U. S. Highway 311 in the direction of Winston-Salem, where they both resided.

Dewey Boles of Kernersville, North Carolina, was the only eyewitness who testified in these actions. His testimony may be summarized as follows: That he was traveling in a northerly direction on U. S. Highway 311 at a speed of about 50 miles per hour; that the Valiant automobile driven by William Lewis Carroll came up behind him at a speed of from 70 to 75 miles per hour; that Jettie Lee Cromer Carroll was seated close to the driver, with her left arm around his shoulders; that the Valiant pulled out into the left-hand lane to pass him; that the Valiant pulled back into the right-hand lane in front of him approximately 150 to 200 feet before it reached the intersection; that the Ford automobile driven by Rufus Cruise Samuel was the second in a line of three or four vehicles proceeding southwardly on U. S. Highway 311, about 25 feet from the automobile in front of it; that he did not see the Ford before it started to turn left into Old Winston Road, and could not tell whether the driver gave a signal or not; that at the time the Ford pulled out, the Valiant had just pulled back into its right-hand lane, and was proceeding at a speed of approximately 50 miles per hour; and that, a split second later, the

two automobiles collided in the northern portion of the intersection. The automobiles behind the Ford stopped; they were going straight, but they stopped.

Boles further testified that visibility on that day was about a quarter of a mile, looking northwardly from the intersection, and 300 yards looking southwardly.

U. S. Highway 311, where the collision occurred, runs generally north and south, and Old Winston Road runs southeastwardly from its intersection with U. S. Highway 311. It does not extend west of the Highway. U. S. Highway 311 is cement and 22 feet in width. Old Winston Road, at the point of the intersection, is asphalt and 18 feet in width.

Approximately 240 yards south of the intersection there was a diamond-shaped sign with a cross, representing an intersection, and just below this, there was a square yellow sign with "35 MILES PER HOUR" written thereon in black letters. To the north of the intersection on the west side of U. S. Highway 311, for southward traffic, there was a similar sign. Closer to the intersection there was a sign with the word "CHURCH" written thereon. These signs were not erected by the City of High Point, although this area was annexed by the City on 1 January 1960. The evidence indicates that these signs had been erected by the State Highway Commission.

The evidence tends to show that the driver of the Ford car pulled to the left out of a line of traffic going south, for the purpose of entering the old Winston Road. The Ford car, driven by defendant's intestate, and the Valiant car, driven by plaintiff C. O. Carroll's intestate, according to the testimony of Dewey Boles, were only 50 to 75 feet apart when the Ford crossed the center line. The Valiant never crossed the center line to the left. However, the evidence further tends to show that the driver of the Valiant applied his brakes immediately when the Ford started to cross the center line, and left skid marks for a distance of 83 feet south of the point where the collision occurred.

Plaintiff Marjorie C. Davis, mother of Jettie Lee Cromer Carroll, gave the following testimony on cross-examination by the defendant: "Jettie Lee was paying for the Valiant, but it was in her father's name. The reason the car was in her father's name was because she was not 21. She was paying for the car with her own money at the time of the accident. As far as I know, she drove the car whenever she wanted to. I did not go with her when it was purchased. She had talked to me about buying a car before the automobile was purchased; she had wanted a car for some time. She brought it over and showed it to me. Jettie Lee handled her own pay check as she saw fit; it was

her money, to spend as she saw fit. She had had this car about five months."

The court submitted issues of negligence, contributory negligence, and damages to the jury in both cases. His Honor ruled as a matter of law that Jettie Lee Cromer Carroll was the owner of the Valiant automobile, even though it was registered in her father's name, and that the car was being driven by her husband, with her consent, on a joint enterprise. The jury was instructed to answer the issue of contributory negligence the same in both cases. The jury answered the issues of negligence and contributory negligence in the affirmative in both cases. Judgment was entered dismissing each action.

From the aforesaid judgments the plaintiffs appeal, assigning error.

White & Crumpler; Leslie G. Frye and Harrell Powell, Jr., for plaintiff appellants.

Jordan, Wright, Henson & Nichols for defendant appellee.

DENNY, C.J. The plaintiffs' first assignment of error is to the consolidation of these actions for trial. The trial court possesses the discretionary power in proper cases to order the consolidation of actions for trial. McIntosh, North Carolina Practice & Procedure, 2nd Ed., Vol. I, Section 1342; *Peeples v. R.R.*, 228 N.C. 590, 46 S.E. 2d 649, and cited cases. Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. Here, both actions grew out of the same accident, and in essence the complaints are identical, and so are the answers. The same defenses are interposed, the plaintiffs used the same witnesses, and the evidence was the same except on the question of damages. Both actions were against the same defendant, and both plaintiffs were represented by the same attorneys. Furthermore, it has not been shown on this record that the appellants were injured or prejudiced by the order of consolidation. This assignment of error is overruled.

The plaintiffs assign as error the following portion of the court's charge: "And the court further instructs you that within the intersection, between the two 35 miles per hour signs, the posted speed limit would be 35 miles an hour." The evidence is to the effect that the signs referred to were erected by the State Highway Commission. The plaintiffs contend that only city officials are authorized to post speed limits within the city. It is further contended that all the evidence shows that the land adjacent to U. S. Highway 311 in the vicinity of the intersection was open and, therefore, the 55 miles per hour speed limit provided for in G.S. 20-141 was applicable.

In the case of *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554, it is stated: "Certain of our highways are built and maintained in part out of funds contributed by the Federal government. They form links in an interstate system and are designated as U. S. highways. They are, nonetheless, State highways under the supervision and control of the State Highway and Public Works Commission. G.S. 20-158 is applicable to these just as it is to other State highways. The contention that Highway 52 was not a dominant or through highway for want of authority in the State Commission to so designate it is without validity."

G.S. 20-141 (d) provides: "Whenever the State Highway Commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said Commission shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

The authority of the State Highway Commission above provided does not stop at city limits, but extends to all State highways maintained by it, regardless of whether such highways are within the corporate limits of a city or town. There is no provision in G.S. 20-141 which supports the plaintiffs' contention. On the contrary, it is provided in G.S. 20-141 (f) (1): "Local authorities in their respective jurisdictions may in their discretion fix by ordinance such speed limits as they may deem safe and proper *on those streets which are not a part of the State highway system and which are not maintained by the State Highway Commission* * * *." (Emphasis added)

The fact that the area surrounding the intersection of U. S. Highway 311 and the Old Winston Road was annexed by the City of High Point, and was a part thereof at the time of the accident, is of no consequence with respect to the force and effect of the signs posted on the Highway by the State Highway Commission. This assignment of error is without merit and is therefore overruled.

The appellants assign as error the statement of the defendant's contentions with respect to the negligence of William Lewis Carroll in the court's charge and the submission to the jury of the issue of contributory negligence in each case. These assignments are based on the contention that the court should have held, as a matter of law, that any negligent conduct on the part of William Lewis Carroll, plaintiff C. O. Carroll's intestate, was insulated by the negligence of Roxie N. Jessup's intestate, Rufus Cruise Samuel. The plaintiffs rely on the cases of *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808;

Aldridge v. Hasty, 240 N.C. 353, 82 S.E. 2d 331; and *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900.

The same contention was made by one of the defendants in *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241, 81 A.L.R. 2d 939. In that case, the defendant Woodlief's automobile collided with the automobile of defendant Ray while the latter was attempting to turn into a driveway. There was evidence that Woodlief was operating his automobile at a speed of 80 to 90 miles per hour. Plaintiff's testate was a passenger in Ray's car. There was a judgment against both defendants in the lower court. On appeal, the judgment for the plaintiff was affirmed. This Court rejected defendant Woodlief's contention that if he was negligent, the negligence of defendant Ray insulated his negligence. We said: "The test of whether the negligent conduct of one tort feasor is to be insulated as a matter of law by the independent act of another, is well settled by our decisions. In *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299, the Court said: ' * * * the test * * * is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected * * *. We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act * * *.' "

In our opinion, the cases relied on by the appellants herein are distinguishable and not controlling on the factual situation presented on this appeal.

We think that when the driver of the Valiant automobile entered a 35 miles per hour speed zone, at a plainly marked intersection, at a speed of 50 miles per hour, the driver of such car could have reasonably foreseen and expected that the driver of one of the several cars approaching the same intersection from the north on U. S. Highway 311, might turn left to enter the Old Winston Road. Therefore, we think the evidence disclosed on the record before us was sufficient to justify the submission of the issue of contributory negligence in each case. *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912; *Barker v. Engineering Co.,* 243 N.C. 103, 89 S.E. 2d 804.

The plaintiffs assign as error the ruling of the court below, as a matter of law, that the negligence, if any, of William Lewis Carroll would be imputed to Jettie Lee Cromer Carroll, and that the court instructed the jury that if the jury should answer the second issue "Yes" in the husband's case, it would answer the second issue "Yes" in the wife's case, or if the jury should answer the second issue "No"

in the husband's case, then it would answer the second issue "No" in the wife's case.

There is no allegation as to the ownership of the Valiant automobile in the pleadings of either of the plaintiffs. The defendant, in her answer to the complaint filed by Marjorie C. Davis, administratrix of the estate of Jettie Lee Cromer Carroll, deceased, alleged ownership of the Valiant in Jettie Lee Cromer Carroll. This was denied in the reply of Marjorie C. Davis.

No evidence was voluntarily offered by the plaintiffs as to the ownership of the Valiant automobile. The court made its ruling on the basis of the testimony of Marjorie C. Davis on cross-examination by the defendant.

In our opinion, the uncontradicted testimony of plaintiff Marjorie C. Davis, elicited on cross-examination, amounted to an admission that her intestate was the owner of the Valiant automobile. Therefore, we hold that this case clearly falls under the rules set forth in *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543, in which *Moore, J.,* speaking for the Court, said: "Where it is admitted or proven that the wife was owner-occupant of an automobile operated by her husband, a presumption arises that the husband was her agent in the operation, or rather the inference is permitted that any negligence on his part in the operation of the automobile is imputed to her. But such presumption or inference is not absolute and irrebuttable. But it casts upon her, who is in possession of the facts, the burden of showing a bailment, other disposition or prevailing condition by which she relinquished, for the time being, the incidents of ownership and the right to control the manner and methods of its use. *Harper v. Harper, supra* (225 N.C. 260, 34 S.E. 2d 185); *Sink v. Sechrest,* 225 N.C. 232, 34 S.E. 2d 2; *Gaffney v. Phelps,* 207 N.C. 553, 178 S.E. 231; *Ross v. Burgan, supra* (126 N.E. 2d 592).

" 'The test is this: Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated — was his relation to the operation such that he would have been responsible to a third party for the negligence of the driver?' *Harper v. Harper, supra;* Restatement of Torts, sec. 491 (1938).

"Where the owner-occupant of an automobile claims to be a guest in the vehicle while driven by another and the evidence with respect to such contention is susceptible of conflicting interpretations, it presents a question of fact for the jury. *Harris v. Draper, supra* (233 N.C. 221, 63 S.E. 2d 209). 'Where, however, reasonable minds can reach but one conclusion from the uncontradicted facts, the question

becomes one of law for the court.' 4 Cyc. of Automobile L. & P.; Blashfield, sec. 2292, p. 326."

Likewise, in the case of *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885, this Court said: "The owner of an automobile, riding therein as a passenger, ordinarily has the right to control and direct its operation. The negligence, if any, of a party operating an automobile with the owner-passenger's permission or at his request is, nothing else appearing, imputed to the owner-passenger. *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543; *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374; *Baird v. Baird,* 223 N.C. 730, 28 S.E. 2d 225."

We have examined the remaining exceptions and assignments of error and, in our opinion, no prejudicial error has been shown that would justify a new trial.

In the trial below, we find

No error.

R. L. COBURN AND WIFE, MARTHA H. COBURN, v. ROANOKE LAND AND TIMBER CORPORATION, COASTAL LUMBER COMPANY, L. B. BLACKMAN, B. H. OATES AND WIFE, RUTH OATES, J. W. WELLS AND WIFE, RUTH WELLS, K. P. LINDSLEY AND WIFE, MURCELL P. LINDSLEY, L. P. LINDSLEY AND WIFE, MARGUERITE G. LINDSLEY.

(Filed 23 May 1962.)

1. Courts § 9; Reference § 1—

After a reference has been ordered by one Superior Court Judge another Superior Court Judge has no power to revoke the order of reference and place the case on the civil issue docket except for good cause shown relating to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case.

2. Reference § 5—

A referee who willfully fails to discharge his duties or intentionally disregards the order of reference may be removed by the trial judge, but the court should remove a referee only for good and substantial reasons upon motion supported by proper and specific allegations and proof.

3. Same—

A party who proceeds with the reference after the day fixed for the final report may not assert the failure of the referee to file his report within the time fixed as ground for removal.

4. Reference § 8—

G.S. 1-194 and G.S. 1-195 must be construed *in pari materia,* and the

trial court does not have the power to set aside the report of the referee *ex mero motu* prior to the expiration of the time for filing exceptions thereto, since the power of the court to amend, modify, set aside, make additional findings and confirm, in whole or in part, the report of a referee, may be exercised only in passing upon exceptions to the report.

5. Same—

An order setting aside the report of the referee does not set aside the order of reference.

6. Reference § 11—

Where compulsory reference is ordered in a case coming within the purview of G.S. 1-189(3) and the parties reserve their right to jury trial, it is the duty of the court to formulate the ultimate issues of fact to be determined by the jury.

7. Reference § 2—

Where the parties agree to a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke the order without consent of both parties.

8. Reference § 7—

Where an appeal is taken from an order which erroneously revokes a prior order of reference, the Superior Court is without jurisdiction pending the appeal, and the parties have the right to file exceptions to the referee's report within thirty days from the date the opinion of the Supreme Court reversing the order of revocation is certified to the Superior Court.

APPEAL by seven of eleven defendants from *Parker, J.*, November 1961 Term of MARTIN.

This case involves a boundary dispute.

Plaintiffs instituted the action on August 20, 1957 to restrain the defendants, Roanoke Land and Timber Corporation, Coastal Lumber Company and F. B. Blackman from cutting timber on the 675-acre tract of land described in the complaint which they allege they own. Plaintiffs also seek to recover double damages for timber cut from 69 acres on the eastern side of the tract. The preliminary restraining order was continued until the final hearing. The original defendants denied the plaintiffs' title and claimed the right to cut the timber as ultimate grantee under warranty deeds in a chain of title from the other defendants who, upon their motion and without objection, were made additional parties defendant.

On November 14, 1958 the Court appointed a surveyor to make a survey and file a map showing the contentions of the parties.

At the January 1959 Term "upon motion of the defendants or a part of the defendants" Bundy, J. found that the case "involved a boundary line and should be referred." He referred the matter to Hon-

orable J. Bryan Grimes who was directed to report by May 15, 1959. All the parties excepted to the order of reference and demanded a jury trial.

The report of the referee recites that "pursuant to said order of compulsory reference" this matter came to be heard before the referee on July 11th and 12th, 1960, and on July 19, 1960, the referee viewed the premises with counsel.

At the August 1961 Term the plaintiff moved to strike the order of reference and to be allowed to amend the description of the land described in the complaint to make it conform to the description in the Court map. No ruling on the motion to amend appears in the record. The referee was ordered to file his report on or before October 15, 1960, and the order recites that plaintiff and defendants agreed "to file with the referee what they consider to be the proper findings of fact and conclusions of law." A term of Court convened on November 20, 1961 and, apparently in anticipation of the report, the case was placed on the Motion Calendar for November 27th. On November 22nd the referee filed his report which contained findings of fact and conclusions of law adverse to the plaintiffs.

Without having filed exceptions as provided by G.S. 1-195, the plaintiffs on November 27th made an oral motion that the Court examine and review the referee's report for the purpose of considering a motion to be made later in the term to set it aside. The record is silent as to the grounds for the motion. The judge allowed this motion. On November 30th, he heard argument of counsel on the plaintiffs' motion to set the report aside, but what reasons counsel advanced the record does not show. Purporting to act "in the exercise of discretion" on December 2, 1961, the judge entered an order setting the report aside and returning the cause to the Civil Issue Docket — presumably for a trial by jury as if no reference had been had. The order finds no facts except that "this matter was involved and considerably confused" and that the referee "took considerable time studying the same to arrive at what he thought was a proper decision in the matter."

At the time this order was entered no exceptions had been filed to the referee's report, and the time for filing exceptions had not expired.

To the order of the judge setting aside the referee's report and returning the case to the Civil Issue Docket, seven of the defendants excepted and appealed.

Clarence W. Griffin & R. L. Coburn for plaintiff appellee.

Peel & Peel; Bourne & Bourne for defendants Roanoke Land and Timber Corporation, Coastal Lumber Company and L. B. Blackman, appellants.

Pritchett & Cooke for defendants B. H. Oates and wife, Ruth Oates, J. W. Wells and wife, Ruth Wells, appellants.

SHARP, J. May one Superior Court Judge, before any exceptions have been filed and before the time for filing exceptions has expired, without finding any facts or assigning any reasons, set aside the report of a referee and revoke the order of reference entered by another Superior Court Judge? The answer is No.

This was a compulsory reference, but whether the reference be compulsory or by consent, after the parties have presented their evidence to the referee and he has filed his report, the trial judge has no authority to set it aside before any exceptions have been filed and before the time for filing same has expired except for good cause shown.

If the motion to set aside the report of the referee is based on extrinsic matters not appearing in the report, such as misconduct on the part of the referee or a failure to perform his duty, it should be supported by proper and specific allegations and proof. 76 C.J.S., References, Section 179.

If any referee should willfully fail to discharge his duties, intentionally disregard the order of reference, or otherwise fail to perform his duties, the trial judge has the power to remove him. *Trust Co. v. Jenkins,* 196 N.C. 428, 146 S.E. 68; *Mills v. Realty Co.,* 196 N.C. 223, 145 S.E. 26; *Keith v. Silvia,* 233 N.C. 328, 64 S.E. 2d 178. But a referee should be removed only for good and substantial reasons. 76 C.J.S., Reference, Section 72, p. 220. In this case the referee eventually filed his report; allegations and evidence of any impropriety on his part are lacking. "A party to a reference will not be permitted to proceed with the reference after the day fixed for the final report, without objection, thereby taking his chances of a decision in his favor, and then at a later stage, after a decision has been or seems likely to be rendered against him, for the first time, urge the delay as cause for removing the referee." *Keith v. Silvia, supra,* 331.

If the motion is based on alleged errors, either in the findings of fact or conclusions of law in the report, G.S. 1-195 requires that they be specifically pointed out.

G.S. 1-194 and 1-195 are *in pari materia* and must be construed together. *Contracting Co. v. Power Co.,* 195 N.C. 649, 143 S.E. 241; *Wallace v. Benner,* 200 N.C. 124, 156 S.E. 795. G.S. 1-195 allows either party thirty days from the filing of the report in which to ex-

cept to the decision of the referee. After exceptions have been filed, or thirty days have expired without any exceptions being filed, G.S. 1-194 authorizes either party during term, or upon ten days notice to the adverse party out of term, to move the judge to review the report.

If the reference is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge who, "in the exercise of his supervisory power and under the statute (G.S. 1-194), may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. . . . *This he may do, however, only in passing upon exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive. . . .*, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee." (Emphasis added) *Anderson v. McRae*, 211 N.C. 197, 189 S.E. 639. He cannot affirm the report of the referee prior to the time for filing exceptions where there has been no waiver of the right to file them. *Crowley v. McDougald*, 241 N.C. 404, 85 S.E. 2d 377.

In *Keith v. Silvia, supra,* the reference was by consent. The referee was directed to file his report on or before April 10, 1950. The report was filed on September 15, 1950, and it was agreed between the parties that exceptions might be filed on or before October 4, 1950. On September 12, 1950, plaintiff filed a motion to remove the referee for failure to file his report. On October 9, 1950, the judge removed the referee as of September 12, 1950, and rejected his report. This Court held that the judge erred (1) in removing the referee because the record disclosed no willful failure to discharge his duties; and (2) in setting aside the referee's report because it was not before the judge for consideration on October 9th, no exceptions having been filed to it and the time for filing them not having expired. As the Court pointed out, plaintiffs' motion did not assail the report of the referee, and the broad supervisory power of the judge over the report *"is to be exercised in ruling upon exceptions duly entered or some motion directly attacking the validity of the report."* (Emphasis added) Speaking for the Court, *Barnhill, J.* (later *C.J.*) stated that G.S. 1-194 did not give the judge power *ex mero motu* to vacate a report upon which no attack had been made by any of the parties, "the authority must be exercised if at all, in an orderly manner in accord with recognized rules of procedure." These rules of procedure are set out in G.S. 1-194 and G.S. 1-195.

When the reference is compulsory, as here, and the parties have reserved their right to a jury trial, the practical purpose of the reference and the exceptions "is to develop and specifically delimit the issues to be determined by a jury." *Mills v. Realty Co., supra.* The statute

contemplates that the trial judge must act upon the report even in a compulsory reference where the right to the trial by jury has been preserved as provided in *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236, to the end that the ultimate issues of fact may be produced in bold and clear relief.

In his order, Judge Parker not only purported to set aside the report of the referee before the time for filing exceptions had expired, but he "returned the case to the civil issue docket." We understand this to mean that he set it for trial by jury as if there had been no order of reference. Even when a report is set aside for cause, the order of reference is not thereby revoked; it continues. *Morisey v. Swinson,* 104 N.C. 555, 10 S.E. 754.

When the parties agree upon a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke it without the consent of both parties. *Stevenson v. Felton,* 99 N.C. 58, 5 S.E. 399.

In *Trust Co. v. Jenkins, supra,* it was held that the trial judge had no authority to revoke an order of compulsory reference, made without objection or exception, and set the cause for trial by jury on the grounds that the referee committed error in excluding evidence in the hearing before him.

The instant case involves a complicated question of boundary which, we may assume, required a personal view of the premises since the referee, with counsel, did make one. It was, therefore, a proper case for a compulsory reference, G.S. 1-189(3). Judge Bundy having ordered the reference, his order was not subject to review at a subsequent term by another Superior Court Judge. *Edwards v. Perry,* 206 N.C. 474, 174 S.E. 285. Once the order of reference is made, and particularly after the report has been filed, it cannot be set aside except "for good and sufficient cause assigned and made to appear to the Court." *Patrick v. R. R.,* 101 N.C. 602, 8 S.E. 172. The *Patrick* case involved a consent reference in which both referees, to whom it had been agreed the case would be referred, refused to act. However, the quoted words *a fortiori* would apply to a compulsory reference.

In *Lance v. Russell,* 157 N.C. 448, 73 S.E. 151, a consent reference was set aside because plaintiff's consent to the reference had been secured by misrepresentation. The Court held that was "good cause shown."

It is difficult to envision a case in which one Superior Court Judge could set aside an order of compulsory reference entered by another. The motion would have to go to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the

status of the case. *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153.

The transcript of the evidence and the exhibits introduced before the referee constitute 173 pages in the record. The case was instituted in 1957; a surveyor was appointed in 1958; the referee, in 1959. He held a hearing in July 1960; he filed his report in November 1961. Surely such an investment of time as is shown by this record should not be lost except for "good cause shown."

This case is remanded to the Superior Court of Martin County to the end that the referee's report may be reviewed in an orderly manner in accordance with recognized rules of procedure. Since that Court has been without jurisdiction from the time the appeal was certified in this Court, *Keith v. Silvia, supra,* the parties will have the right to file exceptions within thirty days from the date this opinion is certified back to the Superior Court.

Reversed.

BENSON DIXON, A MINOR WITHOUT GENERAL OR TESTAMENTARY GUARDIAN APPEARING HEREIN BY HIS DULY APPOINTED NEXT FRIEND, MILDRED S. DIXON v. FRED PAGE LILLY, JR.

(Filed 23 May 1962.)

Automobiles §§ 34, 41m—

Evidence tending to show that a ten year old boy, on a dark night, suddenly ran onto the highway and collided with the right front fender of defendant's truck, that the impact occurred on the paved portion of the road some two and one-half feet from the edge, and that the view of the boy was obstructed by a tree and undergrowth, without evidence that the truck was being operated at excessive speed and without allegation that the truck was being operated without lights, *is held* sufficient to exonerate the defendant driver from liability under the "sudden appearance doctrine."

APPEAL by defendant from *Gambill, J.,* September Term 1961 of MONTGOMERY.

This is a civil action instituted on 22 November 1960 by Benson Dixon, a minor, by his next friend, Mildred S. Dixon, against the defendant Fred Page Lilly, Jr., to recover damages from the defendant on account of personal injuries alleged to have been sustained on 11 July 1960 by Benson Dixon, then ten years of age, when he was struck by a truck owned and operated by the defendant.

The plaintiff alleged: " * * * (T)he defendant approached from the north, headed south, driving his * * * 1956 2-1/2 ton GMC truck at a high, reckless and dangerous rate of speed, and as he approached near the plaintiff, who was on the shoulder of said highway next to the neighbor's yard, the defendant suddenly lost control of his truck, swerving the same to his right and violently striking the plaintiff as he was walking along the edge of the shoulder of said highway and seriously and permanently injuring the plaintiff as hereinafter more fully alleged."

The defendant filed an answer in which he denied any negligence in the operation of his truck and in which he alleged that the accident was unavoidable on his part in that the Dixon boy, in the nighttime, suddenly ran from an obscured place into the highway and against the right front fender of defendant's truck. Defendant further alleged that the presence of the plaintiff in the vicinity of the highway was not known to him and could not have been reasonably foreseen, and that the appearance of the plaintiff was sudden, without warning, and unanticipated and unforeseeable on the part of the defendant.

The plaintiff's evidence is to the effect that the accident occurred on the west side of the paved portion of Highway No. 1346, four-tenths of a mile north of the corporate limits of the Town of Star, North Carolina, in front of a residence occupied by a Mrs. Norman. Rural Road No. 1346 intersects U. S. Highway No. 220 approximately 300 feet south from the point where the accident occurred. This road runs generally north and south for a distance of a quarter of a mile. There are three houses and a church on the west side of this road. On the opposite side of the road and to the north of the Norman home there are four houses and a service station. The service station on the east side of the road is the nearest to the place where the accident occurred. The four houses are located to the north of the service station. The Dixon house, where the plaintiff lived, is the nearest building to the Norman home on the west side of the road but is located 175 to 200 feet north thereof, and the service station on the opposite side of the road is 200 feet north of the Norman home.

The evidence tends to show that it is 43 feet from the edge of the pavement to the edge of the front porch of the Norman home; that a large oak tree, 14 inches in diameter, is located a little to the north of the center of the Norman home and five feet from the western edge of the paved portion of the road. The investigating Highway Patrolman, in describing this tree, said: "The branches are low to the ground and the top of the tree has been topped off. Those branches extend over the west shoulder of the road and onto or over the hard-surfaced part of the road." The testimony of this witness further

tended to show that at the time of the accident there was an undergrowth extending up to the shoulder of the road north of the Norman house; that this undergrowth was as much as head high; that a person going south on this paved road, "about the time he starts getting out of the curve, the bushes and shrubbery are to his right. * * * You can see the entire road opposite the tree from a point 175 feet north, but from a point 175 feet north, you could not see into the yard at the Norman house. The driver of a vehicle going south can see the whole yard at the Norman house when he gets to the edge of the bushes (at the corner of the Norman lot), but he can see objects in the yard, or a car, something that large or tall, farther back than the edge of those bushes." The evidence further tends to show that the shoulder of the road is about five feet wide.

There were no markers indicating a speed zone in the area. The plaintiff offered no evidence in support of his allegations of excessive speed. The defendant's allegations in his answer were to the effect that he was operating his 1956 model 2-1/2 ton GMC truck in a southerly direction at a speed not in excess of 25 miles per hour, about 9:00 p.m. on 11 July 1960, when the accident occurred; that his lights were on bright and the brakes were in good condition. The defendant offered evidence in support of these allegations and that he did not know the plaintiff was anywhere in that vicinity before he ran from behind the tree.

The evidence further tends to show that the plaintiff collided with the right front fender of defendant's truck approximately 2-1/2 feet from the western edge of the pavement, somewhere between nine and 15 feet south of the oak tree referred to herein, and that the tire marks or skid marks of the truck made only by its right rear wheels began a little south of the oak tree and continued 35 feet. The fender with which the plaintiff came in contact was about 15 feet in front of the right rear wheels.

Mrs. Norman testified that she saw the accident from a front window of her house; that there was a small yellow light, 75 watts, burning on her porch; that she was looking into the dark; that it was a dark night. She testified: "I didn't see the truck coming at all. I didn't notice any lights on the truck, it was done so quick. I did not observe anything coming prior to the time I saw the truck hit the boy." On cross-examination, this witness said: "I saw the Dixon boy running toward the road. * * * He was in my yard at the time I first saw him running, and then he ran on past the tree and got up to the edge of the road. * * * He weren't up close to the tree. * * * (H)e was more down south; when he started to run, he just run right on, right straight ahead, and the truck hit him. Q. Well, he ran right into the

right front fender of the truck, didn't he? A. Yes, it was along on the front fender."

The plaintiff testified that he didn't see any lights. " * * * I was about three feet away from the road, and I took off and started running. I made about a step out in the road starting to run * * *. Before I got to the paved portion of the road, I stopped and looked. I reckon I was about two or three feet from the paved portion of the road when I stopped. I did not see anything coming. I looked both ways. And I started as if I were going to run, and I made about two steps in the road * * *, like I was going to run. The next thing I remember I was in the Troy hospital."

Mr. Register, the operator of the service station, testified that the lights from his service station did not cast any light in the area where the collision occurred; that he went to the scene of the accident a few minutes after it occurred; that it was dark; that Benson's body was about 15 feet south of the tree; that someone had a flashlight that was used to see the body. This witness further testified: "It was so dark in the road that I could just vaguely see the boy when I walked up there."

There is no evidence to the effect that the yellow light on the front porch of Mrs. Norman's house lighted the highway to any extent.

The defendant moved for judgment as of nonsuit at the close of plaintiff's evidence and renewed his motion at the close of all the evidence. The motions were overruled.

The case was submitted to the jury on a charge admittedly free from error.

From the judgment entered on a verdict in favor of plaintiff, the defendant appeals, assigning error.

Charles H. Dorsett for plaintiff appellee.
Richard L. Brown, Jr., D. D. Smith for defendant appellant.

DENNY, C.J. The sole question for decision on this appeal is whether or not the court below erred in failing to sustain the defendant's motion for judgment as of nonsuit.

The plaintiff alleged in his complaint that the "defendant failed to sound a horn or to use any other warning device or to give any adequate or timely signal or warning to this plaintiff of the defendant's approach, or intended course * * *." However, plaintiff did not allege that the defendant's truck was being operated without lights.

Moreover, there is no evidence tending to show that the defendant was operating his truck at an excessive rate of speed or that the de-

fendant lost control of his truck and struck the plaintiff while he was walking along the shoulder of the road, as alleged in the complaint.

The plaintiff's evidence clearly establishes the fact that the contact between the truck and the boy occurred on the paved portion of the road and the tire or skid marks on the pavement after the collision tended to show that the driver of the truck pulled his truck to the left in an effort to avoid colliding with the plaintiff, instead of swerving his truck to the right as alleged in the complaint. Mrs. Norman testified: "He (the plaintiff) was in my yard at the time I first saw him running. * * * (W)hen he started to run, he just run right on, right straight ahead, and the truck hit him." The testimony of this witness and that of the plaintiff fixed the point of collision on the paved portion of the road.

The evidence discloses that after the collision there were two dents in the right front fender of the truck, one on the right side of the fender just back of the right front headlight, and the other on the lower part of the fender just above the right front wheel.

We think the plaintiff's own testimony supports the conclusion that he ran onto the paved portion of the road and against the right front fender of the truck.

In our opinion, the evidence disclosed on the record is sufficient to exonerate the defendant from liability under the "sudden appearance doctrine," or that, insofar as the defendant is concerned, the plaintiff was injured as the result of an unavoidable accident — deplorable as it is — for which the defendant may not be held liable for damages. *Knott v. Transit Co.*, 231 N.C. 715, 58 S.E. 2d 696; Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), Vol. 2A, Section 1498. *Cf. Register v. Gibbs*, 233 N.C. 456, 64 S.E. 2d 280.

The above citation in Blashfield says: "Drivers or owners of motor vehicles are not insurers against all accidents wherein children are injured. Accordingly, a driver proceeding along a street or highway in a lawful manner using ordinary and reasonable caution for the safety of others, including children, will not be held liable for striking a child whose presence in the street could not reasonably be foreseen. He is not required to anticipate the appearance of children in his pathway, under ordinary circumstances, from behind parked automobiles or other obstructions.

"Thus, when a motor vehicle is proceeding upon a street at a lawful speed, and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not generally liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid injuring him."

Taking all the evidence into consideration in the light most favorable to the plaintiff, and giving him the benefit of every reasonable inference to be drawn therefrom, we are unable to agree that it is sufficient to establish actionable negligence on the part of the defendant. *Kennedy v. Lookadoo,* 203 N.C. 650, 166 S.E. 752; *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Knott v. Transit Co., supra; Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540; *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610; *Henkelmann v. Metropolitan Life Ins. Co.,* 180 Md. 591, 26 A. 2d 418.

The judgment of the court below is

Reversed.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

(Filed 23 May 1962.)

1. Utilities Commission § 6; Gas § 3—

The provision of G.S. 62-124 that the Utilities Commission, in addition to the factors stipulated, may consider all other facts that will enable it to determine what are reasonable and just rates, authorizes the Commission to consider only such other facts as have a bearing on value and rates which are established by evidence, found by the Commission, and set forth in the record, to the end that they may be properly reviewed by the courts.

2. Same—

Original costs of capital improvements should not be ignored by the Utilities Commission in fixing rates of a public utility.

3. Same—

Where the evidence of a public utility tends to support its right to change its depreciation rate, which results in the payment of a substantial amount in additional taxes, the amount of such additional taxes should be taken into consideration by the Utilities Commission in fixing rates.

4. Same—

Where the evidence tends to support the right of a public utility to establish a pension fund for employees and make reasonable contributions thereto, the amount paid by the utility in such contributions should be considered by the Utilities Commission in fixing rates.

5. Same—

Where the evidence of a public utility tends to support its contention that the banks from which it borrowed money required the maintenance

of a large balance, the minimum balance required by the banks should be considered as working capital by the Utilities Commission in fixing rates.

6. Gas § 3; Utilities Commission § 9—

Where the findings of the Utilities Commission in determining the factors which it considered in fixing the rate base of a public utility are not supported by evidence, the cause must be remanded in order that the Commission may determine, in the manner prescribed by law, a rate schedule which is fair, reasonable, and nondiscriminatory. G.S. 62-124.

APPEAL by defendant from the order of *Hall, J.*, entered October 17, 1961, in Chambers, WAKE Superior Court.

Defendant Public Service Company of North Carolina, Inc., (hereafter called Public Service) originated this proceeding on October 28, 1959, by filing with the North Carolina Utilities Commission (hereafter called the Commission) a revised rate schedule requesting approval of a general increase of its charges for natural gas. According to its allegations, the new schedule was designed to absorb an increase in the price of gas which was put into effect by Transcontinental Gas Pipe Line Corporation (hereafter called Transco) which was defendant's only supply of natural gas.

In order to justify the proposed increase in rates, Public Service introduced evidence that Transco's new rate would increase its cost of gas $460,000 per year. Shortly before Transco's increase, the Commission had conducted a general rate hearing and fixed what it found to be fair and reasonable rates. Public Service introduced the Commission's findings and the 1958 rates based thereon, effective October 1, 1958. Additional evidence reflected changes in plant investment, revenue receipts, and operating expenses subsequent to the findings and the order fixing the 1958 rates. The evidence showed the following additional, or new, expenses: $84,000.00 increase in taxes resulting from changes in depreciation rate of its properties; $32,000.00 contribution to its employees' pension fund. The banks from which Public Service borrowed money required that a substantial balance be maintained on deposit in the account. This balance in the various banks throughout the appellant's territory approximated $230,000.00. The Commission failed to treat a substantial part of this required balance as working capital.

The Commission, by order dated November 3, 1959, suspended the proposed new rate schedule pending this inquiry. Public Service gave bond to make refund to customers of any excess charges found by the Commission to have been exacted on account of any reduction in Transco's rates then being inquired into by the Federal Power Com-

mission whose authority in that respect was exclusive because of the interstate character of Transco's business.

At the conclusion of the hearing the Commission, by order effective April 8, 1960, cancelled the new bonded rates, reinstated the old rates, and ordered Public Service to make refund. The Commission found:

> "5. That, giving full consideration to the value of the Company's property used and useful in rendering service to the public under present conditions, the value of the service rendered, the amounts recently expended in permanent improvements, the original cost of the property, the book cost of the property, and the probable earning capacity of the property in its present condition, state, and location for the use being made of it for the public benefit, and the present and reasonably predictable future capital requirements of the Company, the fair value of its property is found to be $16,125,000.00. * * *
>
> "When viewed in the light of increased earnings which the company may reasonably expect by reason of its additions, its increased customers, and its increased allocation of gas, Public Service is earning, and will continue to earn, a return which is not unreasonably low. * * *
>
> "We have found the fair value in this case to be $16,125,000. In so finding we have considered all factors required by G.S. 62-124 and *all other facts* which we feel have bearing upon our conclusion — without reference to any specific formula." (emphasis added)

Commissioner Long concurred in the result but did so because of failure of Public Service to prove rate base. "I simply cannot find in the testimony a basis satisfactory to me for determining the original cost. I am, therefore, left with neither proof of replacement value and these two criteria for establishing 'value' are not available to me from the record. * * *

"The majority finds a definitive figure to represent the Company's rate base and its expenses during the test period, both before and after pro forma adjustments. It determines the dollar amount of earnings. I do not agree with these determinations. They may be correct. If they are, the evidence does not support them."

Commissioner Worthington, dissenting, said:

> "The established fair value rate base of $16,125,000 is $325,000 less than plant in service at the end of the test period (September 30, 1959). This is true even though the Company follows a custom of not adding to plant investment book balance its

major additions during a year until the month of December. It is evident that no real effort has been made to establish a reasonably just fair value rate base commensurate with investment and according to approved principles. Indeed, it is apparent in this particular instance that the majority determined from the start that the rates in effect at the time the increase was made effective, due to the increase in cost of gas from Transcontinental Gas Pipe Line Corporation, should be established as the rates to be approved in this proceeding and set about to fit the rate base and the rate of return to the revenue produced by these rates. This is a decided departure from rate making. * * *

"As evidence that the rate base used in this instance is an arbitrary figure, one designed to produce just such net revenue by the use of a 6 per cent rate of return thereon as the rates in effect prior to the increase will produce, is the fact that the Commission first established the rate base at $16,500,000 and then at $16,491,000, and when it was found that by the use of a 6 per cent rate of return the old rates would not produce the net revenue to justify the use of these figures the rate base was arbitrarily reduced to $16,125,000. This is a mere juggling of figures and represents no real approach to a determination of the fair value rate base."

To the findings and conclusions of law, Public Service made detailed objections. These objections related (1) to the Commission's fixing the rate base at $16,125,000 as the fair value of appellant's property for rate purposes; (2) concluding that the old rate would yield a net operating income of $967,570.00, which would provide a net income of six per cent on the value as fixed in the rate base. The objection to the findings of fact are upon the ground they lack evidentiary support. The Superior Court of Wake County, after hearing objections, considering exceptions, overruled them and entered an order affirming the Commission. Public Service appealed.

Thomas Wade Bruton, Attorney General, Charles W. Barbee, Jr., Asst. Attorney General for the North Carolina Utilities Commission, plaintiff appellee.

Lake, Boyce & Lake by I. Beverly Lake for defendant appellant.

HIGGINS, J. This proceeding involves many of the issues of fact and conclusions of law discussed by this Court in *Utilities Commission v. Piedmont Natural Gas Company,* decided on May 3, 1961, and reported in 254 N.C. 536, 119 S.E. 2d 469. We may say, however, the Com-

mission entered the order now involved on April 8, 1960, more than one year prior to our decision in *Piedmont.* The Commission did not have, but the Superior Court did have before it that decision.

In this proceeding, as in *Piedmont,* the intent to have Public Service absorb Transco's rate increase is threaded throughout the record. Both the rate base and the allowable deductions seem to have been reduced so that the net income would reflect a six per cent profit at the 1958 rate. Notwithstanding the progressive increase in plant investment, the rate base as of October 8, 1960, was less, by $325,000, than the Commission had found it to have been on September 30, 1959. The record confirms the juggling of figures, charged without equivocation in the dissent, and alluded to in the concurring opinion. These confirm the purpose of the majority to fix a rate base and a net operating profit which would show a six per cent return. In fixing the rate base at $16,125,000 the majority opinion says: "In so finding we have considered all factors required by G.S. 62-124 and *all other facts which we feel have a bearing upon our conclusion — without reference to specific formula.*" (emphasis added)

The statute gives the Commission the right to consider *all other facts* that will enable it to determine what are reasonable and just rates. The right to consider "all other facts" is not a grant to roam at large in an unfenced field. The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in G.S. 62-124. However, it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record to the end the utility might have them reviewed by the courts.

The rules fixing rates are set forth in G.S. 62-122, *et seq.* See especially 124. They are discussed more or less in detail in *State ex rel Utilities Commission v. State,* 239 N.C. 333, 80 S.E. 2d 133; *State v. Carolina Power & Light Co.,* 250 N.C. 421, 109 S.E. 2d 253; *Utilities Commission v. Piedmont Natural Gas Co., supra.* In fixing fair value, original cost is an item to be considered. The Commission's accountant testified: "Original cost would be the actual cost of the property . . . by either the predecessor company or present company . . . by original cost . . . I mean cost at the time it was installed without regard to who installed it. For illustration, if the Raleigh Gas Company installed a certain line of pipe, I mean the actual cost incurred at the time of laying the property. We are not talking about what Public Service may or may not have paid to Raleigh Gas Company."

Unquestionably we think the Commission should consider "original cost" as one of the items in determining fair value. How much or how

little original cost should figure in fixing present value is a matter of judgment, depending on many things. Certainly, original cost to Public Service should not be ignored as the Commission's expert witness suggested in fixing rates giving a fair return on its investment.

Evidence before the Commission tends to support the right of Public Service to change its depreciation rate and to charge as expenses the $84,000 additional taxes the change required. The evidence tends to support the right to establish a pension fund for employees and to make reasonable contributions thereto. Likewise, the evidence tends to support the treatment of the minimum balance required by creditor banks as working capital. Findings to the contrary are without support.

This proceeding differs in one respect from *Piedmont.* In the latter, the superior court reversed the Commission, and the Commission appealed. In this case the superior court affirmed the Commission, and Public Service appealed. In *Piedmont,* the presiding judge held the rate base was a quotient, fixed arbitrarily to require the gas company to absorb Transco's price increase, and that the rate base so fixed was not supported by competent, material and substantial evidence. After review, this Court agreed with the superior court and affirmed the judgment. In this case the Commission fixed the rate base in the same manner and for the same purposes as in Piedmont. On appeal to the superior court, the presiding judge held the evidence of the rate base was sufficient to support the Commission's finding. This appeal confronts us with the same question presented in *Piedmont*: Is there competent, material, and substantial evidence in the record to support the rate base fixed by the Commission? We are forced to conclude, as in *Piedmont,* the record does not disclose evidence sufficient to support the findings. The appellant is entitled to go before the Utilities Commission for further hearing.

The Commission will determine, in the manner provided by law, and put into effect a rate schedule which is fair, reasonable, and nondiscriminatory. G.S. 62-124; *Utilities Commission v. Piedmont Natural Gas Co., supra; State v. Carolina Power & Light Co., supra; Utilities Commission v. Greensboro,* 244 N.C. 247, 93 S.E. 2d 151; *Utilities Commission v. State,* 243 N.C. 12, 89 S.E. 2d 727; *Utilities Commission v. Southern Bell Tel. & Tel. Co.,* 239 N.C. 333, 80 S.E. 2d 133.

The Superior Court of Wake County will remand the proceeding to the North Carolina Utilities Commission for further hearing in accordance with this opinion.

Reversed.

FRANK FULTON PHILLIPS, ADMINISTRATOR OF WILLIAM WAYNE PHILLIPS, DECEASED V. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 23 May 1962.)

1. Negligence § 16—

A child between the ages of 7 and 14 years is not held to the same degree of care for his own safety as an adult and is rebuttably presumed incapable of contributory negligence, with the burden upon defendant to prove by the greater weight of evidence that such child failed to exercise that degree of care for his own safety as would ordinarily be exercised by a child of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances.

2. Negligence § 28— Charge of contributory negligence of 13 year old boy held without error when construed as a whole.

In charging upon the question of contributory negligence of a 13-year old boy, the court instructed the jury to the effect that there is no basic difference between negligence on the part of defendant and negligence on the part of plaintiff and that the same rule of due care required of a defendant was likewise required of a person charged with contributory negligence, and then gave a correct instruction upon the question of contributory negligence of a child between 7 and 14 years of age. *Held:* The charge will not be held for error because the first two principles were applicable to contributory negligence generally without regard to the age of the defendant, since the charge, construed as a whole, was not inconsistent and leaves no reasonable cause to believe that the jury was misled or misinformed.

3. Trial § 33—

It is not required that every clause and sentence of the trial court's instructions express the law applicable to the facts in the case when considered out of context, it being required only that the charge when construed as a whole should explain to the jury the law applicable to such facts so that there is no reasonable ground to believe that the jury was misled or misinformed.

4. Appeal and Error § 19—

An assignment of error must present the question relied on without the necessity of going beyond the assignment itself. Rule of Practice in the Supreme Court No. 19(3).

5. Negligence § 10—

The doctrine of last clear chance applies in those instances in which the plaintiff or plaintiff's intestate has placed himself in a position of peril, and defendant knows, or by the exercise of reasonable care should have discovered, such perilous position in time to have avoided the injury or death, and negligently fails to use the available time and means to avoid such injury or death, and the charge of the court in this case upon the doctrine *is held* without prejudicial error.

PHILLIPS *v.* R. R.

APPEAL by plaintiff from *Walker, S.J.,* November 1961 Term of CABARRUS.

Action for wrongful death of a thirteen-year-old boy allegedly caused by negligence of Southern Railway Company, which operates trains in and through the town of Kannapolis on and over tracks leased by it from North Carolina Railroad Company, the owner.

Defendants deny negligence, and plead contributory negligence of plaintiff's intestate.

The main line of the Southern Railway Company, consisting of two tracks, passes through the town of Kannapolis with a population of over twenty thousand in a northerly and southerly direction, dividing it, from a population point of view, about equally. The east track is for north-bound traffic, the west track for south-bound. About noon on 30 January 1953 Southern Railway Company stopped its freight train, consisting of 146 cars and over a mile long, in the town of Kannapolis on its north-bound track to set off two cars, which blocked all crossings, both vehicular and pedestrian, in the main part of the town for more than a mile. At this place the tracks are straight. To set off these cars required about 15 minutes.

On this day plaintiff's intestate, William Wayne Phillips, a very intelligent child, who went to school regularly, made good grades and was thirteen years ten months old, was present as a student in Cannon Junior High School which is east of the railroad tracks. At the school's lunch hour plaintiff's intestate with Larry Sloan and other children left the school to go to a cafe across the tracks for lunch. They went up Second Street, crossed North Ridge Avenue, and traveled along a path that crossed the railroad tracks. Upon arrival at the tracks the freight train was blocking their way. Some of the children crossed through, under, and over the train.

Steve Fowler, a high school boy, testified for plaintiff:

> "I crossed through the couplings and Wayne climbed the inside steps on the boxcar. As I was in the middle the train jerked and I jumped off on the other side and a passenger train came down on the other side and I stepped back on the other train, the slow moving train, and jumped down on the other side. As I jumped off, I noticed Wayne was lying on his back and the first wheel ran over him."

Jackie E. Poston, a high school boy, testified for plaintiff:

> "When I first saw Wayne Phillips he was standing on top of the train. He was walking north on top of the train. As he stepped toward where the train joined together at the top of the train,

a chain reaction of the cars threw him into the middle of the cars and down on the track."

Larry Sloan, a high school boy and close friend of Wayne Phillips, testified for defendants:

"We went down the path and the train was standing there. We started to crawl through the coupling. Just as we were going to the coupling, a train came by on the other set of tracks south and we couldn't get through. We decided to wait and went up on top of the boxcar. Instead of going on through we went on top of the boxcar. I don't know how long we stayed up there. Wayne was on top of the boxcar with me. We were both up there. The train we were on started before the other train passed. The train we were on did not start before the other train started by. When the train started that we were on it just jerked and I don't really know what happened. It just jerked and we fell."

After the railway had set off the two cars, the engineer gave two blows, indicating a go-ahead signal, and started the train. He testified, "I knew the passenger train would drown out the signal." The conductor was in the caboose a mile behind the engine. The train started in its usual manner.

Before Wayne Phillips was pulled out from under the train, eight or nine cars had run over him, and he was dead.

It was well known to the local agent of Southern Railway Company and the general public that school children and adults using this path crossed trains blocking this path and standing still, as these children did on this occasion.

The jury answered the issue of negligence, Yes, the issue of contributory negligence, Yes, the issue of last clear chance, No, and the issues of damages, None.

From a judgment that plaintiff recover nothing from defendants, he appeals.

W. H. Beckerdite and E. T. Bost, Jr., for plaintiff appellant.

Hartsell, Hartsell & Mills, By William L. Mills, Jr. and W. T. Joyner, for defendant appellees.

PARKER, J. All of plaintiff's assignments of error are to the charge of the court to the jury; he has none to the evidence.

Assignment of error number one relates to the charge on the second

issue, contributory negligence. On that issue the court correctly placed the burden of proof on defendants, and charged as follows:

"(Now, inasmuch as the issue is submitted to you on contributory negligence, the Court will have to define contributory negligence and very briefly it is this; there is no basic difference between negligence on the part of the defendant and negligence on the part of a plaintiff, or a plaintiff's intestate, except ordinarily we refer to negligence on the part of the plaintiff or plaintiff's intestate as contributory negligence.)

"(The same rule of due care which is required of a defendant is likewise required of a plaintiff or in this case the plaintiff's intestate, and the test as to the plaintiff's intestate's conduct in this case will be whether or not he exercised due care for his own safety, and if he failed whether such failure concurred and cooperated with any actionable negligence, if you find there is actionable negligence on the part of the defendant, as a proximate cause or one of the proximate causes of his injury.)

"Now, as to this second issue, Ladies and Gentlemen of the jury, the Court charges you that the law of North Carolina is to this effect. There has been evidence uncontradicted in this case that the plaintiff's intestate was some thirteen years and eight or nine months of age. The law of North Carolina is as follows: There is a prima facie presumption in this state that a child between the age of seven and fourteen years is incapable of contributory negligence, but this presumption may be overcome. Now, what do we mean by prima facie presumption? It merely means that that is enough to carry it to the jury on that presumption alone, but the law also says that this presumption may be overcome by evidence. The test which you will use in arriving at your answer to the second issue, if you reach the second issue, is this: it is up to you to determine from the evidence you have heard, and the law that the Court has given you about the prima facie presumption, as to whether or not on the 30th day of January, 1953, William Wayne Phillips acted as a child of his age, of his capacity, of his knowledge, of his intelligence, of his discretion, and of his experience would have acted under similar circumstances."

Plaintiff excepts to the parts of the charge above in parentheses, and assigns them as error.

Plaintiff's contentions in his brief are: The court in the parts of the charge challenged as set forth above in parentheses made no distinction between the rule applicable to negligence in respect to a boy

under fourteen years of age, and the rule applicable to negligence on the part of defendant railroad companies or of an adult person. While the court immediately after the challenged parts of the charge instructed the jury in respect to the *prima facie* presumption that a child between the ages of seven and fourteen years is incapable of contributory negligence, this part of the charge is inconsistent and in conflict with the challenged parts of the charge on a vital point of the case. That this entitles him to a new trial.

In our opinion such contentions are untenable. Under our decisions an infant between the ages of seven and fourteen years charged with contributory negligence is not held to the same degree of care for his own safety as an adult person so charged. *Caudle v. R. R.*, 202 N.C. 404, 163 S.E. 122; *Walston v. Greene*, 247 N.C. 693, 102 S.E. 2d 124; *Rolin v. Tobacco Co.*, 141 N.C. 300, 53 S.E. 891. See Annotation 107 A.L.R. p. 7—Standard of care required of children. The court in its charge immediately after the challenged part of it instructed the jury, in substantial compliance with our decisions above cited, in respect to the standard of care by which to measure the conduct of William Wayne Phillips, a thirteen-year-old child, as regards the question of contributory negligence on his part. Reading this charge on contributory negligence as a whole and not in detached fragments, *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19, it seems to us and we so hold, that there is no inconsistency or conflict in it, that the jury must have understood from the charge that the child here was not required by law to exercise the degree of care for his own safety as required of an adult, but that the standard by which to measure his conduct, as regards contributory negligence, is that ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience, under the same or similar circumstances, and further, that there is no reasonable cause to believe that the jury was misled or misinformed in respect thereto. To require a trial judge "to state every clause and sentence so precisely that even when lifted out of context it expresses the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance." *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356. Plaintiff's assignment of error number one is overruled.

Plaintiff's assignments of error numbers two and three are that the court failed to comply with the provisions of G.S. 1-180, in respect to the third issue, last clear chance, and failed to give equal stress to the contentions of the plaintiff and defendants. These assignments of error do not definitely and clearly present the error relied on, in that they contain no part or parts of the charge, and we must go beyond

these assignments of error on "a voyage of discovery" through the charge to learn what the questions are. This Court said in *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294:

> "Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554, 555, as interpreted in the decisions of this Court, require: 'Always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is.' *State v. Mills,* 244 N.C. 487, 94 S.E. 2d 324; *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829, *Porter v. Lumber Co.,* 164 N.C. 396, 80 S.E. 443; *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286. The objectionable assignments in their present form would require the Court to undertake a voyage of discovery through the record to ascertain what the assignments involve. This the Court will not do. *Cecil v. Lumber Co.,* 197 N.C. 81, 147 S.E. 735."

Nevertheless, we have examined the court's charge on the third issue, last clear chance. To submit an issue of last clear chance there must be both *allegata* and *probata. Gunter v. Winders,* 256 N.C. 263, 123 S.E. 2d 475; *Wagoner v. R. R.,* 238 N.C. 162, 77 S.E. 2d 701; *Bailey v. R. R.* and *King v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833. Assuming, but by no means conceding, that plaintiff has both *allegata* and *probata,* the court's charge on this issue was far more favorable to plaintiff than he was entitled to.

The court charged:

> "What is the last clear chance doctrine? It is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger."

For plaintiff to invoke the last clear chance doctrine he must establish these four elements: One, that his intestate negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; two, that the defendant knew, or by the exercise of reasonable care could have discovered, his intestate's perilous position and his incapacity to escape from it before he was injured and killed by defendant; three, that defendant had the time and means to avoid injury and death to his endangered intestate by the exercise of reasonable care after it discovered, or should have discovered, his intestate's perilous position and his incapacity to escape from it; and four, that defendant negligently failed to use the avail-

able time and means to avoid injury and death to his endangered intestate, and for that reason injured and killed him. *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150, and the numerous cases there cited.

This Court said in *Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315:

> "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 injury after discovering the perilous position in which another has placed himself."

Plaintiff's assignments of error numbers two and three are overruled.

The remaining assignments of error, numbers four and five, are formal, and are overruled.

Apparently this was the first time William Wayne Phillips, a fine, intelligent thirteen-year-old boy, crossed a standing train, and this one time resulted in his death: a stark, heart-breaking tragedy. The case was for the jury: it has returned its verdict adverse to plaintiff. In the trial below we find

No error.

ALBERT L. CHANDLER v. FORSYTH ROYAL CROWN BOTTLING COMPANY AND JIMMIE L. MARION.

(Filed 23 May 1962.)

1. Automobiles § 9—

It is negligence for the driver of a truck to leave his vehicle standing diagonally across the highway so as to leave only 3 or 4 feet unobstructed and fail to give any warning to approaching motorists of the peril. G.S. 20-161(a).

2. Automobiles § 34½—

Where crates of bottled drinks have fallen from a truck as the truck was driven from a side road onto the highway, it is a breach of the common law duty to exercise due care for the driver to fail to remove from the highway the broken glass and other debris or to fail to warn approaching motorists of its presence. (G.S. 136-91).

3. Automobiles § 41e— Evidence held for jury on question of negligence in blocking highway without warning to approaching motorists.

The evidence tended to show that as defendant driver drove his truck from a side road onto the highway crates of bottles fell to the highway from the truck, that the driver left the vehicle standing diagonally

across the hardsurface blocking all but 3 or 4 feet thereof, and that plaintiff motorist, rounding a curve, applied his brakes upon seeing the conditions, but that he was unable to avoid running over broken glass, causing a blowout, and resulting in his losing control of the car, which ran into a ditch, resulting in the damages and injuries in suit. The evidence further tended to show that the accident occurred some twenty minutes after the truck had been stopped and that the driver did not remove any of the debris from the highway or give any warning to approaching motorists of the peril. *Held:* The evidence was sufficient to be submitted to the jury on the issue of the driver's negligence.

4. Automobiles § 42d— Evidence held not to show contributory negligence as a matter of law on part of motorist in failing to stop before running into an area of broken glass.

The evidence tended to show that plaintiff was driving his automobile some 50 miles per hour in a 55 mile per hour zone, that he rounded a curve with his view of the highway ahead obstructed by trees and tall bushes so that he could not see that the highway was blocked by defendant's truck and glass and debris which had fallen from the truck until he was some 100 feet therefrom, that plaintiff immediately applied his brakes but was unable to avoid running into the area of broken glass which caused a blowout, resulting in plaintiff's loss of control of the vehicle, which ran into a ditch to plaintiff's damage and injury. *Held:* The evidence does not disclose contributory negligence as a matter of law on the part of plaintiff.

5. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom.

APPEAL by plaintiff from *Walker, J.*, December 4, 1961 Term of FORSYTH.

Action to recover for personal injuries and property damage suffered by plaintiff when his automobile was involved in an accident, allegedly caused by the actionable negligence of defendants.

At the close of plaintiff's evidence the court sustained defendants' motion for nonsuit and dismissed the action.

Plaintiff appeals.

W. Scott Buck and Deal, Hutchins and Minor for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson, and W. F. Maready for defendants, appellees.

MOORE, J. The evidence, when considered in the light most favorable to plaintiff, tends to show:

The accident occurred about 2:30 p. m. on 8 August 1958 at a curve

on the Baux Mountain Road north of Winston-Salem in a rural area. The road is a two-lane paved highway. The pavement is about 18 feet wide. The curve in question is fairly sharp and turns to the left for southbound traffic. At the curve the shoulders are only two or three feet wide on each side and the outside of the curve is elevated or banked. On the inside of the curve there are trees and tall bushes making it a blind curve. Approaching the curve from the north the highway is on an incline to the curve. To the south of the curve the highway is straight for a considerable distance. A dirt road comes down a sharp decline from the west and intersects the highway slightly to the south of the center of the curve. The individual defendant, agent and employee of corporate defendant, drove the latter's truck from the dirt road into the highway. The truck body was equipped with racks or shelves which contained crates of soft drink bottles. As the truck came onto the highway a number of the crates fell to the hardsurface and littered the highway with crates, bottles and broken glass, particularly the west lane of travel. The individual defendant stopped the truck diagonally across the highway in the southern portion of the curve so as to block about 80% of the hardsurface. The truck faced southeast. The only open space in the highway was 3 or 4 feet on the west side to the rear of the truck. The truck had been standing in this position about 20 minutes before plaintiff arrived. The glass and debris extended 20 to 30 feet north of the truck to the mouth of the dirt road. It had not been removed. Individual defendant did not flag traffic or otherwise give warning. Plaintiff was driving south at a speed of 45 to 50 miles per hour. He could not see around the curve. He was half way around before he could see the truck. He was then within 100 feet of the truck; at this time he also saw the glass and debris, and immediately applied brakes and tried to stop. He ran into the area of broken bottles; his right front tire blew out and plaintiff lost control. The car did not strike the truck, but ran onto the shoulder and came to rest on its side in the road ditch at a culvert. Plaintiff was seriously injured, was in the hospital several months, and was on crutches for a year after dismissal from the hospital.

Plaintiff alleges in his complaint that defendant was negligent in that he blocked the highway with his truck at a blind curve for a long period of time, gave no warning to southbound traffic, and failed to remove the broken glass and debris from the highway though he had ample time to do so; and that such negligence was the proximate cause of plaintiff's injuries and damage to his automobile.

Defendants aver that plaintiff was contributorily negligent, in that, among other things, he was operating his vehicle at a speed greater than was reasonable and prudent under the circumstances, he failed

to keep a reasonable lookout, and failed to keep his automobile under proper control.

In our opinion the evidence, considered within the framework of the allegations of the complaint, is sufficient to make out a *prima facie* case of actionable negligence.

"No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway . . . when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a *clear view* of such vehicle may be obtained from a distance of *two hundred feet* in both directions upon such highway: Provided further that in the event that a truck . . . be disabled . . . the driver . . . shall display, no less than *two hundred feet* in the front and rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed . . ." (Emphasis added). G.S. 20-161(a).

"One stopping an automobile on the highway should use ordinary care to prevent a collision with other vehicles operating thereon. A motorist stopping on a pronounced curve should anticipate that a following motorist will have an obstructed view of the highway ahead, . . ." 2A Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed.), s. 1191, p. 8; *Hunton v. California Portland Cement Co.*, 50 Cal. App. 2d 684, 123 P. 2d 947.

"The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. . . ." 60 C.J.S., Motor Vehicles, s. 325, pp. 779, 780; *Mullis v. Pinnacle Flour & Feed Co.*, 152 S.C. 239, 149 S.E. 329.

In *Pender v. Trucking Co.*, 206 N.C. 266, 173 S.E. 336, the facts are somewhat similar to those of the instant case. A truck became stuck in soft dirt leaving the attached trailer across the highway, completely blocking it at a point where motorists approaching around a

curve might not be able to see the trailer in time to avoid hitting it. After the trailer had been in this position ten or fifteen minutes, plaintiff drove around the curve and collided with the trailer. The driver of the truck failed to give warning. It was held that motion for nonsuit was properly overruled, that defendant "owed the duty to plaintiff and others approaching the obstruction in the highway . . . to exercise reasonable care to warn them of their peril," and that "failure to perform this duty was negligence."

In the case at bar there is no evidence that the truck was disabled. The evidence tends to show that defendants were negligent in failing to comply with the requirements of G.S. 20-151(a) by leaving the truck in a position so as to block the highway, and were negligent in failing to give warning of the perilous obstruction to motorists proceeding from the north around the curve.

There is also evidence tending to show that defendants were negligent in failing to remove from the highway the glass and other debris that fell from the truck when it entered the highway from the side road, and in failing to warn motorists of its presence.

In North Carolina it is unlawful and punishable for any person to "throw, place or deposit any glass or other sharp or cutting substance or any injurious obstruction in or upon any of the public highways of this State." G.S. 136-91. It is true that there is no evidence in this record that defendants either wilfully or negligently deposited the glass on the highway. But the statute is express recognition of the danger to motorists of the presence of such substances on the public highways. Assuming that the deposit of the glass on the highway by defendants was purely accidental, defendants nevertheless owed plaintiff and other motorists the common law duty of due care to remove the glass and debris from the highway and to give reasonable warning of the peril until it was removed.

"At common law, any unnecessary or unauthorized obstruction that unreasonably incommodes or impedes the lawful use of a street or highway is a nuisance. . . ." 5A Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed.), s. 3252, p. 274. But readily removable objects carelessly left in the highway may render the person who left them there liable for negligence to the drivers of ordinary vehicles moving at a reasonable rate of speed. *Francis v. Gaffey,* 211 N.Y. 47, 105 N.E. 96; *Matsumato v. Arizona Land and Rock Co.,* 295 P. 2d 850; *Batts v. Joseph Newman, Inc.,* 71 A. 2d 121.

Plaintiff did not collide with the truck. One of his tires was punctured as he ran over the glass strewn on the highway, and as a result he lost control and his car ran into the highway ditch causing injury to his person and property. The inference is permissible that the in-

juries were proximately caused by defendants' negligence in leaving the truck standing so as to obstruct the highway in violation of G.S. 20-161(a), in allowing the glass and debris to remain upon the highway, and in failing to warn southbound motorists of the presence of the truck, glass and debris. Plaintiff might have avoided the glass had the highway not been obstructed by the truck.

On this record we do not agree that plaintiff was contributorily negligent as a matter of law. The evidence tends to show that plaintiff was proceeding at a speed of 45 to 50 miles per hour. The speed limit was 55 miles per hour. Because of the trees and bushes on the inside of the curve plaintiff's view was obstructed until he was within 100 feet of the truck. The glass was nearer; he saw it about the same time he saw the truck. Glass is transparent and is not readily distinguishable under ordinary circumstances until one is in close proximity thereto.

Before defendants are entitled to a nonsuit on the ground of plaintiff's contributory negligence it must appear that "the evidence of the plaintiff taken in the light most favorable to him establishes such negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom." *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664. Whether plaintiff was contributorily negligent by reason of excessive speed, failure to keep a reasonable lookout, or failure to keep his vehicle under proper control is for the jury.

The cases relied on by the appellees are factually distinguishable.

The judgment below is

Reversed.

C. P. OWENS AND WIFE, BETTY SUE OWENS, v. J. W. ELLIOTT AND WIFE, WINNIE ELLIOTT.

(Filed 23 May 1962.)

1. Appeal and Error § 54—

Where the evidence and stipulations of the parties are insufficient to support the court's conclusion that as a matter of law the street in question had been dedicated to the public, a new trial must be awarded in order that the questions of law and issues of fact raised by the pleadings may be determined in the light of all pertinent and competent evidence.

2. Dedication § 1—

A purchaser of a lot outside the boundaries of a subdivision has no rights with respect to dedicated streets of the subdivision other than

those of the public generally and, when the public has no rights or they are extinguished by the withdrawal of the dedication, such purchaser has no rights therein.

3. Dedication § 2—

While the sale of lots in a subdivision with reference to a map showing streets constitutes a dedication of such streets to the purchasers of the lots, as to the public it is but an offer of dedication which does not constitute such streets public ways until the offer of dedication is accepted in some recognized legal manner by the proper public authorities.

4. Dedication § 1; Highways § 4—

Permissive use of land by the public does not constitute a dedication or constitute the land a public way.

5. Dedication § 1—

A valid offer to dedicate must be made by the legal or equitable owner of the fee or, at least, with his consent.

6. Dedication § 5; Highways § 10—

An individual may restrain the wrongful obstruction of a public way only if he will suffer injury thereby distinct from the injury to the public generally.

7. Same—

If a public way is obstructed to the peculiar injury of an individual, such individual may be entitled to injunctive relief to end the obstruction and may recover such special damages as he has suffered up to the time the obstruction is removed, but he is not entitled to recover permanent damages measured by the difference in the market value of his own land before and after the obstruction.

APPEAL by defendants from *Walker, S.J.*, September 1961 Regular Civil Term of WILKES.

Action to recover damages suffered by reason of a street, allegedly dedicated to public use, having been barricaded and obstructed by defendants, and for injunctive relief. The verdict was favorable to plaintiffs.

Judgment was entered ordering defendants to remove the obstruction, permanently restraining them from closing and barricading the street, and awarding plaintiffs $500 in damages.

Defendants appeal.

Ralph Davis for defendants, appellants.
Whicker & Whicker for plaintiffs, appellees.

MOORE, J. The allegations of the complaint are summarized as follows: Prior to 1 July 1958 Howard Owens and wife subdivided a portion of their land into 108 lots. In connection with this subdivision

they laid out, graded, constructed and gravelled an unnamed street (hereinafter referred to as the "Street") for access to the lots and the remainder of their property. The Street extends from the Crysel Road (a public highway) to the Pads Road (a public highway). They dedicated the Street to the use of the public and the owners of the lots in the subdivision. On 11 July 1958 they sold and conveyed the 108 lots to defendants and described the lots with reference to a map of the subdivision. Defendants subsequently sold a number of the lots and described them by reference to the recorded map. Howard Owens and wife deeded to plaintiffs a lot situate at the northwest intersection of Crysel Road and the Street. The description refers to the Street. The lot abuts the western margin of Crysel Road a distance of 100 feet, and the northern margin of the Street 150 feet. Plaintiffs erected a dwelling facing the Street, and constructed a driveway from the Street to the carport. In 1960 defendants barricaded the Street, and in March 1961 made the Street impassable by filling it, in front of plaintiffs' lot, with dirt and rock to a depth of several feet. Prior thereto the Street had been used by the public. Plaintiffs are denied vehicular access to their lot by reason of a steep bank along the margin of Crysel Road. Plaintiffs have no adequate remedy at law. They have been damaged in the amount of $2500.

Defendants aver: Plaintiffs purchased a lot from Howard Owens and wife and built a house thereon. Plaintiffs' lot is not one of the 108 lots of the subdivision, is not shown on the subdivision map, and plaintiffs have no right to use the Street. Defendants' deed from Howard Owens and wife is prior to that of plaintiffs. Howard Owens and wife conveyed their title and interest in the Street to defendants. It is a private way, owned by defendants, and has not been dedicated to public use. Defendants obstructed the Street to prevent trespassing. The deeds to the lots sold by defendants do not refer to the subdivision map; and the purchasers were told that the Street was a private, and not a public, driveway — they understood and agreed. The Street was opened, improved and paved at the expense of defendants and the lot owners, and has never been used by the public. Public authorities have refused to accept the Street as a public highway. Plaintiffs have access to their lot from Crysel Road, and have suffered no damage by the closing of the Street.

After the jury was empaneled and the pleadings were read, the parties stipulated the following facts: Plaintiffs and defendants acquired their deeds from a common source. The deed to defendants is dated 1 July 1958, and the deed to plaintiffs is dated 6 June 1960. Both deeds are recorded. The subdivision map was recorded 22 August 1958.

Plaintiffs' lot is not within the subdivision, lies "Right outside it, it abuts on the Street."

At this juncture the court ruled, as a matter of law, that the Street had been dedicated to public use. Defendants objected and excepted.

Thereafter, evidence was introduced, tending to show, and limited to, the following facts: At the time the subdivision was laid out the Street was graded and gravelled, and was opened to the public. It was used by members of the general public for about 18 months, for access to the houses within the subdivision, and as a cut-off between the two public highways. It was so used until defendants barricaded it. Plaintiffs' house faces the Street. There is a steep bank 5 to 6 feet high along the margin of Crysel Road on plaintiffs' lot. The Street was obstructed by defendants after plaintiffs completed their house, but before they moved in. Defendants asked plaintiffs to share the cost of paving the Street, but plaintiffs refused. The market value of plaintiffs' house and lot immediately before the Street was obstructed was $9000; the value immediately afterwards was $6500.

The court submitted issues only with reference to damages.

In ruling as a matter of law that the street in question was dedicated to public use, the court was in error. The admissions in the pleadings and the stipulations of the parties are insufficient to support this conclusion. The answer denies the allegation that the street was dedicated to the public. The subdivision map and the relevant deeds are not included in the record on appeal. Indeed, the record does not disclose that they were offered in evidence at the trial below. It was stipulated that plaintiffs' lot lies outside the subdivision and abuts on the Street. In the absence of the map and deeds many pertinent questions, bearing on the rights of the parties, cannot be answered. Whether or not the portion of the Street directly in front of plaintiffs' lot lies within and is a part of the subdivision, does not appear. And whether or not the land directly across the Street from plaintiffs' lot is a part of the subdivision, is likewise unascertained. It does not appear how much of the Street lies within the subdivision. The provisions of the deed from Howard Owens and wife to defendants are not before us and were not properly in evidence below, and have not been construed so as to determine the rights of defendants thereunder with respect to the street in question. Even if the truth of these matters was known, it would not necessarily determine the issue as to whether or not the Street has been dedicated to the public. Though the factual allegations of the complaint are apparently sufficient to raise the question as to whether or not the Street was dedicated to the use of plaintiffs, the trial apparently proceeded on the theory that plaintiffs' rights depended upon a dedication to the public.

There must be a new trial so that the questions of law and issues of fact may be determined in the light of all pertinent and competent evidence. Therefore, a brief review of applicable legal principles is in order.

"A person who purchases a lot or parcel of land situate outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally. *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153. When the rights of the public are withdrawn and barred, the rights of the owner of the land outside the subdivision are thereby extinguished with respect to the street or streets of the subdivision withdrawn from (public) dedication." (Parentheses added). *Janicki v. Lorek,* 255 N.C. 53, 60, 120 S.E. 2d 413.

Where lots are sold and conveyed by reference to a map which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and a purchaser of a lot or lots located in the subdivision acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the appropriate public authority. However, the dedication referred to in the preceding sentence, insofar as the general public is concerned, without reference to any claim or equity of the purchasers of lots in the subdivision, is but a *revocable offer* and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them. *Steadman v. Pinetops,* 251 N.C. 509, 515, 112 S.E. 2d 102; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664.

An acceptance by the public of an offer to dedicate a street or road must be by the proper public authorities — that is, by persons competent to act for the public, *e.g.,* the governing board of a municipality or State Highway Commission. 16 Am. Jur., Dedication, s. 32, p. 379. To be binding, the acceptance by the public authority must be in some recognized legal manner. *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104. "According to the current of decisions in this Court there can be in this State no public road or highway unless it be one either established by public authorities in a proceeding regularly instituted before the proper tribunal; or one generally used by the public and over which the public authorities have assumed control for the period of twenty years or more; or dedicated to the public by the owner of the soil with the *sanction* of the authorities and *for the maintenance and operation of which they are responsible.*" (Emphasis added). *Chesson v. Jordan,* 224 N.C. 289, 291, 29 S.E. 2d 906; *Scott v. Shackel-*

ford, 241 N.C. 738, 743, 86 S.E. 2d 453; *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153.

"The mere use of a way over land by the public does not constitute it a highway. Nor does the mere permissive use of it imply a dedicatory right in the public to use it." *Chesson v. Jordan, supra.*

It is essential to a valid offer to dedicate that it be made by the legal or equitable owner of the fee or, at least, with his consent. 16 Am. Jur., Dedication, s. 9, p. 352.

An individual may sue to restrain the wrongful obstruction of a public way if he will suffer injury thereby as distinct from the inconvenience to the public generally, and he may recover such special damages as he has sustained by reason of the obstruction. 26 C.J.S., Dedication, s. 68, p. 567; *Scott v. Shackelford, supra.*

In the charge on the damage issue the court below erred as to the measure of damages. The jury was instructed "that the measure of damages . . . is the reasonable market value of the house and land immediately prior to . . . the blocking of the road . . . as opposed to the reasonable market value of the house and land immediately following. . . ." The court was undoubtedly attempting to apply the permanent damage rule, the difference in value before and after. But the permanent damage rule is not apposite in this situation. If plaintiffs are entitled to recover at all, they are entitled to injunctive relief to end the obstruction, and to recover such special damages as they have suffered by reason of the closing of the Street.

New trial.

LANDRUM A. PHILLIPS AND AMERICAN SECURITY INSURANCE COMPANY v. JAMES R. ALSTON.

(Filed 23 May 1962.)

1. Appeal and Error § 22—

Where, in a trial by the court, there are no exceptions to the court's findings, the findings are presumed supported by competent evidence and are binding on appeal.

2. Appeal and Error § 49—

Upon trial by the court, an exception on the ground that there was no evidence or findings to support the court's conclusions of law is, in effect, a contention that the court should have nonsuited plaintiff, and the question of nonsuit, either on the ground of the insufficiency of plaintiff's evidence or on the ground that the evidence established an

affirmative defense as a matter of law, is not reviewable when the evidence is not in the record.

3. Appeal and Error § 19—

An assignment of error must be supported by an exception.

4. Insurance § 53—

Payment by the insurer to the insured subrogates insurer *pro tanto* to insured's claim against the *tort-feasor* causing the damage; where insurer pays the full damages it is subrogated to the entire right of action and alone may sue, if the sum paid is partial compensation of the damages the injured party is a necessary party to the action and insurer is a proper party, while if the insured refuses to bring the action, insurer may bring it and join insured as a defendant.

5. Same; Insurance § 62½—

Where insurer for defendant obtains a release from plaintiff with knowledge that plaintiff's insurer had paid plaintiff a sum for property damage, the release will not bar plaintiff's insurer from recovery on its subrogated claim, since the release will be construed as an adjustment only of those damages not compensated for by plaintiff's insurer.

6. Same—

Where defendant relies upon a release from plaintiff obtained by defendant's insurer as precluding action by plaintiff's insurer to recover on its subrogated claim for the amount paid by it to plaintiff under its policy contract with plaintiff, defendant may not assert that his insurer was without authority to obtain the release, since by asserting rights resulting from the settlement he ratified it, and by accepting its benefits is estopped to reject its obligations.

APPEAL by defendant from *Clark (Edward B.), S.J.*, February 1962 Term of CUMBERLAND.

Plaintiff Phillips, owning a 1959 Ford automobile, insured it against casualty with American Security Insurance Company (hereafter insurer). The insured automobile was damaged on 15 May 1960 when struck in the rear by a Studebaker automobile owned and operated by defendant. Damage amounting to $490 was done the Ford by the collision. This action was brought as a small claim (G.S. 1-539.3) to recover that sum. Plaintiffs allege: The collision was caused by the negligence of defendant particularized in the complaint; insurer had, by reason of its policy provisions, paid to its insured, plaintiff Phillips, the sum of $390, and was, because of such payment, the real party in interest. Judgment in the sum of $490 was prayed.

Defendant denied the asserted negligence. As additional defenses he pleaded negligence of plaintiff Phillips and a release executed by Phillips and his wife to defendant for the sum of $3,100, releasing defendant and his wife "from all claims and demands, actions and causes of action, damages, cost, loss of service, expenses and compensation on account of, or in any way growing out of bodily injuries and property damages" resulting from the collision.

A jury trial was waived. The court found: Phillips was operating his automobile at a lawful and prudent rate of speed in a southerly direction on a rural road intersected by another rural road; plaintiff gave notice of his intention to make a left turn; defendant operated his automobile at a greater rate of speed than was prudent under the circumstances and conditions then existing; he passed a Chevrolet, following and approximately sixty feet to the rear of the Ford; when the Studebaker approached the Ford, plaintiff's vehicle had then crossed the center line of the road; defendant then sounded his horn; plaintiff pulled to his right and back into his righthand lane; defendant then pulled back into his righthand lane to avoid colliding with a truck coming from the opposite direction and ran into the rear of the Ford, causing damage in the sum of $490 to the Ford. Based on these findings the court concluded (a) defendant operated his vehicle at a greater speed than was reasonable and prudent under existing conditions, in violation of G.S. 20-141(a), (b) defendant failed to maintain and keep a proper lookout, (c) defendant failed to keep his automobile under proper control, (d) defendant attempted to pass two vehicles traveling in the same direction when it was unsafe to do so, (e) the negligence of defendant was the sole proximate cause of the collision and damage to the Ford.

The court found insurer paid Phillips the sum of $390 pursuant to the provisions of its policy. It also found defendant's liability insurance carrier paid the sum of $3,100 for a release executed by plaintiff Phillips and his wife; "that said $3,100.00 sum was compensation to Landrum A. Phillips' wife for personal injuries sustained in the collision of the two vehicles and for hospital expenses thereby incurred; that this Court finds as a fact that said release and settlement of claim in favor of the defendant and his wife is a bar to any property damage or personal injury claim by the plaintiff Landrum A. Phillips in this matter; that at the time of the payment of the aforesaid $3,100, the adjuster for defendant's insurance carrier was on notice of the subrogation rights of American Security Insurance Company, and that this knowledge of said adjuster is imputed to defendant . . ." Based on these findings the court concluded that the release executed by plaintiff Phillips was not a bar to the claim of plaintiff insurer.

Based on its findings and conclusions the court entered judgment that plaintiff Phillips take nothing; that plaintiff insurance company recover the sum of $390 and costs. Defendant appealed.

Tally, Tally, Taylor & Strickland by Nelson W. Taylor and Jesse M. Henley, Jr., for defendant appellant.

No counsel contra.

RODMAN, J. Defendant does not except to the facts found by the court. He merely excepts to the conclusions declared to result from the facts found. Illustrative: The court found defendant was operating his automobile "at a greater rate of speed than was prudent under the circumstances and conditions then existing." No exception was taken to this finding. Based on the finding the court concluded defendant had violated the provisions of G.S. 20-141(a). Defendant's first exception is to this conclusion. His exceptions 2, 3, 4, and 5 are similar in character.

Defendant says in his brief: "There is no evidence or finding of fact by the court below to support the finding of negligence on the part of defendant or that any such negligence was the cause of the accident." In effect his argument is that the court should have nonsuited the case. The record does not disclose that such motion was made. The evidence was not included in the case on appeal and brought forward in the record. In the absence of exceptions, the findings are presumed to be supported by competent evidence and are binding on appeal. *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882.

Defendant is without exception to support his assertion that the evidence shows as a matter of law that plaintiff was contributorily negligent. If such an exception had been taken we would be unable to pass on the merit of the exception because the evidence is not before us.

Defendant argues the release executed by Phillips is a bar to insurer's right to recover. Defendant is bound by the factual finding that the adjuster, who paid for and took the release, knew that insurer had paid Phillips $390 as it was obligated to do under its policy of insurance.

The question for decision is: Does the release taken by defendant's agent bar insurer's right to recover? The answer is no.

When an insurer of property pays the insured the sum fixed by the policy, he is, to the extent of the payment, subrogated to insured's claim against a *tort-feasor* who caused the damage. *Winkler v. Amusement Co.,* 238 N.C. 589, 79 S.E. 2d 185. If the sum paid covers the entire loss, the insurer is subrogated to the entire right of action against the *tort-feasor.* It alone can maintain the action. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Cunningham v. R.R.,* 139 N.C. 427.

When the sum paid is only partial compensation, the owner is a necessary party to an action against a *tort-feasor.* If he desires full compensation for his loss, he should bring the suit. If he refuses, insurer may sue, making the owner a party defendant. The *tort-feasor* is entitled to have the amount of damage determined in one action. Where only partial compensation is paid, insurer is not a necessary

but a proper party. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Smith v. Pate, supra.*

While a *tort-feasor* is entitled to have the total damage ascertained in one action, he cannot, when he has knowledge of insurer's rights by virtue of its payment to the owner, defeat those rights by making payment to and taking a full release from the owner. The payment so made and release taken will be construed as a mere adjustment of the uncompensated portion of the loss. Insurer may then assert its right against the *tort-feasor. Cunningham v. R.R., supra; Powell v. Water Co.,* 171 N.C. 290 (297), 88 S.E. 426; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686; *Hamilton Fire Ins. Co. v. Greger,* 158 N.E. 60, 55 A.L.R. 921; *City of New York Ins. Co. v. Tice,* 152 P. 2d 836, 157 A.L.R. 1233; *United Pacific Insurance Co. v. Schetky Equipment Co.,* 342 P. 2d 766; *Pennsylvania Fire Insurance Company v. Harrison,* 94 So. 2d 92; 29A Am. Jur. 810-811; 46 C.J.S. 155.

Defendant contends his liability insurance carrier was without authority to act for him in making the settlement with and taking a release from Phillips. He cites in support of this position *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535, and *Lampley v. Bell,* 250 N.C. 713, 110 S.E. 2d 316. He misapprehends the purport of those decisions. True, a liability carrier cannot impair the rights of the insured by settling his claim without his authority. No suggestion is made here that defendant lost any rights by the settlement. To the contrary he asserts rights resulting from the settlement. When he does so, he ratifies the act of the person making the settlement. He cannot accept the benefits and reject the obligations.

No error.

CLARENCE L. MORTON, JR., CHARLES A. DIGGS AND CARROLL D. OGLESBY, JOINTLY AND AS ASSIGNEES v. EUGENE P. THORNTON AND ELIZABETH P. THORNTON, PARTNERS, TRADING AS THORNTON SALES SERVICE.

(Filed 23 May 1962.)

1. Master and Servant § 9; Parties § 2—

Failure of an employer to pay his employees the compensation to which they are entitled under the contract of employment gives rise to separate causes of action by each employee against the employer, even though the contracts of employment are identical, and one unpaid employee cannot authorize another employee to bring action for the unpaid wages of both, since each action must be maintained by the real party in interest. G.S. 1-57.

2. Same; Assignment § 1—

A claim for unpaid wages is assignable, and an assignee may maintain an action thereon in his own name together with an action on the assignee's own claim for unpaid wages; if the assignment by some of the employees is to other employees jointly, all the assignees must be parties and recover in their joint right, G.S. 1-70, while if the assignment is not to such employees jointly, the assignees may not maintain a common action against the employer.

3. Appeal and Error § 2—

Where, on appeal from order overruling demurrer for misjoinder of parties and causes, it is impossible to tell from the allegations of the complaint whether plaintiffs were joint assignees so as to be entitled to maintain a joint action on the claims assigned, the Supreme Court, in the exercise of its supervisory jurisdiction, will remand the cause to the end that plaintiffs may move for permission to amend to make the complaint specific and definite.

APPEAL by defendants from *Johnston, J.*, February 5, 1962 Regular Civil Term of GUILFORD (Greensboro Division).

Sapp and Sapp by Armistead W. Sapp for plaintiff appellees.
York, Boyd & Flynn by C. T. Boyd for defendant appellants.

RODMAN, J. This appeal presents this procedural question: Do the causes of action stated in the complaint all belong to plaintiffs jointly, or are some owned by plaintiffs severally?

The answer must be found by interpreting the language selected by plaintiffs to warrant a judgment for the sum sought.

Notwithstanding the provisions of our statute (G.S. 1-122) requiring a plain and concise statement of the facts on which the claim for relief is founded, we have experienced difficulty in stripping the complaint of seemingly superfluous allegations. Giving the complaint the liberal construction required (G.S. 1-151), we reach the conclusion that plaintiffs base their claim for relief on these facts: (1) Named defendants are partners trading as Thornton Sales Service. (2) Named plaintiffs and others were employed by the partnership as salesmen during the years 1957, 1958, and 1959. Each of defendants' salesmen was assigned a specific territory. The contracts between the partnership and its salesmen were identical in form, obligating the partnership to pay to each salesman a fixed proportion of the commissions received by the partnership for the sales made by each employee in his assigned territory. (3) During the years in question all employees of the partnership earned $21,252.94 more than defendants paid all of its salesmen.

The complaint also contains allegations that while working for de-

fendant the persons named in sec. XVI of the complaint, quoted hereafter, were also employed by TRU-FAX Corporation, a corporation owned and controlled by defendants. We do not understand plaintiffs to contend that any of the parties named in sec. XVI of the complaint were entitled to recover any sums from defendant partnership for services rendered to the TRU-FAX Corporation because it was owned and controlled by the individual partners.

Sec. XV of the complaint reads: "Plaintiffs have demanded that commissions due them and the other salesmen named be paid for the sales made for the defendants in the MADE-RITE program in the territories assigned. Defendants have failed and refused and still fail and refuse to comply with the terms of their agreement and contract with the plaintiffs and those other salesmen named above. They have breached their contract with the plaintiffs and those other salesmen and have unjustly enriched themselves and exploited the services performed by these plaintiffs and those other salesmen referred to and have retained for themselves commission and income which, by their agreement, they were due and obligated in law and good conscience to pay to the plaintiffs and the other named salesmen."

Sec. XVI of the complaint reads: "The defendants owed December 1, 1958, by reason of the matters and things hereinabove alleged the following sums to the following salesmen:

"Clarence L. Morton, Jr.	$ 3,077.91
Charles A. Diggs	53.26
Carroll D. Oglesby	1,415.84
R. R. Ballew	499.77
Gerald W. Bos	522.96
Larry M. Gray	269.94
W. L. Helms	615.60
Glen Richard Kent, Jr.	266.73
Charles R. Mitchell	612.74
George G. Norton	716.52
James G. Sims, Jr.	995.10
J. B. Timmerman	404.40
Claude E. Weldon	377.77
C. Fraiser Whatley	24.55
Hugh S. Wheaton	254.34
TOTAL DUE	$10,107.43

"Plaintiffs Clarence L. Morton, Jr., Charles Diggs and Carroll D. Oglesby are the owners and assignees of all the above listed claims. The assignments are in writing, and the plaintiffs individually and

jointly are entitled to recover of the defendants Eugene P. Thornton and Elizabeth P. Thornton, individually, severally and jointly, and as partners, trading as Thornton Sales Service, the full sum of $10,107.43, together with interest thereon from the first day of December, 1958, until paid."

A contract of employment gives rise to an action when breached by nonpayment of wages due the employee. Even though all employees work under identical contracts, a failure to pay the wage earned creates a right of action in each unpaid employee. A failure to pay all employees does not give rise to a single action in which all employees may join. *Batts v. Gaylord,* 253 N.C. 181, 116 S.E. 2d 424; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Weaver v. Kirby,* 186 N.C. 387, 119 S.E. 564. A single tortious act may produce separate and distinct causes of action which cannot be joined. *Campbell v. Power Co.,* 166 N.C. 488, 82 S.E. 842. One unpaid employee cannot authorize another such employee to bring an action for the unpaid wages due both. Plaintiff must be the real party in interest. G.S. 1-57; *Federal Reserve Bank v. Whitford,* 207 N.C. 267, 176 S.E. 584; *Insurance Co. v. Locker,* 214 N.C. 1, 197 S.E. 555.

A claim for unpaid wages is a chose in action which may be assigned and, when assigned, the assignee may maintain an action thereon in his own name. G.S. 1-57. The assignor, having parted with his title, has nothing left which will support an action by him. *Lipe v. Bank,* 236 N.C. 328, 72 S.E. 2d 759; *Vaughan v. Davenport,* 157 N.C. 156.

The claim for unpaid wage due an employee can be joined in one action with similar claims assigned to that plaintiff employee. If the claims are assigned to joint assignees, all assignees must be parties and recover in their joint right. G.S. 1-70; *Threadgill v. Faust,* 213 N.C. 226, 195 S.E. 798; *Yonge v. Ins. Co.,* 199 N.C. 16, 153 S.E. 630.

Whether there is a misjoinder of parties and causes of action depends upon the facts. When secs. XV and XVI are read together, we are unable to say with any degree of assurance that it is alleged or intended to be alleged that Morton, Diggs, and Oglesby assigned their individual claims, and that all fifteen claims were held by Morton, Diggs, and Oglesby as joint assignees. The title of the cause designating them not as joint assignees but "jointly and as Assignees," the allegation that they "are the owners and assignees of all the above listed claims," coupled with the allegation in the same paragraph that "the plaintiffs individually and jointly are entitled to recover," implies, if it does not allege, that Morton, Diggs, and Oglesby never assigned their individual claims. On the other hand, there are allegations from which it can be inferred that these three did assign their individual claims.

It is alleged that the assignments are in writing, but they are not made part of the complaint. If attached to and made a part of the complaint, doubt as to what the factual situation is would be removed.

Because of the uncertainty as to the meaning which should be given the language plaintiffs used, we, in the exercise of our supervisory capacity, vacate and set aside the judgment appealed from and remand the cause to the Superior Court of Guilford County. Plaintiffs may there move the court for permission to amend the complaint to make it specific and definite. When the amendment has been made, defendants may file such pleadings as they may be advised.

Judgment vacated Cause remanded.

BERRY BROTHERS CORPORATION v. ADAMS-MILLIS CORPORATION.

(Filed 23 May 1962.)

1. Trial § 5—

The sequestration of witnesses lies in the discretion of the trial court.

2. Bill of Discovery § 3—

The commissioner for the examination of designated persons pursuant to G.S. 1-568.11, is not vested with judicial authority and may not determine in his discretion whether the witnesses to be examined should be sequestered, or whether a certain person summoned is an agent of the adverse party and therefore subject to examination, G.S. 1-568.4(e), and the commissioner's rulings thereon are void.

3. Same; Courts § 6—

Where a commissioner appointed pursuant to G.S. 1-568.11 enters an order allowing the sequestration of witnesses and enters an order holding that one of the witnesses was an agent and subject to examination, such orders are void, but an appeal will not lie therefrom to the judge of the Superior Court, the proper procedure being for the commissioner to refer the judicial questions, at least in the first instance, to the clerk who issued the order for the examination.

APPEAL by plaintiff from *Phillips, J.*, January 22, 1962 Term of GUILFORD. Greensboro Division.

In this action, after defendant had answered the complaint, plaintiff obtained from the Clerk of the Superior Court of Guilford County, pursuant to G.S. Chapter 1, Article 46, an order for the adverse examination of certain officers and employees of defendant and of Frank D. DeLong, Jr., allegedly an agent of defendant.

When the designated persons appeared in compliance with the clerk's

order, plaintiff moved that the commissioner, in his discretion, sequester the witnesses. The commissioner allowed plaintiff's said motion except as to defendant's vice-president and general counsel. Defendant excepted to this ruling and appealed to the superior court.

Also, before the commissioner, defendant objected to the adverse examination of DeLong. DeLong was not an officer or employee of defendant. Plaintiff contended DeLong was, and defendant contended he was not, an agent of defendant within the meaning of G.S. 1-568.4 (e). DeLong was then examined before the commissioner with reference to whether his relationship to defendant was such as to constitute him such agent. After hearing DeLong's testimony, and considering certain documentary evidence, the commissioner ruled that DeLong was such agent. Defendant excepted to this ruling and appealed to the superior court.

Thereafter, Judge Phillips, considering defendant's appeals from the commissioner's said rulings, and "being of the opinion that the plaintiff did not have the right to have the officers and employees of the defendant corporation sequestered for the purpose of adversely examining them," and "finding as a fact, that Frank D. DeLong, Jr., is not an agent of the defendant within the meaning of G.S. 1-568.4(e)," entered an order reversing the actions (rulings) of the commissioner and remanding the matter to the commissioner "for further proceedings consistent with this order."

Plaintiff, based on exceptions aptly taken, appealed from said order and assigns errors.

Smith, Moore, Smith, Schell & Hunter and David M. Clark for plaintiff appellant.

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

BOBBITT, J. G.S. 1-568.11, applicable when complaint and answer have been filed, provides that a party, without notice to other parties, may apply "to the clerk or judge" for an order for the examination of designated persons; and, if the affidavit supporting the application sets out the requisite facts, that "the judge or clerk" shall make such order. G.S. 1-568.6 provides that "(t)he examination shall be held by a commissioner appointed by the judge or clerk."

The "exclusion, separation, sequestration of witnesses, or 'putting witnesses under the rule,' as the procedure is variously termed, is a matter not of right, but of discretion on the part of the trial court." 53 Am. Jur., Trial § 31; *S. v. Spencer,* 239 N.C. 604, 609, 80 S.E. 2d 670; *Lee v. Thornton,* 174 N.C. 288, 93 S.E. 788; 88 C.J.S., Trial § 65.

With reference to the sequestration of witnesses, we are not presently concerned with whether "the judge or clerk," without notice or after hearing, may, in his discretion, order the sequestration of witnesses to be examined before the commissioner. Nothing appears to indicate the clerk's order provided for such sequestration. Presently, we consider whether *the commissioner* may, in *his* discretion, order such sequestration.

G.S. 1-568.16 provides:

> "(a) An examination pursuant to this article shall be conducted in the same manner and subject to the same rules as if the examination were being had at the trial of the action, except as otherwise provided in this section.
>
> "(b) The commissioner before whom the deposition is to be taken shall put the witness on oath or affirmation, and, unless the parties agree otherwise, shall personally, or by someone acting under his direction, record the testimony of the witness in his presence, and cause it to be transcribed.
>
> "(c) All objections made at the time of the examination to the qualifications of the commissioner taking the deposition, or to the conduct of any person, and any other objection to the proceedings, shall be recorded and transcribed as part of the deposition.
>
> "(d) Evidence objected to shall be taken subject to the objection, except that, when an objection is made on the ground of privilege or on the ground that the question goes beyond the proper scope of the examination, the person being examined may refuse to answer the question, in which case such refusal and the grounds therefor shall be recorded and transcribed as part of the deposition. The procedure when the person being examined refuses to answer a question is governed by G.S. 1-568.18 and 1-568.19.
>
> "(e) Any party may examine the person being examined and may make all proper objections to the proceedings and to the evidence taken, but the scope of an examination ordered pursuant to G.S. 1-568.10 shall not thereby be enlarged beyond the scope specified in the order for the examination."

Plaintiff contends G.S. 1-568.16(a), by implication, confers upon the commissioner the authority, in *his* discretion, to order the sequestration of witnesses. However, the further provisions of G.S. 1-568.16 dispel any suggestion that the commissioner is vested with judicial authority. The prescribed duties of the commissioner are administrative, not judicial, in character.

G.S. 1-568.7 provides: "In addition to his other powers the commissioner may—(1) Grant continuances from time to time for good cause; (2) Administer oaths to witnesses; and (3) Designate a reporter to take and transcribe the examination." G.S. 1-568.8 provides: "The procedure prescribed by this article is the sole procedure for the examination before trial of the persons designated in G.S. 1-568.4. The judge or the clerk, however, has authority to fix and determine all necessary procedural details with respect to such an examination in all instances in which this article does not make definite provision." Whether an order for the sequestration of witnesses is a necessary procedural detail within the meaning of G.S. 1-568.8 is not presented. Suffice to say, "this article" (G.S. Chapter 1, Article 46) makes no "definite provision" therefor.

Our conclusion is that G.S. Chapter 1, Article 46, does not confer upon the commissioner the authority, in *his* discretion, to order the sequestration of witnesses. Even so, defendant had no right of appeal from the purported ruling of the commissioner.

G.S. 1-568.18 provides: "If the person being examined refuses to answer any question propounded, the examination may be completed on other matters or it may be adjourned, as the propounder of the question may prefer. The propounder may, upon notice, as provided by G.S. 1-568.14 (b) and (c), given to the person examined and to all other parties, make a motion before the judge or clerk that the person examined be required to answer the question or questions he had refused to answer and to answer any additional questions which relate to the matter or matters as to which he had refused to testify. If the motion is granted, the judge or clerk shall fix a time and place for such further examination. No additional notice of such further examination need be given."

G.S. 1-568.19 provides: "If the person to be examined fails to appear at the time and place fixed in an order for his examination or in an order issued pursuant to G.S. 1-568.18, or refuses, without good cause, to answer any question required to be answered pursuant to G.S. 1-568.18, such failure to appear or refusal to answer constitutes contempt of court and is punishable as such. The judge or clerk may also make all proper orders in regard to the failure to appear, or the refusal to answer any question, including the taxing of costs incident thereto, the striking out of pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default or by default and inquiry against the disobedient party."

The foregoing applies, in large measure, to the second question, namely, whether DeLong is an agent of defendant within the meaning

of G.S. 1-568.4(e) and therefore subject to examination under G.S. Chapter 1, Article 46. Clearly, the commissioner had no judicial authority to make this determination. Nor did defendant have the right to appeal from the commissioner's purported ruling.

DeLong, in effect, refused to comply with the commissioner's ruling and submit to adverse examination; and the other witnesses, in effect, refused to submit to adverse examination in the manner prescribed by the commissioner's ruling. Under these circumstances, the commissioner should have filed with the clerk a transcript of what transpired and referred to the clerk the questions requiring judicial determination. Since the commissioner derived his authority from the clerk's order, these questions were for consideration, at least in the first instance, by the clerk.

Judicial authority and discretion were prerequisite to a determination of the questions involved in the commissioner's rulings. Lacking such authority, the commissioner's purported rulings were void. Even so, defendant had no right of appeal therefrom. Neither defendant nor the witnesses had suffered injury. It was incumbent upon plaintiff, in accordance with the procedure indicated above, to seek a determination of these questions by an officer vested with the judicial authority and discretion to make such determinations.

We do not consider whether Judge Phillips' order, if the questions were properly before him, was erroneous in whole or in part. In our view, and we so hold, he should have treated the commissioner's rulings as void and dismissed defendant's purported appeals therefrom. Hence, the order of Judge Phillips is vacated; and, after certification of this opinion, the commissioner may proceed as indicated herein.

Order vacated.

C. S. ROUSE, TRADING AS MODEL CLEANERS v. ALBANY INSURANCE COMPANY AND WESTCHESTER FIRE INSURANCE COMPANY.

(Filed 23 May 1962.)

1. Insurance § 84—

Where separate insurers issue respectively a policy of fire insurance upon the same property, each policy containing provisions that in case of other valid insurance any loss should be apportioned, insured may sue both insurers in one action to recover the loss by fire of the insured property, since the presence of both the insurers is necessary for a proper apportionment of the loss and to fix the liability of each.

2. Pleadings § 18—

A joint demurrer cannot be sustained on the grounds of misjoinder if the complaint alleges a cause of action against any defendant.

3. Insurance § 73—

A policy of fire insurance on contents of a building used by insured to process goods of his customers in his hands as bailee, covering the loss of "property of the insured or for which the insured is liable," *is held* to include in the coverage property held by insured as bailee and destroyed by fire of unknown origin, notwithstanding the absence of legal liability of insured for such loss, although insured will hold the payments for the bailed articles as trustee for the benefit of the owners.

Certiorari on defendants' application to review an order entered by *Bundy, J.*, at February 1962 Term, LENOIR Superior Court.

The plaintiff instituted this civil action to recover $1,450.00 for contents of a described building, including articles of clothing in plaintiff's possession for processing in the usual course of his dry cleaning business. Fire "of unknown origin" destroyed the building and contents on November 14, 1960. At the time of the fire the plaintiff was the beneficiary in two separate insurance policies. One was issued by Albany Insurance Company for $5,000.00, and the other was issued by Westchester Fire Insurance Company for $3,000.00. Each policy contained this provision:

> "C. STOCK COVERAGE — when this policy covers STOCK of merchandise it shall include all stock items usual or incidental to the business of the occupancy described on the first page of this policy (except motor vehicles designed for use on public highways, boats and aircraft), the property of the insured or for which the insured is liable while contained in the described building or while located within 100 feet thereof."

Each policy, however, contained a provision for the apportionment of loss in case the insured held other coverage.

The defendants filed a joint demurrer upon these grounds:

> "1. There is an alleged misjoinder of parties defendant,
> "2. There is an alleged misjoinder of causes of action,
> "3. And that it is alleged that the complaint does not allege facts sufficient to constitute a cause of action," . . .

The parties stipulated: "It is agreed that if the Court should hold that the 'C Stock Coverage' provision as quoted, does insure customers' goods held by the insured for processing against the fire damages as alleged in plaintiff's complaint, then the demurrer as to the third ground was correctly overruled."

Judge Bundy entered an order overruling the demurrer which is now here for review.

R. S. Langley for plaintiff appellee.
Whitaker & Jeffress By R. A. Whitaker for defendants, appellants.

HIGGINS, J. According to plaintiff's allegations, he operated a dry cleaning plant in a one-story, masonry building located at 205 East Caswell Street in Kinston. Each defendant issued its separate policy containing the "C" Stock Coverage clause set out in the statement of facts. Each policy contained a provision that in case the plaintiff had other valid insurance any loss should be apportioned. By reason of the apportionment clauses in the policies, the presence of both insurers before the court is necessary for the court properly to apportion the loss and to fix the liability of each insurer. *Pretzfelder v. Ins. Co.*, 116 N.C. 491, 21 S.E. 302; *Redmon v. Ins. Co.*, 184 N.C. 481, 114 S.E. 758.

A joint demurrer cannot be sustained on the ground of misjoinder if the complaint alleges a cause of action against any defendant. *Williams v. Strickland*, 251 N.C. 767, 112 S.E. 2d 533; *Paul v. Dixon*, 249 N.C. 621, 107 S.E. 2d 141. The defendants argue their joint demurrer for failure to state a cause of action should be allowed, even though misjoinder is waived by the joint demurrer.

The third ground of the demurrer raises the question whether the "C" stock coverage provision of the policies insures customers' clothes in possession of the plaintiff as bailee for dry cleaning purposes. The defendants contend (1) the policies were intended to insure the plaintiff against liability to the owner and not to insure the property, (2) the complaint having alleged the clothing was destroyed by a fire of unknown origin, the plaintiff is not liable on the ground of negligent loss, and hence the defendants are not liable to him as bailee.

The policies are not before us. However, the complaint alleges that each is a standard North Carolina fire insurance policy. The plaintiff alleges the policies insured "the contents contained in the one-story, masonry building with approved roof used as a dry cleaning plant located at 205 East Caswell Street, Kinston." Each insurer, therefore, was charged with notice not only of the type of articles the plaintiff would receive, but where they would be stored. The policy covered "the property of the insured or for which the insured is liable."

The courts are divided on the question whether "C" is indemnity insurance against the insured's legal liability for loss or whether it insures the property which the insured possesses as bailee. North Carolina seems never to have decided the question. The authorities

are cited and discussed in 29 Am. Jur., "Insurance," §§ 295, 296, pp. 677, 678: "Provisions in a fire insurance policy extending coverage to property held by the insured in trust, on commission, or in a similar manner are usually held to include ordinary bailments and to insure the property to its full value and not merely the bailee's interest unless the coverage is limited in that respect by other policy provisions. Policy provisions covering property contained in *specified places* and 'for which the insured is liable' have been held to insure against loss of the property and not indemnify insured against his legal responsibility." (emphasis added) See also to the same effect, 67 A.L.R. 2d Anno: Fire Insurance, pp. 1243, *et seq.* The foregoing seems to state the general rule.

We hold the insurance policies, as described in the complaint, insured the contents of the described building, including the clothing held by plaintiff as bailee, and that he is entitled to recover their value upon proof of loss by fire. Of course, the payments will take the place of the bailed articles, and will be held by him as trustee for the benefit of the owners.

Affirmed.

STATE v. JOSEPH HAROLD GURLEY.

(Filed 23 May 1962.)

1. Automobiles § 59—

Evidence tending to show that defendant had been drinking, that he attempted to pass a car preceding him in the same direction in disregard of on-coming traffic and collided head-on with a car approaching from the opposite direction, *is held* sufficient to be submitted to the jury on the question of culpable negligence in this prosecution for manslaughter.

2. Automobiles § 60—

Testimony of an officer that from his observation of defendant immediately after the accident, defendant had drunk some intoxicating liquor, with testimony of a physician that he examined defendant less than an hour after the accident and found no evidence that defendant had been drinking, and that defendant's actions and manner of talking at the scene of the accident were due to his injuries, *is held* insufficient predicate for an instruction in regard to the drunken driving statute as bearing upon the question of defendant's culpable negligence.

3. Criminal Law § 107—

It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case.

STATE *v.* GURLEY.

APPEAL by defendant from *Cowper, J.*, November 1961 Term of WAYNE.

This is a criminal action in which defendant was convicted of involuntary manslaughter for the death of Levi Moore in an automobile collision.

From a judgment imposing an active prison sentence, defendant appeals and assigns errors.

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

Braswell & Strickland for defendant.

PER CURIAM. Defendant assigns as error the denial of his motion for nonsuit.

Levi Moore was fatally injured when the automobile in which he was riding collided with an automobile driven by defendant. The collision occurred at 10:20 p. m. on 31 January 1961 on U. S. Highway 70 west of Goldsboro. The Mercury automobile in which deceased was riding was being operated westwardly by Johnnie Exum. It was meeting two cars going east, the second of which, a Cadillac, was being operated by defendant Gurley. Gurley pulled to the left to pass the car in front of him, and collided head-on with the Mercury in which deceased was riding. At the time of the impact the right front wheel of the Mercury and the left front wheel of the Cadillac were on the north shoulder of the highway about 2 feet from the hard-surface. There were skid marks 9 feet and 3 inches long leading to the rear wheels of the Mercury. There were no skid marks to the rear of the Cadillac. The Mercury was knocked 4 feet backwards by the force of the impact, and the cars were stuck together. Moore died about ten minutes after the collision. Exum received injuries and bone fractures which caused him to be hospitalized for forty-six days. The drivers involved were the only eyewitnesses.

Johnnie Exum testified in part.

> "There was an automobile in front of me which I was meeting. There were two automobiles in front of me; Gurley was in the second, and he pulled off to come around and I pulled off to give the highway, and he took the same direction. It was very quick; the last I remember, I was trying to apply my brakes. I know a part of my car got off the road because I had already hit the dirt to the best of my remembrance. I would say I was about fifty yards from the car at the time it started passing the car in front of me. I was driving at a rate, I guess, of forty or forty-five

miles an hour. I swung out to the right and applied my brakes and the last I remember the lights were in my face. I didn't remember anything for a while after the accident. I do not know anything else about how the accident occurred. I have told you all I remember about it. I was injured in the wreck."

The investigating patrolman testified: He arrived at the scene 10 or 15 minutes after the collision occurred. In his opinion defendant was not seriously injured. Defendant was walking around in circles on the side of the road. He was "slightly unsteady," "sort of staggering," talked "a little thick-tongued," and had the smell of alcohol on his breath. There was a pint bottle of liquor in defendant's automobile. The bottle was open but not broken off. The cap was later found. It was unscrewed and a little liquor was in the bottle and some had spilled out on the front floor board.

"Q. At the time of the accident, do you have an opinion satisfactory to yourself whether the defendant Gurley was under the influence of any intoxicating beverages?

"A. Yes Sir. In my opinion he would be what we would call a borderline case of driving under the influence.

"I base this opinion upon the way he talked and acted and by the way he walked and his eyes were also partially glassy. In my opinion he was not drunk but he was under the influence."

Defendant, Joseph Harold Gurley, testified in part:

"I drove up on a car — I went to pass the car. I was driving 50 or 55 miles per hour. When I went to pass the car I could see the lights of the car meeting me, they were dim; I started around — I thought he was further away than he was. I didn't speed up to pass the car and he was so close on me I ducked to the left to miss him and he pulled the same way I pulled; I didn't have the time to put on brakes, and that was it."

Dr. George R. Benton testified for defendant: He examined defendant at the hospital in less than an hour after the accident. He examined him particularly with respect to intoxication, and found no evidence that defendant had been drinking. There was no alcohol on his breath. He treated defendant in the hospital for ten days. After the accident defendant was conscious but was suffering from traumatic amnesia — loss of memory. Defendant's actions and manner of talking at the scene of the accident were caused by injuries.

A number of persons testified they saw him shortly before the accident and he had not been drinking.

PARKER and HIGGINS, JJ., are of the opinion that the evidence for the State, and the testimony of defendant favorable to the State, when considered in the light most favorable to the State, are sufficient to carry the case to the jury. They are of the opinion that when all circumstances are considered, including the statistical and inherent danger in a car being on its wrong side of the road in attempting to pass a preceding car in the face of on-coming traffic and the testimony that defendant had been drinking, the evidence is sufficient to permit, but not to compel, a jury to find that defendant was culpably negligent in the operation of his automobile, which proximately caused the death of Levi Moore. *State v. Cope,* 204 N.C. 28, 167 S.E. 456. They are further of the opinion that defendant's other assignments of error are without merit, there was no prejudicial error in the trial below, and the judgment should be sustained.

RODMAN and MOORE, JJ., are of the opinion that the motion for nonsuit should have been allowed. They concede that defendant violated. G.S. 20-150(a), in that he attempted to pass without having ascertained that the movement could be made in safety, and that this would be proper basis for civil liability. But they reason that the evidence is insufficient to make out a *prima facie* case of culpable negligence, proximately causing the death of deceased, for: (1) there is no evidence of excessive speed, failure to keep a lookout, or prior improper operation; and (2) the evidence as to defendant's consumption of whiskey, in the light of the explanatory testimony of the doctor and the fact that defendant was injured in the collision, will not support the inference that it influenced his operation of the car, and would be insufficient to support a conviction on a charge of driving under the influence. *State v. Hough,* 229 N.C. 532, 50 S.E. 2d 496; *State v. Flinchem,* 228 N.C. 149, 44 S.E. 2d 724.

DENNY, C.J., and BOBBITT and SHARP, JJ., agree with PARKER and HIGGINS, JJ., that the motion for nonsuit was properly overruled, but are of the opinion that there was error in the charge and defendant is entitled to a new trial. In instructing the jury, the court explained that the State relied, in part, on the contention that defendant had violated certain safety statutes, and instructed the jury as to the circumstances under which the violation of such a statute would constitute culpable negligence. Specifically, the court charged with respect to drunken driving statute, G.S. 20-138, stating that the State contends defendant was operating his vehicle at the time in question while under the influence of intoxicants, and giving the rule for determining whether or not a driver is under the influence (*State v. Carroll,* 226

N.C. 237, 37 S.E. 2d 688). The court's instructions clearly imply the evidence was sufficient to support a finding that defendant was operating the car in violation of this safety statute, and that such violation was for consideration in determining whether defendant was guilty of culpable negligence. *Denny, C.J.*, and *Bobbitt* and *Sharp, JJ.*, are of the opinion the evidence was insufficient to support such finding, and that the court's instructions were, in this respect, erroneous and prejudicial. "It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case." 4 Strong: N. C. Index, s. 33, p. 334.

A majority of the Court is of the opinion that the motion for nonsuit was properly overruled. This is the law of the case if the evidence upon retrial is substantially the same as appears in the record on appeal. *Rodman* and *Moore, JJ.*, agree that, notwithstanding their opinion that the State should have been nonsuited, there was error in the charge in the respect indicated in the preceding paragraph. Therefore, a majority of the Court is of the opinion there was error in the charge. This entitles defendant to a new trial.

Venire de novo.

FIRST-CITIZENS BANK & TRUST COMPANY AS EXECUTOR AND TRUSTEE UNDER THE WILL OF HARVEY L. BARNES, KATHLEEN R. BARNES, DONALD L. PAUL, JOHN L. DIXON, ALEXANDER K. KOLB, ROBERT G. McCUTHEON, KENNTH C. REESMAN AND LEROY HARRIS v. ELEANOR BARNES, HELEN BARNES, HARVEY LEE BARNES AND PATRICIA BARNES, INFANT CHILDREN OF HARVEY L. BARNES, JR., DECEASED; AND BARBARA BARNES, MYERS BARNES AND SCOTT BARNES, INFANT CHILDREN OF WILLIAM R. BARNES; WILLIAM R. BARNES, AND PAUL C. STEWART, JR.

(Filed 23 May 1962.)

1. Actions § 3; Wills § 71—

While a trustee under a will may seek the advice of a court of equity to settle conflicting interpretations placed on the instrument by the interested parties, the courts will not give mere advisory opinions with respect to hypothetical situations, and when the allegations are insufficient to show any disagreement between the parties as to the proper interpretation of the instrument, and there are no allegations or evidence sufficient to form a basis for the determination of the questions propounded, the judgment of the Superior Court must be vacated.

APPEAL by C. E. Hancock, Jr., guardian *ad litem* for the named

minor defendants, from *Parker, J.*, at Chambers in New Bern, 14 February 1962.

Plaintiffs, in October 1961, filed with the Clerk of the Superior Court of Craven County their petition asking the court to "advise and instruct the First-Citizens National Bank & Trust Company as Executor and as Trustee as to its duties and obligations" with respect to questions propounded by them "or any others that might arise in connection therewith at the hearing of this matter."

Personal service was had on defendant Stewart on 13 October 1961. Service was had on the remaining defendants in Virginia and Kentucky in the manner permitted by G.S. 1-104.

The complaint, or petition as plaintiffs prefer to designate it, alleges: Harvey L. Barnes, a resident of Craven County, died 26 April 1961. He left a will dated 3 January 1956 with a codicil dated 16 February 1956. These have been probated. First-Citizens Bank & Trust Company was named as, and has qualified and is now acting as, executor of the will. The remaining petitioners are some of the beneficiaries named in the Barnes will. Kathleen Barnes is also widow of testator. William R. Barnes is a son of testator. All of the defendants are named beneficiaries in the will, but defendant Stewart "does not meet the conditions under which he might take under said Will." The only unpaid liabilities of the estate are State inheritance taxes, Federal estate taxes, and costs of administration.

A copy of the will and codicil is attached to the petition and made a part thereof. An examination of the will and codicil indicates all named as beneficiaries in the will, other than testator's son Harvey are parties. There is no specific allegation in the petition of the death of testator's son Harvey, but that fact is implied in the petition. It is affirmatively stated in the affidavit used to obtain service of process outside of the State. The date of his death does not appear. What effect, if any, the time of his death might have on the questions presented does not appear.

Copious quotations from the will appear in the petition. Ten questions are propounded for the court to answer. The petition in no way indicates how the questions arise, nor the position taken by any of the parties with respect to the questions presented. It contains no factual information with respect to the value of the estate. The will makes use of such phrases as "net income," "gross income," "marital deduction," "income distributed," "adjusted gross estate," with other language indicating some degree of familiarity by testator or his legal advisor with statutes imposing "death taxes."

Apparently testator regarded his stock in Maola Milk and Ice Cream Company as his most valuable single asset. He gave his widow

all of his other personal property. The Maola stock was to pay debts, funeral expenses, expenses of administration, and taxes. After providing funds for the payment of these items, the remainder of the stock was devised to plaintiff Bank to be held in trust in designated percentages for named beneficiaries; but the disposition so made accounts for less than 90% of the stock after the payment of the charges imposed. The will contains no residuary clause.

The guardian *ad litem* filed an answer admitting all the allegations of the petition. William R. Barnes and Paul C. Stewart, Jr. did not answer. Judgment by default was taken as to them.

No evidence was presented which would assist in formulating proper answers to the questions propounded even though plaintiffs alleged: ". . . your petitioners will present to the court certain evidence showing a calculation made by and for Harvey L. Barnes at or about the time of making his Will, which calculation reflects his intent, as your petitioners are advised and informed, as to the disposition of the said 10.85% of the capital stock of the Maola Milk and Ice Cream Company."

The trial court gave answers to the questions asked. The guardian *ad litem* excepted and appealed.

Whitehurst and Henderson and Ward and Tucker for plaintiff appellee.

C. E. Hancock, Jr., guardian ad litem.

PER CURIAM. This Court, after reading the record and briefs, is unable to reach the conclusion that the parties are in disagreement as to the proper interpretation of the will or that there is genuine controversy as to how the trustee should perform its duties. If, in fact, controversy does exist, the questions have not been formulated in such manner as to disclose the need for decision, nor has evidence been adduced which will assist in finding the correct answers.

Where a trustee is in need of guidance in solving a problem presently confronting it, arising because of conflicting interpretations placed on the instrument creating the trust, a court of equity will, when presented with facts necessary for it to advise the trustee how it should act, furnish the requested advice; but courts do not provide mere advisory opinions with respect to hypothetical situations. *Boswell v. Boswell,* 241 N.C. 515, 85 S.E. 2d 899; *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334; *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; *Wright v. McGee,* 206 N.C. 52, 173 S.E. 31; *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532; *Finley v. Finley,* 201 N.C. 1, 158 S.E. 549; *Reid v. Alexander,* 170 N.C. 303, 87 S.E. 125.

The appeal entries indicate all defendants appealed. Only the guardian *ad litem*, however, has served case on appeal and assigned errors as required by our rule. He, only, of the defendants has filed a brief. Whether the allegations of the petition are sufficient to warrant a default judgment against William Barnes and Paul C. Stewart, Jr. of the kind here rendered need not be determined. See *Collins v. Simms*, 254 N.C. 148, 118 S.E. 2d 402.

Since there was neither sufficient allegation to warrant a judicial determination nor facts alleged or established to answer the questions propounded, the judgment rendered is erroneous and must be vacated.

If the parties desire, they may apply to the Superior Court for permission to amend their pleadings, and, on the amended pleadings, present such facts as will justify the court in making a judicial determination of the questions presented and requiring answers before the trustee can perform its duties.

Error.

CLYDE JUNIOR CORNS v. TROY NICKELSTON.

(Filed 23 May 1962.)

1. Appeal and Error § 24—

While exceptions to the charge may be noted after trial, they should be included in appellant's statement of case on appeal as served on appellee in order to apprise appellee at that juncture of the theory of the appeal.

2. Same—

The mere notation of exceptions to the charge is insufficient, it being required that the exceptions point out the asserted errors in the charge so as to apprise appellee of the theory of the appeal, and such exceptions cannot be aided by assignments of error setting forth for the first time the asserted error of the court in failing to charge upon matters specified, since such assignments of error are not based upon effective exceptions.

APPEAL by defendant from *Phillips, J.*, October 9, 1961 Civil Term of STOKES.

Action and cross action growing out of a collision which occurred August 14, 1960, about 6:00 p.m. on a sand-clay road in Stokes County known as Doss Road, between a 1951 Ford, owned and operated by plaintiff, and a 1954 Ford Station Wagon, owned and operated by defendant. Approaching the point of collision, plaintiff was driving north and defendant was driving south. Each alleged the collision and his personal injuries and property damages were proximately caused by

the negligence of the other. Issues raised by the pleadings were submitted to the jury and answered in favor of plaintiff. Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed.

Folger & Ellington for plaintiff appellee.
Jordan, Wright, Henson & Nichols for defendant appellant.

PER CURIAM. In the case on appeal, the letter "(A)" appears at the beginning and also at the end of the court's charge. No exception appears between "(A)" and "(A)"; but after the last "(A)" there appears, without explanation of any kind, these words and figures: "Exception No. 1, Exception No. 2, Exception No. 3, Exception No. 4." These "exceptions" do not in any manner indicate in what respect defendant considered the charge erroneous. In Assignments of Error Nos. 1, 2, 3 and 4, which he attempts to base on said "exceptions," defendant asserts the court erred in failing to instruct the jury as to matters set forth for the first time in said assignments of error.

Defendant's Assignments of Error Nos. 1, 2, 3 and 4 are not supported by exceptions previously noted as required by our rules. See Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783, and cases there cited. Hence, they present no question of law for this Court to decide. *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E. 2d 926. "While exceptions to the charge may be noted after trial, when the statement of case on appeal is prepared, even so, such exceptions should be included in appellant's statement of case on appeal as served on the appellee, in order that the latter may be fully apprised at that juncture of the theory of the appeal." *Moore v. Crosswell*, 240 N.C. 473, 82 S.E. 2d 208. Since the "exceptions" do not specify wherein it is claimed the court erred in instructing the jury, they are broadside and wholly ineffectual to support the assignments of error. *Rigsbee v. Perkins, supra.* Moreover, an exception to the charge or an excerpt therefrom "ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Co.*, 242 N.C. 1, 16, 86 S.E. 2d 745; *King v. Powell*, 252 N.C. 506, 512, 114 S.E. 2d 265.

While defendant's purported Assignments of Error Nos. 1, 2, 3 and 4 are insufficient to present questions of law for decision by this Court, consideration of the matters referred to therein fails to disclose prejudicial error. Moreover, no error of law appears on the face of the record.

The remaining assignments of error, Nos. 5 and 6, are formal and are not discussed in defendant's brief.

No error.

W. D. GOLDSTON, JR., ADMINISTRATOR OF THE ESTATE OF RICHARD GOLDSTON, DECEASED v. CHARLES EDWIN WRIGHT.

(Filed 23 May 1962.)

1. Appeal and Error § 46; Trial § 48—

The action of the trial court in setting aside the verdict in its discretion is not subject to review in the absence of manifest abuse of discretion.

2. Appeal and Error § 3; Trial § 46.1—

When the trial court sets aside the verdict in its discretion and orders a new trial, the case remains on the civil issue docket for trial *de novo*, unaffected by rulings made during the trial, and therefore rulings during trial on motions to nonsuit are no longer pertinent, and the correctness of such rulings cannot be presented for review, there being no final judgment or interlocutory order from which an appeal can be taken.

APPEAL by defendant from *Phillips, J.*, November 1961 Civil Term of ROCKINGHAM.

Administrator's action to recover damages for the alleged wrongful death of an eight-year-old boy, who died as a result of injuries received when struck by an automobile driven by defendant.

Issues of negligence, contributory negligence, and damages were submitted to the jury, who answered the first issue (negligence), No. Whereupon, plaintiff moved the trial court to set aside the verdict. The court stated "this verdict shocks the conscience of the court," and, in its discretion, set aside the verdict and ordered a new trial.

Defendant excepted and appealed.

Brown, Scurry, McMichael & Griffin by Hugh P. Griffin, Jr., for defendant appellant.

Fagg, Vaughn, Harrington & Fagg by Thomas S. Harrington, and Jordan, Wright, Henson & Nichols by Luke Wright for plaintiff appellee.

PER CURIAM. The rule is thoroughly established in this jurisdiction that when a trial court sets aside a verdict in its discretion, as here, its action in so doing is not subject to review by appeal to the Supreme Court, in the absence of a manifest abuse of discretion. *Walston v. Greene*, 246 N.C. 617, 99 S.E. 2d 805; *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377; *Goodman v. Goodman*, 201 N.C. 808; 161 S.E. 686; *Bird v. Bradburn*, 131 N.C. 488, 42 S.E. 936; *Brink v. Black*, 74 N.C. 329. The record discloses no abuse of discretion on the part of the trial court. The appeal is without substance and will be dismissed. *Goodman v. Goodman, supra.*

Defendant assigns as error the denial by the trial court of his mo-

tion for a judgment of involuntary nonsuit made at the close of plaintiff's evidence; defendant offered no evidence. This question is not presented. When the trial court, in its discretion, set aside the verdict, and ordered a new trial, the case remained on the civil issue docket for trial *de novo,* unaffected by rulings made therein during the trial conducted by Judge Phillips. *Gillikin v. Mason,* 256 N.C. 533, 124 S.E. 2d 541. Defendant, in respect to the denial of his motion for a judgment of involuntary nonsuit, has nothing to appeal from, for the very simple reason that in this respect there is neither a final judgment nor any interlocutory order of the superior court affecting his rights. *Veazey v. Durham, supra;* G.S. 1-277-278.

Appeal dismissed.

STATE v. CHARLES LEONARD JOHNSON.

(Filed 23 May 1962.)

Criminal Law § 72; Husband and Wife § 21—

In this prosecution of a husband for abandonment and wilful refusal to provide support, testimony of a wife that she advised her husband by telephone that the children did not have food and that she was without funds to purchase food, and that in reply the husband stated that she would have to go to court to see what she could do and that he was through, *is held* competent as an admission by defendant.

APPEAL by defendant from *Bickett, J.,* December 1961 Criminal Term, DURHAM Superior Court.

The defendant was tried and convicted in the Recorder's Court of Durham County upon a two-count warrant charging abandonment and wilful failure to provide adequate suport (1) for his wife, Callie Dean Johnson, and (2) for his three children, naming them, ages 3, 2, and 1. From the judgment imposed, he appealed to the superior court. From a verdict of guilty by the jury after a trial *de novo,* the court imposed road sentences of 18 months on each count, to run concurrently. However, the court suspended the execution of the sentences for five years on condition the defendant pay into court each week the sum of $10.00 for the wife and $20.00 for the children. The defendant appealed.

T. W. Bruton, Attorney General, G. A. Jones, Jr., Asst. Attorney General for the State.

Blackwell M. Brogden for defendant appellant.

PER CURIAM. The State's evidence tended to show the defendant and his wife had separated a number of times during which the defendant's parents made contributions to the support of the wife and children. Over objection, the wife testified: "I called him (defendant) up on Friday after he had been gone a week and told him the children didn't have any milk and I didn't have any money to buy any with and he said, 'Well you will have to go to court and see what you can get . . . I am through.' . . . He had not provided any support since that time."

The evidence was clearly competent as an admission of the defendant and, with the other evidence, made out a case for the jury. The defendant did not offer testimony. His complaint that the charge was overbalanced in favor of the State and the other objections are without merit.

No error.

ZENO H. PONDER v. WILLIAM E. COBB
AND
FRANK E. RUNNION v. WILLIAM E. COBB
AND
OREN RICE v. WILLIAM E. COBB.

(Filed 15 June 1962.)

1. Libel and Slander § 14—

In this action by election officials to recover for libel contained in communications published by defendant charging election frauds, the evidence *is held* sufficient to be submitted to the jury on the question of whether the privileged communications were false and made with actual malice.

2. Libel and Slander § 8—

A letter written by the chairman of a major political party to the Governor and a letter written by him to the chairman of the State Board of Elections, criticizing election officials in the conduct of an election, are qualifiedly privileged.

3. Same—

As a general rule, a privileged communication does not lose its character as such unless there is excessive publication, and, since it must be assumed that every citizen of this State is interested in each State-wide election being properly held in each and every precinct of the State, a release to newspapers of the State and to a wire service

by the chairman of a major political party of letters written by such chairman to the Governor and the chairman of the State Board of Elections, charging irregularities in certain precincts in a designated county, does not constitute excessive publication so as to deprive the publication of its qualified privilege.

4. Same—

Where a matter is qualifiedly privileged there is a presumption that the author made the statements in good faith and without malice, and the burden is upon plaintiff to establish by the greater weight of the evidence that defendant made his charges in bad faith, without probable cause, and with express malice.

5. Libel and Slander § 13; Elections § 4—

The fact that election officials of a precinct, instead of keeping a poll book, kept a card index containing the respective names of the voters and, as each voted voted, separated his card without making any identifying marks on the cards and then re-inserted the cards in the alphabetical card index before the truth or falsity of charges of irregularity could be checked, is competent to be considered by the jury on the question of good faith on the part of a person making charges of fraud in the conduct of the election, such acts being improper, G.S. 163-21(5).

6. Jury § 2—

Whether the court should grant a motion for a special venire is addressed to its sound discretion and is not subject to review in the absence of a showing of abuse of discretion, and the fact that matters, raising questions as to the qualifications of certain jurors and improper influence upon other jurors during the course of the trial, subsequently occur does not show abuse of discretion in denying the motion when none of the matters could have been anticipated at the time the ruling on the motion was made.

7. Libel and Slander § 13; Evidence § 41—

In an action by election officials for libel in the publication of communications charging them with improper conduct of an election, such officials may testify as to the way and manner in which they performed their duties in the conduct of the election in question, but they may not testify that the returns made by them correctly reflected the votes cast, since this is the very question to be decided by the jury and the testimony constitutes an invasion of the jury's province.

APPEAL by defendant from *Huskins, J.*, June Regular Civil Term 1961 of MADISON.

These three civil actions were consolidated for trial by order of the court. Each of these actions arose out of statements written by defendant William E. Cobb concerning the conduct of voting in Madison County, North Carolina, in a State-wide bond election held on 27 October 1959. The plaintiffs were, at the time of that

election, officials of a voting precinct in Madison County designated as No. 1 Township, Ward 1, commonly referred to as Marshall Precinct. Plaintiff Zeno H. Ponder was the registrar of Marshall Precinct, and plaintiffs Frank E. Runnion and Oren Rice were judges of said precinct.

The complaints in these actions are substantially the same in their material allegations. Each alleges two causes of action. The first cause of action is based upon portions of a letter dated 10 November 1959, addressed to The Honorable Luther H. Hodges, then Governor of North Carolina. This letter was written on the letterhead of the North Carolina Republican Executive Committee, and signed by defendant Cobb as chairman of that committee.

In paragraph five of the complaint in the *Ponder* case it is alleged that on or about 11 November 1959, the defendant wrote and published of and concerning the plaintiff the following:

" * * *

"Charges of fraud in Madison now make sense to any fair-minded person, regardless of politics.

"Two state-wide bonds have just been defeated by fraud in Madison. Not just Republican candidates, but the entire State of North Carolina has been thwarted by ballot-stuffing in Madison.

"Evidence lies on the surface this time. Madison County, which had no special interest in the bonds, cast more votes than neighboring Buncombe County with five times as many people and important local expenditures at stake. On the issue of State armories, Madison voted 13 to one against; on the same question the rest of the State supported the issue. Madison's fraudulent 3,000 majority against it was the killing blow.

"Another issue supported by you as Governor, by most of the leading newspapers, and by most of the people of North Carolina, was likewise defeated by a ridiculously lopsided vote from Madison County.

"Again, it was Madison's fraudulent 3,000 majority against the measure which spelled its doom.

" * * *

"One precinct in Madison County reported that 896 voters were against an issue and only 43 favored the issue. We assert that not even one-quarter that many voters appeared at that precinct to vote on October 27. Any poll of the registered voters in the Marshall Precinct will confirm this assertion.

"Any fair investigation there will prove what Republicans have claimed for years, namely: that the public of Madison County has been defrauded at the polls.

"It will also prove that in this case the people of the entire State have been cheated of their choice by popular vote.

" * * * "

It is alleged that the defendant charged the plaintiff with the violation of the Corrupt Practices Act of 1931, and particularly G.S. 163-197, subsections 3, 8 and 9; that the matters and things published of and concerning the plaintiff as set forth in paragraph five of the complaint, were and are false and untrue and defamatory.

In paragraph eight of the first cause of action it is alleged that the matters and things published of and concerning the plaintiff by the defendant as set forth in paragraph five were published "maliciously, willfully, with ill will and in a spirit of spite and pique towards the plaintiff and were published wantonly and willfully and in reckless disregard by the defendant of the truth, without probable cause, not in good faith and in total disregard of the rights and good character, reputation and standing that the plaintiff had in the community in which he lived and with the willful intent of damaging, injuring, defaming and abusing the plaintiff; that the defendant widely published or caused to be published the said defamatory writings; that on or about the 11th day of November, 1959, the said defendant delivered said defamatory writings to North Carolina newspapers including The News-Record, Marshall, North Carolina; News and Observer, Raleigh, North Carolina; The Charlotte Observer, Charlotte, North Carolina; The Asheville Citizen, Asheville, North Carolina, and to the news services in the State, to wit, The Associated Press and other newspapers, with the unlawful and willful and malicious intent to damage the plaintiff by securing widespread publication in the newspapers of said writings and thereby holding plaintiff up to ridicule, hatred and contempt throughout the State of North Carolina, in the County of Madison, in the Town of Marshall, and in the Western part of the State of North Carolina, causing the plaintiff great damage, and that by reason of said publication in the manner and way hereinbefore set forth, this plaintiff has been damaged in the sum of $75,000."

The plaintiff also alleges that by reason of said malicious and willful publication of the matters hereinbefore set out, the defendant should be amerced in punitive damages in the sum of $75,000.

The plaintiff for a second cause of action alleges:

That on and prior to 6 May 1960, and thereafter and on 8 November 1960, the plaintiff was the duly appointed, qualified and acting registrar in a voting precinct in Madison County, North Carolina designated as No. 1 Township, Ward 1, commonly referred to as Marshall Precinct, and as such registrar was and is a public officer,

vested with all the rights and duties pertaining to the office of registrar under the election laws of North Carolina.

It is likewise alleged in the complaint in the second cause of action as it was in the first cause of action with respect to the state-wide bond election held on 27 October 1959, that the plaintiff performed his duties in accordance with the law and the rules and regulations of the North Carolina State Board of Elections on said date including the counting of the ballots, auditing thereof and the certification of returns to the Board of Elections of Madison County in his precinct, truthfully and correctly reporting the vote as follows: 43 for and 896 against the issuance of $18,891,000 in bonds for capital improvements at the State's educational institutions and agencies; 30 for and 905 against the issuance of $100,000 State Armory Capital Improvement Bonds; 30 for and 905 against the issuance of $500,000 of State Ports Bonds for port facilities at Southport, North Carolina.

It is also alleged that the defendant charged the plaintiff with the violation of the Corrupt Practices Act in substantially the same language set forth in the first cause of action.

It is further alleged in paragraph six of the second cause of action that on or about 6 May 1960 the defendant wrote the State Board of Elections a letter and published it, in which he said of and concerning the plaintiff the following: "On November 17th we presented charges with reference to the Bond Issue Election of October 27th, to the effect that there was ballot-stuffing in Madison County. Our evidence included results such as those in the Marshall Precinct of Madison County where a vote was turned in of 30 votes 'for' a bond and 905 'against.'

" * * *

"Normally we wait until after elections before challenging results from Madison County, but at this time we wish to protest results of the election of November 8, 1960. The groundwork for fraud has already been laid and, unless a determined effort by the State Board of Elections is made between now and Election Day, it is an absolute certainty that the results from Madison County will not be representative of the will of the people.

" * * *

"In view of the deplorable conditions with reference to elections in Madison County, we urge the State Board of Elections to send in special agents to observe conditions on Election Day. Realizing that it would be prohibitively expensive to put an Independent Watcher in all 23 Precincts, we urge that the following Precincts be given specific attention: Marshall Precinct (1 - 1); Laurel Fork Precinct (1 - 3); Shelton Laurel Precinct (2 - 1); Spillcorn Precinct (2 - 3);

Paint Fork Precinct (4 - 1); Middle Fork Precinct (4 - 2); Little Pine Precinct (7); Upper Spring Creek Precinct (8 - 1); Revere Precinct (10 - 2); Meadow Fork Precinct (13); Mars Hill Precinct (15); Hot Springs Precinct (9).

"If the twelve (12) Precincts above cannot be monitored, we urge that the following Precincts have special agents in attendance on Election Day: Marshall Precinct (1 - 1); Shelton Laurel Precinct (2 - 1); Upper Spring Creek Precinct (8 - 1); Meadow Fork Precinct (13); Mars Hill Precinct (15); Hot Springs Precinct (9).

"If six (6) men are not available for this type of work, we urge that the following four (4) Precincts be given special attention: Marshall Precinct (1 - 1); Shelton Laurel Precinct (2 - 1); Upper Spring Creek Precinct (8 - 1); Meadow Fork Precinct (13).

"If only one (1) man is available to observe conditions in Madison County, we would like to have him observe conditions in: Marshall Precinct (1 - 1).

"Substantially the same election officials who served in the Bond Election will be in attendance at the General Election on November 8th. * * * A long list of ridiculous returns was submitted to you on October 27th. * * *

"Unless positive action is taken by the State Board of Elections, the returns from Madison County on November 8th will again be fraudulent. * * *"

The foregoing letter dated 6 May 1960, addressed to the State Board of Elections in Raleigh, was also written on the letterhead of the North Carolina Republican Executive Committee and signed by defendant Cobb as chairman of that committee.

The allegations in paragraph nine of the second cause of action with respect to maliciousness, ill will, *et cetera,* and the newspapers and news services to which the information complained of was released for publication on 6 May 1960, and set out in paragraph six of the second cause of action, are, except for the date of publication, alleged in the identical or equivalent language set out in paragraph eight of the first cause of action. Likewise, the same amount of compensatory and punitive damages were prayed for in both actions.

The allegations with respect to punitive damages are substantially the same in both causes of action.

The defendant, in answering each of these complaints, admitted the publication of the two letters upon which these actions are based. The defendant denied that these letters charged any of the plaintiffs, either individually or in his capacity as an election official, with any violation of the election laws of this State. He further denied that the letters contained any false statements, or that they were written

maliciously, in bad faith, or without reasonable and probable cause as to the truth of the matters asserted therein.

The defendant further alleged that he had a right and privilege under the laws of the State of North Carolina to make and publish free and fair comments and criticism on matters of public interest and concern, and concerning public elections in Madison County; that the defendant in good faith and without malice and solely in the public interest in good, efficient and honest elections in Madison County and the State of North Carolina, published the letters upon which the plaintiffs base their actions.

The court entered an order denying a motion made by the defendant for a jury from some other county, as provided in G.S. 1-86. This motion was supported by affidavits of the defendant and several residents of Madison County to the effect that the defendant could not get a fair trial by jury from Madison County by reason of: (1) the widespread publicity given to these cases, and the general discussion and expression of opinion with respect thereto by residents of Madison County; (2) the influence and power of plaintiff Zeno H. Ponder, as a member of the Board of Education of Madison County, within the County; and (3) the fact that the Sheriff of Madison County, a brother of plaintiff Zeno H. Ponder, whose sympathies would lie with the plaintiffs in these actions, would be in a position to exert influence upon the jury. Several affidavits were submitted in opposition to the defendant's motion, which stated, in substance that there was no reason why the defendant could not have a fair and impartial trial by a jury from Madison County.

After a jury of twelve was chosen, sworn and impaneled, an alternate juror, Mrs. Helen Shelton, was selected and sworn in, and the jury was re-impaneled.

The first witness for the plaintiffs was Zeno H. Ponder who testified in pertinent part as follows: That he has been registrar in the Marshall Precinct since 1956 and has held the elections continuously since that time in that precinct. He testified over the objection of the defendant that the vote certified from the Marshall Precinct was a true and correct certification and that the charges made by the defendant were false.

On Cross-examination Mr. Ponder testified that "As to whether in the special bond election that is in question here on the state-wide improvement bonds, we kept a poll book showing the names of the voters of the precinct in Marshall who offered themselves to vote, * * *. We did not keep a poll book. We kept a * * * card index by removing the card of the person voting to the back of the index and at the end of the election, we knew how many and who had voted and

knew that on the day of the canvass. We did not keep a poll book. That being true, I, as Registrar in that election in the Marshall precinct, did not sign any poll book. I did not file any poll book with the Chairman of the Board of Elections following the close of the election, but the qualification is I did bring the card index and present it. It is true that this special bond election on October 27, 1959, is the only election that I have served in as Registrar of the Marshall precinct in which a poll book was not kept. * * * (W)hen a voter came in and offered to vote, I would pull out a card here, beginning with A, and take that voter's name out of this box, turn it around and put it behind the little red tag there at the back of the index * * *. There was no check mark or any other indication made upon the cards representing the names of the prospective voters as I placed them in the back end of the box to indicate anything that that voter had appeared and voted that day, and a qualification, there never has been. * * * It is true that there was no * * * mark or indication or identification of any kind upon any of these cards I speak of that would indicate that any person in this system here, card system, appeared to vote that day * * *. This is a private system that I had made up, this card index system, some three years prior to this election * * *. It was between October 27 and November 17, that I had * * * (an) interview with Mr. Raymond Maxwell, Secretary of the State Board of Elections. * * * I told Mr. Maxwell that I kept no poll book * * * but I did show him what we did keep."

Mr. Raymond C. Maxwell, Executive Secretary of the North Carolina Board of Elections, as a witness for the plaintiffs, testified that: " * * * It is correct that I was here in Madison County between October 27th, the time of the election, and the date of the meeting. I was here in Madison County approximately two days. The purpose of my being in Madison County was to make a preliminary investigation as to the charges which had been made in the paper and to the Governor and the State Board of Elections by Mr. Cobb in regard to the bond election in Madison County."

On cross-examination, this witness testified that: "I asked Mr. Ponder about where the poll book was for precinct one, ward one, or Marshall Precinct, and he told me he did not have any poll book and didn't keep any poll book. I was then trying to ascertain the people who were supposed to have voted in the Marshall precinct in this special election. We were trying to ascertain how many voted in the Marshall precinct in that election. Mr. Ponder did tell me that he in his precinct used a card system by which the names of the people who came to vote were placed on cards out of a filing cabinet he had, and that as a person came to vote, he would take out the card from

the filing system in the alphabetical arrangement and place it in the back of the box, and that that was the only system he used. We asked him to see the cards, and he said they had been placed back in their alphabetical order. I didn't see the cards then. There wasn't any use to look for them if they had been placed back in their alphabetical order."

The plaintiff Frank E. Runnion testified that he was one of the judges in Marshall Precinct No. 1. "I had served in the general elections as a precinct official prior to the voting in this special bond election of October, 1959. I have always maintained a poll book in the primary and general elections. No poll book was maintained in this special election of October 27, 1959; none but the card system. * * * As to whether I knew that we were supposed to keep a poll book, I knew that was what was always done.

"Nobody but Zeno Ponder told me that this system was all right to use. He was the man that had it. I can't tell you all of who voted on the election of these special state-wide bonds on October 27, 1959, from a single marking on one of these cards here or from any other record. * * * The minute they (the cards) were put back * * * in the alphabetical section, all information about who was supposed to have voted was immeditely lost."

Oren Rice testified: "I did participate in the holding of the bond election of October 27, 1959, as a judge in the Marshall precinct. * * * They did not keep any poll book there that day. As to whether I knew they were supposed to keep a poll book, I had never held no election down there. I didn't know how they held it. * * * I have helped hold several elections up on Walnut Creek, and I kept poll books up there."

At the close of plaintiffs' evidence, the defendant moved for judgment as of nonsuit in each of these three cases. The motions were denied.

The defendant's evidence was directed primarily to showing that a lesser number of ballots were cast in Marshall Precinct in the special bond issue election of 27 October 1959 than were certified by the plaintiffs. Due to the fact that no record was kept as to those who were supposed to have voted, it was necessary for the defendant to resort to the registration book of this precinct. According to the defendant's evidence, 24 different subpoenas, containing 2,227 names supplied to the defendant as being registered voters in Marshall Precinct, were delivered for service to Sheriff E. Y. Ponder. It appears that service was obtained on only 1,272 of the persons so listed. It also appears that appeals were made in open court and over the radio station in Marshall requesting those who were registered in Marshall Precinct

to come into court and testify as to whether they had voted in the special bond election of 27 October 1959 whether or not they had been subpoened. Many persons who were served, as indicated by the return on the subpoenas, did not appear at the trial. Of the 809 persons accounted for, the evidence tends to show the following results:

Those who voted in the bond election of 27 October 1959	191
Those who did not vote in the election	508
Those who did not remember whether or not they had voted	52
Those who were not registered voters in Marshall Precinct at the time of the election	58
	809

The defendant Cobb testified: "I came to Madison County between November 10th and November 17th * * *. I did not come to Madison County prior to November 10, 1959, and talk to individuals here in the county; not, certainly, in any recent period before that, although one of them came to me down in Morganton. Clyde Roberts came to me. I can remember some of the people with whom I talked when I came here. * * * I, of course, talked to Mr. Roberts, as said before. I talked to Mr. J. H. Sprinkle, Jr. I talked to C. L. Rudisill. I talked to Dr. A. M. Ramsey. I talked to Mr. Lloyd T. Roberts, and that, to the best of my recollection, are the ones to whom I talked.

" * * * At the time I came here as a result of a report to me from Mr. Clyde Roberts, relative to the conduct of the election In the Marshall Precinct, meaning the election of October 27, 1959, I read affidavits, and I interviewed the people to whom I have referred.

"I learned that the poll book was not available. I had good reason to believe that prior to my coming here. * * *

"As a result of this preliminary investigation and reports that came to me, I wrote the letter to Governor Hodges on November 10th, based on what I considered reliable information at that time. Before the time I came here, Mr. Clyde Roberts had brought me a copy of the returns from Madison County, precinct by precinct, showing the votes as returned in this state-wide bond election. I read this copy, and with the other information he provided me, I came to the conclusions which I included in a letter to Governor Hodges of November 10th. * * *

"At the time I wrote that letter I did not know Mr. Zeno Ponder. I did not know Mr. Oren Rice. I did not know Mr. Frank Runnion. On November 10th, I did not know they were the precinct officials in

the Marshall Precinct during the state-wide bond election. In the letter that I was writing to Governor Hodges at that time, it was not my intention to refer to any individuals in Madison County. My intention was to reveal what I considered a very bad situation with reference to conduct of elections in Madison County, and to bring about corrections.

"Following that, I did issue copies of that letter of November 10th, to the press generally in North Carolina. It was an open letter. * * *"

The defendant further testified with reference to both letters, that at the time he wrote them, he did in good faith believe the substance of the matter set forth therein to be substantially true, and he so believed at the present time.

At the close of all the evidence the defendant renewed his motion for nonsuit in each of these actions. The motions were denied and the defendant excepted. From verdicts in favor of the plaintiffs, the defendant appeals, assigning error.

A. E. Leake and William J. Cocke for plaintiffs.
Meekins, Packer & Roberts and Clyde M. Roberts for defendant.

DENNY, C.J. The trial of these consolidated cases began on 26 June 1961 and ended on 14 July 1961. The record contains 802 pages, exclusive of numerous exhibits. The appellant's brief contains 111 pages and, in addition thereto, an appendix containing 50 pages of in chambers proceedings in connection with several separate motions made by the defendant for a mistrial based on alleged misconduct or other alleged cause for the disqualification and removal of certain members of the jury who had been impaneled to sit and hear the consolidated cases. The appellees' brief contains 154 pages, and the appellant has ten assignments of error based on 198 exceptions. We deem it unnecessary to undertake a *seriatim* discussion of all the questions raised. However, we will undertake to consider and discuss those exceptions and assignments of error which we deem essential to a proper disposition of this appeal.

The defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit in each of these cases, interposed at the close of the plaintiffs' evidence and renewed at the close of all the evidence. A careful consideration of the evidence adduced in the trial below leads us to the conclusion that it was sufficient to carry the cases to the jury. Hence, this assignment of error is overruled.

Assignment of error No. 8 challenges the correctness of the following portions of the court's charge to the jury:

"A communication regarding the character or conduct of a public officer made to a person or persons having no authority to afford redress in the matter is not privileged under the law of this state, and so, the court instructs you, ladies and gentlemen, that in this case the defendant had neither an absolute privilege nor a qualified privilege to make a false, defamatory statement about either of these plaintiffs to the newpapers of North Carolina." (EXCEPTION 159)

"He would have had a qualified privilege to take a grievance about the way and manner in which elections in Madison County are conducted to the State Board of Elections, or to the Governor. We will assume for the purpose of this trial that the Governor was a person having authority to afford some redress in the matter, to do something about his grievance, and, had his communications been only to the Governor and only to the State Board of Elections, then he would have had a qualified privilege, the law would have assumed he was acting in good faith and without malice and would have placed the burden on the plaintiff to satisfy the jury that he acted in bad faith and was actuated by actual malice." (EXCEPTION 160)

"The defendant admitted that he released these matters to the newspapers of North Carolina on each occasion. The court instructs you that under the law in this State, the contents of these releases are defamatory on their face and he had no absolute or qualified privilege to make them." (EXCEPTION 161)

One of the leading cases in this jurisdiction dealing with the doctrine of privileged communications in the law of libel and slander is *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775. In that case the defendant, resided in Hillsboro, North Carolina, wrote a letter to the Superintendent of Census charging that a Mr. Hawkins had appointed in the district a "large majority of enumerators, extreme Democrats, ballot-box stuffers, among them MURDERERS and drunkards"; that he had appointed in Durham a man named Ramsey who "murdered, since the war * * * two *Union soldiers* while they were *asleep.* This same man was the leader in defrauding me and Mr. Nichols out of our election last election," *et cetera.*

When this case came on for trial, the court held that the communication was privileged and that there was no evidence of malice. The plaintiff submitted to a nonsuit and appealed. *Clark, J.,* later *C.J.,* speaking for the Court, said: "In libel and slander, if the words are actionable *per se,* the law presumes malice, and the burden is on the defendant to show that the charge is true, unless the communication is privileged. Then the rule is otherwise.

"Privileged communications are of two kinds:

"1. *Absolutely Privileged* — Which are restricted to cases in which it is so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only where the public service or the due administration of justice requires it, e.g., words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred. 13 A. & E., 406.

"2. *Qualified Privilege* — In less important matters where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege, if he can prove that the words were not used *bona fide,* but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. Odgers Libel and Slander, 184. In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. 13 A. & E., supra. Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se,* when the occasion is not privileged. Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact."

The Court further held that the defendant's communication was " * * * one of qualified privilege. * * * It was not absolutely privileged. But he was an American citizen interested in the proper and efficient administration of the public service. He had, therefore, the right to criticise public officers, and if he honestly and *bona fide* believed, and had probable cause to believe, that the character and conduct of plaintiff were such that the public interest demanded his removal, he had a right to make the communication in question, giving his reasons therefor, to the head of the department. The presumption of law is that he acted *bona fide,* and the burden was on the plaintiff to show that he wrote the letter with malice or without probable cause. * * *"

The Court also said: "Proof that the words are false is not sufficient evidence of malice unless there is evidence that the defendant knew, at the time of using them, that they were false. *Fountain v. Boodle,* 43 E.C.L., 605; *Odgers, supra,* 275. That the defendant was mistaken in the charges made by him on such confidential or privileged occasion, is, taken alone, no evidence of malice. *Kent v. Bongartz,* 2 Am. St. Reports, 870, and cases cited.

" * * * If, however, there are means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretense for any claim of privilege. * * * The malice may be proved by some *extrinsic* evidence, such as ill-feeling or personal hostility or threats and the like on the part of the defendant towards the plaintiff. But the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication as affording evidence of malice. *Odger's, supra,* 277-288; 13 A. & E., 431. * * *

"If the party knows the charge to be false, or makes it without probable cause, this is evidence of malice." See also *Bailey v. Charleston Mail Asso.,* 126 W. Va. 292, 27 S.E. 2d 837, 150 A.L.R. 348.

In the case of *Byrd v. Hudson,* 113 N.C. 203, 18 S.E. 209, the action was based on a circular letter published and circulated by the defendants to the Democratic voters of Wayne County, North Carolina, in which the defendants charged the plaintiff with a crime. The defendants appealed from a verdict in favor of the plaintiff. This Court found no error in the trial below. In considering the appeal, among other things, this Court said: "The instruction now excepted to, that 'the language of the circular which imputes to plaintiff a crime, and alleges that one of the defendants had been damaged by him, may be considered by the jury in finding whether the defendants were actuated by malice in making the publication,' is therefore unobjectionable. *Bradsher v. Cheek,* 109 N.C. 278 (13 S.E. 777). There was other evidence of malice, * * * which is not set out in the third exception. The language of the circular might, therefore, be properly considered upon the question of malice. Newell on Defamation, 770.

"It should be noted that in cases of qualified privilege, though proof of falsity does not *per se* raise a presumption of malice, yet proof of malice takes away the protection of privilege, and shifts the burden of proving the truth of the charge upon the defendant. *Ramsey v. Cheek, supra,* and cases cited * * *."

In *Alexander v. Vann,* 180 N.C. 187, 104 S.E. 360, the defendant wrote a letter to the Sheriff of Pitt County with regard to alleged misconduct of the plaintiff, a deputy sheriff of Hertford County. The Sheriff of Pitt County had no authority or control over the conduct of a deputy sheriff in Hertford County. The Court said: "As we understand it, a privileged communication is one which, under ordinary circumstances, would be defamatory made to another in pursuance of a duty, political, judicial, social, or personal, so that an action for libel or slander will not lie though the statement be false unless actual

malice be proved in addition. The great underlying principle of the doctrine of privileged communications rests in public policy. Qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has some moral or legal duty to perform. The occasion on which the communication was made may rebut the inference of malice or it may tend to prove malice, and that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made. Mr. Newell says, sec. 497, that a communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or proper cause. The learned author further says, sec. 501, that if the communication, whether written or oral, be of such a character that the expressions in it are beyond what common sense indicates to be justifiable, it cannot be held as privileged. In regard to communications containing charges against public officers, Mr. Newell says: 'It is the duty of all who witness any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared in good faith and *forwarded to the proper authorities*, are privileged.'" (Emphasis added)

Other cases in which privileged communications were considered, see *Gattis v. Kilgo*, 128 N.C. 402, 38 S.E. 931; s.c., 140 N.C. 106, 52 S.E. 249; *Logan v. Hodges*, 146 N.C. 38, 59 S.E. 349, 14 Ann. Cas. 103; *Lewis v. Carr*, 178 N.C. 578, 101 S.E. 97; *S. v. Pub. Co.*, 179 N.C. 720, 102 S.E. 318; *Elmore v. R.R.*, 189 N.C. 658, 127 S.E. 710; *Hartsfield v. Hines*, 200 N.C. 356, 157 S.E. 16; *Stevenson v. Northington*, 204 N.C. 690, 169 S.E. 622; *Montgomery Ward & Co. v. Watson* (4th C.C.A.), 55 F. 2d 184. See also, Law and Press (Revised Edition), by Lassiter, Section 1-26, page 63, *et seq.* Cf. *Yancey v. Gillespie*, 242 N.C. 227, 87 S.E. 2d 210.

What constitutes a privileged occasion is defined in 53 C.J.S., Libel and Slander, section 87, pp. 142 and 143, as "an occasion when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter; one on which a privileged person is entitled to do something which no one not within the privilege is entitled to do on that occasion; and it has been said that it is not the publication itself, but the occasion of its publication, that is privileged," citing *Dupont Engineering Co. v. Nashville Banner Pub. Co.* (D. C. Tenn.), 13 F. 2d 186.

This same authority says in the above volume, section 89, pp. 143 and 144, dealing with the subject of qualified privilege: "Qualified privilege exists in a larger number of cases than does absolute privilege. It relates more particularly to private interests; and comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social made to a person having a corresponding interest or duty. Briefly stated, a qualifiedly privileged communication is a defamatory communication made on what is called an occasion of privilege without actual malice, and as to such communications there is no civil liability, regardless of whether or not the communication is libelous per se or libelous per quod. * * *"

In light of the fact that the defendant William E. Cobb, at the time in question, was chairman of one of the major political parties in North Carolina and in the nation, he had the right to comment upon and criticize the conduct of election officials in Madison County on the occasion involved, if he honestly and *bona fide* believed and had probable cause to believe that the election officials in Madison County had falsely and fradulently certified incorrect returns of the votes cast in the State-wide bond election of 27 October 1959.

Furthermore, since the letters involved in these actions were addressed to the Governor of the State and to the State Board of Elections, proper parties from or through whom redress might be expected, we hold they were qualifiedly privileged. Any statements made by the defendant when he appeared before the State Board of Elections at the hearing on 17 November 1959 were likewise qualifiedly privileged. Moreover, since this was a State-wide bond election, and whether all the citizens of the State were particularly interested in the approval or rejection of the bond issues in this election, we must assume that every citizen of North Carolina is interested in each State-wide election being properly held in each and every precinct in the State. Therefore, we hold that the defendant did not lose his qualified privilege by releasing these letters to the press in North Carolina. The general rule is that a privileged communication does not lose its character as such or become an unprivileged communication unless there is excessive publication.

It is said in 53 C.J.S., Libel and Slander, Section 97, subsection (b) 3, page 155: "Where the communication does not concern the public at large, but only one person or a limited number of persons, the rule has been laid down that it will lose the privilege which it might other-

wise have had if it is published by means of a newspaper or circulars issued to the general public. Indeed, the same rule has been applied where, although the matter is of public interest within a limited territory, the publication takes place in a newspaper having a circulation beyond that territory. However, if the newspaper circulation beyond the territory is merely incidental and the communication is otherwise privileged, the privilege is not destroyed. * * *" See also 33 Am. Jur., Libel and Slander, Sections 187 and 188, pp. 178 and 179.

In the case of *Farm Bureau Fed., et al., v. National F.U.S. Corp., et al.* (10th C.A.), 198 F. 2d 20, 33 A.L.R. 2d 1186, the appellants had charged the Farmers Union with Communist domination. This charge had been published in certain newspapers and pamphlets. The Court said: "Appellants do not claim absolute privilege for their publications. They do claim, however, a qualified or conditional privilege, which they say under the facts entitle them to a directed verdict. The Utah courts, following the great weight of authority, hold that publications dealing with political matters, public officials or candidates for office, are entitled to a measurable privilege because of the public interest involved. As to this class of publications, the law raises a *prima facie* presumption in favor of the privilege. *Williams v. Standard-Examiner Publishing Co.,* 83 Utah 31, 27 P. 2d 1, *Derounian v. Stokes,* 10 Cir., 168 F. 2d 305.

"The question whether the comment on or criticism of matters of public concern are fair and privileged, or malicious and libelous, is usually a question to be determined by the jury under all the circumstances, subject of course to the control of the court. Restatement of Law of Torts, Sections 614 and 618."

Likewise, in the case of *Coleman v. MacLennan,* 78 Kan. 711, 98 P. 281, 20 L.R.A. (N.S.) 361, 130 Am. St. Rep. 390, the plaintiff, in 1904, held the office of Attorney General of the State and was a candidate for re-election at the general election which occurred in the following November. By virtue of his office, he was a member of the commission charged with the management and control of the State School Fund. The defendant was the owner and publisher of the Topeka State Journal, a newspaper published at Topeka and circulated both within and without the State. In the issue of the date mentioned appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with a school fund transaction, making comment upon them and drawing inferences from them. Deeming the article to be libelous the plaintiff brought an action for damages against the defendant, alleging that the matter published was false and defamatory, and that its publication was the fruit of malice. Among other defenses the defendant pleaded facts which he claimed rendered the

article and its publication privileged. From a verdict in favor of the defendant the plaintiff appealed and challenged the correctness of the following instruction: " 'As you have already observed from the statement of the case, defendant claims, as his first defense, that the publication is what is known in law as "privileged." A communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. And, where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith, and without malice, the article is privileged, although principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff, and in such a case the burden is on the plaintiff to show actual malice in the publication of the article. If you believe then from the evidence in this case that on August 20, 1904, plaintiff was a candidate for re-election to the office of Attorney General, and that defendant published said article for the sole purpose of giving to the voters of Kansas what he believed to be truthful information concerning the acts of the Attorney General, and only for the purpose of enabling such voters to cast their ballots more intelligently, and that the defendant made all reasonable effort to ascertain the facts before publishing the same, and that the whole thing was done in good faith, and without malice toward plaintiff, and if you believe that the bulk of the circulation of the said paper was within the state of Kansas, and that its circulation outside of the state of Kansas was only incidental, then I instruct you that your verdict must be for the defendant, although you may believe that the principal matters contained in said article are untrue in fact and derogatory to the character of the plaintiff; but, on the contrary, if you should find from the evidence that said article was published with a malicious intent to willfully wrong and injure plaintiff, then the fact that the article was a privileged one would constitute no defense to this action, and the plaintiff would be entitled to recover such damages as the evidence shows him to have sustained by reason of said publication.' " The Court upheld the instruction.

In *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S.W. 665, the defendant newspaper published an article charging the plaintiff with corruption in the discharge of his duties as an election official. The trial court sustained a general demurrer to the defendant's plea of qualified privilege. On appeal, this was held for error. The Court quoted with

approval from *Miner v. Tribune Co.*, 49 Mich. 358, 13 N.W. 773, as follows: " 'The defendant contends that to call public attention to a matter that so vitally concerns the public is a matter of privilege, and that, by the presumption of law, its motives in doing so must be deemed proper, and not actuated by malice. The trial judge denied this claim altogether. In doing so he put the case on precisely the same footing with publications which involve merely private gossip and scandal. The truth was allowed as a defense, if made out; and so it would have been if the injurious charge which was published had been one in which the public was not concerned. If there is no difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave public concern, then this judgment may be right and should be affirmed. But it is very certain, I think, that no declaration of this or any other court can convince the common reason that this distinction is not plain and palpable. Few wrongs can be greater than the public detraction which has only abuse, or profit from abuse, for its object. Few duties can be plainer than to challenge public attention to official disregard of principles which protect public and personal liberty.' " See also *Bereman v. Power Pub. Co.*, 93 Colo. 581, 27 P. 2d 749, 92 A.L.R. 1024, and cited cases; Anno — Libel — Privilege, 92 A.L.R. 1029.

This assignment of error is well taken and is sustained. Therefore, it was error in the trial below not to give the defendant the benefit of the presumption that he made the statements contained in the letters involved in good faith and without malice. *Ramsey v. Cheek, supra.* The burden should have been placed upon the plaintiffs to establish by a preponderance of the evidence or by its greater weight that the defendant made his charges in bad faith, without probable cause and with express malice. Unless these facts are so established the plaintiffs are not entitled to recover.

According to the evidence disclosed on the record herein, each of the plaintiffs in these consolidated actions is an experienced election official, particularly the plaintiff Ponder. Each one of them testified that the State-wide bond election held on 27 October 1959 in the Marshall Precinct was the only election in which he had ever served when a poll book had not been kept. These plaintiffs clearly violated the mandatory provisions of G.S. 163-21, subsection 5, which reads as follows: "One of the judges of election shall keep a poll book in which shall be entered the name of every person who shall vote in the primary or election. The poll and registration books shall be signed by the registrar and judges of election at the close of any primary or election and filed with the chairman of the county board of elections."

Therefore, in our opinion, the fact that no poll book was kept in this precinct, and no identifying mark was made on the cards containing the respective names of the voters who voted in said election, and the further fact that these cards were re-inserted in the general index before the truth or falsity of the charges with respect to improper election returns could be checked, constitute conduct for the consideration of the jury on the question of the defendant's good faith in making his statements with respect to the returns certified by these plaintiffs from the Marshall precinct. If a poll book had been kept, it would have been a comparatively simple matter to have proven the correctness or the falsity of the returns made in this precinct. We do not condemn the use of the card system *per se*, but the manner in which it was used in Marshall precinct on 27 October 1959 in the State-wide bond election, coupled with the failure to keep a poll book, would seem to be indefensible.

The defendant assigns as error the denial of his motion for a special venire of jurors from another county for the reasons set out hereinabove in the statement of facts. This was a matter to be determined in the sound discretion of the trial judge. His Honor's discretion in this matter is not subject to review in the absence of a showing that he abused his discretion. No evidence of abuse of discretion has been shown. In this connection, however, if the able and patient judge who tried this case below could have foreseen the numerous hearings he would be compelled to conduct during the progress of the trial in connection with charges of alleged misconduct on the part of members of the jury, and which would make it necessary to remove one juror from the panel based on a finding that she was disqualified to serve and to substitute the thirteenth juror after the trial had been in progress four and one-half days, and the further fact that another member of the jury would go on a fishing trip over the week end of July 4th with the son-in-law of one of the plaintiffs; that another member of the jury would be charged with having made disqualifying statements after he had been summoned for jury duty, and a fourth member would be charged with having been subjected to improper outside influences during the course of the trial, he doubtless would have granted the defendant's motion or removed this case to another county for trial. But none of these matters could be anticipated at the time he made his ruling on this motion. Hence, this assignment of error is overruled.

Since there must be a new trial, one further comment is appropriate. Plaintiff Runnion, over the objection of defendant, was asked and permitted to answer a question as follows:

"Q. * * * (S)tate whether or not that return there correctly and accurately reports the vote cast in the bond election in number one township, ward one on October 27, 1959?

"A. It does."

Like questions were asked and similarly answered by the other two plaintiffs. Whether or not the return made by plaintiffs reflected "correctly" the "vote cast" was the chief bone of contention in this action, and the conclusion was for the jury. A witness will not be allowed to give his opinion on the very question to be decided by the jury. *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768; *Cheek v. Brokerage Co.,* 209 N.C. 569, 183 S.E. 729; *Trust Co. v. Store Co.,* 193 N.C. 122, 136 S.E. 289. Stansbury criticizes the rule, but makes the following comment: "If there must be an opinion rule, its application in each case ought to depend upon the practicability of breaking down the facts into their component details, and this in turn will depend, among other things, upon the importance of the proffered testimony in its relation to the outcome of the suit. The closer it approaches to the ultimate questions of whether the plaintiff shall recover, and if so how much, the greater the importance of consuming whatever time is necessary to get the exact picture before the jury; and when the picture has been secured there is no need for the witness's 'opinion.' * * *" Stansbury, North Carolina Evidence, section 126, page 243. However, plaintiffs may testify fully as to their conduct of the election, that they served as election officials, describe balloting procedures and state what irregularities they observed, if any, describe in detail how the ballots were counted, discuss the making of the abstract signed by them and state whether or not it was in accordance with the count, state whether or not the return was placed in a sealed envelope and whether the envelope was delivered at the proper time to the county board of elections. In other words, they may fully testify to the way and manner in which they performed their duties as required General Statutes, Chapter 163, Articles 13 and 14. However, they may not then draw the conclusion which is for the jury.

The questions raised by other assignments of error may not recur when the case is tried again, and we therefore do not decide or discuss them.

New trial.

HIGGINS, J., concurring in result. I am in agreement with the excellent opinion of the Chief Justice except in one particular. The Court holds the plaintiffs were incompetent to testify the original return which they filed and certified to the County Board of Elections was true and correct. When first offered, the defendant objected to the

testimony and stated as the ground of the objection, "It is absolutely leading, for one thing, on his own witness." The Court now says the question and answer invaded the province of the jury.

This is the setting: The witnesses (plaintiffs) were the election officials. They were under oath. They held the election, counted the ballots, recorded, and certified the results. The original return was introduced in evidence and was before the witnesses.

The defendant charged the election was fraudulent and the return false. When the plaintiffs were called as witnesses each testified the return from Marshall Precinct 1-1 on all the propositions submitted was true and correct. Each knew — not by deduction, not by what someone else said or did — but by first-hand knowledge whether the record spoke the truth. Their evidence no more invaded the province of the jury than the testimony of a plaintiff that the defendant borrowed $500 from him and had never paid it back.

The cases cited in the opinion do not support the exclusion of the testimony. In *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768, the witness attempted to testify as to which driver had the right of way — a mixed question of law and fact. In *Cheek v. Brokerage Co.,* 209 N.C. 569, 183 S.E. 729, the investigating officer tried to tell the jury that the two vehicles ran together 18 inches across the center line. Of course, he could properly testify as to what he found by way of debris, skid marks, etc. He could not testify by process of deduction as to the point of a collision which he did not see. In *Trust Co. v. Store Co.,* 193 N.C. 122, 136 S.E. 289, a witness attempted to testify there was no fraud in a stock sale. The witnesses attempted to draw deductions which invaded the province of the jury.

Ponder, Rice, and Runnion made the records. They counted the ballots, recorded the totals, and certified the return — not by deduction, not by inference, not by reliance upon what some other person did or said — but from their own first-hand knowledge. They, so far as the record shows, were the only ones with first-hand knowledge. I think their testimony was properly admitted in reply to the charge their return was crooked.

STELLINGS *v.* AUTRY.

BERENIECE BAILEY STELLINGS, AUDRIENNE BAILEY AUTRY AND HUSBAND, J. MURCHISON AUTRY, GEORGE BAILEY AUTRY (SINGLE), ISABEL STELLINGS HOLMES AND HUSBAND, E. MAYO HOLMES, JR., PRINCESS STELLINGS WILLIAMS AND HUSBAND, EDWARD S. WILLIAMS, JR. *v.* AUDRIENNE ISABEL BAILEY AUTRY, E. MAYO HOLMES, III, MARK R. HOLMES, S. GREGORY HOLMES, CHRISTOPHER A. HOLMES, LAURAINE B. HOLMES, PRINCESS ANN WILLIAMS, MARTHA M. WILLIAMS, EDWARD S. WILLIAMS, III, THE UNBORN DESCENDANTS OF GEORGE W. BAILEY, AND WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF GEORGE W. BAILEY.

(Filed 15 June 1962.)

1. Executors and Administrators § 31—

A family agreement for the distribution of a testamentary trust at variance with the clear intention of testator will not be approved for the convenience of beneficiaries *in esse* at the expense of the ultimate beneficiariies, but such agreement may be approved only when exigencies growing out of the trusts themselves or directly affecting the *corpus* or income arise and such settlement is necessary to preserve the trust and effectuate the intent of testator and is not adverse to the interests of minors and unborn ultimate beneficiaries.

2. Same— Under facts of this case no exigencies threatening validity or dissipation of trusts existed so as to warrant approval of family settlement.

The trusts provided benefits in specified monthly sums to testator's children, with descendants of deceased children to receive *per stirpes* the income of their ancestor, with provision for the distribution of the *corpus* and income from the trusts, less the stipulated monthly incomes, to testator's lineal descendants when the rule against perpetuities should require the termination of the trusts. Litigation was threatened relating solely to the construction of the trust provisions and the determination of the validity of the provisions relating to the duration of the trusts. The parties entered into an agreement that the entire income from the trusts should be paid to the descendants of testator *per stirpes*, with provision for the distribution of the *corpus* to the descendants of testator 21 years after the death of the last descendant who was alive at the time of testator's death. *Held:* A construction of the trusts and the adjudication of their duration would be necessary in order to determine whether the family settlement was advantageous to the minor beneficiaries and lineal descendants of testator thereafter born, and therefore the threatened litigation is not such an exigency endangering the *corpus* of the estate so as to warrant the court in approving the family settlement to the detriment of the ultimate beneficiaries.

3. Wills § 40—

Provisions of a testamentary trust that the trusts should continue until such time as "the law of perpetuities" should cause the trusts to be dissolved and that then the trust estates should be divided among testator's lineal descendants *per stirpes*, are valid and the intent of testator must

be given effect and the trusts terminate 21 years after the death of the last survivor of testator's descendants who were alive at the time of testator's death.

4. Wills § 27—

A will must be construed to effectuate the intent of testator as expressed in the language employed, considered in the light of the conditions and circumstances existing at the time the will was made.

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

APPEAL by Wachovia Bank & Trust Company, Trustee, and Napolean Barefoot, Guardian *Ad Litem* for Unborn Descendants of George W. Bailey, from a judgment of *Mintz, Resident Judge,* entered (by consent) in Chambers on November 28, 1961. From NEW HANOVER.

Plaintiffs' action is to obtain court approval of an alleged family settlement agreement dated December 1, 1959, and a judgment authorizing and directing Wachovia Bank & Trust Company, as Trustee under the will of George W. Bailey, to manage and disburse the income and principal of the trusts created by said will as provided in said agreement.

George W. Bailey died June 30, 1940. His will (dated June 22, 1937) was probated July 5, 1940. Wilmington Savings & Trust Company qualified as executor and as trustee. Upon settlement of the estate, it received, in its capacity as trustee, the stock in Wilmington Theatres, Inc., and the residue of the George W. Bailey estate, referred to in paragraphs 8 and 9 of the will, respectively.

On November 25, 1958, Wilmington Savings & Trust Company merged with Wachovia Bank & Trust Company, and thereafter Wachovia Bank & Trust Company has acted and is now acting as (successor) trustee.

George W. Bailey was survived by his wife, Isabel R. Bailey; two children, Bereniece Bailey Stellings and Audrienne Bailey Autry; and three grandchildren, Isabel Stellings (now Holmes), born August 7, 1925, Princess Stellings (now Williams), born November 23, 1929, and George Bailey Autry, born March 14, 1937.

Isabel R. Bailey, widow of George W. Bailey, died April 10, 1952.

Bereniece Bailey Stellings, Audrienne Bailey Autry and her husband, J. Murchison Autry, Isabel Stellings Holmes and her husband, E. Mayo Holmes, Jr., Princess Stellings Williams and her husband, Edward S. Williams, Jr., and George Bailey Autry, are the plaintiffs in this action.

After George W. Bailey died, one grandchild and eight great grandchildren were born. These nine persons, represented by Louis K. New-

ton, their Guardian *Ad Litem,* are defendants herein. This grandchild, Audrienne Isabel Bailey Autry, the child of (plaintiff) Audrienne Bailey Autry and J. Murchison Autry, was born May 17, 1941. Five of the great grandchildren, to wit, (1) E. Mayo Holmes, III, born March 25, 1951, (2) Mark R. Holmes, born October 11, 1952, (3) S. Gregory Holmes, born April 12, 1955, (4) Christopher A. Holmes, born May 10, 1957, (5) Lauraine B. Holmes, born January 9, 1959, are the children of (plaintiff) Isabel Stellings Holmes and E. Mayo Holmes. Three of the great grandchildren, to wit, (1) Princess Ann Williams, born June 5, 1953, (2) Martha M. Williams, born November 29, 1955, (3) Edward S. Williams, III, born September 3, 1958, are the children of (plaintiff) Princess S. Williams and Edward S. Williams, Jr.

The other defendants are the Unborn Descendants of George W. Bailey, represented by Napolean B. Barefoot, their Guardian *Ad Litem,* and Wachovia Bank & Trust Company, Trustee under the will of George W. Bailey.

This action was instituted December 16, 1960. Thereafter, on June 10, 1961, according to plaintiffs' evidence, George Bailey Autry married Bess Powell (Autry).

The pertinent dispositive provisions of the will of George W. Bailey are as follows:

> "EIGHTH: I give and bequeath unto The Wilmington Savings & Trust Company of Wilmington, North Carolina, in TRUST such stock as I may own in Wilmington Theatres, Inc., at the date of my death, to be held by said Trustee, and known as TRUST NUMBER ONE, for the following uses and purposes:
>
> "That it will take possession of said stock and collect the dividends therefrom, and after the payment of necessary expenses incident to this Trust, said Trustee shall pay from time to time quarterly, or when the same are received by it, twenty per cent (20%) of net dividends, or income, to my daughter, Bereniece Bailey Stellings, for life, and shall pay twenty per cent (20%) of the net dividends, or income, to my daughter, Audrienne Bailey Autry, for life, and shall pay ten per cent (10%) of the net dividends, or income, to my wife, Isabel R. Bailey, for life. The remaining fifty per cent (50%) shall be credited to the Trust hereinafter established and referred to as Trust No. Two.
>
> "At the death of my wife I direct that the Trustee under this Trust pay twenty-five (25%) per cent of the net income from said stock to my daughter, Bereniece Bailey Stellings, and twenty-five per cent (25%) to my daughter, Audrienne Bailey Autry,

and pay the remaining fifty per cent (50%) to trust No. Two hereinafter created.

"Upon the death of either of my two daughters the percentage of income from stock in Wilmington Theatres, Inc., which by my Trustee had prior to her death been paid to her shall after her death be paid to her child, or children, in equal shares per stirpes.

"Upon the death of my wife and the last surviving daughter I direct that the aggregate payments of fifty per cent (50%) of the income from Wilmington Theatres, Inc., Stock which had theretofore been made to my daughters shall continue to be paid to my legal descendants, per stirpes, until such time as the Law of Perpetuity shall cause this Trust to be dissolved, at which time my Trustee is directed to pay over the remainder of the corpus and accrued income to my legal descendants entitled to such property at that time, per stirpes."

(Paragraph EIGHTH also prescribes in detail the conditions under which the Trustee is authorized and directed to sell any or all of the stock in Wilmington Theatres, Inc., and reinvest the proceeds in other income-producing property, and provides that the Trustee distribute the income and *corpus* thereof "in the same manner and at the same time as it would have been distributed had the stock in Wilmington Theatres, Inc., not been sold.")

"NINTH: All the rest, residue and remainder of my property and estate, of every nature and kind whatsoever and wheresoever the same may be situate at the time of my death, I give, devise and bequeath unto The Wilmington Savings and Trust Company of Wilmington, North Carolina, IN TRUST, however and nevertheless, to be known as TRUST NUMBER TWO, for the following uses and purposes, that is to say:

"That it will take possession of the said property, collect the rents and income from the same, and after the payment by it of the expenses of this Trust, including taxes, insurance, necessary repairs and all other charges and expenses incident to the proper upkeep and maintenance of said property, I direct that it shall pay to my wife, Isabel R. Bailey, for life a sum from the income, supplemented from the principal if necessary, which when added to the installment payments received by her from the insurance companies, a list of which have been, or will be, placed with my Trustee, and the ten per cent (10%) from Wilmington Theatres, Inc., Stock under Trust No. One will aggregate not less than Five Hundred Dollars ($500.00) per month. In other words, it is my desire that my wife shall receive not less than Five Hundred

Dollars ($500.00) per month; first, from payments made by the various insurance companies and, secondly, from the ten per cent (10%) from stock earnings of Wilmington Theatres, Inc., supplemented, if found to be necessary by my Trustee, by income or principal from Trust No. Two. I have directed the various insurance companies, hereinbefore referred to, to forward to The Wilmington Savings and Trust Company, Trustee, monthly reports showing the aggregate payments made to my said wife and to my descendants; and the amount so paid, together with the amounts to be paid under Trust No. One, shall be a guide to my Trustee in determining the amount of income or principal, if any, to be supplemented from Trust No. Two to my said wife or descendants, as the case may be.

"During the lifetime of my wife I authorize my Trustee, herein named, to advance from time to time such sums from the income or corpus of this Trust as in its sole discretion may be necessary to supplement payments made to my said wife for hospitalization or other extreme emergencies.

"During the lifetime of my wife, Mrs. Isabel R. Bailey, I authorize and direct my Trustee to pay from the income or corpus of this Trust No. Two all taxes and insurance when due and repairs and maintenance when necessary against property referred to in Clauses Fourth and Fifth of this Will.

"Upon the death of my wife I direct that my Trustee, herein named, shall see that my two daughters receive not less than Two Hundred and Fifty Dollars ($250.00) per month each during their respective lives; these amounts to be made up, first, from the insurance payments which after the death of my wife will be paid by the Insurance Companies to my daughters, and, secondly, from the dividends of Wilmington Theatres, Inc., as hereinbefore bequeathed to them under Trust No. One, and, thirdly, from the income or principal of this Trust, if the Trustee finds it necessary to make any supplements from this Trust No. Two for said purposes.

"Upon the death of one of my daughters I direct that the payments which were being made to her shall be paid to her children in equal shares if she dies leaving more than one child; and if she dies leaving only one child, then such payments are to be made to such child.

"Upon the death of the last surviving daughter I direct that the aggregate payments of Five Hundred Dollars, as heretofore mentioned, shall be paid to my grandchildren per stirpes and to their descendants, per stirpes, during their respective lives, until such time as the Law of Perpetuity shall cause this Trust to be

dissolved, at which time my Trustee is directed to pay over the remainder of the corpus and accrued income to my legal descendants entitled to such property at that time, per stirpes."

The court's findings of fact include the following:

"19. The defendant, Wachovia Bank & Trust Company, Trustee under the will of George W. Bailey, together with its predecessor Trustee, the Wilmington Savings & Trust Company, has construed the Will of George W. Bailey as creating valid trusts, and has construed and is construing the trust provisions of said will as follows:

"(a) The corpus of Trust No. 1 consists of stock in Wilmington Theatres, Inc. During the life of Isabel R. Bailey, ten per cent of the dividend income from said stock was paid to Isabel R. Bailey, twenty per cent of said income was paid to each of the Testator's daughters, Bereniece Bailey Stellings and Audrienne Bailey Autry, plaintiffs herein, and fifty per cent of said income was paid to Trust No. 2. Since Isabel R. Bailey's death in 1952, twenty-five per cent of said income has been and shall be paid to each of the two daughters and the remaining fifty per cent to Trust No. 2. After the death of either of the two daughters, or both of them, the twenty-five per cent of said income previously payable to the deceased daughter shall be paid to the deceased daughter's descendants, per stirpes, and the remaining income (the fifty per cent above mentioned) shall continue to be paid to Trust No. 2. The income shall be so paid until twenty-one years after the last to die of any of George W. Bailey's children and grandchildren living at the time of his death, and at such time the corpus of Trust No. 1 shall be paid to Mr. Bailey's legal descendants, per stirpes.

"(b) Trust No. 2 principal and income (present and accumulated) shall be distributed only in the event and to the extent that the Trust No. 1 income paid to either of George W. Bailey's daughters, or her respective heirs as a group, when supplemented by any sums received by said persons by virtue of insurance contracts on the life of George W. Bailey purchased by him prior to his death, falls beneath the sum of Two Hundred and Fifty Dollars ($250.00) per month. Unless so distributed, all of Trust No. 2 principal and income shall be held and accumulated until twenty-one years after the last to die of any of George W. Bailey's children and grandchildren living at the time of his death, and at such time the entire principal and accumulated income shall be paid to George W. Bailey's legal descendants, per stirpes.

"20. Isabel Stellings Holmes has a present life expectancy of 35.92 years. Princess Stellings Williams has a present life expectancy of 39.48 years, and George Bailey Autry has a present life expectancy of 45.84 years. Under the present construction by Wachovia Bank and Trust Company, Trustee under the Will of George W. Bailey, of the trusts created therein, said trusts will terminate and the assets thereof be distributed, assuming no failure of the issue of George W. Bailey prior to the respective dates hereinafter set forth, (1) In the year 2017, if Isabel Stellings Holmes completes her life expectancy as set forth above, and is the survivor of Princess Stellings Williams and George Bailey Autry, or (2) in the year 2021, if Princess Stellings Williams completes her life expectancy as set forth above, and is the survivor of Isabel Stellings Holmes and George Bailey Autry, or (3) in the year 2026, if George Bailey Autry completes his life expectancy as set forth above, and is the survivor of Isabel Stellings Holmes and Princess Stellings Williams.

"21. Under the present construction by Wachovia Bank & Trust Company, Trustee under the Will of George W. Bailey, of the trusts established therein, the maximum distribution possible from Trust No. 2 is five Hundred Dollars ($500.00) per month."

Analysis of the voluminous exhibits, incorporated by reference in the findings of fact, discloses:

The *corpus* of Trust No. 1 consists of 630 shares of the common stock of Wilmington Theatres, Inc. On October 1, 1960, this stock (50% of all outstanding stock of the company) had a book value of $162,396.61. The company's total net worth of $324,793.23 on October 1, 1960, represented (assuming all the then liabilities of the company paid from cash on deposit) the following net assets:

Cash	$ 25,858.83	
U. S. Government Securities	243,541.75	
Notes and Accounts Receivable	2,711.64	
Total Current Assets		$272,112.22
Land and Buildings (Less depreciation)	51,061.66	
Prepaid Expense	1,619.35	
Total other assets		52,681.01
Total Net Assets (Net Worth)		$324,793.23

The *corpus* of Trust No. 2 on May 5, 1960, consisted of conservative investments of a total (acquisition) value of $154,132.42. These assets

were acquired principally by investment of the income received from Trust No. 1 and income from such investments.

The exhibits show the receipts and disbursements of Trust No. 1 for the twenty-one years beginning July 5, 1940, and ending May 5, 1961.

During the (approximately) twelve years from July 5, 1940, to April 10, 1952, 10% of the income of Trust No. 1 was received by Isabel R. Bailey, widow of George W. Bailey; and, during this period, the widow received all of the annual payments from insurance provided by George W. Bailey. The respective amounts received by the widow from Trust No. 1 for each of these twelve years was: (1) $2,000.00, (2) $2,500.00, (3) $3,250.00, (4) $2,750.00, (5) $6,500.00, (6) $2,000.00, (7) $6,750.00, (8) $4,000.00, (9) $3,250.00, (10) $4,000.00, (11) $5,000.00, (12) $3,500.00.

During said period of (approximately) twelve years, each of the two daughters, Bereniece Bailey Stellings and Audrienne Bailey Autry, received these amounts, being 20% of the income of Trust No. 1, to wit: (1) $4,000.00, (2) $5,000.00, (3) $6,500.00, (4) $5,500.00, (5) $26,000.00, (6) $4,000.00, (7) $13,500.00, (8) $8,000.00, (9) $6,500.00, (10) $8,000.00, (11) $10,000.00, (12) $7,000.00.

During the remaining (approximately) nine years, each of the two daughters received these amounts, being 25% of the income of Trust No. 1, to wit: (13) $7,500.00, (14) $7,875.00, (15) $3,125.00, (16) $6,250.00, (17) $4,875.00, (18) $3,250.00, (19) $3,250.00, (20) $3,000.00, (21) $2,250.00. During this nine-year period each also received annual payments from insurance provided by George W. Bailey as follows: (13) $2,523.50, (14) $2,523.50, (15) $3,886.00, (16) $3,886.00, (17) $1,900.00, (18) $1,900.00, (19) $1,900.00, (20) $1,900.00, (21) $1,900.00.

During said period of twenty-one years, these amounts were received by Trust No. 2 from Trust No. 1, being 50% of the income of Trust No. 1 in each of said years, to wit: (1) $10,000.00, (2) $12,500.00, (3) $16,250.00, (4) $13,750.00, (5) $32,500.00, (6) $10,000.00, (7) $33,750.00, (8) $20,000.00, (9) $16,250.00, (10) $20,000.00, (11) $25,000.00, (12) $17,500.00, (13) $15,000.00, (14) $15,750.00, (15) $6,250.00, (16) $12,500.00, (17) $9,750.00, (18) $6,500.00, (19) $6,500.00, (20) $6,000.00, (21) $4,500.00.

In each of the twenty-one years, each of the two daughters received from Trust No. 1 and insurance payments an amount in excess of $250.00 per month; and, except for the last year, May 5, 1960 — May 5, 1961, each received from Trust No. 1 alone, exclusive of insurance payments, $250.00 per month or more. Up to now, under the trustee's said construction of the will of George W. Bailey, there has been *no* disbursement from Trust No. 2 to any beneficiary.

The alleged family settlement agreement dated December 1, 1959, was entered into and executed by plaintiff Bereniece Bailey Sutton *(sic)*, (referred to as a free-trader under G.S. § 52-6), plaintiff Audrienne Bailey Autry and J. Murchison Autry, plaintiff George Bailey Autry (single), as parties of the first part, and plaintiff Isabel Stellings Holmes and E. Mayo Holmes, Jr., and plaintiff Princess Stellings Williams and Edward S. Williams, Jr., as parties of the second part.

After recitals, the alleged family settlement agreement provides:

"NOW, THEREFORE, WITNESSETH:

"In order to avoid the publicity attendant upon a family controversy or dispute and to preserve the peace, honor, and dignity of the family of George W. Bailey, to effect his testamentary intentions as clearly understood by the parties hereto, to avoid expensive, venturesome, extensive and disastrous litigation, with its attendant risks and uncertainties, to provide security and protection for the family of George W. Bailey, and to protect the ultimate takers of the trusts heretofore mentioned from distasteful and detrimental family environment the Parties of the First Part and the Parties of the Second Part agree with and between themselves and each other that the trusts established under the Will of George W. Bailey, as recorded in Will Book O, page 432, in the office of the Clerk of the Superior Court of New Hanover County, shall be interpreted and construed as follows:

"TRUST NO. 1

"The Trustee of Trust No. 1 shall have the power, right and duty to retain possession of the corpus of Trust No. 1 and to collect the income thereon, and after the payment of necessary expenses incident to said trust, said Trustee shall pay from time to time quarterly, or when the same is received by it, twenty-five per cent (25%) of said net income to Bereniece Bailey Sutton *(sic)* during her life, and twenty-five per cent (25%) to Audrienne Bailey Autry during her life, and shall pay the remaining fifty per cent (50%) to Trust No. 2.

"Upon the respective deaths of Bereniece Bailey Sutton and Audrienne Bailey Autry, the percentage of net income, which prior to such death had been paid by the Trustee to the decedent, shall after such death be paid to the descendants of the decedent per stirpes, during their respective lives. All such payments shall continue to be made until twenty-one years after the death of the last survivor of Bereniece Bailey Sutton, Audrienne Bailey

Autry, George Bailey Autry, Princess Stellings Williams, and Isabel Stellings Holmes; and at said time, Trust No. 1 shall terminate, and the Trustee shall pay over all of the corpus of Trust No. 1, together with any other funds held in said Trust, to the legal descendants, under the law of North Carolina, of George W. Bailey, per stirpes.

"The Trustee shall dispose of the stock of Wilmington Theatres, Inc., presently held by it (the same comprising the entire corpus of Trust No. 1) only upon the written consent of Bereniece Bailey Sutton and Audrienne Bailey Autry, or the survivor of the same. After the death of Bereniece Bailey Sutton and Audrienne Bailey Autry, said stock may be sold in whole or in part by said Trustee at any time, and upon such terms as to it seems proper, if in the discretion of said Trustee such a sale appears to be in the best interest of said trust.

"While said stock is held in Trust No. 1, said stock shall be voted by the said Trustee, jointly with Bereniece Bailey Sutton and Audrienne Bailey Autry, or the survivor of the latter two parties. Upon the death of Bereniece Bailey Sutton and Audrienne Bailey Autry, said stock shall from time to time be voted by and in the sole discretion of the said Trustee.

"In the event the stock of Wilmington Theatres, Inc. held by Trust No. 1 is sold, the proceeds shall be invested in other income producing real or personal property, such investment to be approved by Bereniece Bailey Sutton and Audrienne Bailey Autry, or the survivor of them; after the death of said survivor such investments may be made as are approved by the Trustee; said property to be held and the proceeds invested and reinvested from time to time, and the income and corpus thereof distributed in the same manner and at the same time as the income and corpus of Trust No. 1 would have been distributed had the stock in Wilmington Theatres, Inc. not been sold.

"TRUST NO. 2

"The Trustee shall have the power, right and duty to retain possession of the corpus of Trust No. 2, and all of the income accrued by said trust from the time said trust was established to the beginning of the current trust year. Said sum (being all funds held in Trust No. 2 on the aforesaid date, including the aforesaid corpus and the aforesaid accrued income) shall hereinafter be referred to as the corpus of Trust No. 2 for the purposes of this agreement.

"The Trustee shall collect the rents and income from the corpus of Trust No. 2 (as heretofore defined), and after payment by it of the expenses of Trust No. 2, including taxes, insurance, necessary repairs, and all other charges and expenses incident to the proper upkeep and maintenance of said property, the Trustee shall pay all of the net income received after the beginning of the current trust year (said date being on or about May 7, 1959) by said Trust No. 2, from whatever source derived, including all net income received from Trust No. 1, equally to Bereniece Bailey Sutton during her life, and to Audrienne Bailey Autry during her life. Upon the death of Bereniece Bailey Sutton or Audrienne Bailey Autry, the net income which prior to such death had been paid by the Trustee to the decedent, shall be paid to the descendants of said decedent, per stirpes, during their respective lives. All such payments shall continue to be made until twenty-one years after the death of the last survivor of Bereniece Bailey Sutton, Audrienne Bailey Autry, George Bailey Autry, Princess Stellings Williams and Isabel Stellings Holmes; and at said time, the Trustee shall pay over all of the corpus (as heretofore defined for the purposes of this agreement) of Trust No. 2, together with any other funds held in said trust, to the legal descendants, under the law of North Carolina, of George W. Bailey, per stirpes.

"In the event that the sums to be paid to Bereniece Bailey Sutton and Audrienne Bailey Autry, or their descendants, from Trust No. 1 and Trust No. 2, as heretofore set forth in this agreement, should fail to aggregate Five Hundred Dollars ($500.00) per month, when supplemented by any sums received by said persons by virtue of insurance contracts on the life of George W. Bailey purchased by him prior to his death, then the Trustee shall pay such amount from the corpus (as heretofore defined) of Trust No. 2 as will, together with the sums heretofore described, aggregate Five Hundred Dollars ($500.00) per month. All sums so paid from Trust No. 2 shall be paid in the same proportions and to the same persons as are entitled to receive income of Trust No. 1 and Trust No. 2 as hereinabove set forth.

"The Trustee shall have the power, right and duty to transfer, set over, assign, sell, convey, and make necessary conveyances therefor, for such prices and upon such terms as it may deem best, any of the property devised and bequeathed to it under Trust No. 2 of the Will of George W. Bailey, or received through the Will of Isabel R. Bailey for the benefit of Trust No. 2, and to invest from time to time the proceeds of any such sale or sales in

such income producing real and/or personal property as may be most advantageous for the proper administration of Trust No. 2, the same to be held by the Trustee in the same plight, and under the same conditions as the property so sold. All investments made for the benefit of Trust No. 2 shall be made with the written approval of Bereniece Bailey Sutton and Audrienne Bailey Autry, or the survivor. After the death of Bereniece Bailey Sutton and Audrienne Bailey Autry, investments of the corpus (as heretofore defined) of Trust No. 2 shall be made at the direction of the Trustee.

"BOTH TRUSTS

"Should Bereniece Bailey Sutton die and there be a failure of her descendants prior to the termination of Trust No. 1 and Trust No. 2, as heretofore set forth, all sums payable to the descendants of Bereniece Bailey Sutton under the terms of this agreement shall become payable to the descendants, under North Carolina law, of George W. Bailey, per stirpes, during their respective lives. Should Audrienne Bailey Autry die and there be a failure of her descendants prior to the termination of Trust No. 1 and Trust No. 2, as heretofore set forth, all sums payable to the descendants of Audrienne Bailey Autry under the terms of this agreement shall become payable to the descendants under North Carolina law of George W. Bailey, per stirpes, during their respective lives. Notwithstanding anything hereinabove set forth to the contrary, upon a failure of legal descendants of George W. Bailey under North Carolina law, Trust No. 1 and Trust No. 2 shall terminate, and all sums held in said trusts shall be paid over to the University of North Carolina."

The court's findings of fact include the following:

"22. It was and is the sincere and earnest conviction and opinion of the plaintiffs that under the Trustee's present interpretation of the Will of George W. Bailey, ANY material distributions from Trust No. 2 are most unlikely for reasons hereinafter set forth. If Trust No. 2 income or principal were to be distributed, however, it is the plaintiffs' opinion that such income would be distributed to George W. Bailey's descendants until circa 2021, and consequently, such payments would be made to at LEAST three generations — children, grandchildren and great-grandchildren. There are presently two children of George W. Bailey, and four grandchildren. There are presently eight great-grandchildren of George W. Bailey, and there may be additional great-grand-

children born hereafter. It is the belief of the plaintiffs that when the class of great-grandchildren closes, that said class will number approximately twelve persons. Under the plaintiffs' beliefs and convictions as heretofore set forth, it is the plaintiffs' further belief and conviction that the maximum monthly payments to beneficiaries from Trust No. 2 would be, therefore, Two Hundred and Fifty Dollars ($250.00) to each child at the 'children' level, One Hundred and Twenty-Five Dollars ($125.00) to each grandchild at the 'grandchildren' level, and about Forty-Two Dollars ($42.00) to each great-grandchild at the 'great-grandchildren' level all of such sums constituting only POSSIBLE payments. It is incredible to the plaintiffs that George W. Bailey wished or intended to provide such meager and remote benefits to his all inclusive descendants at the expense of his two daughters, the natural objects of his bounty.

"23. It is the belief of the plaintiffs that any material distribution from Trust No. 2 is most unlikely under the Trustee's interpretation of the will, as it is their belief that fifty percent of Trust No. 1 income is almost certain to produce sufficient funds to make the Five Hundred Dollars ($500.00) monthly payments which the trusts' life tenants are guaranteed. This belief is predicated upon the income record of Trust 1 since the establishment of the same, said income record being set forth in Schedule A of plaintiffs' Exhibit IV. The plaintiffs, therefore, are of the opinion that all or substantially all of Trust No. 2 income, under the Trustee's present interpretation of the Will, will be accumulated until the final distribution of trust assets circa 2021. It is the conviction of the plaintiffs that George W. Bailey never intended such an accumulation, for if a final distribution of the trusts' assets occurs circa 2021, it will most likely be made to George W. Bailey's great-great-grandchildren whom he never knew or cared for and who, in all probability, will, in the opinion of the plaintiffs, number about 36. It is the further belief of the plaintiffs that the prospective annual income of Trust No. 2 (exclusive of Wilmington Theatres, Inc. dividends) will itself, in all probability, exceed the maximum possible distribution from the same of Five Hundred Dollars ($500.00) per month. This belief is predicated upon the past income record of Trust No. 2, as set forth in Schedule 3 of plaintiffs' Exhibit IV.

"24. Believing that the Trustee's present interpretation of George W. Bailey's will was contrary to the latter's intentions as expressed therein, was at the expense of and at odds with the natural objects of his bounty, and was inherently inequitable, and

that the accumulation of Trust No. 2 income as heretofore described fostered indecent disinheritance of those having natural claims on the testator's worldly goods, and that the Trustee's present interpretation resulted in an indiscreet hoarding of income at the expense of the ancestral and parental environment of the ultimate takers of the trusts' corpus, Bereniece Bailey Stellings, Audrienne Bailey Autry and husband, J. Murchison Autry, and George Bailey Autry, employed counsel to advise them with regard to the trusts established under the will of George W. Bailey. Said persons were advised by said counsel that there were sound legal grounds for (1) a suit to construe the trusts to permit the Trustee to pay the present Trust beneficiaries such amount of Trust No. 2 income, ACCUMULATED or PROSPECTIVE, as is compatible, in the judgment of the Trustee, with the beneficiaries' needs and position, and (2) a suit to declare the Trusts void ab initio for the reason that they violate the Rule Against Perpetuities. Said persons desired and were prepared to institute such suits.

"25. Isabel Stellings Holmes and husband, E. Mayo Holmes, Jr. and Princess Stellings Williams, and husband, Edward S. Williams, Jr. were and are opposed to the institution of the legal actions heretofore mentioned and relief to be sought therein for that (a) the first action, if successful, would make possible the distribution of Trust No. 2 income heretofore accumulated, thus causing possible loss to said persons of said sums and the income thereof, and (b) the second action, if successful, would completely extinguish the rights of said persons to share in any fashion in the estate of George W. Bailey.

"26. If the threatened litigation referred to above should be begun, it would act as a constant barrier to the establishment of family peace, and would doubtless attract wide attention and publicity which would tend to expose to the public gaze intimate family affairs which should be guarded within the family circle. Furthermore a trial of said actions would disrupt and tend to destroy the peace, honor and dignity of the family resulting in the embarrassment and humiliation of the members thereof, and would plunge the family into litigation which would doubtless extend for a long period of time and would be attended by an enormous amount of expense, uncertainty and risk, and would defeat or seriously jeopardize the testamentary trusts of George W. Bailey.

"27. The disputes involved in the threatened litigation are bona fide disputes, parties thereto making adverse contentions in good

faith; a determination of the rights of the parties by carrying said litigation to a conclusion would involve long and expensive litigation and a determination of difficult and doubtful questions of fact and of law; the result of a trial in the Superior Court would be uncertain; the losing parties would doubtless appeal to the Supreme Court of North Carolina, and as a consequence, further trials might be necessary before reaching a conclusion of such threatened litigation. The final outcome of said litigation would be doubtful and would be attended with risk on the part of all parties. Leaving the parties to work out their rights in said litigation would not only permanently impair the honor and dignity of the family and result in permanent family discord, but would also seriously jeopardize the trusts involved.

"28. In order to avoid the publicity attendant upon a family controversy or dispute and to preserve the peace, honor and dignity of the family of George W. Bailey, to effect his testamentary intentions as clearly understood by the plaintiffs herein, to avoid expensive, venturesome, extensive and disastrous litigation, with its attendant risks and uncertainties, to provide security and protection for the family of George W. Bailey and to protect the ultimate takers of the trusts heretofore mentioned from distasteful and detrimental family environment, the plaintiffs entered into an agreement between themselves and each other providing that the trusts established under the will of George W. Bailey should be interpreted, construed and administered pursuant to the terms of said agreement.

"29. Said agreement was entered into by the plaintiffs after long, careful and painstaking consideration of the same, and plaintiffs have taken into consideration all of the facts and circumstances in connection therewith, and have sincerely sought to arrive at said agreement so as to put an end to threatened family litigation and dissension and to re-establish peace and concord.

"30. The agreement entered into by the plaintiffs is a written agreement dated December 1, 1959, and a copy of said agreement is attached to the complaint herein as Exhibit A, and is hereby referred to for all the terms thereof, and is made a part of this finding of facts as fully as if set out herein in full, and this action has been instituted by the plaintiffs herein for the purpose of obtaining an adjudication of the Court as to the validity of said agreement, and in order that all fiduciaries may be properly advised and instructed by the Court as to the validity thereof and their duties in regard thereto.

"31. The plaintiffs are keenly interested in protecting the interest of the minors involved and the rights of unborn children and are of the opinion that the aforesaid agreement will be for the best interests of all persons interested in the assets of said trust estates, both born and unborn, and that approval of said agreement will preserve for them a substantial portion of the trust estates free from the risk and dissipation which might destroy and wipe out their entire interest in said estates or in material parts thereof.

"32. The Wilmington Savings & Trust Company and the Wachovia Bank & Trust Company have at all times acted in good faith in administering upon said estate and in interpreting, executing, managing and distributing said trusts.

"33. The settlement of the threatened litigation under the terms of the family agreement as attached to the complaint marked Exhibit A is for the best interest of all the parties, including the present, prospective and contingent beneficiaries of the trusts under the will of George W. Bailey, and it is for the best interests of Audrienne Isabel Bailey Autry, E. Mayo Holmes, III, Mark R. Holmes, S. Gregory Holmes, Christopher A. Holmes, Lauraine B. Holmes, Princess Ann Williams, Martha M. Williams, and Edward S. Williams, III, and all other infants who are parties to this action, and the unborn descendants of George W. Bailey; the family agreement will prevent dissipation and waste and will more nearly accomplish the primary objects and effectuate the real intentions of the creator of said trusts than could be accomplished by rejection of said family agreement and a relegation of the parties to a family strife and long-drawn-out litigation."

Judgment, approving the alleged family settlement agreement of December 1, 1959, was entered; and it was adjudged that this agreement, a copy of which is attached to the complaint as Exhibit A, is "legally binding upon the parties thereto" and "upon all other parties and interests, including trustees, guardians ad litem, minors and unborn persons in interest." It was adjudged further that "said Exhibit A shall, from the 7th day of May 1959, until the termination of said trusts, constitute the terms and provisions of the trusts created under the will of George W. Bailey," and "that said Exhibit A was intended by the parties to this action to be irrevocable, and such agreement and the aforesaid trusts as altered thereby are hereby adjudged to be irrevocable."

Plaintiff Bereniece Bailey Stellings is the same person referred to in the alleged family settlement agreement as Bereniece Bailey Sutton.

Defendants Napolean B. Barefoot, Guardian *Ad Litem* for the unborn descendants of George W. Bailey, and Wachovia Bank & Trust Company, Trustee under the will of George W. Bailey, excepted to designated findings of fact and conclusions of law and appealed from said judgment.

Poisson, Marshall, Barnhill & Williams for defendant Wachovia Bank & Trust Company and defendant Napolean Barefoot, Guardian Ad Litem, appellants.

Carter, Murchison, Fox & Newton for plaintiffs, appellees.

BOBBITT, J. With reference to Trust No. 1, the provisions of the will as construed by the trustee are not materially affected by the alleged family settlement agreement. Each of the two daughters received 20% of the income of Trust No. 1 until the death of their mother; and since then each has received and will continue to receive for life 25% of the income thereof. Too, upon the death of each daughter, the income she would receive if living is to be paid to her descendants, *per stirpes*, until termination of the trust.

But, with reference to Trust No. 2, the alleged family settlement agreement does materially alter the provisions of the will as construed by the trustee. It provides, in effect, that the assets of Trust No. 2 as of May 7, 1959, consisting largely of investments made from income theretofore received from Trust No. 1 and income from such investments, shall thereafter constitute the *corpus* of Trust No. 2; that there shall be no further investment of income of Trust No. 2; that one-half of *all* income thereafter received by Trust No. 2, whether from Trust No. 1 or from assets in Trust No. 2 on May 7, 1959, shall be paid to each of the two daughters for life; and that upon the death of each daughter the amount she would receive if living shall be paid to her descendants, *per stirpes*, until termination of the trust. (Note: Plaintiffs alleged the assets of George W. Bailey, at the time of his death, exclusive of the Wilmington Theatres, Inc., stock, "consisted of a small amount of bonds.")

The two daughters, and the three grandchildren who survived George W. Bailey, are plaintiffs herein. They are the parties to the alleged family settlement agreement and are the only present and prospective beneficiaries of the trusts living on June 30, 1940, when George W. Bailey died. Under the trustee's construction, the trusts terminate twenty-one years after the death of the last survivor of these five persons; and none of them will ever receive any part of the *corpus*. Obviously, the administration of the trusts in accordance with the alleged family settlement agreement will substantially increase the

income to be presently received from Trust No. 2 by the two daughters and the prospective income to be received by said three grandchildren.

Under the trustee's construction, the trusts terminate and the *corpus* is distributable twenty-one years after the death of the last survivor of the two daughters and said three grandchildren; and, when this event occurs, the persons to receive the *corpus* will be the named defendants, who are minors, or lineal descendants of George W. Bailey hereafter born. Clearly, the *corpus* of Trust No. 2 to be then distributed will be much greater if Trust No 2 is administered in accordance with the trustee's construction rather than in accordance with the alleged family settlement agreement.

With reference to family differences allegedly composed by the settlement agreement, these facts are noted: Only the two daughters and three grandchildren who survived George W. Bailey were involved in such family differences. Moreover, their differences relate to *whether actions should be instituted* (1) for construction of the trust provisions of the will of George W. Bailey, and (2) to declare invalid the provisions relating to the duration of the trusts.

There is no evidence to support the findings that the proposed or threatened actions "would plunge the family into litigation . . . for a long period of time and would be attended by an enormous amount of expense" and that "the family agreement will prevent dissipation and waste" of the assets of the trusts. Nothing appears to indicate the proposed or threatened actions would be more protracted, involved or expensive than the present litigation.

Moreover, we find no evidence to support findings that approval of the alleged family settlement agreement will allay family dissensions. Conceding the differences as *between the plaintiffs* as to whether such suits should be instituted were composed by the settlement agreement, approval thereof may well become quite disturbing to the named defendants (now minors) and to lineal descendants of George W. Bailey hereafter born. In this connection, it is noted that the named defendants are (1) a child of plaintiff Audrienne Bailey Autry, (2) five children of plaintiff Isabel Stellings Holmes, and (3) three children of plaintiff Princess Stellings Williams; and further, that the guardian *ad litem* for these nine named defendants did not appeal from the judgment or appear by brief or otherwise in this Court.

The will of George W. Bailey was probated July 5, 1940; and since then the trustee has administered the trusts in accordance with its construction of the provisions of the will relating thereto.

The present factual situation differs from that in cases where a family settlement agreement is entered into to avoid threatened destruction of testamentary trusts by caveat, *e.g.*, *Wagner v. Honbaier,*

248 N.C. 363, 103 S.E. 2d 474, or by dissent, *e.g., Bank v. Alexander,* 188 N.C. 667, 125 S.E. 385. Too, it differs from that in cases where pending or threatened litigation involves multiple complicated questions, factual as well as legal, and is of such nature as to dissipate the trust estate and adversely affect the interests of minors, *e.g., Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341. Here, the proposed or threatened suits related solely to the construction of the trust provisions of the will and the determination of the validity of the provisions relating to the duration of the trusts.

It may be conceded that plaintiffs were uncertain as to the outcome of the proposed or threatened suits in the superior court or in this Court. Even so, the court must consider the trust provisions of the will. Whether the alleged family settlement agreement is advantageous to the nine named defendants and the lineal descendants of George W. Bailey hereafter born must be determined in relation to their rights under the will of George W. Bailey as construed by this Court.

There are material limitations upon the right to alter by family settlement agreement the terms of a testamentary trust. *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Trust Co. v. Buchan,* 256 N.C. 142, 153, 123 S.E. 2d 489. These limitations, as stated by *Barnhill, J.* (later *C.J.*), in *Carter v. Kempton, supra,* are as follows:

> "(1) The will creating a trust is not to be treated as an instrument to be amended or revoked at the will of devisees or to be sustained *sub modo* only after something has been sweated out of it for the heirs at law. The power of the court is exercised not to defeat or destroy, but to preserve, it.
>
> "(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. (Citations)
>
> "(4) To invoke the jurisdiction of a court of equity the condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubted-

ly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency. (Citation) It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator. The controlling objective is to preserve the trust and effectuate the primary purpose of the testator. (Citations)

"(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."

In the present case there is no exigency, contingency or emergency related to or growing out of the trusts themselves or directly affecting the *corpus* thereof or the income therefrom. It appears the trusts are well preserved. The questions presented relate solely to the respective interests of present and future beneficiaries.

George W. Bailey's will clearly designates the assets of each trust and the beneficiaries thereof, present and prospective. The will does *not* provide, expressly or by implication, that "the Trustee shall pay all of the net income received after the beginning of the current trust year (said date being on or about May 7, 1959) by said Trust No. 2, from whatever source derived, including all net income received from Trust No. 1, equally to Bereniece Bailey Sutton during her life, and to Audrienne Bailey Autry during her life," or that "(u)pon the death of Bereniece Bailey Sutton or Audrienne Bailey Autry," *such* net income "shall be paid to the descendants of said decedent, per stirpes, during their respective lives." These (quoted) provisions of the alleged family settlement agreement are in direct conflict with the trust provisions of the will.

The only provision of the will, with reference to disbursements to be made to the two daughters from Trust No. 2 (and, upon the death of each daughter to her descendants, *per stirpes*, until termination of the trusts), is the following: "Upon the death of my wife I direct that my Trustee, herein named, shall see that my two daughters receive not less than Two Hundred and Fifty Dollars ($250.00) per month each during their respective lives; these amounts to be made up, first, from the insurance payments which after the death of my wife will be paid by the Insurance Companies to my daughters, and, secondly, from the dividends of Wilmington Theatres, Inc., as hereinbefore bequeathed to them under Trust No. One, and, thirdly, from the income or principal of this Trust, if the Trustee finds it necessary to make any

supplements from this Trust No. Two for said purposes." Clearly, this provision contemplates payments to the testator's daughters from Trust No. 2 only in the event the income of each from the insurance provided by the testator and from the Wilmington Theatres, Inc., stock is less than $250.00 per month and in such event to supplement the income only to the extent necessary to provide each an income of $250.00 per month.

Even so, plaintiffs contend there is a serious question as to whether the trusts are void *ab initio* on the ground the provisions thereof violate the rule against perpetuities. If this is a serious question, it arises solely from the provisions of the will and must be resolved by the court before the court can determine whether the alleged family settlement agreement is advantageous to the nine named defendants and the lineal descendants of George W. Bailey hereafter born. The court cannot discharge its judicial responsibility by a declaration that a serious legal question of this nature is presented. Presently, we are not concerned with a will where, on account of vagueness, ambiguity or conflict in the provisions thereof, the testator's intentions cannot be ascertained, *e.g., Bank v. Hendley,* 229 N.C. 432, 50 S.E. 2d 302.

"The rule against perpetuities prohibits the creation of future interests or estates which by possibility may not become vested within a life or lives in being *at the time of the testator's death* or the effective date of the instrument creating the future interest, and twenty-one years thereafter, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth. Stated affirmatively, the rule against perpetuities allows the postponement of the vesting of an estate or interest for the period of lives in being and twenty-one years and the period of gestation." (Our italics) 41 Am. Jur., Perpetuities and Restraints on Alienation § 3; 70 C.J.S., Perpetuities § 4; *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899, and cases cited therein.

Plaintiffs, in support of their contention *that a serious question* is presented, cite *Fitchie v. Brown,* 211 U.S. 321, 29 S. Ct. 106, 53 L. Ed. 202, in which the will under consideration provided: "The balance, residue, or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute." The will directed that the trustee "devote sufficient of the annual income" toward paying specified amounts to named annuitants for life, "and then to their heirs." The Supreme Court of the United States affirmed a decision of the Supreme Court of the Territory of Hawaii ordering that a decree be entered directing the trustee to pay the specified amounts to the named annuitants "for and during their respective

lives, and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all the said annuitants, . . . and, at the end of said twenty-one years, to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will."

In *Farmers Nat. Bank of Cynthiana v. McKenney* (Ky.), 264 S.W. 2d 881, cited by plaintiffs, the will provided that the income from the trust should be paid in equal parts to the testator's three half sisters as long as they lived, and upon the death of each, her share should be paid to "her heirs, if any as long as the law allows." Commissioner Clay, speaking for the court, said: "If he (the testator) had disposed of the corpus of the trust or devised and bequeathed the fee in his property to some ultimate beneficiary, we may have had some key to his intention." Again: ". . . we find the principal vice of Item IV to be such uncertainty that we cannot ascertain the true purpose or intent of the testator." The trust provision was held void *for uncertainty.*

George W. Bailey's lineal descendants are the only beneficiaries, present or prospective, of the trusts created by his will. The provision as to the termination of each trust is in the same language, to wit: ". . . until such time as the Law of Perpetuity shall cause this Trust to be dissolved, at which time my Trustee is directed to pay over the remainder of the corpus and accrued income to my legal descendants entitled to such property at that time, per stirpes."

The provisions of George W. Bailey's will manifest his clear intention that the trusts shall continue as long as permissible under the "Law of Perpetuity." His deliberate use of this term must be given significance. It indicates the testator intended, wisely or unwisely, that the trusts should continue as long as legally permissible. To determine the duration of the trusts otherwise than according to the "Law of Perpetuity" would defeat rather than effectuate the testator's intent. To effectuate the testator's intent the "Law of Perpetuity" must be related to the beneficiaries, present and prospective, who were living on June 30, 1940, when George W. Bailey died, the two daughters and three grandchildren; and in our opinion, and we so decide, the trusts, under the "Law of Perpetuity," terminate twenty-one years after the death of the last survivor of these five persons. Decision to this effect is, in our view, in full accord with the intention of the testator. It is also in accord with *Fitchie v. Brown, supra.*

It is noteworthy that the provision of the alleged family settlement agreement with reference to the termination of each trust and the trustee's construction are in accord as to *when* the trusts terminate.

But they differ greatly with reference to the value of the assets of Trust No. 2 to be distributed to the ultimate takers.

"In ascertaining the intent of the testator, the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made.*" *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151, and cases cited; *Trust Co. v. Wolfe,* 243 N.C. 469, 473, 91 S.E. 2d 246.

The clear intent of the testator, when he executed his will, was to provide for immediate payment of one-half of the income from his Wilmington Theatres, Inc., stock, the only asset of Trust No. 1, to designated beneficiaries and to provide (subject to the provision quoted above with reference to supplementing income from other sources to the extent necessary to provide each daughter $250.00 per month) for the accumulation and investment of the remaining one-half as assets of Trust No. 2. It is noted that this provision as to supplementing the income of each daughter, if necessary, did not become effective until the death of George W. Bailey's widow.

The record does not disclose the income received by George W. Bailey from his Wilmington Theatres, Inc., stock prior to June 22, 1937, the date of his will, or from then until his death on June 30, 1940. If the income therefrom during the earlier years of the trust exceeded the testator's reasonable expectations, each of the two daughters benefited thereby in receiving twenty and later twenty-five per cent of such income.

It does appear that, during the earlier years of the trusts, the income from the Wilmington Theatres, Inc., stock was substantially more than the income therefrom in recent years. Too, it appears the present assets of Wilmington Theatres, Inc., consist of conservative investments with the result that the income presently received by each of the two daughters therefrom is substantially less than the income each received therefrom in the earlier years of the trust.

We cannot know whether George W. Bailey, if now living, would make a different disposition of his estate. Nor is it our function to speculate as to what he would or might do under present circumstances. "The authority and responsibility to interpret or construe a will rest solely on the court. Its objective is to ascertain the intent of the testator, as expressed in the will, when he made it." *Trust Co. v. Wolfe, supra,* and cases cited. As stated recently by *Moore, J.,* in *Keesler v. Bank,* 256 N.C. 12, 20, 122 S.E. 2d 807: "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."

Undoubtedly, plaintiffs entered into and seek approval of the alleged family settlement agreement in good faith; and it may well be

it provides a more reasonable distribution. Even so, the distribution provided therein is not in accord with the intent of the testator, as expressed in the will, when he made it.

Since it substantially alters the provisions of the will of George W. Bailey as construed by this Court and does or may substantially impair without compensating benefits the interests of the nine named defendants and the interests of lineal descendants of George W. Bailey hereafter born, the alleged family settlement agreement cannot be approved by this Court. To what extent, if any, the interest of Audrienne Isabel Bailey Autry, the granddaughter of the testator born after his death, or of the other eight named defendants, great-grandchildren of George W. Bailey, or of any other grandchild, great-grandchild or lineal descendant of George W. Bailey hereafter born, will be impaired, cannot be foreseen. This will depend upon the date the trusts terminate and the identity of the ultimate takers. Suffice to say, the interest of certain of the lineal descendants of George W. Bailey, presently unidentifiable, will be seriously affected and impaired. Hence, the judgment of the court below is reversed.

It is unnecessary, in view of the foregoing disposition of this appeal, to consider whether the lineal descendants of George W. Bailey hereafter born would be bound by a judgment adverse to them. In this connection, see *McPherson v. Bank,* 240 N.C. 1, 81 S.E. 2d 386, and the provision of the 1955 statute now codified (in the 1961 Supplement) as G.S. § 1-65.2.

Reversed.

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

STATE v. EUGENE COLLINS POPE.

(Filed 15 June 1962.)

1. Constitutional Law § 31—

A defendant in a criminal prosecution has the right to be present throughout the trial, which right may be waived only in prosecutions for less than capital offenses.

2. Same; Criminal Law § 127—

A defendant in a criminal prosecution has the common law right to be present at the time sentence or judgment is pronounced, which right is separate and apart from his constitutional or statutory right to be present throughout the trial.

3. Same—

Pre-sentence investigation to obtain information bearing upon the aggravation or mitigation of punishment after plea or verdict of guilty has been entered is favored and encouraged by the law, and in such investigations the trial judge must be given wide latitude and is not restricted by the rules of evidence applicable to the trial of the issue of guilt or innocence; nevertheless, oral testimony should not be heard in defendant's absence and hearsay testimony should be disregarded, and defendant should be given full opportunity to rebut any defamatory and condemnatory matters, to give his version of the offense charged, and to introduce any relevant facts in mitigation.

4. Same—

A judgment is presumed valid and just with the burden upon appellant to show error amounting to the denial of some substantial right, and a judgment will not be disturbed for procedures in the judge's pre-sentencing investigation in the absence of a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

5. Same—

A sentence entered after plea or verdict of guilty will not be disturbed because information bearing upon the aggravation or mitigation of sentence is heard by the court in the absence of defendant when such information is known or disclosed to defendant or his counsel before judgment is entered, and defendant is given opportunity to refute any unfavorable aspects of the information.

APPEAL by defendant from *Williams, J.*, and *Burgwyn, E.J.*, October 1961 Criminal Term of ALAMANCE.

Criminal actions, in which defendant is charged in bills of indictment as follows:

No. 83. Felonious breaking and entering, and larceny of goods of the value of $50.00.

No. 84. Felonious breaking and entering, and larceny of goods of the value of $60.00.

No. 202. Felonious breaking and entering, and larceny of goods of the value of $253.00.

No. 221. Larceny of chattel of the value of $400.00.

The indictments in cases 202 and 221 were returned by the grand jury of Durham County. These cases were removed to Alamance County for trial. Cases 83 and 84 were instituted in Alamance County.

In each of the cases defendant pleaded guilty before Williams, J., who presided during the first week of the two-weeks criminal term. Williams, J., imposed active prison sentences as follows:

No. 83. Not less than 2 nor more than 3 years.

No. 84. Not less than 18 months nor more than 2 years.

No. 202. Not less than 2 nor more than 4 years, to run concurrently with the sentence in 221.

No. 221. Not less than 2 nor more than 4 years.

Burgwyn, E.J., presided during the second week of the term. Defendant moved before him to set aside the judgments entered by Williams, J., and to vacate the prison sentences on the grounds that they were irregularly entered and violated defendant's constitutional rights. Defendant, in his written motion, alleged in substance that Judge Williams, after hearing evidence, called for the bills of indictment, invited to his room the solicitor, the deputy clerk and two officers who had testified for the State, left the bench and retired with them to chambers, for more than an hour held a private conference in which the judge questioned the officers relative to the punishment to be given defendant, received information not previously elicited in open court, failed to invite defendant or his counsel to be present at the conference, and imposed the judgments after privately receiving the information.

At the hearing on the motion, defendant called as witnesses the two officers who had participated in the alleged conference. These officers had investigated the charges against defendant and had testified for the State in open court in the presence of defendant and his counsel prior to the alleged private conference. They testified in the motion hearing before Judge Burgwyn, in substance except where quoted verbatim, as follows: Seven defendants, "boys," had pleaded guilty in 68 cases from six counties. The judge was considering all these cases at the same time. Some of the cases involved larceny only, and some involved breaking and entering and larceny. Some of the alleged offenses were felonies, some were misdemeanors. In some of the indictments several defendants were charged jointly, in others only one defendant was named. "The total value of the warrants (of goods stolen) . . . was about $17,000. . . . (T)otal of what was recovered was somewhere in excess of $9,000 or $10,000." No effort had been made "to assemble information . . . as to each defendant. . . . (I)n that conference the time was spent compiling the information. . . ." And an "effort was made to assign numbers to each of the bills and warrants" to correspond to the numbers on the "shucks" in which they had been placed — this had not been done before. The solicitor read from the bills of indictment, and the judge made tabulations as to each defendant, separating felonies and misdemeanors, and adding the value of goods involved. The officers were assisting the solicitor in separating the bills and warrants. The conference lasted about an hour and a half. Most of what was being done was tabulation. There was very little conversation. None of the defendants or their attorneys

were in the judge's room at any time during the conference. Something was said to the judge about instances in which gasoline had been stolen, but for which no warrants had been issued. Values were not mentioned, and no particular defendant was mentioned in this connection. In the testimony in open court prior to the conference, the officers had testified that "there were other cases that warrants were not issued for." In conference they "did discuss the boys and what type of boys they were, they were good boys, etc. All of that had been brought out" in the testimony prior to the conference. Eugene Collins Pope and William Anderson "had never been in any trouble before." Something was said about the Smith boy (another defendant) assisting and cooperating with the officers. In the conference no one was designated or mentioned as captain or a leader among the defendants. No recommendations were made to the judge with reference to punishment. When the judge returned to the bench he called one of the officers to the stand and questioned him in open court in the presence of defendants "about any other cases they (defendants) were involved in and what they were." The judge tendered the witness for cross-examination. Thereafter the judgments were entered.

Judge Burgwyn found as a fact that the evidence does not show the "judgments were either irregular or contrary to the practice of the courts and in violation of the constitutional rights of the defendant." He further found that the challenged action of Judge Williams "was for the purpose of determining in his own mind what was right, just and proper punishment. . . ." He overruled the motion.

Defendant appeals from the judgments entered by Judge Williams, and from the order of Judge Burgwyn overruling the motion.

Attorney General Bruton for the State.
Dalton, Long & Latham for defendant.

MOORE, J. The motives of Judge Williams are not in question on this appeal. Defendant's brief states: "Judge Williams went to a lot of trouble . . . out of a sense of duty. He knew none of the parties and had no prior feelings one way or the other. In fact, as the record shows, on his own initiative Judge Williams brought out in open court what he apparently thought was the most important matter he had elicited in chambers — the theft of the gasoline not charged in any of the bills or warrants. Nevertheless, the defendant feels he was entitled to hear what the Judge heard at the time he heard it and not by way of recapitulation."

Thus is presented the sole question as to whether or not a judge presiding at a criminal term of court violates a fundamental right of

a defendant when he receives in the absence of defendant, after a plea or verdict of guilty has been entered, information bearing upon the matter of punishment, either in aggravation or mitigation, even when the information is known, or disclosed, to defendant and his counsel before judgment is entered, and defendant is given opportunity to refute any unfavorable aspects of the information.

As to what is proper procedure in the sentencing process we do not find unanimity among the courts.

In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right. And in capital trials the right cannot be waived by the prisoner. *State v. O'Neal,* 197 N.C. 548, 149 S.E. 860; *State v. Cherry,* 154 N.C. 624, 70 S.E. 294; *State v. Dry,* 152 N.C. 813, 67 S.E. 1000. ". . . (T)he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, section 35." *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782. The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial. *Ball v. United States,* 140 U.S. 118. A defendant should be present when evidence is introduced for the purpose of determining the amount of punishment to be imposed. 14 Am. Jur., Criminal Law, s. 190, pp. 899, 900; *Thomas Fowler's* Case, 13 N.W. 530 (Mich. 1882). However, the procedure in the sentencing process is not the same as that in the trial process. *Driver v. State,* 92 A. 2d 570 (Md. 1952).

In some jurisdictions the sentencing procedure is regulated by statute. California and Montana have laws providing that punishment is to be determined in the sound discretion of the trial judge after the circumstances have been presented by the testimony of witnesses examined in open court. California Penal Code, ss. 1203, 1204; Revised Code of Montana (1947), ss. 94-7813, 94-7814. Under these statutory provisions any representation made to the court in aggravation or mitigation of punishment may not be considered unless made in open court in the presence of the accused. *People v. Sauer,* 155 P. 2d 55 (Cal. 1945). Though the court may receive and consider the pre-sentence report of a probation officer, letters, telephone messages and personal requests relating to punishment may not be considered, and where it appeared that such were received and given attention by the trial judge, the sentence imposed was vacated and the cause remanded for proper sentence. *People v. Giles,* 161 P. 2d 623 (Cal. 1945). And under such statute the unsworn report and recommendations of an investigating probation officer "privately offered and privately received and adopted by the trial judge do not measure up to . . . requirements. . . ." *Kuhl v. District Court,* 366 P. 2d 347 (Mont. 1961).

In South Carolina the reception and adoption of information in aggravation or mitigation of punishment is strictly guarded. Evidence of moral character and affidavits may be received, and these do not violate the constitutional right of confrontation. *State v. Reeder,* 60 S.E. 434 (S.C. 1908). It is proper "for the trial judge in open court, in the presence of the defendant, to inquire into any relevant facts in aggravation or mitigation of punishment." *State v. Brandon,* 43 S.E. 2d 449 (S.C. 1947); *State v. Bodie,* 49 S.E. 2d 575 (S.C. 1948). But where the judge discussed with the solicitor and another in his chambers, in the absence of defendant and his counsel, the matter of punishment, the sentence thereafter imposed was vacated on appeal. Held: Defendant "has a right that everything pertaining to the case, in the way of evidence affecting the case, be open . . . and public." *State v. Harvey,* 123 S.E. 201 (S.C. 1924). And where, in sentencing accused, the judge remarked, "A number of people from your community have been to see me at my office about you, and they have all spoken against you. . . . (N)o one has come . . . to speak a good word in your behalf," on appeal the case was remanded for resentencing. *State v. Simms,* 127 S.E. 840 (S.C. 1925).

In a Texas case the trial judge held a conference in the absence of defendant, and reviewed the evidence with the county attorney and an officer before entering judgment. The appellate court stated that the right to be present extends to the time ". . . 'when evidence is introduced for the purpose of determining the amount of punishment to be imposed'. . . . We think the trial court should be granted great latitude in what he considers, in order to properly fit the punishment to the offender, but all reason and justice require that the accused be present when he hears anything defamatory of the accused." *Phelps v. State,* 257 S.W. 2d 302 (Tex. 1953).

It has been declared the better practice to receive and consider in open court in defendant's presence pre-sentence investigation reports of probation officers and other officials. *Stephan v. United States,* 133 F. 2d 87 (CC6C 1943); *Smith v. United States,* 223 F. 2d 750 (CC5C 1955).

In Pennsylvania when a defendant enters a general plea of guilty to a murder indictment, a three-judge court *en banc* hears evidence and determines the degree of guilt and fixes the punishment, and thus to some extent exercises the functions of both jury and judge. In such cases the reception of evidence is subject to approximately the same rules as in jury trials. *Commonwealth v. Johnson,* 35 A. 2d 312 (Pa. 1944); *Commonwealth v. Petrillo,* 16 A. 2d 50 (Pa. 1940). But the opinion in *Petrillo* lays down the principles applicable in sentencing generally, as follows: "In determining what the penalty shall be after

convictions in criminal cases, courts have a wide latitude in considering facts, whether or not these facts are produced by witnesses whom the members of the court may see and hear. In many jurisdictions courts in determining proper sentences consider official records and the reports of probation officers, psychiatrists and others." See *Commonwealth v. Coleman,* 115 A. 2d 811 (Pa. 1955). In a case in which accused was charged with robbery, the judge, after verdict but before imposing sentence, held a conference in chambers. He invited a captain of police into consultation and stated, "All of you can be present." On appeal the court stated: "It is of course true that a defendant . . . has a right to be present at every stage of the proceedings from arraignment to the rendition of verdict. (Citing authorities.) However, this right does not extend to a pre-sentence investigation. In determining appropriate sentences, trial judges have a wide latitude in ascertaining pertinent facts, whether or not these facts are produced by witnesses who are seen and heard. . . . The sentencing of a defendant is a matter which is committed to the sound discretion of the trial judge." Judgment was not disturbed. *Commonwealth v. Myers,* 165 A. 2d 400 (Pa. 1960).

The Maryland court states the matter thus: "To aid the sentencing judge in exercising . . . discretion intelligently, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the kind of sentence that should be imposed. In such cases, however, any information which might influence his judgment, which has not been received from the defendant himself or has not been given in his presence, should be called to his attention, or to the attention of his counsel, without necessarily disclosing the sources of such information, so that he may be afforded an opportunity to refute or discredit it." *Driver v. State, supra.*

The Supreme Court of the United States, in a well considered opinion, *Williams v. New York,* 337 U.S. 241 (1949), delivered by *Mr. Justice Black,* has spoken clearly and with practical understanding on the subject of procedure and the exercise of discretion by trial judges in the sentencing process. The opinion states:

> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources

and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. . . .'

"In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevent — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

". . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this

information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

"The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. . . . In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice."

In our opinion rules of mathematical certainty and rigidity cannot be applied to the sentencing process. Justice may be served more by the substance than by the form of the process. We prefer to consider each case in the light of its circumstances. It is conceded that in a great many criminal cases, especially when there has been a plea of guilty, the matters of greatest concern to defendant are the nature and severity of his punishment, and he has the right to fair and just consideration, and to be given full opportunity to rebut representations in aggravation of punishment and to make representations in mitigation. Sentencing is not an exact science, but there are some well established principles which apply to sentencing procedure. The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation.

G.S. 15-198 provides: "When directed by the court the probation officer shall fully investigate and report to the court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable, the findings of a physical and mental examination of the defendant." This establishes policy that full investigation may be made before sentencing. The pre-sentence investigation may be made by

a probation officer or by the trial judge himself. The investigation may adduce information concerning defendant's criminal record, if any, his moral character, standing in the community, habits, occupation, social life, responsibilities, education, mental and physical health, the specific charge against him, and other matters pertinent to a proper judgment. The information obtained by investigation may be received and considered. It is discretionary with the judge whether or not the sources of information are divulged, else it might prove difficult to obtain information in many instances, and the time required in sentencing procedure might be unreasonably extended. Unsolicited whispered representations and rank hearsay are to be disregarded. It is better practice to *receive* all reports and representations from probation officers in open court. All information coming to the notice of the court which tends to defame and condemn the defendant and to aggravate punishment should be brought to his attention before sentencing, and he should be given full opportunity to refute or explain it.

In our opinion it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. He should not be put in a defensive position and be required to sustain and justify the sentences he imposes, and be subject to examination as to what he has heard and considered in arriving at an appropriate judgment. He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Pre-sentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

We are of the opinion that the sentences imposed in the instant case should be affirmed. The most reasonable inference to be drawn from the evidence in the record is that Judge Williams retired to chambers for the sole purpose of clerically compiling and considering the information contained in the 68 bills of indictment. Certainly the judge's chambers are better adapted to such activity than the bench in open court. He called to his aid in tabulating the information those most familiar with the indictments and their contents. It must be assumed that defendant and his counsel were thoroughly familiar also with the bills of indictment affecting him. In listing the cases and the value of goods stolen, it was logically called to the judge's attention that there had been thefts of gasoline for which no indictments had been re-

turned. All other matters mentioned in chambers had been testified to in open court in defendant's presence, and were favorable to defendant — that his record was good and he had not been in trouble previously. No recommendation was made as to punishment. Upon the judge's return to the courtroom, he called to the witness stand one of the officers who had been assisting him in chambers, and questioned him concerning the thefts for which no prosecutions had been instituted, thus disclosing the information he had received privately. Defendant was given the opportunity to cross-examine the officer. He had full opportunity to show he was not involved in these thefts, if in fact he was not.

As already indicated, defendant in his brief admits that the facts do not show that he was prejudiced by the conduct of the court. On the charges pending against defendant, the judge could have imposed sentences aggregating in the maximum fifty-four years. None of defendant's fundamental rights were violated, and he was not denied that due process of law guaranteed by Article I, section 17, of the North Carolina Constitution.

The judgments entered by Judge Williams and the ruling and order of Judge Burgwyn are

Affirmed.

STATE v. WILLIAM ANDERSON.

(Filed 15 June 1962.)

APPEAL by defendant from *Williams, J.*, and *Burgwyn, E.J.*, October 1961 Criminal Term of ALAMANCE.

Defendant is charged in bills of indictment in cases Nos. 32, 78, 80, 109, 133 and 200, variously with the criminal offenses of larceny and felonious breaking and entering. There are six counts of larceny (two of them misdemeanors) and three counts of breaking and entering. The indictments in cases 32, 133 and 200 were returned by the grand juries of Guilford, Orange and Durham Counties respectively. These cases were removed to Alamance for trial. The other three cases were instituted in Alamance County.

Defendant entered pleas of guilty in all the cases before Williams, J., who presided during the first week of the two-weeks term.

Judge Williams imposed active prison sentences as follows: Case No. 32, 5 years; No. 78, 5 years, to begin at the expiration of the

sentence in 32; in each of the cases, Nos. 80, 109, 133 and 200, not less than 3 nor more than 5 years.

Defendant moved before Burgwyn, E.J., who presided during the second week of the term, to vacate the sentences imposed by Judge Williams on the grounds that they were irregularly entered and defendant's constitutional rights were violated by the sentencing procedure. The motion was overruled.

Defendant appeals from the sentences imposed and from the ruling on the motion.

Attorney General Bruton for the State.
Dalton, Long & Latham for defendant.

PER CURIAM. This is a companion appeal with *State v. Pope, ante* 326. Pleas were entered and sentences imposed at the same time as in the *Pope* case. Defendant herein and Pope made identical motions to vacate judgments, and rely on the same facts and legal principles to support the motions. Except for the indictments, sentences and the names of the defendants, the records and briefs in the two appeals are in all material respects the same.

On the authority of the opinion in the *Pope* case, the judgments entered by Judge Williams and the ruling and order of Judge Burgwyn are

Affirmed.

IN RE DRAINAGE OF AHOSKIE CREEK AND ITS TRIBUTARIES, WHITE OAK SWAMP, KNEE BRANCH, TURKEY CREEK, FORT BRANCH, TURKEY BRANCH, MILL BRANCH, PEGGY BRANCH, OTHER TRIBUTARIES, AND LANDS ADJACENT THERETO.

(Filed 15 June 1962.)

1. Appeal and Error § 19—

In grouping his exceptions, appellant should use language indicating that the matters or things referred to in the exceptions so grouped are assigned as error.

2. Appeal and Error § 1—

Where, the trial in the lower court is predicated upon the drainage district in question being an improvement district, appellant will not be allowed on his appeal to change his position and assert error on the ground that the district was a reclamation district and not an improve-

ment district, since the appeal, *ex necessitate*, must follow the theory of trial in the lower court.

3. Drainage § 6—

Petitioners' evidence together with as much of respondents' evidence not in conflict therewith but which tends to clarify or explain petitioners' evidence, *is held* to constitute affirmative and substantial evidence that the drainage proposed by the drainage district in suit would benefit the lands of respondents, and therefore respondents' motion of nonsuit on the ground of lack of sufficient evidence on this aspect was properly denied.

4. Appeal and Error § 19—

In grouping exceptions to the charge and to the exclusion of evidence and to the submission of the issues, the purported assignments of error should definitely and clearly present the errors relied on without going beyond the assignments of error themselves, and when this is not done the Supreme Court will not embark "on a voyage of discovery" through the record to ascertain what the purported assignments involve.

5. Trial § 40—

The issues are sufficient when they present to the jury proper inquiries as to all the determinative issues of fact in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

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

APPEAL by respondents North Carolina Pulp Company and Weyerhaeuser Company from *Paul, J.*, November 1961 Term of BERTIE.

On 8 January 1960, pursuant to G.S. 156-56, a petition signed by a majority (455) of the resident landowners in a proposed drainage district and by the owners of three-fifths of all the land which will be affected or assessed for the expense of the proposed improvements was filed in the office of the clerk of the superior court of Bertie County, in which a part of the lands is located, setting forth substantially the information required by the statute. The petition, *inter alia*, alleged: That the area of land described in the petition contains about 66,000 acres. That by reason of said improper and insufficient drainage water accumulates in low places and becomes stagnant and provides places for malarial mosquitoes to breed, and said condition creates a generally unhealthy condition in the community and affects injuriously the general health of the people residing in the community, and that the public benefit in the public health, convenience, and welfare will be promoted by draining, ditching, or leveeing the same, or by changing or improving the natural water course. That the drainage of the area described will result in the improvement and proper drainage of the lands already under cultivation, and that the

benefits from drainage will largely exceed the costs thereof. That in this area by reason of insufficient drainage surface water in large quantities accumulates both in the swamps and on the high lands decreasing the productivity of the soil and causing the crops grown thereon to be of inferior quality. Pursuant to G.S. 156-57, bond was filed and summons issued. Counsel for petitioners and counsel for respondents stipulated that the petition was signed by more than a majority of the resident landowners of the proposed drainage district representing more than three-fifths of the land area adjudged to be benefited, that summonses were issued and served against other landowners not parties to the petition, particularly North Carolina Pulp Company.

Pursuant to G.S. 156-59, the clerk of the superior court of Bertie County on 11 April 1960 by order appointed a board of viewers. On 19 May 1960, pursuant to G.S. 156-62, the board of viewers filed a preliminary report with the clerk of the superior court of Bertie County. In their report they stated about 18,000 acres of land in the area set forth in the petition should be eliminated from the proposed drainage district, and about 48,000 acres of land in the area should compose the drainage district, and the map they filed with the report showed the boundaries of the about 48,000 acres. They reported to the court:

"1. That the proposed drainage is practical.

"2. That it will benefit the public health, public highways, and will be conducive to the general welfare of the community through which it passes.

"3. That the proposed drainage canal will benefit the lands sought to be benefited and the health of the people living and working thereon.

"4. As nearly as we can ascertain by preliminary examination all of the lands that will be benefited by such drainage are included within the proposed drainage district, the boundary of which is shown on the attached map.

"5. That the proper drainage district will be an improvement district under the definition given in Section 156-62 of the North Carolina Code of 1943 as amended."

Pursuant to G.S. 156-63, there was a first hearing of the preliminary report of the board of viewers by the clerk of the superior court of Bertie County on 19 May 1960. Then, pursuant to G.S. 156-64, notice was given of a further hearing, which was held on 3 June 1960. On 9 February 1961, the clerk of the superior court of Bertie County, pursuant to the jurisdiction, power, and authority vested in him by

G.S. Chapter 156, Drainage, subchapter III, Article 5, had another hearing on the preliminary report of the board of viewers, and entered an order setting forth basically the preliminary report of the board of viewers, finding that the boundaries as shown on the map filed with the preliminary report of the board of viewers include all the lands that will be benefited by the establishment of the drainage district, that a majority of the resident landowners and/or the owners of 60% of the area within the boundaries of the proposed drainage district have petitioned the court for the creation of the drainage district, and decreeing the creation and establishment of the Bertie, Hertford, Northampton Drainage District No. 1. The clerk's order referred the report back to the board of viewers to make a complete survey, plans, and specifications for the drains and other improvements, in conformity with G.S. 156-69, nature of the survey, G.S. 156-70, assessment of damages, and G.S. 156-71, classification of lands. Up to this point it seems there had been no objection by anyone to the proceeding.

On 8 May 1961, service of summons in this proceeding was had on the North Carolina Pulp Company. On 17 May 1961, North Carolina Pulp Company and Weyerhaeuser Company filed an answer alleging in substance as follows: Of the lands owned by respondents in the drainage district only 50 acres will receive any benefit from the drainage project. That all their land in the district is swamp or woodland, and that actually some of their lands sought to be drained will be in jeopardy of destruction by fire.

On 20 June 1961, the board of viewers, pursuant to G.S. 156-73, filed their final report with the clerk of the superior court of Bertie County. In this report, pursuant to G.S. 156-71, their classification of land was as follows: That receiving the highest benefit "Class A"; that receiving the next highest benefit "Class B"; next "Class C"; next "Class D"; and that receiving the least benefit "Class E." In the report all the tracts of land belonging to North Carolina Pulp Company were classified as follows:

	Tract No.	Class A	Class B	Class C	Class D	Class E	Total
(F-5)	181		30	4	228		262
(I-5)	273		52	18	411	215	696
(F-6)	545			23		58	81
(F-6)	549					67	67
(F-6)	551					53	53

The report further stated all the lands within the district will be benefited, with an exception apparently not relevant on this appeal, and that this is an improvement district as defined by G.S. 156-62.

Respondents filed exceptions to the classification of their lands in the final report of the board of viewers as follows: As to tract No. 181 they do not challenge the 30 acres classified as "B", but challenge the classification of the remaining acres of this tract. As to tracts Nos. 273 and 545 they challenge the entire classification. As to tracts Nos. 549 and 551 they do not challenge the classification.

On 31 August 1961, the clerk of the superior court of Bertie County entered a judgment finding as a fact that the board of viewers classified all the lands in the drainage district fairly and equitably, and that no evidence was offered by respondents tending to show otherwise, concluding that the board of viewers had offered substantial and competent evidence supporting their findings that the lands of respondents will be benefited by the proposed drainage improvements within the drainage district, and confirming the final report of the board of viewers. From which judgment respondents appealed to the superior court.

At the September 1961 Term of the superior court of Bertie County, Judge Paul presiding remanded the proceeding to the clerk of the superior court of Bertie County directing him to enter an order commanding the board of viewers to go upon respondents' tracts of land Nos. 181, 273, and 545, and report to him in writing their findings as to how these three tracts of land will be benefited by the completion of the drainage district, if benefited at all. The order further provided that the clerk should have a hearing upon any exceptions filed by respondents to the report. On 11 September 1961, the clerk entered an order as directed by Judge Paul.

On 30 October 1961, the board of viewers filed with the clerk of the superior court of Bertie County their report, which is set forth in more than 15 pages in the record, stating with great particularity and minuteness the benefits respondents' tracts of land Nos. 181, 273, and 545 will receive from the aforesaid drainage district. Respondents filed exceptions to this report, which cover over 12 pages in the record. Their exceptions are almost completely argumentative. On 9 November 1961, the clerk of the superior court of Bertie County entered judgment approving and confirming the report of the board of viewers. Respondents appealed to the superior court.

At the November 1961 Term the appeal came on to be heard before Judge Paul and a jury.

The jury found by its verdict to this effect: That respondents' tracts of land Nos. 181, 273, and 545 will be benefited by the drainage project of Bertie, Hertford, Northampton Drainage District No. 1.

The judge entered a judgment decreeing and adjudging that respondents' tracts of land Nos. 181, 273, and 545 will be benefited by

the drainage project of Bertie, Hertford, Northampton Drainage District No. 1, that the report of the board of viewers and the order of the clerk of the superior court of Bertie County as the same relates to and adjudges that respondents' above-described lands will be benefited is approved and confirmed, and that respondents' exceptions to said report and order of the Clerk with respect to said benefits to the above-described lands be, and hereby are, overruled.

From this judgment, respondents appeal to the Supreme Court.

Norman & Rodman and Pritchett & Cooke for respondent appellants.

Stuart A. Curtis, Frank M. Wooten, Jr., and David E. Reid, Jr., for petitioner appellees.

PARKER, J. Respondents in the record have a grouping of their exceptions at the end of the charge to the jury, and before the judgment and appeal entries, but the grouping of their exceptions contains no language that they assign the matters or things referred to in their exceptions as error.

However, we will discuss their exception to the denial by the court of their motion for judgment of involuntary nonsuit made at the close of all the evidence. G.S. 1-183.

Respondents first contend that their motion for nonsuit should have been allowed for the reason that all the evidence shows that the Bertie, Hertford, Northampton Drainage District No. 1 is an improvement district as defined by G.S. 156-62, 5, but that so far as their lands in the district are concerned it is a reclamation district. They contend second their motion should have been allowed for the reason that there is no affirmative evidence that the drainage district will benefit their lands therein.

The first contention is without merit. The preliminary report of the board of viewers states that the drainage district will be an improvement district, and the clerk's order decreeing the establishment of Bertie, Hertford, Northampton Drainage District No. 1 states it is an improvement district. The record shows that during the trial before Judge Paul and the jury petitioners and respondents entered into a stipulation "that the Drainage District contains the lands of Weyerhaeuser Company and North Carolina Pulp Co., is an improvement district as described in the statute." G.S. 156-71 authorized the engineer and board of viewers to personally examine the land in the drainage district, and classify it with reference to the benefit it will receive from the construction of the drainage district. They were authorized by the statute to classify the land benefited in five classes. The land receiv-

ing the highest benefit to be marked "Class A"; that receiving the next highest benefit "Class B"; that receiving the next highest benefit "Class C"; that receiving the next highest benefit "Class D"; and that receiving the smallest benefit "Class E." As to respondents' tract of land No. 181, 30 acres were classified as "Class B," 4 acres as "Class C," and 228 acres as "Class D," as set forth in the final report of the board of viewers filed with the clerk of the superior court of Bertie County on 20 June 1961. In respondents' exceptions filed to the classification of their lands, they did not challenge the classification of 30 acres of tract No. 181 as "Class B." In the same report respondents' tracts of land Nos. 549 and 551 were both classified as "Class E," and respondents in their exceptions to the final report did not challenge the classification of these two tracts of land.

It seems manifest that respondents elected to try their case in the lower court on the theory that Bertie, Hertford, Northampton Drainage District No. 1 was an improvement district in respect to all their lands in the district, and now they want to change their attitude with respect thereto on appeal, and contend that so far as their lands in the drainage district are concerned it is a reclamation district. Such a change of position with respect to a material point between the trial and the Supreme Court will not be permitted. The appeal, *ex necessitate*, must follow the theory of the trial in the court below. *Lyda v. Marion*, 239 N.C. 265, 79 S.E. 2d 726; *Leggett v. College*, 234 N.C. 595, 68 S.E. 2d 263; *Hargett v. Lee*, 206 N.C. 536, 174 S.E. 498.

It is expressly provided by G.S. 156-65 that if the court shall determine that there is any land included in a proposed drainage district, established thereunder, that will not be benefited by the establishment of the district, such land shall be excluded from the drainage district.

In *O'Neal v. Mann*, 193 N.C. 153, 161, 136 S.E. 379, 383, it is said: "Only lands which are benefited are subject to assessments; but all lands included in the district, which are benefited, are subject to assessments, the amount of the assessment upon the land of each owner being determined by the benefit which the said land receives."

Evidence offered by Bertie, Hertford, Northampton Drainage District No. 1 tends to show that on all of respondents' tracts of land Nos. 181, 273, and 545, there is some growing timber, and no farm crops, and that respondents are engaged in the business of growing timber. C. R. Friddle, who works for the Soil Conservation Unit Service of Hertford County, a witness for the drainage district, testified on cross-examination: "I saw Coxville soil on each tract [tracts 181, 273, and 545]. It is adapted to the growing of timber *when properly drained.*" Emphasis ours. Joe Covington, found by the court, without objection, to be an expert scientist in the classification of soils, testified

for the drainage district: "Coxville silt loam is the dominant on all three tracts of 273, 181, and 545. It is a poorly drained soil."

TRACT NO. 181

This tract of land is composed of 262 acres, is located on the road from Aulander to Rich Square, and is classified as follows: 30 acres "Class B," 4 acres "Class C," and 228 acres "Class D," by the board of viewers in their report filed 20 June 1961. Respondents do not challenge this classification of the 30 acres as "Class B." In respondents' exceptions to the classification of their lands in the final report of the board of viewers on 20 June 1961 they stated: "As to the 30 acres in Class B, this classification is not challenged." In respondents' exceptions to the report of the board of viewers filed with the clerk on 30 October 1961 it is stated: "These respondents admit that approximately 35 acres of this Tract No. 181 will receive some trace of benefit if the lateral entering the east end of said land along an old ditch is constructed." In these exceptions respondents further state in effect that the said 35 acres is not sufficiently drained. This tract is a pocosin type land. The only ditch on it of any consequence is very much clogged up. Much of the area is full of reeds. One of the proposed laterals of the drainage district will go up the ditch about 1500 feet. The natural drainage of this tract is in the direction of this proposed lateral. Water was found standing in the ditch and in ruts on the back of the tract. The few drainage outlets were clogged up, and unable to take care of drainage in a normal manner. Coxville silt loam is dominant on this tract, which is identified as poorly drained. Thomas W. Rivers, held by the court, without objection, to be an expert civil engineer specializing in drainage, testified for the drainage district: "In the vicinity of that ditch, and on either side, there is a large area that was covered with weeds, reeds, brambles; there were numerous tall dead snags where trees had died, and it was all quite flat. In that particular area there was on the back of the tract a growth of timber, of pines, quite a lot of reeds. * * * There is a cleared area that leads away from these road ditches and in which when I was there we found quite a lot of; a large accumulation of water, debris, and collection of materials that you get when water runs off of surface areas." William S. Grimes of the Hertford County Health Department testified for petitioners that when he went on Tract 181 he found mosquito larvae there.

TRACT NO. 273

This tract of land consists of 696 acres which are classified as follows: 52 acres "Class B," 18 acres "Class C," 411 acres "Class D," and 215 acres "Class E," by the board of viewers in their report filed

20 June 1961. On this area was a mill pond consisting of 20 or 30 acres. It has two natural drainage ditches, both of which were badly clogged with logs, debris, and brush of all types. There were water marks on the trees 16 to 18 inches high from the ground for a considerable distance on both sides of the proposed lateral that will come to the ditch. On both sides of the proposed lateral water has washed across the road. Water drains from this in the direction of the proposed lateral. When it had not rained in the general area for three or four weeks water was seen standing in spots, and the land around the ditches that led to the old mill pond was generally wet. This tract is of a rolling type with its outer edges at a higher level than the old mill pond section. It borders a paved highway between Aulander and Ahoskie. This tract is covered pretty thoroughly with growing timber. The soil appears to be quite thick, plastic, and generally impermeable to water.

TRACT NO. 545

This tract consists of 81 acres, and is classified by the board of viewers in their report filed 20 June 1961 as follows: 23 acres "Class C," and 58 acres "Class E." This tract of land is of a pocosin type, is flat, and has no drainage whatever. It had been burned over. Some type of equipment had been used to break up the land. There is an old ditch on the back side pretty well clogged up. Herbert Jenkins, Jr., testified for the drainage district:

> "I know that some of Tract 545 has been used for row crop cultivation. How often and how long duration these periods the water will stand on 545 would depend on what kind of year we have. With a fall like the one we have just had, you could not find water standing there except in the ruts on Tract 545 but in a normal year there were a very few times you could go on this tract without finding some water standing. * * *
>
> "* * * All of the water on tract 545 goes into this ditch, the proposed lateral."

Thomas W. Rivers, whose qualification as an expert witness is set forth above, testified for the drainage district as to tract No. 545 on direct examination:

> "The terrain of that tract is quite flat, it is a pocosin. There is no assured surplus drainage outlet. That is the course the water will follow. The land is so flat it has to follow anything it can get into. The lateral ditch along the roadway is the nearest thing to a drainage outlet."

J. V. Hofman, admitted by the parties to be an expert in forestry, testified for the respondents on cross-examination:

"* * * Trees must have air for growth, and in order to get air the water cannot stand stagnant on the ground. It must be moved off. It is very dangerous for water to stand for more than two to three weeks at a time without being drained off. It keeps the air from getting to the trees. The sub-surface water should not be affected by the drainage. The important thing is getting the water off the top of the land so that the trees can get the air they need to grow."

Respondents offered evidence tending to show that these three tracts of land have sufficient natural drainage for the growth of timber thereon, and that the drainage of these tracts of land, if included in the drainage district, may be a detriment to the growing of timber on certain parts of these tracts.

It is our opinion, and we so hold, that considering the evidence offered by the drainage district in the light most favorable to it, and considering so much of respondents' evidence as is favorable to the drainage district, or tends to clarify or explain evidence offered by the drainage district not inconsistent therewith, as we must do in passing on a motion for judgment of involuntary nonsuit, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1, it permits a finding by a jury of the following facts and legitimate inferences: That all three tracts of land, or most of all these three tracts, do not have sufficient natural drainage, or any other drainage, to prevent surface water from standing on the ground, that Coxville silt loam is the dominant on all three tracts, that each tract has Coxville soil, and that such soil is adapted to the growing of timber, *when properly drained,* that trees must have air for growth, and in order to get air the water cannot stand stagnant on the ground, it must be moved off, that it is very dangerous for water to stand for more than two to three weeks at a time without being drained off, because it keeps the air that trees need to grow from getting to the trees, that the sub-surface water on these tracts should not be affected by the drainage district, and that all three tracts of land, Nos. 181, 273, and 545, will be benefited for the growing of trees by being included in and receiving the benefits of the drainage district, in that the surface water will be drained off so that the trees will have air for growth. The conflicting evidence of the parties presented a case for the jury, and the court properly denied respondents' motion for judgment of compulsory nonsuit made at the close of all the evidence.

Respondents' grouping of exceptions to the charge—there are no assignments of error—is: "GROUP 'F'. Exception No. 11 (R p 174), Exception No. 12 (R p 175) are to the charge of the court. Exception

No. 13 (R p 178), Exception No. 14 (R p 179), Exception No. 15 (R p 180), are to the charge of the court." These exceptions to the charge are overruled. This Court speaking by *Higgins, J.* said in *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294:

> "Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554, 555, as interpreted in the decisions of this Court, require: 'Always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is.' *State v. Mills,* 244 N.C. 487, 94 S.E. 2d 324; *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Porter v. Lumber Co.,* 164 N.C. 396, 80 S.E. 443; *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286. The objectionable assignments in their present form would require the Court to undertake a voyage of discovery through the record to ascertain what the assignments involve. This the Court will not do. *Cecil v. Lumber Co.,* 197 N.C. 81, 147 S.E. 735."

Respondents' grouping of exceptions to the exclusion of evidence is: "GROUP 'B'. Exception No. 2 (R p 132); Exception No. 3 (R p 132); Exception No. 4 (R p 133); Exception No. 5 (R p 134) are to the ruling of the court excluding evidence of respondents." These exceptions are overruled for the Court will not embark "on a voyage of discovery."

Respondents' grouping of exceptions Group "D" is: "Exception No. 8 (R p 149); Exception No. 9 (R p 149), are to the refusal of the court to charge the jury according to the prayers tendered by the respondents." These exceptions are overruled, for the reason above stated.

Respondents group exceptions to the submission of the issues to the jury, and to the recital of the issues to the jury in its charge. These exceptions are overruled. Respondents tendered no issues. To find the issues and the recital of the issues in the charge we must go "on a voyage of discovery" beyond the grouping of exceptions. However, the issues submitted by the court were sufficient, because they presented to the jury proper inquiries as to all the determinative issues of fact in dispute, and afforded the parties opportunity to introduce all pertinent evidence and to apply it fairly. G.S. 156-66; G.S. 156-75; *Shelton v. White,* 163 N.C. 90, 79 S.E. 427; *Cherry v. Andrews,* 231 N.C. 261, 56 S.E. 2d 703; Strong's N. C. Index, Vol. 4, Trial, sec. 40. In respondents' brief their only statement to the submission of the issues is "on the same grounds that support our contentions for judgment as of nonsuit."

The other grouping of exceptions by respondent is to the refusal of the court to set the verdict aside, and to the signing and entry of the judgment. These exceptions are overruled.

In the trial below we find

No error.

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

STATE OF NORTH CAROLINA v. FRANK JACKSON GOUGH.

(Filed 15 June 1962.)

1. Kidnapping § 1—

The word "kidnap" as used in G.S. 14-39 means the unlawful taking and carrying away of a person by force or fraud and against his will, or the unlawful seizure and detention of a person by force or fraud and against his will, and therefore the contention that the statute, since it repeals C.S. 4221, and omits the word "fraud" or "fraudulently," or words of similar import, does not embrace an unlawful detention or carrying away of a person against his will by fraud, is untenable.

2. Same—

Evidence that defendant induced a young girl to go with him in his car by means of false representations that he wished her to baby-sit with his two children, and that such representations were made by defendant falsely, knowingly, and with intent to deceive the young girl so he could carry her off in his automobile for some immoral purpose, *is held* sufficient to be submitted to the jury in this prosecution for violation of G.S. 14-39, since her consent, having been obtained by false representations and fraud, was no consent in law, so that the asportation was in fact against her will.

3. Same—

Where, in a prosecution under G.S. 14-39, the evidence tends to show that defendant kidnapped prosecutrix by fraud, but there is no evidence that he used threatening words or violence or any overt act or an attempt, with force and violence, to do injury to prosecutrix, there is no evidence of assault upon a female, and therefore the court correctly refrains from submitting the question of defendant's guilt of assault upon a female, and correctly confines the jury to a verdict of guilty or not guilty of the offense charged.

BOBBITT, J., concurs in result.

HIGGINS, and RODMAN, JJ., dissent.

STATE v. GOUGH.

APPEAL by defendant from *Armstrong, J.*, 9 October 1961 Term of FORSYTH.

Prosecution for kidnapping.

The indictment charges that the defendant on 22 July 1961 "unlawfully, willfully, feloniously and fraudulently did kidnap Elaine Saunders, a human being."

Plea: Not Guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Ralph Moody for the State.

Robert M. Bryant and Deal, Hutchins & Minor by Roy L. Deal for defendant appellant.

PARKER, J. The State's evidence shows these facts:

In the spring of 1961 Elaine Saunders, a fifteen-year-old high school student, was living with her parents in Winston-Salem. When her school was ending, in an endeavor to obtain employment during the summer, she put an advertisement in the student ad page of the morning and afternoon papers for a baby-sitting job. It ran two or three weeks.

About 7:30 p. m. o'clock on 22 July 1961, Saturday, defendant called Elaine Saunders by telephone. He told her he had seen her advertisement in the paper, and wanted her to baby-sit with his two children, because his mother had a sprained ankle and couldn't get around. He said he was some kind of doctor, and wanted her to get a cab and come to the Professional Building where he was. She replied he would have to talk to her mother. He said he would call back in five or ten minutes. In a short time he telephoned again, and told Margaret Saunders, Elaine's mother, he was Dr. Watson, and wanted Elaine to baby-sit with his two girls, his mother had a sprained ankle, and he and his wife were going out. He further said he had some work to do at the office, and it would save time if Elaine came in a taxi to the Professional Building. She replied she would have to see him before she permitted her daughter to go out. He replied he would come to the home, and asked directions to get there.

About 9:00 p. m. o'clock on the same night he came to Elaine's home driving a 1960 beige colored Dodge. Elaine, her parents, her younger sister, and her uncle and aunt were there. He said he was going somewhere about Ardmore, he had wanted Elaine to stay until eleven o'clock at night, but since it was so late he wanted her to stay until midnight, and he asked her mother if it was all right. The mother

replied, Yes, and asked him would it be all right for Elaine's younger sister to go along. He answered, Yes.

Elaine and her sister got in the automobile with defendant. He drove to a drug store, went in, and came back with a package. He then drove to 2015 Elizabeth Avenue in Winston-Salem where he said he lived. He said he was tired of wearing a white shirt and tie, which doctors had to wear, and wanted to put on a red shirt. He left Elaine and her sister in his automobile, went into the house, and a few minutes later came out wearing a red shirt. When he drove off, he said he was going to Clemmons, North Carolina, where his mother and children were. He drove out on the East-West Expressway a considerable distance and turned off on a dirt road. He passed several houses on the dirt road, slowed his automobile down, and said to Elaine and her sister "if we would be nice to him and co-operate with him we wouldn't get hurt, and he would pay us nice." Whereupon, Elaine and her sister jumped out of his automobile, and ran back up this dirt road about a mile to a house occupied by Mr. and Mrs. John Sparks in Davie County near Farmington. Sparks and his wife were asleep, and were awakened by these two girls knocking and saying, "Please help us." Sparks and his wife turned on the porch light and went out. The girls were hysterical—just scared to death; their legs were fairly muddy up to the knees. They told Mr. and Mrs. Sparks what had happened, and said, "Please take us to where mama is." While they were on the porch an automobile passed several times, and the girls yelled, "That is him," and looked like they wanted to run over Sparks and his wife to get in the house. Officers of Davie County brought the girls to Forsyth County. The Sparkses' home is about ten miles from Clemmons, North Carolina, and about eight miles from Elaine Saunders' home in Forsyth County.

Later that night defendant was arrested in an apartment at 2015 Elizabeth Avenue in Winston-Salem, which had on the door the name Frank Gough, and placed in the Forsyth County Jail, where he was identified by Elaine Saunders, her sister, and her mother. Defendant told the arresting officer he knew nothing about these two girls, saying, "I have been home all afternoon and all evening." In front of the apartment, when defendant was arrested, was a beige colored 1960 Dodge automobile registered in the name of Frank and Carol Gough.

Defendant's evidence shows: He works at Western Electric, where he is classified as a gyro-technician. On 22 July 1961 his wife was away from home. He was taking Elaine Saunders and her sister to his mother's house in Davie County. On the way he planned to go by his sister's house, and got on the wrong road. He slowed his automobile down, and was turning around, saying, "I am on the wrong road," when

all of a sudden the two girls jumped out and ran. He could tell they were frightened. He testified: "I couldn't figure out why they were frightened."

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. G.S. 15-173.

Our present kidnapping statute, G.S. 14-39, which was enacted by the General Assembly at its 1933 Session as a result of the Lindbergh tragedy, reads in pertinent part:

> "It shall be unlawful for any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom: Provided, however, that this section shall not apply to a father or mother for taking into their custody their own child."

This statute repeals C.S. 4221, *S. v. Kelly,* 206 N.C. 660, 175 S.E. 294, which was enacted by the General Assembly at its 1901 Session, and reads as follows:

> "If any person shall forcibly or fraudulently kidnap any person, he shall be guilty of a felony * * *."

Defendant's counsel contend our 1933 Act, different from our 1901 Act, applies only to a forcible taking, because the word fraud, or fraudulently, or words of like import, were omitted from the 1933 Act, and that he cannot be guilty under our present Act of kidnapping, because the evidence fails to show that any force was used by defendant in taking Elaine Saunders away with him.

In *S. v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497, the Court said in reference to G.S. 14-39:

> "The word 'kidnap,' as defined by Webster, means: 'To carry (anyone) away by unlawful force or by fraud, and against his will, or to seize and detain him for the purpose of so carrying him away.' Moreover, in American Jurisprudence, the author, in treating of the subject, states that 'the generally accepted basic element of the crime of kidnapping is the taking or detaining of a person against his will and without any lawful authority.' 31 Amer. Jur., 815. And in the *S. v. Harrison* case, *supra,* the court instructed the jury that 'by kidnapping is meant the taking and carrying away of a person forcibly or fraudulently.' However, reference to the record on appeal in that case discloses that the

instruction as given was not the subject of an exception.

"In the light of these definitions, we are of opinion that a finding that defendant 'did forcibly take and carry away' the person of Mary Simmons, without more, is insufficient to constitute the crime of kidnapping with which he is charged. The word 'forcibly' as so used means 'effected by force used against opposition or resistance,' or 'obtained by compulsion or violence,' that is, physical force. However, 'a taking and carrying away' effected or obtained by fraud would constitute an element of the offense as completely as if effected or obtained by force. But regardless of the means used, by which the taking and carrying away is effected, there must be further finding that the taking and carrying away was unlawful or done without lawful authority, or effected by fraud."

In *S. v. Dorsett,* 245 N.C. 47, 95 S.E. 2d 90, the Court repeated Webster's definition of kidnapping, and referred to the *Witherington* case.

Defendant contends that the statement in the *Witherington* case in respect to our present kidnapping statute: "However, 'a taking and carrying away' effected or obtained by fraud would constitute an element of the offense as completely as if effected or obtained by force" is merely an *obiter dictum,* and what is more an erroneous *obiter dictum.* Defendant further contends that the Court's use of Webster's definition of kidnapping in the *Witherington* and *Dorsett* cases is not sound, because the statutes of different states vary, and some do include a fraudulent kidnapping and some not.

The common law definition of kidnapping has been somewhat differently stated by the early legal writers. Blackstone, Commentaries, Book 4, p. 219, defines kidnapping: "Being the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another." 1 East, Pleas of the Crown, 429, 430, says: "The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offense at common law, punishable by fine, imprisonment and pillory." Hawkin's Pleas of the Crown, John Curwood, 8th Ed., Vol. I, p. 119, states: "But an aggravated species of false imprisonment is the privately carrying off any person, and keeping them secretly confined, which is generally understood by the term *kidnapping.*" Bishop, Criminal Law, 9th Ed., Vol. 2, sec. 750, 2, page 573, states the better view as to the definition of kidnapping is that "kidnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place." Bishop, *ibid,* sec. 751, page 575, states: "The

consent of a person of mature years and sane mind, on whom no fraud was practiced, would, of course, prevent an act otherwise wrongful from being kidnapping, but not so a young child."

It would seem that the better view as to the common law definition of kidnapping is that the use of physical force or violence is not always necessary to the commission of kidnapping, or certainly of child stealing, but that fraud may likewise be sufficient. *S. v. Marks,* 178 N.C. 730, 101 S.E. 24; *Gooch v. U. S.,* 82 F. 2d 534; *S. v. Brown,* 181 Kan. 375, 312 P. 2d 832; *Moody v. People,* 20 Ill. 315; *S. v. Rollins,* 8 N.H. 550; *People v. DeLeon,* 109 N.Y. 226, 16 N.E. 46, 4 Am. St. Rep. 444; 1 Am. Jur. 2d, Abduction and Kidnapping, secs. 13 and 15; 51 C.J.S., Kidnapping, sec. 1 (4) and (5). See also *S. v. Harrison,* 145 N.C. 408, 59 S.E. 867.

In the *Marks* case, this Court quoted from 24 Cyc., 798, 799, as follows:

> " 'To constitute the offense of kidnapping, it is not necessary that actual physical force should have been employed. It is essential only that the taking or detention should be against the will of the persons kidnapped. . . . In determining whether the person was coerced by fraud and inveiglement, the nature of the artifice employed and the age and education and *condition of mind* must be taken into consideration. The offense is not committed if the person taken away or detained, being capable in law of consenting, goes voluntarily without objection in the absence of fraud and deception, but a child of tender years is regarded as incapable of consenting.' 24 Cyc., 798, 799."

This quotation from Cyc. is not entirely verbatim, and omits a few words. The exact language used by Cyc. is:

> "To constitute the offense of kidnapping it is not necessary that actual physical force or violence should have been employed, and this was true even at common law. It is essential only that the taking or detention should be against the will of the person kidnapped. Falsely exciting the fears of the person who is the subject of the offense by threats, or enticement or inveiglement by false and fraudulent representations amounting substantially to a coercion of the will is sufficient. In determining whether the person was coerced by fraud and inveiglement, the nature of the artifice employed and the age, education, and condition of mind must be taken into consideration. The offense is not committed if the person taken away or detained, being capable in law of consenting, goes voluntarily without objection in the absence of fraud

and deception. But a child of tender years is regarded as incapable of consenting."

In the *Gooch* case the Court said:

"While kidnapping at common law means to forcibly abduct a person and to carry him from one state into another state, it involves the element of seizing the victim by force or fraud and against his will."

In the *Brown* case the Court stated:

"The word 'kidnap' has a technical meaning. It is derived from the common law, and must be interpreted in the light of its technical meaning in common law. Both under the common law and under a statute, unless clearly modified, it means to take and carry away any person by unlawful force or by fraud, and against his will."

In the *Moody* case the Court said:

"The statute defines kidnapping to be the forcible abduction or stealing away of a man, woman or child from his or her own country, and sending or taking him or her into another. While the letter of the statute requires the employment of force to complete this crime, it will undoubtedly be admitted by all that physical force and violence is not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence. If the crime may be committed without actual violence, by menaces, it would seem that any threats, fraud, or appeal to the fears of the individual, which subjects the will of the person abducted, and places such person as fully under the control of the other, as if actual force were employed, would make the offense as complete as by the use of force and violence."

In *Kent v. Commonwealth,* 165 Va. 840, 183 S.E. 177, 1936, the defendant was indicted, tried and convicted under section 4407 of the Code of Virginia, as amended by Acts 1934, Ch. 338, for the kidnapping of one Mary J. Hastings, and sentenced to imprisonment for thirteen years.

Section 4407, as amended, of the Code of Virginia, which appears in the same words in Code of Virginia, 1950, Vol. 4, Title 18, Article 3, sec. 43, p. 140, reads as follows:

> "Kidnapping, or threatening or attempting to kidnap, with intent to extort money; how punished.—If any person seize, take or secrete any other person with intent to extort money, or pecuniary benefit, he shall be punished with death, or within the discretion of the jury be confined in the penitentiary not less than eight nor more than twenty years. If any person threaten, or attempt, to seize, take or secrete any other person with intent to extort money, or pecuniary benefit, he shall be punished by * * * ."

According to the opinion the evidence shows: Mrs. Hastings was pressing the defendant for the payment of money he owed her, and she was induced to accompany him to Washington on the occasion referred to upon the assurance that if she would do so he would obtain the money from a relative living there and pay her. Defendant expected to obtain the possession of Blue Ridge Springs and otherwise benefit financially if he could get Mrs. Hastings out of the way. On the night of Sunday, 24 August 1934, defendant left Blue Ridge Springs, Va., in his automobile, for Washington, D. C., taking Mrs. Hastings with him. On the morning of Wednesday, 27 August 1934, the body of Mrs. Hastings was found lying on the side of the highway near Stroudsburg, Penn. She had been shot through the head with a pistol, and had been dead several days.

Defendant's counsel contended, as here, that he cannot be convicted under the statute because the evidence fails to show that any force or restraint was used by defendant in taking Mrs. Hastings with him. Defendant's counsel further contended the evidence fails to show there was any intent on defendant's part to extort money or pecuniary benefit.

The Court in a *per curiam* opinion in affirming the judgment below said:

> "After careful consideration of the record, we think the evidence shows that the accused took Mrs. Hastings with him under such circumstances as amount to fraud and coercion on his part, and for the purpose of pecuniary benefit, and the same is therefore sufficient to sustain a conviction under the statute."

It would seem from the evidence stated in the opinion, and from the contention of defendant's counsel, that there was no forcible taking, although the opinion states that: "We think the evidence shows that the accused took Mrs. Hastings with him under such circumstances as amount to fraud and coercion on his part." However that may be, it would appear that the Virginia Court considered that the false and fraudulent representations of defendant amounted sub-

stantially to a coercion of the will of Mrs. Hastings, and that the consent of Mrs. Hastings having been obtained by the fraud of defendant is, in truth, no consent at all.

From our investigation it appears that all of our states have enacted statutes in respect to the offense of kidnapping. There is such a variance in the language of these statutes, enlarging the common law concept of the crime, and especially in not making its existence dependent on any interstate, or taking out of the country, element, that it seems impossible to give a generally valid definition of kidnapping which would apply to all the states. "However, it may be said as a general proposition that * * * the gravamen of kidnapping is the taking or detention of a person against his will and without lawful authority. In other words, it is an unlawful interference with the freedom of the person kidnapped." 1 Am. Jur. 2d, Abduction and Kidnapping, sec. 2. See also *ibid,* sec. 11.

The elements of the crime of kidnapping are necessarily dependent on the wording of the statute in the particular state, and authority cited from the states must be read in connection with the statute of the particular state. *S. v. Croatt,* 227 Minn. 185, 34 N.W. 2d 716.

Under our present kidnapping statute, G.S. 14-39, a person is guilty of kidnapping (1) if he kidnaps or causes to be kidnapped any human being, or (2) if he demands a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or (3) if he holds any human being for ransom. There is a proviso in the statute not applicable here.

According to the authorities we have cited, the crime of kidnapping by its very nature cannot ordinarily be committed by an act to which a person, being capable in law of consenting, consents in a legally valid manner. But where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim. In brief, under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person.

Considering the commonly accepted meaning of the word "kidnap," and its special legal meaning, and considering the object of our statute, and the manifest meaning of the law-making body to secure the personal liberty of the citizen, and the language used in our cases above quoted, it is our opinion, and we so hold, that the word "kidnap" as used in G.S. 14-39 means the unlawful taking and carrying away of a person by force or fraud and against his will, or the unlawful seizure and detention of a person by force or fraud and against his will. The expression used in *S. v. Witherington, supra,* quoted above, may be an

obiter dictum as contended by defendant, but it is a correct statement of law in this jurisdiction in respect to the meaning of the word "kidnap" as used in G.S. 14-39, and this is true even though G.S. 14-39 omits the words "forcibly or fraudulently" used in C.S. 4221. To construe the word "kidnap" as used in G.S. 14-39 as applying only to a forcible taking, as contended by defendant, is too narrow a construction, and in many instances would make G.S. 14-39 practically useless.

In the present case there was no actual confinement or detention of Elaine Saunders, nor any actual force used by defendant. She consented to go with defendant in his automobile, and baby-sit, as defendant said, with his two girls because his mother had a sprained ankle and couldn't get around, and voluntarily left her home with him in his automobile for that lawful and innocent purpose. But the evidence for the State permits the legitimate inference that she did not consent to go with him in his automobile out on a dirt road in another county for some other purpose, and that she would not have gone with him at all, except for his false representations and fraud in saying that he wanted her to go and baby-sit for his two girls, which representations were untrue in fact, and defendant knew them to be untrue when he made them, that such representations were reasonably calculated to deceive Elaine Saunders taking into consideration the nature of the representations, and her age and education, that such representations were made by defendant with intent to deceive her so that he could carry her off in his automobile for some indecent or immoral purpose, and did in fact deceive her and cause her to leave with him. And further, the evidence for the State permits the reasonable inference that the false representations and fraud of defendant amounted substantially to a coercion of the will of Elaine Saunders, and that the consent of Elaine Saunders to leave her home in defendant's automobile having been obtained by the false representations and fraud of defendant was, in truth, no consent at all, and that her leaving her home with defendant was in fact against her will. The evidence for the State, considered in the light most favorable to it, *S. v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241, is sufficient to carry the case to the jury on the charge in the indictment, and the trial judge was correct in denying defendant's motion for judgment of nonsuit made at the close of all the evidence.

Defendant assigns as error parts of the charge on the ground that the trial court instructed the jury that the "taking and carrying away a human being by fraud constitutes the offense of kidnapping." His argument in his brief on these assignments of error is incorporated in, and is the same as, his argument in his brief that the court erred in denying his motion for judgment of nonsuit. The parts of the charge

assailed by these assignments of error are in substantial, if not in exact, compliance with the law in respect to kidnapping effected by fraud, as we have stated it above, and are overruled.

Defendant also assigns as error that the court in its charge limited the jury to returning one of two verdicts: Guilty as charged in the indictment, or Not Guilty. Defendant contends that the court should have instructed the jury that they could return one of three verdicts: Guilty as charged in the indictment, or Guilty of an assault on a female, or Not Guilty.

There is no evidence here of threatening words or violence menaced, nor is there any overt act or an attempt, with force and violence, to do physical injury to Elaine Saunders. This Court said in *S. v. Ingram,* 237 N.C. 197, 74 S.E. 2d 532:

> "So that it seems well settled that in order to constitute the criminal offense of assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another."

There is no evidence in the case tending to show that defendant committed an assault on Elaine Saunders, and, therefore, the court properly did not instruct the jury that they could return a verdict of Guilty of an assault on a female, but correctly instructed them that they could return one of two verdicts, as set forth above. *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *S. v. Brown,* 227 N.C. 383, 42 S.E. 2d 402.

The only other assignment of error is to the judgment, which is overruled.

In the trial below we find

No error.

BOBBITT, J., concurs in result.

HIGGINS, and RODMAN, JJ., dissent.

HOUSING AUTHORITY OF THE CITY OF WILSON v. W. L. WOOTEN AND WIFE, MAUDE H. WOOTEN; O. WAYNE YELVERTON AND WIFE, VIVIAN S. YELVERTON; CITY OF WILSON; WILSON COUNTY.

(Filed 15 June 1962.)

1. Municipal Corporations § 4; Eminent Domain § 7c—

Allegations of facts upon which respondents assert the legal conclusions

that petitioner housing authority's act in selecting respondents' land for a low-rent housing project was arbitrary and capricious, amounting to a manifest abuse of discretion, *is held* to constitute a plea in bar to petitioner's right to condemn respondents' land.

2. Same; Appeal and Error § 3—

In a proceeding by a housing authority to condemn respondents' land, motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously or arbitrarily in selecting respondents' land for the site of the housing project, is in effect a demurrer to the plea in bar, and order allowing the motion is appealable, Rule of Practice in the Supreme Court No. 4(a) not being applicable.

3. Municipal Corporations § 4; Eminent Domain § 7c—

A housing authority is given wide discretionary power in the selection of a site for a low-rent housing project and is not required to select as a site a slum area.

4. Same— Allegations held insufficient predicate for conclusion that housing authority acted arbitrarily in selecting site for project.

In an action to condemn land for a low-rent housing project, respondents' allegations to the effect that 90 per cent of the property within the area selected for the site consists of cleared land, that the few houses therein are not slum houses, that the boundaries of the project were drawn adjacent to, but excluded areas that are congested slum areas, that suitable sites existed in the city for such housing project, and that other sites within the city which had been selected by the housing authority for other projects were subject to like objections, *held* not to support respondents' inferences and conclusions of law that the selection of respondents' land for the site was arbitrary or capricious, amounting to abuse of discretion, and therefore petitioner's motion to strike such allegations was properly allowed.

5. Public Officers § 8—

There is a presumption that public officials have discharged their duties in good faith consonant with the spirit and purpose of the law.

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

APPEAL by respondents W. L. Wooten and wife, Maude H. Wooten, O. Wayne Yelverton and wife, Vivian S. Yelverton, from *Copeland, S.J.*, September 1961 Civil Term of WILSON.

Special proceeding by Housing Authority of the City of Wilson, pursuant to the provisions of G.S., Chapter 157, Article 1 (Housing Authorities Law), and of G.S., Chapter 40, Article 2 (Condemnation Proceedings), to condemn a tract of land in the city of Wilson owned by W. L. Wooten and O. Wayne Yelverton for the erection of a low-rent housing project for persons of small incomes, heard below on an appeal from an order of the clerk of the superior court of Wilson

County striking in their entirety Sections 1, 3, 6, 7, 8, 9, and 10 from the further answer and defense of respondents contained in their amended answer to the petition.

The petition alleges in substance:

Four hundred safe, sanitary dwelling units are needed in the city of Wilson for rental to persons of low incomes. Petitioner, acting in good faith, is engaged in the development of Housing Projects Nos. N. C. 20-1 and N. C. 20-2 in the city of Wilson in order to erect the needed dwelling units. A tract of land in the city of Wilson owned by respondents is located within the area of its Housing Project No. N. C. 20-2, and this tract of land, with other adjacent, adjoining, and nearby land, is required and is necessary for the development of its Project No. N. C. 20-2, which is in the public interest. A description of respondents' tract of land by metes and bounds is attached to the petition, and made a part thereof. The locations of land selected by petitioner for the above projects have been approved by the city of Wilson and by the Utilities Commission of the State. The Utilities Commission, after a public hearing, has issued its Certificate of Public Convenience and Necessity for its projects, a copy of which is attached to the petition, and made a part thereof. Petitioner has attempted to acquire title to respondents' tract of land necessary for the development of its Project No. N. C. 20-2 by negotiations in good faith, but has been unable to do so, because it and respondents have been unable to agree as to the value of respondents' tract of land. Wherefore, petitioner prays that the court appoint three freeholders to appraise the value of respondents' tract of land, and render judgment that a fee simple title to the land be vested in it.

Respondents filed an answer, which contains a further answer and defense, and a cross-action and counterclaim. Upon motion of petitioner, the clerk of the superior court of Wilson County struck out a large part of respondents' further answer and defense and of their cross-action and counterclaim, and allowed them ten days to file an amendment to their answer.

Respondents filed an amended answer. In their answer they admit petitioner is a municipal corporation organized and existing under the Housing Authorities Law of the State, and that it has selected certain sites in the city of Wilson for its projects. They further admit that this proceeding is prosecuted under the appropriate State statutes, but they deny that the proceeding is prosecuted in good faith, for the action of petitioner in seeking to condemn their land is arbitrary, capricious and unreasonable.

And for a further answer and defense, they allege in substance:

1. The property of respondents, and in fact more than 90% of the property within the area selected for this housing project site, consist of cleared land, and the few houses within the area are not slum houses. The boundary lines of this project were drawn adjacent to, but excluding areas that are the most congested slum areas in the city of Wilson. The action of the Housing Authority in selecting their land for condemnation is arbitrary, capricious, and unreasonable, in that their land is not a slum area in the city of Wilson.

2. To secure a Certificate of Public Convenience and Necessity the Housing Authority was required to show the existence of insanitary dwellings in the city of Wilson. A survey in certain portions of the city disclosed more than 1200 unsafe dwellings.

3. The survey did not include their land, which does not have on it any unsafe dwelling.

4. In the hearing before the Utilities Commission the Housing Authority showed exhibits of the slum areas in the city, and produced evidence of the existence of unsafe dwellings in the city.

5. As a result of the hearing the Utilities Commission issued its Certificate of Public Convenience and Necessity for removing these blighted areas from the city, and for providing safe and sanitary dwellings for the occupants of the dilapidated houses in the city.

6. The refusal of the Housing Authority to remove these slum areas is unreasonable, arbitrary, and capricious, in that their property selected for condemnation has no dilapidated buildings on it, and is cleared land.

7. The action of the Housing Authority in seeking to condemn their land and other land in this project is not for a public purpose, in that it intends to construct private dwelling units for private individuals, and to locate the same immediately adjacent to slum areas. The public will not benefit from the construction of dwelling units on cleared land, because of the existence of over 1200 dilapidated dwellings within this project area and other areas of the city.

8. The Housing Authority has other suitable sites in the city where it can construct dwelling units, for instance, where the survey disclosed over 1200 dilapidated dwellings, which are adjacent to and on all sides of it projects. A selection of such sites would benefit the residents of the city and fulfill the purpose of the Housing Authorities Act.

9. The action of the Housing Authority in selecting and seeking to condemn their property is arbitrary, capricious, fraudulent, and unreasonable in that:

a. More than 90% of the area selected for the project site is cleared land, and the few houses in it are not slum houses.

b. The first housing project selected and purchased by petitioner, and on which the erection of rental units has commenced, consists entirely of about 25 acres of cleared land on which there was no building. This first project is surrounded on at least two sides by modern middle-class subdivision developments, which in a short time would have become a subdivision for privately-owned new homes by white persons of low and middle-class incomes. On one side of this first project area is one of the worst slum areas in the city.

c. The Housing Authority has selected a third site, and has requested the city planning board to approve it as a site for a third project, which site is a cleared field outside of the city limits and adjacent to a slum area.

d. The entire plan and scheme of the Housing Authority is not of eliminating slum dwellings in the city, but of engaging in the private enterprise of rental units.

10. The action of the Housing Authority is arbitrary and capricious, and seeks to perpetrate a fraud upon the residents of the city because the public was led to believe a public housing development would rid the city of its dilapidated buildings. But the Housing Authority in seeking their land does not contemplate the removal of any of these dilapidated buildings, in that it is seeking to obtain cleared land to save the expense of removing these dilapidated buildings. That such conduct is not in the public interest, and is arbitrary and capricious.

11. Respondents demand a jury trial upon all issues of facts raised by the pleadings.

On 5 December 1960 petitioner made a motion before the clerk of the superior court to strike from the further answer and defense of the amended answer, Sections 1, 3, 6, 7, 8, 9, and 10.

On 4 January 1961 the clerk of the superior court appointed three freeholders to appraise the value of respondents' land which petitioner seeks to condemn in this proceeding. The three freeholders filed their report with the clerk on 26 January 1961 finding the fair market value of the land was $2,100.00. Within apt time respondents filed exceptions to their report. On 17 August 1961 the clerk entered an order overruling respondents' exceptions to the report, and confirming it. On the same day respondents appealed from the clerk's order to the superior court, and demanded a jury trial.

On 23 August 1961 the clerk entered an order allowing in its entirety petitioner's motion to strike above set forth. On the same day respondents excepted, and appealed to the superior court.

On 27 August 1961 Judge Copeland entered an order affirming the clerk's order allowing petitioner's motion to strike.

From Judge Copeland's order, respondents appeal to the Supreme Court.

Finch, Narron, Holdford & Holdford by Roy R. Holdford, Jr., for respondent appellants.

Lucas, Rand & Rose by Naomi E. Morris for petitioner appellee.

PARKER, J. The basis of the Housing Authority's motion to strike Sections 1, 3, 6, 7, 8, 9, and 10 from respondents' further answer and defense contained in their amended answer is that the facts therein alleged constitute no legal defense to its special proceeding to condemn respondents' land. The stricken allegations are in substance a plea in bar that denies the Housing Authority's right to condemn their land, and which, if established, will destroy its right. *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554; *In re Housing Authority of the City of Salisbury,* 235 N.C. 463, 70 S.E. 2d 500. In substance and in effect, but not in form, the Housing Authority's motion to strike is a demurrer to what is in substance a plea in bar. Such being the case, Judge Copeland's order affirming the clerk's order allowing the Housing Authority's motion to strike in its entirety affects a substantial right of respondents, and they may appeal therefrom, and Rule 4(a), Rules of Practice in the Supreme Court, 254 N.C. 783, 785, is not applicable. G.S. 1-277; *Mercer v. Hilliard, supra.*

Respondents state in their brief: "Respondents contend that by their further answer and defense they have alleged facts which show the Housing Authority of the City of Wilson has acted in bad faith in the selection of a site or sites for its housing projects."

This Court said in *In re Housing Authority of the City of Charlotte,* 233 N.C. 649, 660, 65 S.E. 2d 761, 769:

> "In the selection of a location for a housing project as authorized under the Housing Authorities Law, the project may be built either in a slum area which has been cleared, or upon other suitable site. The housing authority is given wide discretion in the selection and location of a site for such project. *Housing Authority v. Higginbotham,* 135 Texas 158, 143 S.W. 2d 79, 130 A.L.R. 1053; *Riggin v. Dockweiler,* 15 Cal. 2d 651, 104 P. 2d 367; *Chapman v. Huntington W. Va. Housing Authority,* 121 W. Va. 319, 3 S.E. 2d 502; *Stockus v. Boston Housing Authority,* 304 Mass. 507, 24 N.E. 2d 333; *Housing Authority of the City of Oakland v. Forbes,* 51 Cal. A. 2d 1, 124 P. 2d 194. And the fact that a few isolated properties in an area may be taken and dismantled which are above the standard of slum properties, or that some few desirable homes will be taken, will not affect the public character of the condemnation proceeding. *Blakemore v. Cincinnati Metropolitan Housing Authority,* 74 Ohio App. 5, 57 N.E. 2d 397; *In re Edward*

J. Jeffries Home Housing Project of Detroit, 306 Mich. 638, 11 N.W. 2d 272."

An examination of the cases cited by this Court shows that they support this Court's statement of law. To the same effect are the following cases: *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 66 N.W. 2d 362 (1954); *State v. Rich*, 159 Ohio St. 13, 110 N.E. 2d 778 (1953), which cites our case of *In re Housing Authority of the City of Charlotte, supra; Ferch v. Housing Authority of Cass County*, 79 N.D. 764, 59 N.W. 2d 849 (1953); *Scheuer v. Housing Authority of City of Cartersville*, 214 Ga. 842, 108 S.E. 2d 264 (1959); *Carroll v. City of Camden*, 34 N.J. 575, 170 A. 2d 417 (1961).

In *Ferch v. Housing Authority of Cass County, supra*, the Supreme Court of North Dakota said:

"The plaintiff complains that the condemnation of land for new housing outside the slum area as in the instant case could not be held to be for a public purpose and therefore violates said sections of the state and federal Constitutions. If that were so, the purpose of the Act would in many instances be thwarted. There may be many reasons why the new project should not be built in the slum area, such as the topography, drainage and lack of space. In the case of *Chapman v. Huntington Housing Authority*, 121 W. Va. 319, 3 S.E. 2d 502, 509, the court says:

" 'The projects may be built in any area within the exercise of sound discretion of the federal and state authorities and the council of the City of Huntington, whether slum or not slum. They are simply low-cost-housing projects, incidental to slum clearance. In some cities it is quite conceivable that slums exist in low-water areas. Equally, it is quite inconceivable that public moneys in large amounts should be expended to build modern dwelling units where they will be subject to and endangered by rising waters.'

"In *Riggin v. Dockweiler*, 15 Cal. 2d 651, 104 P. 2d 367, the court said:

" 'In working out the problem of low-cost housing, it may appear that the clearance of a slum area is desirable because the dwellings in use are insanitary, or present fire hazards or are maintained under such conditions that their removal would be in the interest of the public welfare. Also, the location may be an undesirable one for dwellings. Where such circumstances exist, it would be folly to require the new buildings to be constructed at the old location, and compel the new units to be crowded into the space taken up by those cleared away. Such an interpretation of the

housing act would thwart the very purposes for which it was passed and effectively block slum clearance in districts where the problem is most acute.' See also *Thomas v. Housing & Redevelopment Authority,* 234 Minn. 221, 48 N.W. 2d 175, 188; *Keyes v. United States,* 73 App. D.C. 273, 119 F. 2d 444, Id., 314 U.S. 636, 62 S. Ct. 70, 86 L. Ed. 510."

In *In re Housing Authority of the City of Salisbury, supra,* this Court said:

"In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated. G.S. 157-11; G.S. 157-50; G.S. 40-37.

"Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion. See *Power Co. v. Wissler,* 160 N.C. 269, 76 S.E. 267; *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, p. 315, 22 S.E. 2d 896. However, allegations charging malice, fraud, or bad faith in the selection of a housing project site are not essential to confer the right of judicial review. It suffices to allege and show abuse of discretion. The distinction here drawn is not at variance with the decision reached in *In re Housing Authority of the City of Charlotte,* 233 N.C. 649 (headnote 2), 65 S.E. 2d 761 (headnote 4)."

This is the question for decision: Admitting, for the purpose of passing on the Housing Authority's motion to strike sections 1, 3, 6, 7, 8, 9, and 10 from respondents' further answer and defense contained in their amended answer (which is in substance and effect a demurrer to what is in substance a plea in bar to the Housing Authority's right to condemn respondents' land in this special proceeding), the truth of factual averments well stated, and such legitimate inferences as may be drawn therefrom, but not admitting any legal inferences or conclusions of law asserted by the pleader, were the stricken allegations sufficient to put to the test for judicial review by Judge Copeland, whether the action of the Housing Authority in selecting the area for the site of its Project No. N. C. 20-2 and in including respondents' land therein was arbitrary or capricious amounting to a manifest abuse of the wide discretion vested in it in the selection and location of a site for its Project No. N. C. 20-2? The definition of what in law amounts to "arbitrary" or "capricious" conduct on the part of a Hous-

ing Authority is set forth in *In re Housing Authority of the City of Salisbury, supra.* The answer is, No.

The stricken allegations allege in substance these facts: The property of respondents, and in fact more than 90% of the property within the area selected for the site of Housing Project No. N. C. 20-2, consist of cleared land, and the few houses therein are not slum houses. The boundary lines of this project were drawn adjacent to, but excluding areas that are the most congested slum areas of the city of Wilson. A survey in the city did not include their land. The Housing Authority has other suitable sites in the city where it can construct dwelling units, for instance, where the survey disclosed over 1200 dilapidated buildings which are adjacent to and on all sides of its project. The first housing project selected and purchased by petitioner, and on which the erection of rental units has commenced, consists entirely of about 25 acres of cleared land on which there was no building. On one side of its project is one of the worst slum areas in the city. The Housing Authority has selected a third site, and has requested the city planning board to approve it as a site for a third project, which site is a cleared field outside of the city limits and adjacent to a slum area.

The remainder of the stricken allegations allege inferences of fact, and inferences and conclusions of law, which inferences, in our opinion, are *non sequitur,* and which conclusions of law are not supported by the allegations of fact, for instance: The Housing Authority's selection of their land for condemnation is arbitrary and capricious, because their land is not a slum area in the city of Wilson. The Housing Authority refuses to remove the slum areas, because their property selected for condemnation has no dilapidated buildings on it, and is cleared land. The public will not benefit from the construction of dwelling units on cleared land, because of the existence of over 1200 dilapidated dwellings within the city of Wilson. A selection of sites in the slum area will benefit the residents of the city and fulfill the purpose of the Housing Authorities Act. The entire plan and scheme of the Housing Authority is not to eliminate slum dwellings in the city, but to engage in the private enterprise of rental units. The Housing Authority in seeking their land does not contemplate the removal of any of these dilapidated buildings, because it is seeking to obtain cleared land to save the expense of removing these dilapidated buildings, and such conduct perpetrates a fraud upon the residents of the city of Wilson, and is not in the public interest, and is arbitrary and capricious.

The gravaman of respondents' contention and complaint is that the Housing Authority in selecting its land for condemnation with

other land adjacent to it, which consists of 90% cleared land, instead of picking a slum site for its Project No. N. C. 20-2, acted arbitrarily and capriciously amounting to a manifest abuse of discretion. Upon the record before us the contention is untenable. There is nothing in the law in this jurisdiction that requires housing projects to be located only where slum districts exist. The object of our Housing Authorities Act is to clear slums and to afford cheap housing for low-income people. That object Housing Project No. N. C. 20-2 will accomplish, so far as its dwelling units can, for we indulge the "presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *In re Housing Authority of the City of Charlotte, supra.*

The order of Judge Copeland is

Affirmed.

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

GREAT AMERICAN INSURANCE COMPANY v. WILLIAM A. JOHNSON, COMMISSIONER OF REVENUE, AND CHARLES F. GOLD, COMMISSIONER OF INSURANCE, DEFENDANTS.

AND

EMPLOYERS MUTUAL FIRE INSURANCE COMPANY v. W. A. JOHNSON, COMMISSIONER OF REVENUE, AND CHARLES F. GOLD, COMMISSIONER OF INSURANCE, DEFENDANTS.

(Filed 15 June 1962.)

1. Municipal Corporations § 5—

The organization and operation of a municipal fire department is authorized by G.S. 160-235 and is a governmental and not a private or proprietary function of a municipal corporation.

2. Constitutional Law § 19—

A pension paid a governmental employee for long and efficient service is a deferred payment of a portion of the compensation earned by such employee, and therefore is an emolument for services rendered not coming within the proscription of Article I, § 7 of the State Constitution.

3. Taxation § 7—

Allocation of a part of the general tax revenue of the State to aid municipal corporations in paying pensions to retired firemen is for a public purpose, since the State may assist a municipality as an agency of the State in the discharge of a governmental function. Article V, § 3, Constitution of North Carolina.

4. Taxation § 2—

A tax on insurance companies, levied on all fire and lightning contracts except such contracts written on property in unprotected areas, *is held* not unconstitutional as discriminatory, since the General Assembly has the power to make reasonable classifications of those subject to a privilege tax.

5. Statutes § 3—

The exclusion of contracts of fire insurance written on property in "unprotected areas" from the general tax levied on fire insurance contracts does not render the statute void for indefiniteness, since the phrase "unprotected areas" has a definite and well understood meaning when related to fire insurance coverage.

6. Statutes § 4—

Whether separate statutes must be treated as a single act in determining whether the enactments attempt to accomplish a prohibitive objective or attempt to accomplish a permitted objective by a prohibitive route, the court must look to the legislative history and background and all legislative pronouncements bearing upon the question, particularly any provisions in the separate acts disclosing that they are interrelated.

7. Same—

Chapter 1211, imposing a tax on certain insurance companies, Chapter 1212, creating a firemen's pension fund, and Chapter 1273, appropriating moneys from the general fund to the North Carolina Firemen's Pension Fund, must be construed as but a single statute in view of the legislative history and the provisions of the acts themselves disclosing their interrelation. Chapter 1212 expressly provides that in the event no valid tax should be imposed by Chapter 1211 or if no appropriation be made for said fund by Chapter 1273, the fund established by Chapter 1212 should be dissolved.

8. Taxation § 8—

A tax imposed on fire insurance contracts for the purpose of providing funds for the payment of pensions to retired firemen is unconstitutional under Art. I, § 17 of the State Constitution, since it imposes a tax on a particular group of tax payers for the special benefit of a particular group of public employees.

APPEAL by plaintiffs from *Mallard, J.*, February 1962 Regular Civil Term of WAKE.

These appeals present for determination the constitutionality of statutes enacted in 1959 establishing a firemen's pension fund and a source necessary for the support and maintenance thereof by a tax on fire and lightning insurance premiums.

Insurers first sought to have the validity of the act determined by a declaratory judgment. *Insurance Co. v. Gold, Comr. of Insurance,* 254 N.C. 168, 118 S.E. 2d 792. Failing in that effort, they paid the

taxes assessed under protest, and when their demand for refund was refused, they brought these actions to recover the taxes so paid.

Since the cases presented identical legal questions, they were consolidated for trial. Judge Mallard, at the conclusion of the evidence, sustained motions to nonsuit. Plaintiffs appealed from the judgments dismissing the actions.

Joyner & Howison by W. T. Joyner, Jr. and Allen, Hipp & Steed by Arch T. Allen for plaintiff appellants.

Attorney General Bruton and Assistant Attorney General Pullen for defendant appellees.

RODMAN, J. The 1957 Legislature, by c. 1420 of the laws of that Session, imposed a tax on purchasers of fire and lightning insurance to provide funds which, with contributions made by firemen, would suffice to create and maintain a fund from which qualified retired firemen would be paid a monthly sum, dependent in amount upon age and service. That act was, in January 1959, held unconstitutional. *Assurance Co. v. Gold, Comr. of Insurance,* 249 N.C. 461, 106 S.E. 2d 875.

Plaintiffs who attacked the 1957 statute based their claim of invalidity in part on grounds on which plaintiffs here challenge the 1959 statutes. Since the 1957 statute was manifestly void for the reason given in the opinion, it was not then thought necessary to discuss and pass on the other reasons advanced to invalidate that act.

The 1959 Legislature convened a week after the opinion was filed in *Assurance Co. v. Gold, Comr. of Insurance, supra.* Advocates of the proposal to pension firemen introduced in the House three bills numbered and captioned as follows: H. B. 689, "AN ACT TO AMEND G.S. 105-228.5 RELATING TO TAXES UPON INSURANCE COMPANIES"; H.B. 690, "AN ACT CREATING A FIREMEN'S PENSION FUND"; and H.B. 785, "AN ACT TO APPROPRIATE FUNDS FROM THE GENERAL FUND TO THE NORTH CAROLINA FIREMEN'S PENSION FUND." Bills 689 and 690 were ratified 19 June; bill 785, the appropriations act, was ratified 20 June. They became c. 1211, 1212, and 1273, S.L. 1959.

Plaintiffs assert these statutes, although separately enacted, must be treated as a single act enabling retired firemen to receive pensions derived, so far as taxes are considered, solely from moneys which plaintiffs and like corporations must contribute. This is the crucial question for discussion. Before reaching this question, it is proper to dispose of other questions urged to invalidate the several statutes.

C. 1212, S.L. 1959, added art. 3 to c. 118 of the General Statutes. Sec. 1 of the act declares its purpose to reduce fire losses by more

efficient local fire departments, and, to accomplish that purpose, sets up a fund from which retired firemen may receive pensions. This fund is composed in part of payments made by firemen who wish to take advantage of the statute and in part by appropriations by the State. To be eligible for pensions, firemen must meet specified conditions relating to training, length and continuity of service.

Sec. 2 of the act reads: "It is the purpose and intent of this Act that the State's contribution to the pension fund created hereby be derived solely from the proceeds of a one per cent (1%) tax imposed by the 1959 General Assembly upon amounts collected on contracts of insurance applicable to fire and lightning. In the event that such tax should not be imposed or that no appropriation be made for said fund, or in the event that such tax should be declared unconstitutional or invalid, then the fund herein established shall be dissolved."

Plaintiffs contend the maintenance of fire departments is a purely local obligation. Hence the Legislature may not authorize the use of State funds derived from State taxes to pension local firemen, some of whom are volunteers receiving no compensation for their services, some of whom are compensated from sources other than municipal taxes, and some of whom are compensated as regularly paid employees of the municipality. To use State taxes for such purpose would, they say violate the provisions of Art. V, sec. 3, of our Constitution prohibiting the levy of taxes for other than public purposes.

To support their contention that an appropriation by the State to a fund for the retirement of firemen is not a public purpose, plaintiffs cite and rely on *Commonwealth v. National Fire Ins. Co. of Hartford,* 172 S.E. 448; *Aetna Fire Ins. Co. v. Jones,* 59 S.E. 148; *Henderson v. London & L. Ins. Co.,* 34 N.E. 565; *Trustees of Exempt Firemen's Fund v. Roome,* 45 Am. Rep. 217. Because of differing constitutional and statutory provisions, we think the cited cases are not here controlling on the question of public purpose.

Municipal corporations are specifically authorized to organize and maintain fire departments and to fix the compensation of the persons so employed. G.S. 160-235. The organization and operation of a fire department is a governmental, not a private or proprietary function. *Mabe v. Winston-Salem,* 190 N.C. 486, 130 S.E. 169; *Howland v. Asheville,* 174 N.C. 749, 94 S.E. 524.

A pension paid a governmental employee for long and efficient service is not an emolument which, by Art. I, sec. 7, of our Constitution, cannot be paid. To the contrary it is a deferred portion of the compensation earned for services rendered. *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825; *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241; *Hinton v. Lacy,* 193 N.C. 496, 137 S.E. 669; *Brumley v.*

Baxter, 225 N.C. 691, 36 S.E. 2d 281; *Bowler v. Nagel,* 37 A.L.R. 1154; 70 C.J.S. 423; 40 Am. Jur. 961.

In fact plaintiffs concede the local community might use local tax funds to pension local employees.

"A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits." *Smith v. Winston-Salem,* 247 N.C. 349; 100 S.E. 2d 835; *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545; *Mabe v. Winston-Salem, supra.*

No good reason has been advanced which would prohibit the State from aiding its local agent in performing its governmental function by the allocation of part of general tax revenues. Unchallenged historical practice gives approval to such use of State funds. Statutes illustrative of the policy of providing assistance to local governments from State funds are: G.S. 105-213, directing distribution of the intangible taxes collected by the State; G.S. 136-41.2, 41.3, directing distribution of a part of the gasoline tax to cities for the maintenance of their streets not part of the State Highway system; G.S. 143-236.1, aiding in the construction of armories, *Morgan v. Spindale,* 254 N.C. 304, 118 S.E. 2d 913; G.S. 131-120, assisting in the construction of local hospitals. The State contributes to the salaries paid county farm agents and others locally employed.

The 1959 legislation, unlike the 1957 statute, does not penalize the purchaser of insurance because he chooses to buy from one insurance company rather than another. Here the tax is imposed on the insurance companies. It is merely a part of their cost of doing business. Of course the premium charged must suffice to take care of necessary expenses and provide a fair profit. But the Legislature levying privilege taxes for a permissible purpose may make reasonable classifications of those subject to the tax. *Finance Co. v. Currie,* 254 N.C. 129, 118 S.E. 2d 543, app. dis., 368 U.S. 289, 7 L. ed. 2d 336; *Bottling Co. v. Shaw, Comr. of Revenue,* 232 N.C. 307, 59 S.E. 2d 819.

C. 1211 (H.B. 689) amended G.S. 105-228.5 by inserting as the sixth paragraph from the last the following provision: "The amounts collected on contracts of insurance applicable to fire and lightning coverage, (marine and automobile policies not being included), a tax at the rate of one per cent (1%). This tax shall be in addition to all other taxes imposed by G.S. 105-228.5; provided, that this tax shall not be levied on contracts of insurance written on property in unprotected areas." Appellants insist that this statute is void because the proviso makes the statute so indefinite as to be unenforceable. True, there is no definition of the words "unprotected areas." Nonetheless we think the phrase has a well-understood meaning when dealing with property

protected by fire insurance. *In re Rating Bureau,* 245 N.C. 444, 96 S.E. 2d 344.

The statute does not purport to be based on benefits accruing to the insurance companies required to pay the tax. It is not, therefore, open to the objection that some who benefit from an efficient fire department are required to bear the burden without participation by others receiving equal benefits.

The reasons so far considered are not sufficient to invalidate the statutes. We are thus brought to the question on which plaintiffs place principal reliance. That question may be stated thus: May the Legislature by statute impose a tax on one group for the sole purpose of paying the salaries of a particular class or group of public employees?

The question as stated assumes that the three acts here challenged are in fact a single piece of legislation although divided into three separate bills for enactment by the Legislature. The soundness of that assertion must be determined before the question raised can be answered.

When an act is challenged because the object to be accomplished is prohibited or a prohibited route is selected to reach a permissive destination, it is proper to look at legislative background to ascertain legislative intent. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *Nance v. R.R.,* 149 N.C. 366; 50 Am. Jur. 274-275.

The movement by organized firemen to secure enactment of a statewide law providing greater benefits than the firemen's relief fund (arts. 1 and 2, c. 118, General Statutes) culminated with the enactment of c. 1420, S.L. 1957. As previously noted, that act was held void because of the discriminatory provision in the tax section.

We are now confronted with the question: Did the 1959 Legislature, when it enacted c. 1211, 1212, and 1273, intend to accomplish the same objective as in 1957, and, if so, has it again chosen a prohibited route?

Courts, when called upon to determine the meaning or validity of a particular statute, should consider all the Legislature has said that has a bearing on the question at issue. *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *Keith v. Lockhart,* 171 N.C. 451, 88 S.E. 640; *Alton R. Co. v. Railroad Retirement Board,* 16 F. Supp. 955.

When the three 1959 statutes are examined it is, we think, impossible to escape the conclusion that all are parts of a composite picture, and the tax statute, c. 1211, would not have been enacted if the pension fund statute, c. 1212, had failed of passage. Sec. 2 of c. 1212 makes it clear that statute would not have passed if H.B. 689 (c. 1211), levying

the tax, had failed to pass. The appropriation act, c. 1273, is by express language conditional, and the appropriation is limited to revenues to be produced by c. 1211.

So we have a tax imposed exclusively on a particular group of insurance companies for the special benefit of a particular group of public employees. The tax is imposed without any suggestion of any benefit peculiar to the group taxed. As said by *Mr. Justice Roberts* in *United States v. Butler,* 297 U.S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914: "The word (tax) has never been thought to connote the expropriation of money from one group for the benefit of another." *Walker, J.,* phrased the rule this way: "(T)he few ought not to be taxed for the sole benefit of the many, or the whole, nor should the latter be taxed for the sole benefit of the former." *Faison v. Commissioners,* 171 N.C. 411, 88 S.E. 761; *Keith v. Lockhart, supra.* Both of these cases are cited with approval by *Parker, J.,* in *Wilson v. High Point,* 238 N.C. 14, 76 S.E. 2d 546.

Hoke, J., said, in *Commissioners v. State Treasurer,* 174 N.C. 141, 93 S.E. 482: "It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provision of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land."

As indicated earlier in this opinion, the Legislature may use tax moneys to pay pensions to those who have served in the Armed Forces; but presumably no one would contend the Legislature could levy a tax on all male citizens between the ages of 18 and 45 who had not served in the Armed Forces to provide funds to pension those who had so served. That is exactly what the legislation here challenged does to a limited group of insurance companies. To hold otherwise would be to utterly ignore the provisions of sec. 2, c. 1212, and sec. 1 1/2, c. 1273, S.L. 1959. Therein lies the distinction between this case and *Knights v. Jackson,* 260 U.S. 12, 67 L. ed. 102.

The legislation enacted in 1961 relating to taxes on insurance companies and pensions for firemen is not relevant to the present controversy. Plaintiffs' rights are to recover the taxes levied and paid under the 1959 statutes, c. 1211, 1212, 1273, S.L. 1959.

Reversed.

DOROTHA D. GOODYEAR v. GEORGE S. GOODYEAR

(Filed 15 June 1962.)

1. Husband and Wife § 11—

Provision in a separation agreement that the husband pay to the wife specified sums monthly for the support of the adopted children of the marriage will be construed in the light of the existing legal principles that it is the father's primary duty to support the children during their disability, including adopted children, and that he cannot relieve himself of this obligation by contract, etc., and therefore that the provision for such payments need not have been contemplated as a complete discharge of the husband's duty to support the children.

2. Same— Under terms of separation agreement, husband was obligated to make payments specified in the contract for the support of the children without deducting sums expended by him for their support.

The separation agreement in suit provided that the husband pay the wife a stipulated sum monthly for the support of their two adopted children. The agreement further provided that both husband and wife should have alternating custody of each child, with further provision that each child should have the privilege of visitation at any time by the other, and that both the husband and wife should have the right to take both children on trips, vacations, etc. The husband made payments to the wife of the stipulated monthly sum for support of the children notwithstanding that during certain periods he supported each child while in his custody. *Held:* The fact that the oldest boy, prior to the time fixed in the separation agreement for the termination of the payments for the support of the children, becomes gainfully employed in the husband's business and pays the husband an agreed sum for his maintenance and care, does not relieve the husband of his obligations under the agreement to continue to pay to the wife the entire amount stipulated in the separation agreement for the support of the children.

3. Same—

Payments made to the wife by the husband for the support of the children of the marriage under the provisions of a separation agreement belong to the children, and the wife is a mere trustee for them, so that she must account to them for that part of the payments not expended for their reasonable support and maintenance.

4. Same—

The separation agreement in suit provided that the husband should purchase for the wife a new automobile as soon after a specified date as the business conditions of the husband reasonably warranted. It appeared that before the separation the husband had purchased an automobile of a particular make for the wife. *Held:* The provision is not necessarily void for indefiniteness, since it may be assumed that the parties contemplated an automobile in the same price class as the one theretofore purchased by the husband, and evidence of his financial condition on the date specified as compared with his financial condition when he purchased the car may be introduced in explanation of the terms of the agreement, but *held further*, if such provision is void for in-

definiteness the wife may recover fair compensation for surrender of her rights in consideration of the husband's agreement to purchase the car.

5. Contracts § 12—

A contract must be interpreted in the light of the existing law relating to the subject matter.

6. Same—

An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used.

7. Same—

If the language of a contract is not ambiguous the effect of the instrument is a question of law for the court, while if its terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms, and its meaning ascertained by the jury under proper instructions by the court.

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

APPEAL by plaintiff from *Walker, S.J.*, October 9, 1961 Special Civil "A" Term of MECKLENBURG.

Plaintiff and defendant were married in 1939. They entered into a separation agreement 21 May 1959. The rights of the parties are determined by that contract. Plaintiff, asserting defendant's failure to comply with the contract provisions, began this action on 8 November 1960. Defendant asserts he has faithfully complied with all of the contract provisions requiring him to provide support for plaintiff and their two adopted children. He contends the provision with respect to the purchase of an automobile for plaintiff is too vague and uncertain to create a binding obligation.

Jury trial was waived. Judge Walker found the facts, to which no exception was taken. He concluded plaintiff was not entitled to recover and rendered judgment to that effect. Plaintiff thereupon appealed.

Bradley, Gebhardt, DeLaney & Millette for plaintiff appellant.
Levine, Pizer and Goodman by Sol Levine for defendant appellee.

RODMAN, J. The separation agreement provided, in summary: (1) The parties would thereafter live separate and apart. (2) Husband would convey to his wife specified real and personal property, including "the 1955 Oldsmobile automobile which the wife now has custody of." (3) Each relinquished any right which they had or might have in the property or estate of the other.

In addition to the summarized provisions, the contract provided:

"(v) The husband agrees to pay all bills incurred by the wife on behalf of herself and the children of the marriage which were incurred prior to June 1, 1959. Thereafter, the husband will pay to the wife the total sum of Fourteen Hundred Dollars ($1400.00) per month for a period of twelve months beginning June 1, 1959. It is agreed that One Thousand Dollars ($1,000.00) is for the support of the wife and Four Hundred Dollars ($400.00) of this sum is for the support of the children. Beginning June 1, 1960, the husband will pay to the wife the sum of One Thousand ($1,000.00) Dollars per month for a period of four years. Six Hundred ($600.00) Dollars of this sum is to be for the support of the wife and Four Hundred ($400.00) Dollars for the support of the children. Thereafter, the husband shall pay to the wife the sum of Four Hundred ($400.00) Dollars per month. It is expressly understood and agreed that the aforesaid payments which are for subsistence of the wife will terminate upon the death of Mrs. Dorotha Goodyear, or in the event the parties may in the future, secure a divorce and Mrs. Dorotha D. Goodyear remarries."

"(vii) The husband agrees to purchase for the wife a new automobile as soon after June 1, 1960 as business conditions of the husband reasonably warrant."

"(viii) The parties have two boys, namely George Goodyear, III, aged 16 and Dent Goodyear, aged 13. It is agreed that the husband and wife will have joint custody of these children with the privilege of visitation at any time by the other and both the husband and the wife shall have the right to take said children on trips, vacations and events, provided, of course, that reasonable consideration is had for the other party in making said arrangements. It is expressly agreed that at all times one of the boys shall have his residence with the husband and one with the wife although the boys may visit for extended periods of time with either of their parents."

The summarized provisions have been complied with.

These facts are established: (1) Monthly payments of $1400, as required by sec. v have been made. (2) Monthly payments of $1000, beginning with June 1960 and running through October 1960, have been made. (3) Payments of $800 per month were made for the months of November and December 1960. (4) Plaintiff, having divorced defendant, married Adon Smith on 1 December 1960. (5) George Goodyear, III was born 4 November 1942. (6) Beginning I June 1961 defendant has paid plaintiff $200 per month.

Judge Walker found these additional facts:

"(7) Beginning with the Fall semester George Goodyear, III entered the Freshman Class at the University of North Carolina where he remained until the end of the first semester in the latter part of Jan-

uary 1961. The defendant furnished to George Goodyear, III, all of his clothing, tuition, and every other item of expense incurred by George Goodyear, III during the time that he was a student at the University of North Carolina."

"(8) In the late January of 1961, or early February 1961, George Goodyear, III became gainfully employed by the defendant at the defendant's place of business and between February 1961 and June 1961, George Goodyear, III resided with the plaintiff, but paid to the plaintiff an agreed monthly sum for his maintenance and care. Beginning in early July 1961, and continuing to the date of this hearing, George Goodyear, III has been residing with the defendant and still remains in the employment of the defendant."

"(10) The youngest son, Dent Goodyear, age 15, resides with the plaintiff and the plaintiff pays to her husband, Adon Smith, an agreed monthly sum of $140.00 for the maintenance and care of Dent Goodyear."

"(11) At the time of the hearing, the plaintiff has the use of a 1961 Chevrolet automobile provided for her by her present husband."

Plaintiff contends she is entitled to receive from defendant the sum of $400 per month until 1 June 1964. Defendant contends that the $400 he agreed to pay was for the support and maintenance of two children, one-half for the support of the older, the other half for the support of the younger: that plaintiff personally is not entitled to any part of the moneys which he contracted to provide for the support of the children, and since no more than $200 is necessary for the support of the younger, he has fully complied with his contract.

Contracts should be interpreted in the light of established principles of law.

These legal principles are established: Parents are under a legal, as well as a moral obligation to educate and support their children during their disability. *Ford v. Bank,* 249 N.C. 141, 105 S.E. 2d 421; *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31; *In re TenHoopen,* 202 N.C. 223, 162 S.E. 619. This obligation is the same whether the child is adopted or natural. G.S. 48-23. A willful failure of a parent to perform his duty is a crime. G.S. 14-322. The duty to support is primarily the obligation of the father. *Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136. A father cannot, by contract, relieve himself of his obligation to support his child. *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371; *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721; *Pace v. Pace,* 244 N.C. 698, 94 S.E. 2d 819.

If a parent fails to perform his duty of supporting his child, courts will enforce performance by an action brought in the child's behalf.

Thomas v. Thomas, supra; Green v. Green, 210 N.C. 147, 185 S.E. 651; *Sanders v. Sanders,* 167 N.C. 319, 83 S.E. 490.

The father is entitled to the earnings of his minor unemancipated child. *White v. Charlotte,* 212 N.C. 539, 193 S.E. 738; *Shipp v. Stage Lines,* 192 N.C. 475, 135 S.E. 339. A child may be emancipated before he reaches his majority. When that happens the father is no longer liable for the support of the child. *Holland v. Hartley,* 171 N.C. 376, 88 S.E. 507; 39 Am. Jur. 707.

When the separation agreement is examined in the light of the undisputed facts and legal principles stated above, it is, we think, clear the contracting parties contemplated the payment by the father of $400 per month for the support of the children, which amount would continue until 1 June 1964. This amount was to be paid even though the mother was expected to have the custody of only one of the children at a time; although she might have the custody of both periodically, and at periods, might not have the custody of either. The contract required the father to make these monthly payments to a date subsequent to the twenty-first birthday of the elder child. The obligation to pay terminates before the younger reaches his majority.

The agreement, on its face, shows the father did not understand the $400 monthly payment would discharge his obligation to support his children. He was at all times to have the custody of one. Certainly he did not expect his wife, out of the $400 to be paid to her, to reimburse him for his expense in caring for the child living with him. He expressly provided that he might take the children on trips during vacations. Certainly he expected to pay the costs incurred. He freely provided for the education of the children, sending one to college and the other to a private school. He did not make a deduction because of these expenditures. He made other gifts to the children. He had no legal right to deduct the gifts so made from the $400 monthly payment he contracted to provide. 27B C.J.S. 636. He did not attempt to charge the amounts so expended against his obligation to provide monthly payments to his former wife.

The parties, at a time when no controversy existed, interpreted the contract as not completely fulfilling the father's obligation to his children. It merely provided a sum which the mother would have at her disposal for that purpose. The interpretation so given ought not to be rejected. *Construction Co. v. Crain and Denbo, Inc.,* 256 N.C. 110; *Power Co. v. Membership Corp.,* 253 N.C. 596, 117 S.E. 2d 812.

Having reached the conclusion that the contract did not provide for a monthly payment of $200 for each child, but required a monthly payment of $400 for the children, we do not need to decide whether the older child is emancipated, without a right to call upon the father for support.

While defendant was and is obligated to make the monthly payments called for in his contract for the support of his children, plaintiff is not the beneficiary of the moneys which defendant must pay. These moneys belong to the children. Plaintiff is a mere trustee for them. That part of the payments not reasonably necessary for support and maintenance, she must hold for the benefit of the children and account to them when they call upon her. She cannot, by contract with another person, profit at the expense of her children. If, because of the generosity of the father, only $140 per month is reasonably necessary for the support of the children, she must hold the balance paid to her for their benefit. The Supreme Court of Iowa, called upon to interpret a separation agreement by which the husband and father of two adopted children agreed to make monthly payments to his wife for their support, said, in *Watts v. Watts,* 36 N.W. 2d 347: "The primary purposes of these remittances was the daily care of these children, month by month, and not to build up a reserve to lighten his burden in later years. It was his duty to pay these sums monthly as provided in the stipulation and the decree. Without a contract he was liable for their needs during their minority. The remittances were, of course, not the property of the plaintiff. She was merely the custodian of the funds with the right and duty to use them as provided in the decree. Having the children under her custody, care, and control, she is the one best situated and best fitted to know what is needed and best for them. In this she may use a sound discretion. Their requirement will vary from time to time. Because of sickness, medical or dental care, or other matters, the monthly sum may fall short. The amount thereof was no doubt fixed to be adequate to meet the anticipated average monthly needs."

Speaking with respect to money ordered to be paid for the support of an infant, the Supreme Court of Indiana said: "The person to whom money for the support of a child is ordered paid by the court receives it as a trustee, and can only expend the same for the benefit of the child." *Stonehill v. Stonehill,* 45 N.E. 600; *Corbridge v. Corbridge,* 102 N.E. 2d 764; *Thomas v. Holt,* 70 S.E. 2d 595; *Cervantes v. Cervantes,* 203 S.W. 2d 143; *Gard v. Gard,* 239 S.W. 2d 410; *Pavuk v. Scheetz,* 29 N.E. 2d 992.

Where, as here, the parties have attempted to put in writing an agreement fixing the rights and duties owing to each other, courts will not deny relief because of vagueness and uncertainty in the language used, if the intent of the parties can be ascertained. *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176; *Chew v. Leonard,* 228 N.C. 181, 44 S.E. 2d 869.

Here there is a definite obligation to give the wife a new automobile. This is a part of the consideration which she was to receive for the surrender of her legal rights. The kind of car and the date of purchase are not fixed with minuteness, but enough appears in the writing, we think, to indicate what the parties contemplated when they called on counsel to reduce their agreement to writing. The wife had for her use an Oldsmobile. The model was four years old. A car of that kind and model fits in a definite price class. Did the parties not contemplate a car in that price class when they reached their agreement? The contract declared the husband had informed his wife of his financial condition and their expenditures over the preceding years. We are not informed of the nature of defendant's business. Wisely, perhaps, he did not wish to fix a specific date for the purchase because he might at that very moment need all his cash resources for some important transaction. Did the parties not understand that the car would be purchased on 1 June 1960 if defendant's financial condition compared favorably with his financial condition when he acquired the Oldsmobile for his wife's use. It is permissible to prove the financial condition of the defendant on 1 June 1960 as compared with his financial condition in preceding years, particularly at the times when he provided automobiles for his wife. The rule here applicable was stated by *Adams, J.*, in *Porter v. Construction Co.*, 195 N.C. 328, 142 S.E. 27. He said: "The general rule is that where the entire contract is in writing and the intention of the parties is to be gathered from it, the effect of the instrument is a question of law, but if the terms of the agreement are equivocal or susceptible of explanation by extrinsic evidence the jury under proper instructions may determine the meaning of the language employed."

If the language which the parties used to express their agreement were so ambiguous and uncertain as to render that part of the contract void, it would not mean that plaintiff could not recover fair compensation for the rights which she surrendered. The agreement to provide an automobile is a part of that consideration.

New trial.

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

IVOR B. HAWLEY v. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

AND

GEORGE HAWLEY, BY HIS NEXT FRIEND, IVOR B. HAWLEY v. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

(Filed 15 June 1962.)

1. Insurance § 57—

Under an "omnibus clause" in an automobile liability policy, persons using the vehicle with the express or implied permission of insured are covered, and implied permission involves an inference arising from language or conduct of insured or someone having authority to bind insured in this respect, or a relationship between the parties, under circumstances signifying assent.

2. Same—

Evidence tending to show that the employer gave possession of the insured vehicle to its employee with permission to keep it overnights, with the understanding that the employee was not to "do too much running around with it at night," *is held* to permit the conclusion that the employer gave the employee express permission to use the vehicle on personal missions, subject to the limitation against "excessive use," and is sufficient to be submitted to the jury on the question of such employee's coverage under the "omnibus clause" of an automobile accident policy while driving the vehicle on a personal mission at night.

3. Trial § 22—

Contradictions and discrepancies, even in plaintiff's evidence, are to be resolved by the jury and do not warrant nonsuit.

4. Insurance § 3—

An insurance contract is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions.

5. Insurance § 57—

In this State, consonant with statutory provisions, G.S. 20-279.21(b)(2), coverage of an employee under the "omnibus clause" in an automobile liability policy extends only to use by the employee with the express or implied permission of the employer, and while a slight deviation by the employee is not sufficient to exclude him from coverage, a material deviation from the permission given is a use without permission. The fact that while driving the vehicle for a permitted use the employee permits passengers to ride with him contrary to the instructions of the employer will not alone take such use out of the coverage.

6. Same—

In determining coverage under an "omnibus clause" in a policy of automobile insurance, the act of the employer in giving initial permission to the employee to use an insured vehicle does not extend to any use thereafter made by the employee while the vehicle is in his possession unless expressly prohibited, but in this State coverage is limited to use by

the employee with the permission of the employer, express or implied, and an instruction applying the more liberal rule must be held for prejudicial error.

APPEAL by defendant from *Clark (Edward B.) S.J.*, November 1961 Term of CUMBERLAND.

Plaintiffs, in separate actions, seek to fix liability upon defendant Insurance Company under the "omnibus clause" of an automobile liability insurance policy. The actions were consolidated for trial.

Infant plaintiff suffered personal injuries and adult plaintiff's property was damaged on 17 June 1960 when a motor vehicle, owned by the latter and in which the former was a passenger, collided with a Chevrolet pickup truck owned by Burkhead DeVane Printing Company and being operated by Joseph L. Monroe, employee of the Printing Company. Plaintiffs recovered judgments against Monroe in the amounts of $5000 and $1520.20, respectively. The judgments have not been paid. The Printing Company (a corporation) is the "named insured" in an automobile liability insurance policy issued by defendant. The policy covers the pickup in question and was in full force at the time of the collision. The policy definition of "insured" includes any person while using the pickup, "provided the *actual use* of the automobile is by the named insured . . . or with the permission" of the named insured.

Plaintiffs allege that Monroe, at the time of the collision, had the permission, express or implied, of the Printing Company to use the pickup, and was an "insured" within the policy definition. Defendant denies these allegations and avers that Monroe was using the pickup without permission and for his own pleasure.

An issue was submitted to and answered by the jury as follows:

"Was Joseph Monroe, at the time of the collision, driving the insured pick-up with the permission, either express or implied, of Burkhead DeVane Printing Company, or anyone having authority to bind it in that respect?

"Answer: Yes."

The court adjudged that defendant pay the judgments theretofore recovered by plaintiffs against Monroe.

Defendant appeals.

Anderson, Nimocks and Broadfoot for appellant.

Hair & Ruppe; Williford & Person for appellees.

MOORE, J. The crucial question in these actions is whether or not Joseph L. Monroe was operating the pickup at the time of the collision with the permission of his employer, Burkhead DeVane Printing Company.

The evidence bearing on this question is summarized as follows: The Printing Company owned two automobiles and the pickup truck. They were not stored at the place of business at night. Officers of the Company usually kept the automobiles at their homes overnight. Burns, an old and trusted employee, took the pickup to his home each night and kept it there on week-ends. Burns was permitted to drive the pickup to church and could use is locally without special permission. Burns obtained permission on one occasion to use the pickup to transfer furniture for his daughter — Monroe accompanied him on this occasion. Monroe had worked for the Company about five months. On one occasion, about three months before the collision, Monroe was permitted to keep the pickup overnight when Burns was ill, but was instructed to take it "straight home," park it, and bring it "straight back" next morning. During working hours Monroe drove the truck in making deliveries and on other Company business. While on Company business, he had on occasion picked up riders. Upon learning this, Mrs. Burkhead, Secretary-Treasurer, reprimanded him and threatened to fire him if he did so again, and explained that the insurance did not cover passengers. She repeated the warning several times. In June 1960 Mr. Brixon, Vice-President and General Manager, took a two-weeks vacation. Before leaving he arranged for Burns to drive home each night, during the vacation period, the automobile Brixon was accustomed to keep; and Brixon gave Monroe permission to keep the pickup overnight during the vacation. Brixon testified that he specifically instructed Monroe to drive it straight home, park it, and drive it straight back to work, and that Monroe had no permission to use it for his personal business or pleasure. According to Monroe, Brixon said: "Don't do too much running around with it at night." Brixon left on Wednesday for California. On the following Friday night Monroe drove to his home, ate supper, and then drove the pickup about three miles to the home of an aunt. About 10:00 P. M. he left the home of his aunt in the company of two men and a woman, all sitting in the cab of the pick-up, and drove eight miles to a Western Union office so the woman could "pick up" some money. On the return trip the collision occurred — at about 11:15 P. M. Monroe testified that no one ever gave him specific permission to use the truck for any personal business or pleasure, but that Mr. Brixon didn't say he couldn't.

The liability insurance policy in question contains an extended coverage or omnibus clause which insures "any person while using the automobile . . . , provided the *actual use* of the automobile is . . . with the permission of" the named insured. (Emphasis added).

Permission which gives coverage under the omnibus clause may be either express or implied. *Hooper v. Casualty Co.*, 233 N.C. 154, 158,

63 S.E. 2d 128. This is the universally accepted rule. *Hodges v. Ocean Accident & Guarantee Corporation,* 18 S.E. 2d 28, 31 (Ga.), cert. den. 316 U.S. 693, which has reh. den. 317 U.S. 705 (1942). Indeed, compliance with the requirements of the Motor Vehicle Safety and Financial Responsibility Act (G.S., Ch. 20, Art. 9A) necessitates coverage of all who use the insured vehicle with the permission, express or *implied,* of the named insured. Whether the permission be expressly granted or impliedly conferred, it must originate in the language or the conduct of the named insured or of someone having authority to bind him or it in that respect. *Hooper v. Casualty Co., supra.*

In the cases at bar we are concerned with permission granted by employer to employee. As to cases involving omnibus clauses in automobile liability insurance policies and relating to permission from employer to employee, there is an exhaustive annotation in 5 A.L.R. 2d, pp. 601-690, reviewing all pertinent legal principles. A general or comprehensive permission is much more readily to be assumed where the use of the insured motor vehicle is for social or nonbusiness purposes than where the relationship of master and servant exists and the usage of the vehicle is for business purposes. *Jordan v. Shelby Mut. Plate Glass & Casualty Co.,* 51 F. Supp. 240 (W.D. Va. 1943). Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. *Hinton v. Indemnity Ins. Co. of North America,* 8 S.E. 2d 279 (Va. 1940).

While it is a universally accepted rule that permission which will effectuate coverage under the usual omnibus clauses may be either express or implied, there is a wide difference of opinion in the construction of the term "permission" as used in such clauses. The main difference in construction "is whether the permission is confined to the time when the accident occurs or whether it is defined as permission 'in the first instance'. . . ." *Hodges v. Ocean Accident & Guarantee Corporation, supra.* Court opinions construing "permission" especially as between employer and employee, may conveniently be placed into three categories or classifications (though this is a somewhat oversimplification), from which three rules are evolved:

(1) The strict or "conversion" rule. Under this rule, the permission, express or implied, which will bring the operator-employee within the coverage of the policy, must be given to the employee not only to use the vehicle in the first instance, but also for the particular use being made of the vehicle at the time in question. "In other words, the

automobile must have been used for a purpose reasonably within the scope of the permission given, during the time limits expressed, and within the geographical limits contemplated." 5 A.L.R. 2d 622; *Johnson v. American Automobile Insurance Co.*, 161 A. 496 (Me. 1932); *Blair v. Travelers Insurance Co.*, 197 N.E. 60 (Mass. 1935); *Gray v. Sawatzki*, 289 N.W. 227 (Mich. 1939).

(2) The liberal or "initial permission" rule. Operator-employee is insured if he has permission to take the vehicle in the first instance, and any use while it remains in his possession is "with permission" though that use may be for a purpose not contemplated by the named insured when he parted with possession. 5 A.L.R. 2d 622; *Stovall v. New York Indemnity Co.*, 8 S.W. 2d 473 (Tenn. 1928); *Dickinson v. Maryland Casualty Co.*, 125 A. 866 (Conn. 1924); *Parks v. Hall*, 181 S. 191 (La. 1938); *Matits v. Nationwide Mutual Insurance Co.*, 166 A. 2d 345 (N.J. 1960). This view has been referred to as the "hell and high water" rule. 7 Appleman: Insurance Law and Practice, s. 4366, p. 308.

(3) The moderate or "minor deviation" rule. A material deviation from the permission given constitutes a use without permission, but a slight deviation is not sufficient to exclude the employee from the coverage under the omnibus clause. *Hodges v. Ocean Accident & Guarantee Corporation, supra; United States Fidelity & Guaranty Co. v. Brann*, 180 S.W. 2d 102 (Ky. 1944); *State Farm Mutual Automobile Insurance Co. v. Cook*, 43 S.E. 2d 863 (Va. 1947).

Hooper v. Casualty Co. supra, is the only case in this jurisdiction which fits into the factual and legal category to which the instant cases belong. In that case it was deemed unnecessary to expressly adopt either of the rules of construction above stated. Indeed, it is unnecessary to make a choice on the present appeal in determining the question of nonsuit; but it is otherwise in ruling on the exception to the charge.

It is our opinion that the evidence is sufficient to make out a *prima facie* showing of *express* permission. Considered in the light most favorable to plaintiffs, it tends to show that the pickup was put in the possession of Monroe for a period of two weeks, with permission to keep it overnights and with the understanding that Monroe was not to "do too much running around with it at night." This permits the conclusion that non-excessive use at night was authorized. There is no evidence of any personal use of the car by Monroe at night other than on the occasion in question. It is true that Monroe testified on cross-examination: "In a way, I guess I did violate their express instruction by riding people in it and using it for my personal business." Conflicts and contradictions in the evidence, even though such occur in the evidence

offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *Stathopoulos v. Shook*, 251 N.C. 33, 36, 110 S.E. 2d 452.

However, the challenged portion of the charge requires us to construe the omnibus clause. It seems that the court below applied the liberal or "hell and high water" rule. It is well settled that plaintiff has the burden of showing that there was permission to use the vehicle. 5 A.L.R. 2d 666 (citing many cases); *Kirk v. Insurance Co.*, 254 N.C. 651, 654, 119 S.E. 2d 645. The strict and moderate rules of construction seem to speak in terms of affirmative burden, *i.e.*, of permission *granted* or *given*. 5 A.L.R. 2d 622; 7 Appleman: Insurance Law and Practice, ss. 4367, 4368, pp. 312, 321. Under the liberal rule there are holdings that employer cannot limit the use once initial permission is granted. *Jerson v. London Guarantee & Accident Co.*, 11 N.E. 2d 993 (Ill. 1937); *Konrad v. Hartford Accident & Indemnity Co.*, 137 N.E. 2d 856 (Ill. 1956); *United States Fidelity & Guaranty Co. v. De Cuers*, 33 F. Supp. 710 (E.D. La. 1940). But as to deviations in violation of *express prohibition* by employer, most of the courts, even those embracing the liberal rule, are in agreement that the use of the vehicle by employee for prohibited personal purposes is not a permissible use within the meaning of the omnibus clause. In other words, under the liberal rule, if permission is given initially, anything goes unless specifically prohibited. *Waits v. Indemnity Insurance Co. of North America*, 33 S. 2d 554 (La. 1947), and cases therein cited.

The court below, in its final application of the law to the facts, instructed the jury: ". . . if you find from the evidence and by its greater weight, the burden being upon the plaintiff to so satisfy you, that either (naming officers of the Printing Company) did not expressly or by their previous acts and course of conduct impliedly *prohibit* the said Joseph Monroe from using for personal purpose the said company pick-up truck after driving it to his home from the plant following the day's work on June 17th, 1960, then I instruct you that this said Joseph L. Monroe was operating said vehicle with permission. . . ." (Emphasis ours). This instruction assumes, as a matter of law, that initial permission was granted and was comprehensive and unlimited if specific uses were not expressly forbidden and prohibited. Under the liberal rule of construction this instruction is not improper; but under the strict rule or the moderate rule it is erroneous and fails to put upon plaintiffs the burden of showing, as an affirmative matter, the nature and extent of the permission granted.

The wide-spread enactment of financial responsibility and compulsory insurance laws has caused a decided trend in the courts toward liberal construction of omnibus clauses. We have expressed the view that it is the purpose of the Financial Responsibility Act to provide

protection for persons injured or damaged by the negligent operation of automobiles. *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482. The Motor Vehicle Safety and Responsibility Act of 1947 provided that insurance policies issued in conformity therewith must "insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, express or implied, of the named insured, *or any other person* in lawful possession." S.L. 1947, Ch. 1006, s. 4(2)(b), codified as G.S. 20-227(2)(b). This provision was sufficiently broad to embrace the liberal rule. It required that policies of insurance insure all operators, irrespective of limits of permission, if in the lawful possession of the vehicle. But the Legislature repealed this provision in 1953 and provided for insurance coverage for "the person named therein and any other person . . . using any such motor vehicle . . . with the express or implied permission of such named insured. . . ." S.L. 1953, Ch. 1300, s. 21, codified as G.S. 20-279.21(b)(2). We interpret this statutory change to mean that the Legislature intended no more radical coverage than is expressed in the moderate rule of construction, *i.e.*, coverage shall include use with permission, express or implied. An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decision. *Kirk v. Insurance Co., supra.* It does not seem reasonable to assume that parties to an insurance contract covering a vehicle used in business contemplate an indiscriminate use for the social and separate business purposes of employees of named insured unless permission, express or implied, is given for such additional uses. To hold that the scope of any permission cannot be limited would be strange "in view of the fact . . . owner could sue (employee) bailee for conversion of the automobile in exceeding his permission." 7 Appleman: Insurance Law and Practice, s. 4366, p. 311. Furthermore, the policy in the instant case uses the term "actual use" in reference to permission granted. In our opinion this term confines the coverage to situations where the use made of the vehicle at the time of the accident is within the scope of the permission granted. 7 Appleman: Insurance Law and Practice, s. 4354, p. 241; *Gulla v. Reynolds*, 81 N.E. 2d 406 (Ohio 1948). The challenged instruction was erroneous. This entitles defendant to a new trial.

Where the violation of permission consists merely of carrying guests in the vehicle, and the employee's use of the vehicle is otherwise permitted, the fact alone that the employee permitted riders on the vehicle will not serve to annul the permission of the employer so as to

take the employee out of the protection of the omnibus clause. This is in accord with the substantial weight of authority. 5 A.L.R. 2d 654.

Plaintiffs do not seek recovery under the doctrine of *respondeat superior* and therefore G.S. 20-71.1 has no application in these cases. *Roberts v. Hill*, 240 N.C. 373, 82 S.E. 2d 373.

New trial.

SMITHFIELD OIL COMPANY, INC. v. C. W. FURLONGE AND WIFE, ALICE M. FURLONGE; AND BETTIE JONES (UNMARRIED).

(Filed 15 June 1962.)

1. Assignments § 1; Landlord and Tenant § 8; Vendor and Purchaser § 1—

A lease and an option to purchase contained therein are assignable even without the use of the word "assigns" in the absence of statutory or contractual restrictions.

2. Same—

Provision in a lease and option that lessors agree not to sell the property during the term of the lease to any person other than lessees is not a limitation on lessees' right to assign, but is only a recognition that lessors could not, during the term of the lease, sell to anyone except those exercising the right to purchase pursuant to the option.

3. Same—

Where there are no statutory or contractual restrictions on the right to assign a lease and option, and there are no personal services contemplated or relation of personal confidence between lessors and lessees, uncontradicted evidence of a valid assignment and the exercise of the option by the assignee within the time limited warrants an instruction that as a matter of law assignee had a right to exercise the option.

4. Vendor and Purchaser § 2—

Where the purchaser notifies vendors of his election to exercise the option and that he is ready, able, and willing to pay the purchase price upon tender of deed, vendors' disavowal of the contract by notification that they would not convey constitutes a waiver of actual tender of the purchase price.

5. Assignment § 4; Vendor and Purchaser § 4—

Where a partnership assigns its option to purchase certain property in the event the partnership should decide to discontinue its business operations or if the partnership should be dissolved or terminated, and such assignment is duly registered, the rights of the assignee cannot be defeated by a subsequent assignment by one of the partners to a stranger.

6. Same—

The fact that an assignment of an option by a partnership is conditional may be asserted as a defence to specific performance only by the members of the original partnership and may not be asserted by the owner of the land as against the assignee of the partnership, certainly when the original partners thereafter perform their agreement by executing an unconditional assignment.

7. Partnership § 9—

Even though a partnership ceases to do business, the partnership is not terminated until the winding up of its affairs has been completed.

8. Assignments § 1; Partnership § 2—

The assignment by one partner of all his rights in the partnership to a stranger does not affect the rights of the other partner who is not a party to such assignment, and such assignment cannot transfer title to partnership property. G.S. 59-55(2).

9. Contracts § 12—

Where the language of a contract is explicit and unambiguous, its legal effect is for the determination of the court.

APPEAL by defendants from *Carr, J.*, November 1961 Term of JOHNSTON.

This is an action for the specific performance of a contract to convey land pursuant to the exercise of an option granted by defendants to the assignors of plaintiff. Plaintiff alleged that it was the assignee of the option to purchase the land described in the complaint; that, within the time provided, it tendered to the defendants the specified purchase price and demanded a deed; that it at all times had been ready, willing, and able to pay the purchase price, but defendants refused to execute the deed. Defendants denied the tender and alleged that they had no contractual relation with plaintiff which obligated them to convey the property.

By stipulation and uncontradicted record evidence, the following facts appear:

Subject to a pre-existing lease not herein involved, on February 13, 1953, the defendants, Dr. C. W. Furlonge and Bettie Jones leased the land in question, a lot in the Town of Smithfield, to Robert A. Bradley and William L. Denning, partners doing business as Bob's Drive-In Grill, parties of the second part. The granting clause demised and leased the premises to the said parties of the second part, their heirs and assigns for five years beginning on the first day of March, 1955. This lease contained the following provisions:

"The lessors agree with the lessees that the lessees shall have the right to purchase said property at any time during the term

of this lease for the sum of $25,000, and the lessors agree not to sell the property during the term of this lease to any person other than the lessees; and by payment of said sum of $25,000 to execute and deliver to said lessees an indefeasible deed in fee simple to said lands; and upon the sale and conveyance of said premises to said lessees, this lease shall terminate and become null and void

"And to the faithful performance of all the agreements herein contained on the part of the parties of the first and the parties of the second part, they do each of them bind themselves, their heirs, executors and administrators and assigns."

This lease was recorded on October 30, 1953 in Book 513, at Page 83 in the office of the Register of Deeds of Johnston County.

On November 2, 1953, Bradley and Denning as "sublessors" leased the property to the plaintiff for the purpose of operating a service station on it until March 1, 1960. This sub-lease was recorded on November 3, 1953, in Book 513 at Page 96. It contained the following:

"Sub-Lessors grant to Lessee, Smithfield Oil Company, Inc. the option to purchase all their rights and privileges that they now or hereafter may be entitled to under the terms of the two Leases from A. J. Harmon and C. W. Furlonge, Odell Jones and Bettie Jones to Sub-Lessors herein, as recorded in Book 513, at pages 83 and 84 of the Johnston County Registry, in the event that Sub-Lessors shall hereafter decide to discontinue the operation of said service station and 'Bob's Drive-In Grill,' or if the partnership of Sub-Lessors known as 'Bob's Drive-In Grill' for any reason shall be dissolved or otherwise terminated."

On March 19, 1954, "subject to the sub-lease agreement" of November 2, 1953 executed by Bradley and Denning to plaintiff, Robert A. Bradley assigned to Edwin A. Jackson all his right, title and interest in the lease agreement of February 13, 1953, recorded in Book 513 at Page 83. This assignment was also recorded.

On October 16, 1957, Robert A. Bradley, William L. Denning, and defendants, Dr. C. W. Furlonge and Bettie Jones, received the following letter from the plaintiff:

"Gentlemen:

"Reference is made to sub-lease and Option to purchase agreement, dated November 2, 1953, recorded in Book 513, page 96, and to original Lease and Option dated February 13, 1953, recorded in Book 513, page 83, Registry, Johnston County, relating

to a lot 140 feet by a 120 feet, corner of Market & 8th Street in the town of Smithfield, North Carolina.

"This is to notify you that Smithfield Oil Company, Inc., (Sub-Lessees) grantee in said sub-lease, desires to and hereby exercise the rights and privileges to purchase, granted by said Options, and stands ready, willing and able to comply with the terms of said Option to purchase agreement. It is requested that you prepare and tender to the Smithfield Oil Company, Inc., a Warranty Deed on or before December 1, 1957, and upon the tender and delivery of a sufficient Warranty Deed, as provided for in said contracts, the undersigned will make payment of the purchase price as provided for under terms of said agreements.

Very truly yours,
SMITHFIELD OIL COMPANY, INC.
By: (s) J. Marvin Johnson."

On January 13, 1960, plaintiff's president wrote the defendant, Dr. Furlonge, a letter which contained, *inter alia,* the following:

"I am ready to exercise the option granted in Book 513, pages 83 and 84; Smithfield Oil Company is, as you know, the owner of this option by purchase from the original lessees.

"Please have your attorney make Smithfield Oil Company, Inc., the Grantee in the deed of purchase. May we have your immediate attention in this matter."

On February 15, 1960, Bradley and Denning, in compliance with the provisions of the sub-lease of November 2, 1953, conveyed to the plaintiff the right to purchase which they had acquired under the leases recorded in Book 513 at page 83. This agreement was recorded on February 15, 1960.

Witnesses for the plaintiff testified that Bob's Drive-In Grill, referred to in the sub-lease of November 2, 1953, had been discontinued in the early part of 1954; that between the 15th and 17th of February, 1960, J. Marvin Johnson, president of the plaintiff corporation, informed defendants that plaintiff proposed to exercise its option to buy the property in question and that it was ready, willing, and able to pay for it upon receipt of a deed; that defendant Jones told him Dr. Furlonge was handling the matter for her; that the defendant Dr. Furlonge told Johnson that he had knowledge of the contract and option and referred him to their attorney, Mr. Albert Noble; that Johnson then told Noble that plaintiff was ready to pay the money and requested him to prepare the deed by which defendants would convey the property to the plaintiff; that Noble did not say "yes" or

"no", but told him he would confer with him in the near future; that the next day Mr. Noble called Mr. Johnson and told him his client did not desire to sell and would not give plaintiff a deed.

Plaintiff's evidence further tended to show that during the period from February 15th to February 19th, it had $25,000.00 to hand defendants, either by check or in cash, simultaneously with the presentation of the deed. Plaintiff instituted this action for specific performance on February 19, 1960.

The defendants' evidence tended to show that Johnson's visit to Attorney Noble was ten days or two weeks before February 15, 1960, and before Bradley and Denning had assigned their option to the plaintiff; that the purpose of Johnson's visit to Noble was to negotiate a trade of lots and the purchase of the lot under the option was not mentioned. Noble testified that Johnson did not come to see him at all between February 15th and February 19th, 1960, but that he did tell Johnson over the phone that Dr. Furlonge had decided he did not want to get rid of the land; that for about two weeks before February 15th, he had been searching the records every few days to see if there had been a transfer of the option to the plaintiff by Denning or Bradley or by Denning and Johnson; that his interpretation of the lease was that defendants were not obligated to convey the land to anybody except Bradley and Denning and that was the reason he told Mr. Johnson that Dr. Furlonge was not going to convey the property.

Defendants' motions for nonsuit at the close of plaintiff's evidence and at the close of all the evidence were denied. The jury, by its answer to the issues, found that between the dates of February 15th and February 19th, 1960, the plaintiff notified the defendants of its intention to exercise the option rights under the agreements of February 13, 1953, recorded in Book 513 at Page 83, and November 2, 1953, recorded in Book 572 at Page 591; that the defendants after demand refused to comply with the terms of the written agreement to convey the property described in the complaint; that the plaintiff at the time of making the demand did not tender $25,000.00 to the defendants, but was ready, willing, and able to comply with the terms of the lease and option agreement and to pay the $25,000.00; and that the plaintiff was entitled to have the defendants execute and deliver to it a deed for the property upon the payment of the sum of $25,000.00. From judgment entered upon the verdict, the defendants appealed.

Pope Lyon and Albert A. Corbett for plaintiff appellee.
Herman L. Taylor and Samuel S. Mitchell for defendant appellants.

SHARP, J. The defendants list thirteen assignments of error. However, the hub of the appeal is clearly the denial of their motions for nonsuit, and a discussion of the questions raised by these motions will dispose of the other assignments of error.

In support of their motions for nonsuit defendants argue that: (1) the option was personal between the original parties and was not assignable to the plaintiff; (2) plaintiff did not tender the $25,000.00 purchase price; (3) on March 19, 1954, Robert A. Bradley, one of the members of the partnership which was the grantee in the original lease of February 13, 1953, assigned his interest therein to Edwin A. Jackson and thereafter had nothing to assign to plaintiff; and (4) defendants had no knowledge of the assignment of the option on February 15, 1960 to the plaintiff. These arguments are without merit.

The rule is that in the absence of a statutory or contractual restriction on the assignment of a lease, such lease, and an option to purchase contained therein, is assignable. *Pearson v. Millard,* 150 N.C. 303, 63 S.E. 1053; *Cadillac-Pontiac Co. v. Norburn,* 230 N.C. 23, 51 S.E. 2d 916; 55 Am. Jur., Vendor and Purchaser, Section 42; Anno. 45, A.L.R. 2d 1034, 1036. The right is not dependent on the use of the word "assigns" in the lease but exists absolutely in the absence of contractual or statutory prohibitions. 32 Am. Jur., Landlord and Tenant, Section 319.

There was nothing in the lease agreement, executed February 13, 1953 by and between the defendants and the partnership composed of Bradley and Denning, which precluded a sub-lease or an assignment of either the lease or the option. The lease specifically provides that it is binding on the assigns of all of the parties. The contract involved no personal services or relation of personal confidence, only the payment of a specified rental and the sales price of $25,000.00 in the event the option were exercised. The provision contained in the option clause of the lease that "lessors agreed not to sell the property during the term of this lease to any person other than the lessees," was merely an affirmation of the option itself and a recognition by the lessors that, having agreed to sell to the lessees at any time during the term of the lease, they could not sell to anyone else.

The defendants' second contention that they were entitled to a nonsuit because the plaintiff did not tender the $25,000.00 purchase price before the institution of the suit is equally untenable. Plaintiff's evidence tended to show — and the jury so found — that the defendants disavowed the contract before the option expired. Notice from defendants that they would not carry out the terms of the option made unnecessary a tender of payment by the plaintiff. *Millikan v. Simmons,*

244 N.C. 195, 93 S.E. 2d 59; *Penny v. Nowell,* 231 N.C. 154, 56 S.E. 2d 428. As the Court said with reference to a similar situation in the latter case, "such a tender would avail nothing according to the testimony of the record. The law does not require the doing of a vain thing. The disavowal was a waiver of the requirement." The evidence was plenary that the plaintiff was ready, willing, and able to pay the purchase price at the time it requested defendants to comply with the terms of the option and deliver the deed. If defendants' attorney informed the plaintiff — and the jury so found from the evidence — that defendants did not desire to sell at that time and would not make plaintiff a deed, the futile gesture of a tender was not necessary.

Defendants' third defense is that Bradley, prior to February 15, 1960 had assigned all his interest in the option to Johnson and therefore the partnership of Bradley and Denning could not assign the option to plaintiff on that day. This argument overlooks the following facts: (1) the contract of November 2, 1953, in which Bradley and Denning gave plaintiff the right to purchase their option, was immediately recorded in the office of the Register of Deeds of Johnston County, and thereafter the rights of the plaintiff could not be defeated by an assignment; (2) the agreement between Bradley and Johnson on March 19, 1954 specifically provided that it was subject to the rights of the plaintiff; (3) the right to exercise the option was an asset of the partnership of Bradley and Denning, doing business as Bob's Drive-In Grill. Although this partnership had ceased to do business, it was not terminated until the winding up of its affairs had been completed. Denning was not a party to the assignment to Jackson on March 19, 1954 and Bradley had no right to assign the option "except in connection with the assignment of rights of all the partners in the same property." G.S. 59-55(2).

Defendants' fourth argument that they had no notice of the assignment of February 15, 1960 is also untenable. In their pleadings defendants based their defense on a failure of tender and a denial of any contractual obligation to convey to the plaintiff. This is still their position. At the trial defendants stipulated that on February 16, 1960 Bradley and Denning executed the agreement which purported to transfer to the plaintiff their rights under the option contained in the lease of February 13, 1953. Since the letter of October 16, 1957, which each defendant stipulated he received, they had known that plaintiff was the assignee of their lease to Bradley and Denning. They also knew that plaintiff claimed the right to exercise the option the lease contained. It is implicit in the evidence in this case that the defendants desired to defeat the option and to avoid the consequences of the contract they had made. They were counting on plaintiff's over-

looking the fact that its sub-lease of February 13, 1953 did not contain an assignment of option but merely gave plaintiff *the option to buy the option* if the partnership known as Bob's Drive-In Grill should be dissolved or terminated. By the assignment of February 15, 1960, duly recorded on that date, this potential defense was eliminated. Counsel for defendants testified that prior to that date he had been watching the records to see if such an assignment would be recorded. Dr. Furlonge testified that he had knowledge of the contract and the option.

If there were any defenses available to Bradley and Denning which might have defeated plaintiff's right to an assignment from them, Bradley and Denning did not interpose them. They complied with their agreement and conveyed to the plaintiff their right to exercise the option. In any event, their unused defenses would not have been available to defendants.

The terms of the written agreements which fixed the rights of the parties to this action were explicit and unambiguous. Therefore, it was the duty of the Court to determine their effect by simply declaring their legal meaning to the jury. *Strigas v. Insurance Co.*, 236 N.C. 734, 73 S.E. 2d 788. This the trial judge did by telling the jury, in effect, that after the assignment of February 15, 1960 the plaintiff had legal right between that time and February 19, 1960, the date the suit was instituted, to have defendants execute and deliver to it a deed for the land described in the complaint upon the payment of the purchase price; that if defendants "refused to execute the deed after February 15, 1960 and before the time this suit was instituted, after demand had been made and the statement had been made that the purchase price was ready and could be paid, . . . it would not be necessary then for the plaintiff to tender the sum of $25,000.00 in order to be entitled to exercise the option rights."

The record discloses that this case was carefully and fairly tried by an able and experienced judge. The issues tendered by the defendants were not material in the case. Upon appropriate issues the jury found the controverted facts in favor of the plaintiff. The judge correctly entered judgment for the plaintiff on the verdict. Each of defendants' assignments of error has been considered and is overruled. In the trial below we find

No error.

JUNIOR B. SETZER v. OLD REPUBLIC LIFE INSURANCE COMPANY.

(Filed 15 June 1962.)

1. Fraud § 3; Reformation of Instruments § 2—

Mistake of one party alone affords no ground for the relief of reformation unless such mistake is induced by the fraud of the other.

2. Fraud § 3—

In order for silence to be tantamount to a positive misrepresentation as the basis for fraud, such silence must relate to a material matter which the person remaining silent is under duty to disclose by reason of a relationship of trust and confidence existing between the parties, or because the party relying upon the want of disclosure does not have equal opportunity to ascertain the facts, which facts are within the knowledge of the party remaining silent, so that the silence amounts to an affirmation of a material fact upon which the other party has a reasonable right to rely.

3. Fraud § 5—

Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, his failure to read the instrument will bar him from thereafter asserting that he belived it contained provisions which in fact it does not, unless his failure to read the instrument is prevented by some trick or device or misrepresentation upon which he has a reasonable right to rely.

4. Evidence § 3—

It is a matter of common knowledge that insurance companies from time to time change the terms of their policies.

5. Insurance § 7—

Where an insurance company issues successive separate contracts of insurance, as distinguished from mere renewals of an original policy, insured does not have the right to assume that a new contract will conform to the terms of a prior policy of the same type.

6. Same; Reformation of Instruments § 2— Allegations held insufficient to state cause of action for reformation for failure of insurance company to disclose limitation of coverage.

Allegations to the effect that plaintiff procured successive loans from a loan company which also acted as agent for an insurance company, that in connection with the loans plaintiff made applications for and received successive life insurance policies which contained indemnity provisions for the loss of a hand or foot, that plaintiff, in connection with a later loan, made application for a policy on the same form as he had theretofore used when obtaining prior loans, that the loan company failed to disclose that insurer had changed its loan policies by deleting the indemnity provision, that plaintiff received the policy but did not read it until plaintiff lost his right arm in an accident occurrng some eight months thereafter, and that plaintiff, in the absence of notification to the contrary, assumed and relied on the assumption that the last policy also

contained the indemnity coverage, *are held* insufficient to state a cause of action to reform the policy to include the indemnity coverage.

APPEAL by plaintiff from *Froneberger, J.*, January 1962 Term of CATAWBA.

In this action plaintiff seeks to reform a policy of life insurance and to recover upon the reformed policy for the loss of an arm. Defendant demurred to the complaint.

The plaintiff alleges in substance the following facts:

During the two years prior to January 20, 1960, plaintiff had five times borrowed money from the Statesville Production Credit Association which was acting as the agent for defendant Insurance Company in soliciting insurance business for it. Whenever plaintiff obtained a loan from the Credit Association at its office, he filed an application for credit life insurance. In the application he stated the amount of insurance he wanted, agreed to pay the premiums, and authorized the Credit Association to renew and continue the insurance, in whole or in part, as long as his indebtedness to it was unpaid. Between January 16, 1958 and May 6, 1959, the plaintiff had applied for and received five such policies. Each policy, in addition to life insurance, had provided indemnity coverage for the loss of one or both eyes, hands, or feet. On January 20, 1960, plaintiff went to the office of the Credit Association and applied for a loan of $9,800.00. In doing so he filled out the usual application form for credit life insurance in the amount of the loan. The Credit Association made no mention that defendant's credit life insurance policy no longer provided indemnity for loss of either hand.

On January 27, 1960, for a premium of $98.00, the defendant Insurance Company issued to the plaintiff its policy No. 101858 which insured his life in the amount of $9,800.00 for one year under a creditor's group insurance policy issued to Statesville Production Credit Association. This policy contained no provision for indemnity for the loss of sight, a hand, or foot. About the last of January or the first of February, 1960 the policy was mailed to the plaintiff who did not read it. He opened the envelope and noted that it contained the policy which "to all appearances as to size, shape, color and the amount and position of printed matter" appeared to be just like the previous policies issued him. He assumed that because the application he had executed on January 20th was the same form he had used in making previous applications, and since the premium rate was the same, the insurance coverage was also the same.

On October 21, 1960 the plaintiff lost his right arm in a farm-tractor accident and thereafter discovered for the first time that indemnity

for loss of either hand had been omitted from his policy. Notwithstanding, however, he tendered to the defendant proof of loss, but defendant refused to pay. Plaintiff alleges that defendant knew the policy did not contain indemnity coverage for the loss of one or both eyes, hands, or feet but negligently and by its silence caused the plaintiff to believe that it did; that the provision was omitted through the mutual mistake of the plaintiff and defendant or through the mistake of the plaintiff and the fraud or inequitable conduct of the defendant. He prays that the policy be reformed to include indemnity in the amount of $9,800.00 for the loss of one or both eyes, hands, or feet through external, violent and accidental means as had been provided in previous policies.

Defendant demurred on the ground that the complaint alleged no facts constituting mutual mistake and no facts constituting fraud or other conduct on the part of the defendant which would entitle plaintiff to reformation. The trial judge sustained the demurrer and dismissed the action. The plaintiff appealed.

Richard A. Williams and Martin C. Pannell for plaintiff appellant.

Craighill, Rendleman and Clarkson and John R. Ingle for defendant appellee.

SHARP, J. The appeal presents this question: Does the complaint allege a cause of action for reformation on the grounds of fraud? Mutual mistake is eliminated by Paragraph X of the complaint which is as follows: "X. That the defendant knew the policy to be issued pursuant to the plaintiff's application on or about January 20, 1960 would not provide indemnity coverage for loss of either hand."

The mistake of only one party to an instrument, if it is not induced by the fraud of the other, affords no ground for relief by reformation. *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530. "A mere misunderstanding of facts is not sufficient ground for asking reformation. Where the mistake has been on one side only, reformation will not be decreed. The mistake must have been common to both parties, * * *. *Britton v. Insurance Co.,* 165 N.C. 149, 80 S.E. 1072.

The plaintiff concedes in his brief that he bases his right to reformation on actionable fraud and that to withstand a demurrer he must allege facts which bring his case within the well-known rule laid down in *Kemp v. Funderburk,* 224 N.C. 353, 30 S.E. 2d 155; *Evans v. Davis,* 186 N.C. 41, 118 S.E. 845; and *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5.

Sometime prior to January 27, 1960 the defendant Insurance Company changed the coverage of its credit term-life insurance policy by

eliminating indemnity for loss of sight, hands and feet. The defendant's soliciting agent, who had written five other separate and distinct policies for plaintiff within two years made no representation that the policy still contained the indemnity coverage. It made no representation at all about it; it merely failed to tell plaintiff that the policy had been changed. Did this constitute fraud under the circumstances? We hold that it did not.

Where there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation. *Isler v. Brown,* 196 N.C. 685, 146 S.E. 803; *Brooks Equipment and Manufacturing Co. v. Taylor,* 230 N.C. 680, 55 S.E. 2d 311; *Brooks v. Ervin Construction Co.,* 253 N.C. 214, 116 S.E. 2d 454.

"Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances. * * * the silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not, and the uninformed party is deprived to the same extent that he would have been by positive assertion." 23 Am. Jur., Fraud and Deceit, Section 77.

Under the circumstances of this case a duty to inform plaintiff of the change in the insurance contract would arise only if there were a relationship of trust and confidence between the plaintiff and the defendant. There was none. An insurance company is not a trustee for its insured. *Thames Realty Co. v. Mass. Fire and Marine Ins. Co.,* 184 N.Y.S. 2d 170. In *Thames Realty Company* the defendant's adjusters discovered that defendant's loss was greater than plaintiff knew and failed to tell him. The court held it had no obligation to inform plaintiff.

In *Metropolitan Life Insurance Co. v. James,* 238 Ala. 337, 191 So. 352, the beneficiary in a life insurance policy paid the initial premium while the insured was still alive but missing. The court held that there was no confidential relation between the plaintiff beneficiary and the insurance company which required plaintiff to disclose the fact that the insured was missing. The court said: "In dealings between persons standing in confidential relations or positions of trust, the law imposes an obligation on the part of one to safeguard the interest of the other with the same fidelity he safeguards his own, and charges him with knowledge of such duty. Withholding facts, material to be known is a breach of such legal duty, regardless of intent to deceive and is a legal fraud * * * In this case there were no confidential relations."

In *Stanbury, Inc. v. Massachusetts Bonding & Insurance Co.*, 90 F. Supp. 545, plaintiff alleged a custom and usage whereby bonding companies investigated the previous records of employees for whom indemnity bonds were sought; that plaintiff relied on this custom; that defendant failed to investigate the employee of plaintiff whom it bonded when an investigation would have revealed that he had a criminal record which would have caused plaintiff not to employ him. The theory of plaintiff's case was that by issuing the bond defendant had impliedly represented that it had investigated the employee and approved him as a good risk. *Medina, J.* said "Elementary principles of tort law require the dismissal of this claim. First of all, the defendant made no representation. Even had it known of the prior arrest, non-disclosure of that fact would be a misrepresentation only if defendant was under a duty to disclose such information. Defendant was under no such duty. By issuing the bond * * * the only duty it assumed thereby was to indemnify plaintiff up to the amount of $10,000.00 on certain contingencies. Defendant is not alleged to have had any knowledge that plaintiff would rely on the issuance of the bond as an assurance of (the employee's) Lamantia's reliability, nor is it alleged that defendant intended to induce plaintiff to rely upon any such representation." The complaint in the instant case also fails to make this allegation.

In this case, while the plaintiff alleges that defendant knew the indemnity provisions had been eliminated from the policy and by its silence caused plaintiff to believe it was included and "that the plaintiff did rely on the silence," there is no allegation that this particular coverage was one of the inducements to the plaintiff for taking the insurance. The factual situation raises an inference to the contrary. The insurance was an incident of the loan; plaintiff took the insurance because he wanted to borrow money from the Credit Association and the Credit Association required him to take the insurance if he got the loan. Had the omission in this policy been pointed out to the plaintiff, the complaint contains no suggestion that plaintiff would have declined to take the policy and would have sought a loan elsewhere.

Furthermore this complaint contains no allegation that the defendant had any fraudulent intent to induce plaintiff to rely upon its silence. "An essential element of a cause of action for the recovery of damages for false and fraudulent representations is that the representations alleged to be false and fraudulent were made with intent that the plaintiff shall act upon them. In the absence of an allegation that the representations were made by the defendant with intent that plaintiff shall act upon them, the complaint is subject to demurrer on the ground that the facts stated therein are not sufficient to constitute a cause of

action." *Bechtel v. Bohannon,* 198 N.C. 730, 153 S.E. 316; *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406.

Plaintiff's complaint discloses that his application was for $9,800.00 of term life insurance. That is what he got. The application did not include indemnity for loss of sight, hands or feet; the defendant's agent did not tell plaintiff that it did. No positive misrepresentation was alleged. The complaint also shows that plaintiff had the policy in question from the last of January or the first of February, 1960 until the date of his injury on October 21, 1960, a period of almost nine months, before he read it and discovered that it did not contain the indemnity provisions. From the date plaintiff received the policy he had the same opportunity as did the Insurance Company to know what it contained. No trick or device kept him from reading it; there was then no inequality of condition or knowledge. *Newbern v. Newbern,* 178 N.C. 3, 100 S.E. 77; *Graham v. Insurance Co.,* 176 N.C. 313, 97 S.E. 6.

This particular certificate was no cumbersome insurance policy, replete with fine print, exclusions, provisions, conditions, warranties, and stipulations. It is written in plain English and is reprinted in full on one page of the record on appeal. Including its heading, number, and signature, the policy contains only forty-three lines.

Courts which hold that the failure of an insured to read his fire insurance policy does not bar reformation have reasoned that "if an intelligent and prudent person reads his policy he will not understand much of what he reads." Anno., Reformation — Effect of Negligence, 81 A.L.R. 2d 7, 69; 29 Am. Jur., Insurance, Section 351. This argument could not apply here.

The North Carolina Court has frequently said that where no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had the opportunity to do so will bar his right to reformation. *Clements v. Insurance Co.,* 155 N.C. 57, 70 S.E. 1076; *Newbern v. Newbern, supra; Coppersmith v. Insurance Co.,* 222 N.C. 14, 21 S.E. 2d 838; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165.

In *Welch v. Insurance Co.,* 196 N.C. 546, 146 S.E. 216; defendant issued a policy of fire insurance on August 4, 1924. The property covered by the policy was destroyed November 15, 1924. At that time, the policy was void because insured had violated certain stipulations and covenants contained therein. Plaintiffs prayed for a reformation of the provisions affecting their right to recover. The court said: "All the evidence upon the trial of this action showed that plaintiffs accepted the policy as issued by defendant; that they were able to read, and had full opportunity to read the policy, which was in their pos-

session from the date of its issuance to the date of the fire. * * * Upon all the evidence, plaintiffs were not entitled to the equitable remedy of reformation of the policy."

Gordon v. Fidelity and Casualty Co. of New York, 238 S.C. 438, 120 S.E. 2d 509, involved a demurrer quite similar to the one under consideration here. Plaintiff, a career soldier, obtained from the defendant a liability insurance policy on a motor scooter. By the medical coverage in the policy, defendant agreed to pay all reasonable medical expenses incurred within one year from the date of an accident. As a result of an injury covered by the policy, plaintiff was hospitalized in a Government hospital. He incurred no expense because he was a soldier. He sued for the reasonable cost on his hospitalization alleging that defendant's agent knew at the time the policy was issued that he was a soldier and would incur no expense for hospitalization as required by the policy but remained silent, all of which constituted a fraud upon him. He alleged that the agent's silence related to a material matter known to the defendant but not known to him; that defendant had a legal duty to speak and its silence amounted to a representation known to be false and relied upon by the plaintiff as being true. The complaint showed that the plaintiff had the policy in question in his possession from January 22, 1958 until October 1st, 1958 before he discovered it did not contain the coverage he believed it to contain. Defendant's demurrer to the complaint was sustained. The court said:

> "The respondent asserts that the silence of the agent of appellant, with respect to the medical benefits that he would be entitled to under the policy in question, constituted a fraud upon him. We have held that nondisclosure becomes fraudulent only when it is the duty of the party having knowledge of the facts to uncover them to the other. * * * An examination of the complaint fails to show any relation of trust and confidence between the respondent and the agent of appellant. * * * Here, the agent of appellant did nothing to prevent the respondent from reading the policy in question. We do not think that silence on the part of the agent of appellant, under the circumstances, amounted to a fraud.
>
> "In the instant case, the respondent had the policy in question for more than eight months, with the opportunity to learn the contents and coverage provided for therein. Since he failed to avail himself of that opportunity, he is not entitled to damages for fraud and deceit on the basis that the representations of the soliciting agent are at variance with the coverage of the policy."

It should be pointed out that the policy involved in the instant case was not a renewal. It was an entirely new contract; it was life insurance in a different amount and for a different term from any the plaintiff had ever had before. It is a matter of common knowledge that insurance companies from time to time change the terms of their policies. One may not assume that a new insurance contract of any kind will conform to the terms of a prior policy of the same type. However, a different rule applies to renewals and the law does not impose the same degree of care upon an insured to examine a renewal policy as it does to examine an original policy. With reference to renewals, Appleman states the rule to be as follows: "Unless otherwise provided, the rights of the parties are controlled by the terms of the original contract, and the insured is entitled to assume, unless he has notice to the contrary, that the terms of the renewal policy are the same as those of the original contract. * * * On renewal of a fire policy, the insurer must call attention to any change in the terms, and if it does not, such change is no part of the contract." Appleman, Insurance Law and Practice, Section 7648; 29 Am. Jur., Insurance, Section 351. *Lumbermen's Insurance Co. v. Heiner,* 74 Ariz. 152; 245 Pac. 2d 415. *Quachita Parish Police Jury v. Northern Insurance Co. of New York,* 176 So. 639, (La. App., 1937); Anno., 76 A.L.R. 1223. "Where an insured person holds a policy of insurance which is about to expire, and which is satisfactory, and he orders a renewal of the policy, he is not negligent in failing to examine the new or renewal policy; he is entitled to assume that the terms of the new policy are the same as those of the expiring policy." Anno. 81 A.L.R. 2d p. 71. See also p. 108.

The complaint in this action alleges no facts which establish either mutual mistake or fraud. Furthermore, it discloses that plaintiff's right to reformation is barred by his own negligence. This latter disclosure supplies "extra weight" to the decision — as pointed out in an article by Professor Wex S. Malone, "The Reformation of Writings Under the Law of North Carolina," 15 N.C.L.R. 154, 174.

The judgment sustaining the demurrer is

Affirmed.

CHARLES RAY DOSS, BY AND THROUGH HIS NEXT FRIEND, MATTIE DOSS *v.* MARJORIE CASE SEWELL AND DOUGLAS DOSS.

(Filed 15 June 1962.)

1. Courts § 20—

In an action in this State to recover for injuries received in an automobile accident occurring in another state, the substantive law of such other state controls.

2. Automobiles § 47—

Under the laws of the State of Virginia, a gratuitous passenger in an action in which there is no allegation of wilful and wanton disregard of the safety of the passenger and no plea of contributory negligence, is entitled to recover upon a showing of gross negligence.

3. Same— Evidence held sufficient to be submitted to jury on issue of gross negligence of driver.

Evidence tending to show that a driver, en route to a city requiring a right turn at an intersection, approached the intersection at a speed between 95 and 100 miles per hour along a road only 18 to 20 feet wide, reduced speed to 60 or more miles per hour at the intersection, disregarding a luminous stop sign and a directional sign, missed the paved portion of the crossing, skidded over the south lanes of the intersecting four-lane highway, across the grass median, and across the north lanes, and crashed into a bank, to the injury of his passenger, *is held* sufficient to be submitted to the jury under the laws of the State of Virginia on the issue of gross negligence of the driver.

4. Appeal and Error § 24—

Each exception to the charge should relate to a single principle of law and pinpoint a specific objection, and an exception to a long excerpt from the charge embracing a number of propositions cannot be sustained if anyone of the propositions is correct.

5. Same—

The right to object to the court's statement of the contentions of a party is waived when the matter is not brought to the attention of the trial court before verdict.

6. Appeal and Error § 42—

An exception to the charge will not be sustained if the charge is without prejudicial error when construed contextually.

7. Parent and Child § 4—

Where a parent, as next friend, brings an action to recover damages for negligent injury to a child, including hospital and medical expenses, the parent waives the right to maintain a separate suit to recover such medical expenses, and they may be included in the award of damages in the action in behalf of the child.

APPEAL by defendants from *Phillips, J.*, November 20, 1961 Civil Term, ROCKINGHAM Superior Court.

Charles Ray Doss, by his mother as Next Friend, instituted this civil action to recover damages for the personal injuries which he received as a result of an automobile wreck at the intersection of north-south highway No. 863 and east-west highway No. 58, near Danville, Virginia.

The plaintiff alleged and offered evidence tending to show that on the night of May 26, 1959, he was a nonpaying guest passenger in a 1953 Ford sedan owned by the defendant, Marjorie Case Sewell, and at the time of the wreck was being driven with the consent of the owner by the defendant, Douglas Doss, age 17, brother of the plaintiff. In addition to the plaintiff, who was then 14, two of the owner's minor sons and another boy, Michael Turner, were riding in the vehicle. Before leaving the Sewell home, Julius Sewell requested his mother for the keys to the Ford to take the two Doss boys, Michael Turner, and a younger brother of Julius Sewell to a drive-in theater near Reidsville. Mrs. Sewell gave the keys to Julius who, in her presence, delivered them to Douglas Doss who got under the wheel in her presence. The other four teen-age boys also got in the vehicle. Before starting for the theater, Mrs. Sewell gave them directions about what time to return.

The members of the party had seen the picture showing at the theater. They decided to visit another some distance away. At the second theater they found they did not have enough money for all to be admitted and decided to drive on to still another near Danville, Virginia. Highway No. 863 is paved and is 18-20 feet wide. No. 58 is a dual highway, the north lanes, 24 feet wide, are for west-bound traffic. The south lanes, also 24 feet wide, are for east-bound traffic. Separating the two lanes is a grass plot or median, 31 feet wide.

On the night of the accident the Ford driven by Douglas Doss approached the intersection from the south on 863. A directional sign indicating Danville to the right and Martinsville to the left was in place on the right side of 863, approximately 60 feet south of 58. From this sign north, the entrance into 58 gradually widened. A traffic island 35 feet long divided this entrance. Near the north end of the traffic island there was a large, reflecting, luminous stop sign.

The boys were not acquainted with the roads. The Ford driven by Douglas Doss approached the intersection at great speed—95 to 100 miles per hour. One of the Sewell boys had requested the driver to slow down. The others, including the plaintiff, tended to encourage the speed. However, whether from the discovery of the crossing or in compliance with young Sewell's request, the driver did reduce speed and entered the intersection at 60 or more miles per hour. Skid marks, beginning south of the actual crossing, continued for 168 feet to the

north bank of the road. The vehicle missed the paved part of the crossing, ran across the grass median, knocked down a post, struck a drainage culvert in this grass plot, skidded across the north lanes, and crashed into the bank at the side of the highway. The plaintiff was seriously injured.

The plaintiff alleged his injuries were proximately caused by the defendants' gross negligence and their wanton and wilful disregard for his safety. He alleged serious and permanent injuries, pain, suffering, hospital and medical bills incurred in the necessary treatment of his injuries.

The defendant, Mrs. Marjorie Case Sewell, by separate answer, admitted "that on May 26, 1959, the defendant Marjorie Case Sewell authorized the defendant Douglas Doss to operate her automobile in taking her sons, Tommy Sewell and Julius Sewell, to the Midway Drive-in Theater outside of Reidsville." Other material allegations were denied. No affirmative defenses were interposed.

The defendants did not offer evidence. The court overruled motions for nonsuit. The following issues were submitted to and answered by the jury as indicated:

> "1. Was the plaintiff Charles Ray Doss injured by the gross negligence of the defendants, or the wilful and wanton disregard of the safety of the plaintiff by the defendants, as alleged in the complaint?
>
> "Answer: Yes.
>
> "2. What amount of damages, if any, is the plaintiff Charles Ray Doss entitled to recover?
>
> "Answer: $5,500.00."

From the judgment in accordance with the verdict, the defendants appealed.

Gwyn & Gwyn by Allen H. Gwyn, Jr., for plaintiff appellee.

Jordan, Wright, Henson & Nichols by Luke Wright for defendants, appellants.

HIGGINS, J. The defendants' first assignment of error is addressed to the court's refusal to grant their motion for nonsuit at the close of the plaintiff's evidence. The assignment requires us to determine whether the evidence, and the legitimate inferences from it, together with admissions in the pleadings, are sufficient to support a finding the plaintiff's injuries resulted from the defendants' gross negligence.

The accident occurred in Virginia. Liability, or lack of it, must be determined according to the substantive law of that State. *Morse v.*

Walker, 229 N.C. 778, 51 S.E. 2d 496; *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82. The Virginia guest statute (Code, Sec. 8 686-1) provides:

> "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation, and no personal representative of any such guest so transported, shall be entitled to recover damages against such owner or operator for death or injuries to the person, or property of such guest, resulting from the operation of such motor vehicle unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person, or property of the person, being so transported on the part of such owner or operator."

The Supreme Court of Appeals of Virginia has defined gross negligence and wilful and wanton disregard for safety in many cases, among them, *Crabtree v. Dingus,* 194 Va. 615, 74 S.E. 2d 54: "Gross negligence, as we have often said, is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another . . . the element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. . . . It has been described as such heedless and reckless disregard of the rights of another as should shock fair-minded men." In *Thomas v. Snow,* 162 Va. 654, 174 S.E. 837, the court said: "Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton, and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence. * * * It is important to mark the distinction between acts or omissions which constitute gross negligence and those which are termed wilful or wanton, because it is usually held that in the former contributory negligence on the part of plaintiff will defeat recovery, while in the latter it will not." *Bates v. Thompson,* 200 Va. 501, 106 S.E. 2d 728; *Young v. Dyer,* 161 Va. 434, 170 S.E. 737; *Jones v. Massie,* 158 Va. 121, 163 S.E. 63; *Sibley v. Slayton,* 193 Va. 470, 69 S.E. 2d 466; *Hale v. Hale,* 219 N.C. 191, 13 S.E. 2d 221; *Altman v. Aaronson,* 231 Mass. 588, 121 N.E. 505, 4 A.L.R. 1185.

As the pleadings are cast in this action, we may eliminate the question of wilful and wanton disregard of safety. Gross negligence is alleged in the complaint and denied in the answer. Contributory negligence is not interposed as a defense. Consequently the finding of gross negligence is in itself sufficient to support the verdict. On the other

hand, if contributory negligence had been alleged and found by the jury, the additional issue of wilful and wanton injury then would be material, but not otherwise. Consequently liability is fixed by the finding of gross negligence.

In this case the evidence disclosed the plaintiff, his older brother, Douglas Doss, and Michael Turner, all teen-age boys, were guests, or at least visitors, at the home of the defendant, Marjorie Case Sewell. Mrs. Sewell's son asked his mother for the use of the family automobile to take the boys, including his younger brother, to a drive-in theater near Reidsville. Mrs. Sewell gave the keys to Julius, who, in her presence, gave them to Douglas Doss. The five boys — Douglas Doss driving — left for the theater after Mrs. Sewell gave them instructions about the time for their return.

The drive-in was showing a picture the boys had previously seen. They drove to another theater near Leaksville. After ascertaining they did not have enough money for all to gain admission, they decided to go to another across the line in Virginia. On this stage of the journey the wreck occurred.

It was dark. The party approached the intersection from the south at a rate of speed between 95 and 100 miles per hour over a road, the surface of which was only 18-20 feet wide. The younger of the Sewell boys requested Douglas to slow down. The others, including the plaintiff, apparently encouraged the speed. However, a short distance south of the intersection protected by a stop sign, the driver began to reduce speed and entered the intersection at 60 or more miles per hour. The driver failed to see, or disregarded, the directional sign 62 feet south of the intersection. He failed to see, or disregarded, the luminous stop sign at the end of the traffic island. He missed the paved portion of the crossing, skidded over the south lanes, across the grass plot, knocked down a post, jumped the drainage ditch in the grass median, skidded across the north lanes, and crashed into the bank. Was the driver guilty of gross negligence under Virginia Law? Such operation of a vehicle with five boys aboard would shock fair-minded men. At least there would be a difference of opinion.

In *McDowell v. Dye,* 193 Va. 390, 69 S.E. 2d 459, the Supreme Court of Appeals of Virginia said: "The trial judge and the jury . . . saw the witnesses while . . . testifying. . . . In such instances they have the advantage over an appellate court. . . . Whether the conduct of a person operating an automobile amounted to gross negligence . . . depends upon the facts and circumstances surrounding the operation . . . If reasonable men may differ upon the question then a jury problem is presented."

The assignment of error No. 1, based on exceptions 1 and 2 for

failure of the court to enter judgment of compulsory nonsuit, cannot be sustained. The defendant, Mrs. Sewell, did not tender an issue as to the agency of Douglas Doss and stated she was not contesting the question of agency. The evidence was sufficient to require the jury to determine whether the plaintiff was injured by the gross negligence of Douglas Doss.

The defendants' assignment of error No. 2, based on exception No. 3, involves three full pages of the charge dealing with definitions of negligence, gross negligence, and proximate cause. Assignment No. 4, based on exception No. 5, involves more than seven pages of the charge dealing with damages for temporary and permanent injury, pain, suffering, etc. These objections are broadside. They fail to pinpoint the specific objections. "Each exception to the charge required by the statute (The Code, § 550, now C.S. 643) shall be stated separately in articles 'numbered,' and no exception should contain more than one proposition, else it is not 'specific' and must be disregarded." *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *Gwaltney v. Assurance Society,* 132 N.C. 925, 44 S.E. 659; *Barefoot v. Lee,* 168 N.C. 89, 83 S.E. 247. "This exception falls under the condemnation of the necessary rule of appellate practice that an exception must point out some specific part of the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any one of the propositions is correct." *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143, citing many cases.

Assignments of error Nos. 2 and 4 are not presented in accordance with the rules. They are not sustained.

Assignment of Error No. 3 involves the statement of plaintiff's contentions. Such objections should be called to the attention of the court before verdict — otherwise they are deemed to have been waived. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59; *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817.

Assignments of error 5 and 6 involve alleged failure of the judge to review the testimony and to give equal stress to the contentions of the parties. These assignments are general rather than specific. However, the charge, when considered contextually, presents a clear, accurate, and fair picture of the duties and liabilities of the parties on the issues in the case.

The plaintiff, by his mother as next friend, pleaded as an item of damage the medical, surgical, and hospital bills incurred in the necessary treatment of the injury. The court permitted the doctors to testify as to treatment and their charges, which amounted to approximately $500.00. Necessary medical expense of an unemancipated infant is the

responsibility of the father, if living, of the mother if he is not. A separate cause of action for recovery of such expenses exists in favor of the parent. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925; *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492; *Williams v. Stores Co.,* 209 N.C. 591, 184 S.E. 496. When the parent in whom the cause of action exists is the next friend and participates in the trial in which an award is made to the infant for medical expenses, the participation is a waiver of the parent's right. *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534.

The infant's right to recover medical expenses was raised by the defendants' brief after the docketing of this appeal. Both the mother, individually, and the father, Talmadge Doss, filed in this Court an express waiver of their right to recover medical expenses incident to the treatment of their son's injuries. Moreover, G.S. 44-49 provides for a lien in favor of the physician or surgeon upon the fund recovered on account of the injury. It is immaterial to the defendants whether the infant or the parent asserts the claim. The parents' waiver of the right to recover medical expenses is a bar and precludes them hereafter from asserting such a claim.

The Clerk will certify the waiver to the Superior Court of Rockingham County to be filed as a part of the record. Otherwise, in the trial, we find

No error.

B. E. SMITH AND WIFE, ELECTA C. SMITH v. STATE HIGHWAY COMMISSION

(Filed 15 June 1962.)

1. Highways § 1—

The State Highway Commission is an agency of the State created for the purpose of constructing and maintaining our public highways.

2. Eminent Domain § 2—

When the work of changing the grade of an existing public highway is performed completely within the right of way, without allegation of negligence in the manner or method of doing the work, the fact that such change of grade results in a diminution of access to the owner of the fee of abutting property, who also owns the fee subject to the easement in a part of the highway, does not constitute a partial "taking" of the landowner's property, since the easement includes the right to change the grade of the highway as the public convenience and necessity may require and there is no statutory or constitutional provision in this State for the recovery of compensation in such instance.

SMITH *v.* HIGHWAY COMMISSION.

APPEAL by respondent from *Shaw, J.*, 8 January 1962 Civil Term of GUILFORD—Greensboro Division.

Special proceeding instituted on 23 April 1957, before the clerk of the superior court of Guilford County, wherein petitioners seek to recover alleged damages by reason of respondent raising the grade in East Bessemer Avenue, thereby allegedly destroying for their abutting property ingress to and egress from East Bessemer Avenue.

Respondent filed an answer in which, *inter alia*, it alleged that the work it did on East Bessemer Avenue was done in its right of way and none on petitioners' property. It made a motion before the clerk that this plea in bar should be heard before Commissioners were appointed to assess damages. The clerk denied the motion.

The clerk then appointed Commissioners to assess damages and benefits. Damages were assessed at $5,000.00. The report of Commissioners was confirmed by the clerk, and judgment entered for petitioners in the sum of $5,000.00. Respondent appealed to the superior court.

When the appeal came on to be heard before Judge Shaw and a jury, the following facts appeared from the evidence and from stipulations by the parties:

Petitioners, subject to respondent's right of way, own in fee a lot or tract of land in the city of Greensboro, whose northern boundary is the center line of East Bessemer Avenue. In May 1955 the city of Greensboro, in the exercise of its right of eminent domain, acquired by gift, dedication and purchase a 100-foot right of way on Bessemer Avenue from Summit Avenue eastwardly to the city limits for street-widening purposes. This right of way passes directly in front of petitioners' realty. The parties stipulated that this right of way owned by the city of Greensboro was acquired by respondent, State Highway Commission.

The State Highway Commission in carrying out a plan for highway improvements, set forth in its Projects Nos. 5327 and 5363, and to facilitate the flow of highway traffic, constructed a bridge over what is now Highway #29. To reach this bridge from East Bessemer Avenue, which was an established highway, respondent constructed a fill for the purpose of raising the grade westwardly along East Bessemer Avenue in front of petitioners' property within the right of way owned by respondent.

The parties stipulated:

> "The petition may be construed as referring to Project No. 5327 and Project No. 5363, being the projects of grading and paving separately numbered.

"All grading, filling, and paving, referred to in Projects Nos. 5327 and 5363, was done entirely within the limits of said right of way as described in the several right of way agreements mentioned and specifically referred to in paragraph 4 of this stipulation. The foregoing stipulation is made with the understanding that it does not preclude the parties from offering evidence tending to show the exact location of the toe of the slope, the top of the slope, and the physical properties of the construction placed within said right of way by the respondent."

This fill varies in height from the top of the fill to the toe of the fill. The height of the fill or embankment at the northwest corner and at the northwest line of petitioners' property is 6.1 feet, in the center of petitioners' property it is 8.5 feet, and to the east at the eastern line of petitioners' property it is 12.8 feet.

Petitioners' property was level with East Bessemer Avenue, which was an established highway, before the fill was built. The fill is such that vehicular traffic from petitioners' realty cannot use it to go up on the roadway of East Bessemer Avenue. In order for vehicular traffic to go up on the roadway of East Bessemer Avenue a ramp would have to be built, which would extend about 35 feet into petitioners' property at the northwest corner where the height of the fill is 6.1 feet, and it would have to extend about 46 feet onto petitioners' property at the northeast corner where the height of the fill is 12.8 feet. By reason of this petitioners' property has been damaged.

Petitioners' property fronts 141.48 feet on Headquarters Drive. Petitioners' property is level with Headquarters Drive, and it has access to it.

There is neither allegation nor proof that the alteration of the grade of the public highway in East Bessemer Avenue was not lawfully authorized, or that it was effected for other than legitimate highway purposes. Further, there is neither allegation nor proof that respondent in raising the grade of the highway did the work in a negligent, or unskillful, or incautious manner. Petitioners' evidence—respondent offered none—shows that respondent's completion of its projects Nos. 5327 and 5363 is of general benefit to the public.

The following issues were submitted to the jury, and answered as appears:

"1. Did defendant, North Carolina State Highway Commission take the property of the plaintiffs in the form of easements of ingress, egress and regress?

"ANSWER: Yes.

"2. What sum, if any, including interest from the taking August 8, 1955, are the plaintiffs entitled to recover?

"ANSWER: $6,925.00 including interest from August 8, 1955, to January 8, 1962."

From judgment on the verdict, respondent appeals.

Attorney General T. W. Bruton, Assistant Attorney General Harrison Lewis, Trial Attorney Andrew McDaniel, and Hoyle, Boone, Dees and Johnson by T. C. Hoyle, Jr., for respondent appellant.

Jordan J. Frassinetti and Sapp and Sapp by Armistead W. Sapp for petitioner appellees.

PARKER, J. The State Highway Commission assigns as error the denial by the court of its motion for judgment of compulsory nonsuit made at the close of petitioners' evidence—the respondent offered no evidence. G.S. 1-183. In denying the motion the court committed reversible error.

The State Highway Commission is an unincorporated governmental agency of the State of North Carolina, charged with the duty of exercising certain administrative and governmental functions. *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782; *McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772.

The powers and duties of the State Highway Commission are set forth in G.S. Ch. 136, Art. 2. It is the State agency created for the purpose of constructing and maintaining our public highways. *De Bruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.

All the evidence shows the following: The State Highway Commission owns a 100-foot right of way on Bessemer Avenue from Summit Avenue eastwardly to the city limits of Greensboro, which right of way passes directly in front of petitioners' realty. Its complete right to occupy and use the entire surface of the land covered by its perpetual easement for all time to the exclusion of petitioners, their heirs, and assigns, makes the bare fee remaining at present in petitioners for all practical purposes of no value. *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778. In East Bessemer Avenue respondent had an established highway, and acting with lawful authority vested in it by the General Assembly and for legitimate highway purposes, it, acting in a governmental capacity, raised the grade of the established highway in East Bessemer Avenue passing in front of petitioners' property so as to impair or destroy, unless ramps are built, petitioners' ingress to this public highway from their abutting land, and egress from this public highway to their abutting land. According to a stipulation of the parties all grading, filling, and paving by

respondent on East Bessemer Avenue in front of petitioners' abutting land was done entirely within the limits of its right of way. There is neither *allegata* nor *probata* that respondent did not do the work in a proper method or manner.

When a public highway is established, whether by dedication, by prescription, or by the exercise of eminent domain, the public easement thus acquired by a governmental agency includes the right to establish a grade in the first place, and to alter it at any future time, as the public necessity and convenience may require. Consequently, it is the rule with us, and very generally held elsewhere, that, unless otherwise provided by statute or constitutional provision, an abutting property owner, even if he owns the fee of the land within the highway, may not recover for damages to his land caused by a municipal corporation or the State Highway Commission changing the grade of an established street or highway, when said change is made pursuant to lawful authority and for a public purpose, and there is no negligence in the manner or method of doing the work. Any diminution of access by an abutting landowner is *damnum absque injuria. Thompson v. R. R.*, 248 N.C. 577, 104 S.E. 2d 181; *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37; *Calhoun v. Highway Commission,* 208 N.C. 424, 181 S.E. 271; *Stamey v. Burnsville,* 189 N.C. 39, 126 S.E. 103; *Bennett v. R. R.*, 170 N.C. 389, 87 S.E. 133, L.R.A. 1916D 1074; *Hoyle v. Hickory,* 167 N.C. 619, 83 S.E. 738; *Dorsey v. Henderson,* 148 N.C. 423, 62 S.E. 547; *Meares v. Wilmington,* 31 N.C. 73; 29 C.J.S., Eminent Domain, pp. 938-9; 18 Am. Jur., Eminent Domain, sec. 211; Nichols on Eminent Domain, 3d Ed., Vol. 2, sec. 6.4441, (1), (2), (3).

Nichols, *ibid,* p. 369 states:

> "Accordingly, there are few propositions better settled by the authorities than that an owner of land adjoining the highway and owning the fee of the way is not constitutionally entitled to compensation for injury resulting from a change in the grade. As serious injuries to lands adjoining public ways were inflicted by changes of grade in the early years of the last century, the question was thoroughly contested and conclusively settled before the modern theories extending municipal liability had been invented, and the old rule was then too well supported by authority to be shaken."

"Incidental interference with the abutting owner's easements of light, air, and access by reason of the change of grade does not entitle him to compensation, in the absence of a constitutional or statutory liability." 29 C.J.S., Eminent Domain, p. 939. See also Nichols, *ibid,* sec. 6.4441 (3).

"Where the change of grade of a highway causes damage to the land of an abutter it is not deemed a 'taking' in the constitutional sense so as to require compensation therefor as in eminent domain. This rule does not, however, apply to cases of partial takings, where damage to the remainder by reason of change of grade is involved, nor does it apply where the alteration in the grade is not lawfully authorized or is effected for other than legitimate street purposes." Nichols, *ibid.*, pp. 364-368. Numerous cases from the federal and state jurisdictions are cited in support of the text, including our cases of *Dorsey v. Henderson, supra; Harper v. Lenoir,* 152 N.C. 723, 68 S.E. 228; *Earnhardt v. Commissioners of Lexington,* 157 N.C. 234, 72 S.E. 864; *Hoyle v. Hickory,* 164 N.C. 79, 80 S.E. 254; *Wood v. Duke Land Co.,* 165 N.C. 367, 81 S.E. 422; *Hoyle v. Hickory,* 167 N.C. 619, 83 S.E. 738; *Bennett v. R. R., supra; Powell v. R. R.,* 178 N.C. 243; 100 S.E. 424; *Stamey v. Burnsville, supra; Calhoun v. Highway Commission, supra.*

We have no statutory provision and no constitutional provisions imposing liability upon respondent for the acts complained of by petitioners.

Petitioners rely upon *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748. The holding in that case was that an abutting landowner was entitled to recover compensation for damages resulting from the closing of a street at a railroad crossing. In the instant case, petitioners are seeking to recover damages by reason of respondent raising the grade of an established highway made by it pursuant to lawful authority and for a legitimate highway purpose—a proper exercise of its highway easement, because when respondent acquired the easement on East Bessemer Avenue, the easement thus acquired includes the right to alter the grade in East Bessemer Avenue at any future time, as the public necessity or convenience may require, without any liability to an abutter for the impairment or loss of his easement of access, for the reason that his easement of access is "held subject to public right to make use of the way for travel and other proper highway uses, and anything that would constitute a proper exercise of the highway easement is no infringement of the abutter's rights." Nichols, *ibid.*, p. 370. The public has a paramount right to improve the highway for highway purposes. The holding in the *Hiatt* case conflicts in no way with the holding here, because the facts of the two cases are different, and to the different facts different principles of law apply.

Petitioners also rely upon *Thompson v. R. R., supra.* That case and the instant case are easily distinguishable, and the holding in that case does not conflict at all with the holding here. In the *Thompson* case the railroad raised the elevation of the street, and the evidence dis-

closed that the change in grade was for the benefit of the railroad, and was not a function of the city nor done for the city's benefit. The *Thompson* case in the opinion states:

> "When a city acts for public convenience under the authority granted it by the Legislature and raises or lowers the grade of a street, any diminution of access by an abutting property owner is *damnum absque injuria*. The abutting property owner can neither prevent the change by injunction nor recover damages for the diminished value of his property, when the work is done in conformity with plans designed to promote public convenience."

Petitioners rely upon statements in *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630 (a case where the town of Smithfield closed a grade crossing at the intersection of a street in the town with a railroad), and *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129 (a case involving the condemnation of land for a limited access highway), to the effect that an abutter's right of access to a public highway is in the nature of an easement appurtenant to his property, and any interference with the easement, which is itself property, is considered *pro tanto*, a "taking" of the property for which compensation must be allowed. Those statements of law are correct where there has been a "taking" in the constitutional sense of an abutter's easement of access, as in the *Hiatt* case by closing a street, but they are not applicable to the facts of the instant case, because, as set forth above, when respondent acquired the public easement on East Bessemer Avenue, the easement thus acquired includes the right to alter the grade as the public necessity and convenience may require, and consequently the change of grade of the highway, which impaired or destroyed petitioners' access to it, is not deemed a "taking" in the constitutional sense so as to require compensation therefor.

In the court below the verdict and judgment will be vacated, and a judgment of compulsory nonsuit entered.

Reversed.

FLORA MOLINA HARRIS v. JETER CLARENCE HARRIS

(Filed 15 June 1962.)

1. Divorce and Alimony § 18—

Evidence that after the institution of an action for alimony without divorce, defendant's counsel discussed the settlement of the matters in controversy with counsel for plaintiff, *is held* to disclose that defendant's

counsel had sufficient authority to warrant the service of notice upon them of plaintiff's motion for a hearing for alimony *pendente lite*, G.S. 1-585, and therefore evidence that defendant's counsel had more than five days' notice of such motion is sufficient to support a finding that defendant had the notice required by G.S. 50-16.

2. Same—

Where, upon hearing of a motion for alimony *pendente lite* in the wife's action for alimony without divorce, there is evidence sufficient to support the court's finding that the parties were husband and wife, the order for alimony *pendente lite* will not be disturbed upon the husband's contention that he and plaintiff were not lawfully married, the matter being finally determinable upon the hearing upon the merits if the issue should be raised.

3. Appearance § 2—

While a defendant may challenge the validity of the process purporting to subject him to the jurisdiction of the court and at the same time deny the facts upon which plaintiff seeks relief, G.S. 1-134.1, where he appeals from the clerk's order denying his motion to dismiss the matter is properly before the Superior Court, G.S. 1-272, and if in the Superior Court defendant does not request a ruling on the motion to dismiss, but participates in the hearing of plaintiff's motion for alimony *pendente lite*, he waives the right to object to the validity of the process.

4. Divorce and Alimony §§ 1, 16—

While residence is a condition to the maintenance of an action for divorce in this State it is not required for an action for alimony without divorce, and where the husband abandons the wife while they are living in this State, our courts have jurisdiction of an action for alimony without divorce based upon such abandonment, G.S. 50-16, notwithstanding the parties are domiciled in another state.

5. Divorce and Alimony § 18—

While the court, ordering alimony *pendente lite*, has authority to secure as much of the husband's estate as may be necessary to insure compliance with its order, G.S. 50-16, where the husband has realty in this State and the order for alimony *pendente lite* is made a lien thereon, and it further appears that the husband has a large income from properties in this State, it is error for the court *sua sponte* to order a receiver to take over all of defendant's property, since the record fails to show the necessity for the appointment of the receiver.

APPEAL by defendant from *Williams, J.*, December 1961 Criminal Term of ALAMANCE.

This action for alimony without divorce was begun 12 December 1961. Judge Williams, on plaintiff's application, made an order for alimony *pendente lite* and counsel fees. He adjudged the payments to be made a lien on defendant's real property and appointed a receiver to take possession of all of defendant's real and personal property.

Defendant challenged the court's right to hear plaintiff's motion for alimony *pendente lite,* asserting he had not been given five days' notice as required by G.S. 50-16. The court, upon findings, concluded that the required notice had been given. Defendant then sought a continuance. This was denied. The court heard evidence, found facts on which it based its order awarding alimony. Defendant, having excepted to the findings and orders overruling his motions, appealed.

Cooper & Cooper for plaintiff appellee.

Dalton, Long & Latham and Edgar Dameron, Jr. for defendant appellant.

RODMAN, J. Appellant in his brief enumerates five questions presented by the appeal. Each is discussed only so far as necessary to dispose of the present appeal.

1. Was proper notice of the hearing below given, and, if not, were sufficient facts shown to dispense with the necessity for such notice?

The answer is yes. The complaint alleges: Plaintiff and defendant were residents of Horry County, S. C., temporarily residing in Alamance County, where defendant has property and business interests. Defendant, on 8 September 1961, without cause or excuse, abandoned plaintiff.

The record discloses these additional facts: Summons for defendant issued to Alamance County on 12 September 1961. It was returned "not to be found." Based on plaintiff's affidavit that defendant was secreting himself, plaintiff obtained warrant of attachment and order of publication. Certain of defendant's properties were attached. Notice of the institution of the action was published in a Burlington paper. On 10 November 1961 defendant entered a special appearance before the clerk and moved to dismiss for the asserted reason that the published notice was defective in that it failed to tell him when he was required to answer. The motion to dismiss was overruled. Defendant excepted and appealed. On 30 November 1961 plaintiff directed a notice to "W. R. Dalton, Jr. and E. S. W. Dameron, Jr., Attorneys for the defendant, Jeter Clarence Harris," notifying them plaintiff would, on 8 December, seek from the presiding judge an order allowing plaintiff alimony *pendente lite.* This notice was served on named counsel on 2 December 1961. Defendant assertedly appearing specially moved to strike the notice of the hearing. Judge Williams, in overruling the motion and in an order rejecting defendant's motion for a continuance, found these facts: That from approximately October 15, 1961 to November 30, 1961, W. R. Dalton, Jr. and E. S. W. Dameron, Jr., attorneys for the defendant, had in their possession all of the

original official Court documents relating to this case and had conferences with the attorneys for the plaintiff with reference to the possibility of settlement of the case and with reference to the possible opening of safe deposit boxes rented by the defendant in the National Bank of Alamance . . . the defendant has been continuously in Alamance County at his farm cottage and available for conferences with his counsel from several weeks prior to December 2, 1961, to present date . . . counsel for defendant have participated in hearings and matters ancillary to this main action since its institution to the present date and had in their possession, from approximately October 15, 1961, to November 30, 1961, the official original Court file in this case . . ."

Defendant has taken no exception to the foregoing findings.

Notice of a motion may be given defendant personally, or it may be given his attorney. G.S. 1-585. The court's finding that counsel for defendant had discussed settlement of the matters in controversy with counsel for plaintiff necessarily implies the discussion was authorized by defendant. An attorney with such authority comes within the statutory provision defining the manner by which notice of a motion for a hearing may be given defendant.

Messrs. Dalton and Dameron, as attorneys for defendant, had entered a special appearance and moved to vacate the warrant of attachment and dismiss the action for asserted defects in the process by which plaintiff sought to bring defendant into court. Such appearance was sufficient to authorize service of notice on them of a motion for a hearing on the merits.

It is perhaps significant that defendant does not assert that he was not promptly informed by his counsel of plaintiff's demand for a hearing. He sought a continuance, but not on the ground that he had not been notified. To the contrary, he sought the continuance to give him time to investigate the merits of plaintiff's claim, a matter which the court finds had been the subject of discussions looking to a settlement for nearly sixty days. The court did not err in concluding that the requirements of G.S. 50-16, of five days' notice of hearing to the defendant, had been complied with.

Defendant's fifth question is a challenge to the sufficiency of the evidence to support the finding that plaintiff and defendant are husband and wife. Although defendant has filed no answer controverting the allegations of the complaint entitling plaintiff to alimony, defendant insists the evidence offered at the hearing for subsistence and counsel fees conclusively demonstrated plaintiff and defendant are not, as alleged, husband and wife; hence plaintiff is not entitled to look to defendant for her support. Defendant offered evidence that a decree of

divorce from a prior wife obtained in Alabama on 19 February 1959 was, on 24 February 1961, declared void by the Alabama court. Hence, he says, his marriage to plaintiff in Georgia on 19 February 1959 was a nullity. But the evidence also shows that defendant was subsequently granted a divorce in Alamance County, N. C. The validity of that divorce is not challenged. Plaintiff and defendant, residents of South Carolina, lived there as husband and wife subsequent to the rendition of the Alamance decree divorcing defendant from his prior wife. South Carolina recognizes common law marriages. *Tedder v. Tedder,* 94 S.E. 19; *Rodgers v. Herron,* 85 S.E. 2d 104, 48 A.L.R. 2d 1241. If the relation of plaintiff and defendant subsequent to defendant's valid divorce was sufficient to constitute a valid marriage in South Carolina, such marriage would be given full recognition in this State. *S. v. Ross,* 76 N.C. 242. Defendant's own evidence is sufficient to establish the fact that he abandoned plaintiff in North Carolina when they were living at his farm in Alamance County as husband and wife.

Judge Williams found as a fact the parties are husband and wife. This is the crucial question. The place of marriage is immaterial. The question of the sufficiency of plaintiff's allegations to show a marriage in South Carolina is not presently before us. There is evidence to support a finding of marriage. The evidence on this question will undoubtedly be more fully developed if and when a proper issue is raised by denial by defendant that he and plaintiff were married. Defendant's exception to the finding that he and plaintiff "are husband and wife" is overruled.

Defendant, when he applied to the court to strike plaintiff's notice of her motion for an order for subsistence, said he was appearing specially. When that motion and his motion for a continuance were overruled, he filed "SPECIAL APPEARANCE AND AFFIDAVIT." This gave defendant's version of the facts which would defeat plaintiff's claim for subsistence.

A defendant may now by answer challenge the validity of process purporting to subject him to the jurisdiction of the court and deny the facts on which plaintiff seeks relief. G.S. 1-134.1. But if he proceeds to a hearing on the merits without having the court pass on his objection to the process, he waives that objection. *In re Blalock,* 233 N.C. 493 (504), 64 S.E. 2d 848; *Bank v. Derby,* 215 N.C. 669, 2 S.E. 2d 875; *Scott v. Life Association,* 137 N.C. 515. Had defendant wished to preserve his special appearance, he should have requested a ruling, and, if adverse, taken an exception. His appeal from the clerk's order overruling his special appearance was properly before the court. G.S. 1-272. Defendant is now before the court on a general appearance.

Defendant's seventh exception and fourth question is directed to the order awarding subsistence and counsel fees. He contends the court did not have jurisdiction to hear plaintiff's claim since neither of the parties was domiciled in North Carolina, nor did the asserted marriage occur in North Carolina. The home of the parties is, according to the complaint and testimony, in Horry County, S. C., but they are frequent visitors to Alamance County, N. C., where defendant has large property interest, including a farm and a house which he and plaintiff occupied on their visits to North Carolina. It was during a visit to this State and while the parties were living at defendant's farm that he abandoned plaintiff. Plaintiff's right of action arose here. Residence is, under our statutes, a condition to the maintenance of an action for divorce. This is not true of an action brought under G.S. 50-16. We perceive no sound reason why, under the facts of this case, the courts of this State should refuse to hear plaintiff and render such judgment as justice may require. *Walters v. Breeder,* 48 N.C. 64; *Howell v. Howell,* 154 So. 328; *Kiplinger v. Kiplinger,* 2 So. 2d 870; *George v. George,* 23 A. 2d 599. The varying views of courts dependent on varying statutes and facts are indicated in 42 C.J.S. 220 and 27 Am. Jur. 25, 26.

The remaining question argued by defendant relates to that portion of the order awarding alimony which appoints a receiver "directed to take possession of all the defendant's properties, both real and personal, tangible and intangible, located in the State of North Carolina, with full authority and power to collect all rents and profits therefrom and, after the payment of all expenses for its conservation and maintenance, including taxes, insurance and other costs, including costs of this action and reasonable allowance to said Receiver, pay the remainder to the Clerk of this Court for application upon this judgment and to hold the remainder, if any, subject to the further orders of this Court."

Plaintiff's motion for alimony was heard 8 December 1961. The parties agreed the court might sign such order as it deemed appropriate in or out of the district. The order bears date of 30 December 1961. It was filed 2 February 1962. Plaintiff had not requested the appointment of a receiver, apparently not deeming such action necessary for the protection of her rights. The provision for a receiver to take possession of *all* of defendant's property was inserted by the court *sua sponte.* Accepting plaintiff's estimate of defendant's financial condition as correct, it does not appear necessary for her protection to exclude defendant from control of *all* of his property. He has, according to plaintiff, an annual income of $36,000, derived in part from rent from sixty houses, an apartment house, business buildings, a farm, all in North Carolina, in addition to vacant properties in Burlington.

By the express language of the order, sums to be paid plaintiff are liens on all defendant's real estate.

When a court awards alimony *pendente lite,* it has authority "to cause the husband to secure so much of his estate" as may be necessary to comply with its order. G.S. 50-16. Such order as may be necessary for the protection of the wife is the limit of the court's authority. It cannot penalize defendant unless and until he refuses to comply with the court's direction. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443; 27B C.J.S. Divorce, sec. 270; 17 Am. Jur. 686-7.

Since plaintiff did not seek the appointment of a receiver and the record does not show the necessity therefor, the order will be modified by striking therefrom that portion appointing a receiver. This modification is, of course, without prejudice to plaintiff's right to hereafter move in the Superior Court for such order as may be necessary to secure compliance with that portion of the order which directs payment of monthly sums for plaintiff's subsistence and counsel fees.

The order, modified as directed in this opinion, is

Affirmed.

NEWTON SMITH v. FRANK STEPP, GUARDIAN AD LITEM FOR ELIZABETH STEPP, AND JESSE FRANKLIN JONES

AND

GLENDA GAIL SMITH, BY HER NEXT FRIEND, NEWTON SMITH v. FRANK STEPP, GUARDIAN AD LITEM FOR ELIZABETH STEPP, AND JESSE FRANKLIN JONES.

(Filed 15 June 1962.)

1. Courts § 20—

In an action to recover for injuries received by a gratuitous passenger in an automobile accident occurring in a Federal parkway within the exterior boundaries of the State of Virginia, the substantive law of the State of Virginia controls and plaintiff is required to show that her injuries resulted from gross negligence of the driver. 16 USCA § 457, Code of Virginia § 8-646.1.

2. Automobiles § 47—

Under Virginia law, the sufficiency of the evidence of gross negligence in an action by a gratuitous passenger to recover against the driver must be determined upon the facts and circumstances of each case, and the evidence must be submitted to the jury unless reasonable men should not differ as to the proper conclusion to be drawn from the evidence, considering it together with all reasonable inferences in the light most favorable to plaintiff.

3. Same— Evidence of gross negligence of driver held sufficient under Virginia law to be submitted to jury.

Evidence tending to show that an inexperienced driver presisted in operating a vehicle at an excessive speed, notwithstanding repeated admonitions by the passengers and after repeated instances of negligent operation in running off the road, in slowing down too suddenly because the driver was unaccustomed to power brakes, and in passing another car in a negligent manner, and then, while traveling at excessive speed in disregard of successive signs limiting the speed, lost control of the vehicle in applying the brakes, causing it to skid some several hundred feet until it ran off the right of the highway, then across the highway and down an enbankment, *is held* sufficient to be submitted to the jury on the issue of such driver's gross negligence, since the number of negligent acts are so combined that reasonable men may differ as to whether their accumulated effect shows a form of recklessness or a total disregard of precaution.

4. Automobiles § 49—

Evidence that plaintiff passenger entered a car while it was being driven by the owner, that thereafter on the trip the owner permitted an inexperienced person to drive, that plaintiff passenger remonstrated with the inexperienced driver as to speed, at which times the driver would slow down momentarily and then resume excessive speed, *is held* insufficient to show contributory negligence of the passenger as a matter of law in refusing to continue the trip, notwithstanding repeated acts of negligence in the operation of the car by such driver.

APPEAL by plaintiffs from *Phillips, J.*, November 6, 1961 Term of SURRY.

On May 25, 1959, in the State of Virginia, Glenda Gail Smith (hereafter called Glenda) was riding as a guest passenger in a 1954 Cadillac operated by Elizabeth Stepp (hereafter called Elizabeth) on the Blue Ridge Parkway. Jesse Franklin Jones (hereafter called Jones), the owner of the car, was present therein. The car ran off the road and turned over and Glenda sustained personal injuries.

Two actions were instituted against Elizabeth, the operator, and Jones, the owner: one by Glenda, represented by next friend, to recover damages for personal injuries, and the other by Newton Smith, Glenda's father, to recover for his expenses in providing medical care for Glenda and for the loss of Glenda's services. The two actions, by consent, were consolidated for the purpose of trial.

Plaintiffs alleged Elizabeth operated Jones' Cadillac carelessly and heedlessly, in wilful and wanton disregard of the rights and safety of others, in particulars set forth, and thereby caused the wreck and Glenda's injuries; that Jones permitted Elizabeth to continue to operate his car with knowledge she was not a competent driver and was operating the car in such manner; and that Elizabeth was operating the car as the agent of Jones.

Answering, defendants denied negligence and, as further defenses, pleaded unavoidable accident and contributory negligence.

The only evidence was that offered by plaintiffs. At the conclusion thereof, the court, allowing defendants' motions therefor, entered judgments of involuntary nonsuit. Plaintiffs excepted and appealed.

White & Crumpler, Leslie G. Frye and Harrell Powell, Jr., for plaintiff appellants.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson and W. F. Maready for defendant appellees.

BOBBITT, J. It was stipulated "that the accident happened on the Blue Ridge Parkway, within the confines of the State of Virginia, and that the State of Virginia has ceded the area where this accident happened to the Federal Government, and that the Federal Government has exclusive supervision of the road at this point."

An Act of Congress, 45 Stat. 54, provides:

> "In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." 16 U.S.C.A. § 457.

A Virginia Statute provides:

> "§ 8-646.1. Liability for death or injury to guest in motor vehicle.—No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." Code of Virginia of 1950, Vol. 2 (1957 Replacement), Title 8, Chapter 29, Article 5.

Decisions of the Supreme Court of Appeals of Virginia, relating to the quoted Virginia statute and defining (1) simple or ordinary negli-

gence, (2) gross negligence, and (3) wilful and wanton disregard of safety, are cited and discussed in *Doss v. Sewell, ante,* 404, ... S.E. 2d ....., filed simultaneously herewith.

The term "gross negligence" does not appear in the complaint. While the case on appeal shows plaintiffs were permitted to amend, the amendments are not in the record. Appellees' brief indicates the complaint was amended to allege gross negligence. Gross negligence is "something less" than wilful and wanton conduct. *Thomas v. Snow,* 162 Va. 654, 174 S.E. 837. No question is raised as to the sufficiency of plaintiffs' allegations. Hence, notwithstanding the amendment is not before us, we consider the two questions discussed in the briefs: (1) Whether the evidence was sufficient to require submission of an issue as to *gross negligence;* and (2) whether the evidence discloses Glenda was contributorily negligent as a matter of law.

"Whether gross negligence has been proved depends on the facts and circumstances in each case and each case is governed by its own facts. Ordinarily the issue is for the jury, and it becomes a question of law for the court only when reasonable men should not differ as to the proper conclusion to be drawn from the evidence." *Kennedy v. McElroy,* 195 Va. 1078, 81 S.E. 2d 436, and cases cited.

In North Carolina, as in Virginia, in determining its sufficiency for submission to the jury, the evidence and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to plaintiffs. See *Gill v. Haislip,* 201 Va. 840, 114 S.E. 2d 603.

The evidence, when considered in the light most favorable to plaintiffs, tends to show the facts narrated below.

On May 25, 1959, about 2:30 p.m., in Mount Airy, North Carolina, Glenda and Elizabeth, two sixteen-year-old girls, walking, were on their way home from school. Jones, driving his Cadillac and accompanied by Don Harris, stopped and invited the girls "to go riding around." The girls got in the back seat. While riding in Mount Airy and then out Highway #89 to Low Gap, Jones was driving and Harris was to his right on the front seat. Before reaching Low Gap, Elizabeth had asked Jones "two or three times" to let her drive. She told Jones she had "a learner's permit" and could drive. They stopped at a Grill near Low Gap to get some drinks. From there, "up the mountain and across the Parkway," Elizabeth did the driving and Jones rode with Glenda in the back seat.

On the trip up the mountain: The road from Low Gap "on up to the top of the mountain is very curvy, mountains on one side, and the valley on the other." Elizabeth "was used to the brakes on a '53 Ford which worked rather hard . . ." Twice, when Elizabeth put on brakes, the car "would bump a little bit." Elizabeth said "she would have to

get used to the power brakes and the power steering." She "started out slow and then she started speeding." Glenda first told Elizabeth to slow down when "she cut out sharp" to pass a car and, when she passed it, "cut back in too close." On one occasion, Elizabeth ran off the road two or three feet, then got back on the road. She was driving about "50 to 55" up the mountain. When Glenda asked Elizabeth to slow down, she would slow down a little bit and then "speeded back up." Glenda asked Elizabeth to let somebody else drive. Elizabeth's reply was that "she was driving." When Jones asked Elizabeth to slow down, she slowed down "just long enough to speed back up." When they reached the top of the mountain, they stopped at a place called "Jimmy's Nite Spot," "another eating place at the top of the mountain." Jones and Harris went inside. The girls stayed in the car.

When Jones and Harris got back in the car, Elizabeth drove toward the Parkway. Before getting on the Parkway, when they came to a stop sign, Elizabeth put on brakes and the car "bounced again." Elizabeth said "she had to get used to the brakes." From the Highway #89 crossing, Elizabeth drove continuously along the Parkway toward Fancy Gap.

On the Parkway: Elizabeth was "going about 55 or 60." Around the curves, "you could hear the tires squealing." When the tires squealed, the car "felt like it was pulling to the right." When Glenda asked Elizabeth to slow down, Elizabeth said "she was doing all right." About a half of a mile before the scene of the wreck, Elizabeth "left the road once more," —"it just weaved off and then back on." Glenda then told her to slow down. Elizabeth said, "Okay," slowed down a little bit, but then "speeded right back up." Just before the wreck, Glenda asked Elizabeth again to slow down. Elizabeth slapped or slammed on the brakes and the car skidded to the right and down the highway, then crossed the highway and went down the embankment on the left. While traveling on the Parkway, both Jones and Harris asked Elizabeth to slow down and be careful. Glenda asked Elizabeth to let somebody else drive.

The general speed limit on the Parkway was 45 miles per hour. Where the speed limit was lower, signs to that effect were posted.

The section of the Parkway from the Highway #89 crossing to the Highway #52 (Fancy Gap) crossing is approximately seventeen miles. In this area, the Parkway runs generally near the top of the mountains, along the crest, at an elevation of about 2950 to 3000 feet. The particular area in which the wreck occurred is known as "Felts Hill." Traveling toward Fancy Gap, the general nature of the Parkway, for several miles before reaching "Felts Hill," is "primarily gently curving through open farm land." Upon reaching "Felts Hill," the Parkway is down-

hill for eight-tenths of a mile. "The top of it is a long gentle curve, then it goes, heading northeast, into a fairly sharp curve before it gets to the bottom." At the bottom, the elevation is about three hundred feet lower. The wreck occurred about half-way down "Felts Hill."

Traveling toward Fancy Gap, two rectangular signs, "Speed 35," face the motorist. The first is approximately four hundred feet from the top of "Felts Hill." The second is approximately fifteen hundred feet beyond the first. The wreck occurred approximately two hundred feet beyond the second sign.

The Parkway Ranger testified he observed these tire or skid marks: The first set of marks extended 136 feet before leaving the pavement. The next set was off the pavement on the right, on the "solid turf, grass shoulder," extending 116 feet. The next set extended diagonally across the twenty-foot (paved) road, a distance of 116 feet. It was 103 feet from the northern end of these skid marks to the wrecked car. The Cadillac had turned over several times and was down the embankment on the left side of the Parkway.

Defendants stress *Hale v. Hale*, 219 N.C. 191, 13 S.E. 2d 221, where *Barnhill, J.* (later *C.J.*), after citing *Young v. Dyer*, 161 Va. 434, 170 S.E. 737, and *Thomas v. Snow, supra*, and other Virginia decisions, stated: "The operation of an automobile at an excessive rate of speed by an inexperienced, unskillful and incompetent person 17 years of age who, by reason of his inexperience, lack of skill and incompetency, lost control of the car which leaves the pavement and goes into a ditch, does not constitute gross negligence." In these and other Virginia decisions cited by defendants, the evidence tended to show proper prior operation of the automobile, with the acquiescence of the passenger, and the evidence as to the negligence of the driver related solely to what occurred on the occasion of the accident.

Here, according to plaintiff's testimony, what occurred on "Felts Hill" was not an isolated incident but the tragic climax of Elizabeth's negligent operation of the Cadillac from Low Gap up the mountain and thereafter along the Parkway toward Fancy Gap. There was evidence that, in addition to specific prior instances of negligent driving, Elizabeth persisted, with the acquiescence of Jones, in operating the Cadillac notwithstanding plaintiff's protests and in disregard of repeated warnings that she slow down and drive more carefully. Her lack of experience and skill, when she persisted in operating the Cadillac under these circumstances, tends to magnify rather than minimize the negligent character of her conduct. Moreover, her persistence in driving down "Felts Hill" at excessive speed, notwithstanding the additional warnings of the "Speed 35" signs, supports the view she was responsible for the emergency situation in which she

slapped or slammed on her brakes in such manner as to cause her to lose control of the car.

"If a number of negligent acts are so combined that reasonable men may differ as to whether their cumulative effect shows a form of recklessness or a total disregard of all precautions akin to willful and wanton misconduct, it is a question for the jury whether such negligence amounts to gross negligence." *Kennedy v. McElroy, supra; Mitchell v. Wilkerson,* 193 Va. 121, 67 S.E. 2d 912; *Drumwright v. Walker,* 167 Va. 307, 189 S.E. 310. When tested by this rule, we are of opinion, and so decide, that the evidence, when considered in the light most favorable to plaintiffs, was sufficient to require submission for determination by the jury of issues as to whether the wreck of the Cadillac and the resulting personal injury and damages were proximately caused by the *gross negligence* of defendants.

It may be conceded the evidence, when considered in the light most favorable to defendants, was sufficient to require the submission for determination by the jury of issues as to whether the alleged contributory negligence of Glenda was a proximate cause of the wreck of the Cadillac. However, when considered in the light most favorable to plaintiffs, it does not establish Glenda's contributory negligence so clearly no other reasonable inference or conclusion may be drawn therefrom and therefore does not establish contributory negligence as a matter of law. *Dennis v. Albemarle,* 243 N.C. 221, 223, 90 S.E. 2d 532. It is noted that Glenda became a guest passenger in the Cadillac when Jones, the owner, was driving it, and that Jones continued to drive it until they reached the Grill at Low Gap. In this connection, see *Dinkins v. Carlton,* 255 N.C. 137, 120 S.E. 2d 543, and cases cited.

For the reasons stated, the judgments of involuntary nonsuit are reversed.

Reversed.

D. C. KIRKMAN, AND WIFE, LELA M. KIRKMAN, v. STATE HIGHWAY COMMISSION.

(Filed 15 June 1962.)

1. Eminent Domain § 5—

While loss of profits or injury to a going business are not elements of compensation which may be recovered in eminent domain proceedings, where the taking of an abutting landowner's access to a highway results in a loss of business which in turn renders the land less valuable, the diminution in value of the land itself is a proper element of compensation.

2. Same—

The highest and most profitable use for which property is adaptable is one of the factors properly considered in arriving at the market value.

3. Same—

While special and general benefits accruing to the remainder of petitioner's land are to be considered as an offset in determining the amount of damages sustained by petitioner in the taking of a part of his tract of land, the burden is on condemnor to prove the existence of such special and general benefits as actual and appreciable and not merely conjectural or hypothetical. Further, such benefits having once been allowed in a previous proceeding cannot be again allowed in a subsequent one.

4. Same—

The evidence disclosed that petitioner had theretofore conveyed a right of way for highway purposes, reserving access points to the highway from its remaining lands. Petitioner instituted this proceeding to recover compensation for the later taking of his access. Under the facts it *is held* that the failure of the court to submit the question of special and general benefits was not error, since special and general benefits had already been taken into account in ascertaining compensation for the conveyance of the right of way, and since it is evident that no appreciable benefit resulted to petitioner's remaining land from the mere fact that his access to the highway had been closed.

5. Trial § 35—

An excerpt from the charge lifted out of context will not be held for error as containing an expression of opinion by the court upon the evidence when it is apparent in construing the charge contextually that the court was merely stating a contention of a party and was not expressing an opinion upon the evidence.

APPEAL by respondent from *Phillips, J.*, October 23, 1961 Civil Term of FORSYTH.

In January, 1953 petitioners owned a tract of land just outside the city limits of Kernersville and situated about twelve miles east of Winston-Salem and eighteen miles west of Greensboro. The Greensboro Airport is about seven miles east. The north side of the lot fronted on U. S. Highway No. 421, which will hereinafter be called "Old 421". This highway goes from Greensboro to Winston-Salem through the center of Kernersville. In January, 1953 petitioners sold to the State Highway Commission a right of way across this property for new 421 which was to be located a short distance south of old 421. Thereafter, between these two highways, petitioners owned a lot containing approximately three acres which fronted about 700 feet on old 421 and 644.93 feet on new 421. The lot had a depth of about 300 feet on the west and about 100 feet on the east end. Petitioners also owned an unspecified amount of land on the south side of new 421. When petitioners sold the right of way for new 421, they retained a specifi-

cally located point of access to new 421 on both the north and south side of that highway. New 421 was opened to traffic in 1953.

On August 6, 1950, the petitioners conveyed to the respondent a right of way for Project No. 5346 known as Interstate Highway No. 40. In this transaction petitioners sold respondent all the land they had left on the south side of new 421 including the right of access to that highway from the south. However, they retained the access point and right of access to new 421 on the north side. Thereafter the respondent converted this section of new 421 into a ramp connecting Interstate Highway No. 40 with U. S. Highway No. 421.

In 1956 on the lot between old and new 421 the petitioners built twelve units of an L-shaped motel, at the same time installing facilities for eight additional units to be built later. This motel, known as the Pony Motel, faced new 421. It opened for business on June 1, 1956, and petitioners operated it continuously after it was opened. The driveway into the motel was constructed at the point where access to new 421 had been reserved. At the same time a restaurant which faced north on the lot was remodeled, and a side entrance was added on the east so that it faced the motel. On August 15, 1958, the respondent took the access point which petitioners had reserved and placed a barricade across it, thereby completely eliminating access to the motel from new 421. Several months prior to the taking the State Highway Commission had made new 421 one-way for traffic going west, and at the time the barricade was put up, traffic going east to Greensboro did not have access to the motel at the reserved point.

To get to the motel since the entrance from new 421 has been barricaded, west-bound traffic, after passing the barricade, has to travel about 1500 feet to the clover-leaf intersection with State Highway No. 66, go under the overpass (Highway No. 66), take the ramp onto No. 66 and then go about 1200 feet northerly to the intersection of No. 66 with old 421 at the edge of Kernersville, turn sharply to the right, and then go east on old 421 to the motel. This route is well over one-half a mile.

If a person traveling west on new 421 from the Greensboro Airport knew where the motel was, and was familiar with the roads, he could turn right off of new 421 at the Pilgrim Bible College into old 421 and go about 1700 feet to the motel. North Carolina Highway No. 66 is the road between Kernersville and High Point and it crosses Interstate 40 and new 421 on an overpass about three-tenths of a mile west of the Pony Motel. Passengers on No. 40 cannot see the entrance to the motel.

To get to the motel a motorist going east towards Greensboro would go under the bridge (Highway No. 66) and out on the east-

bound lane of new 421 to the Bible College, make a sharp left turn and go back along old 421. The traveler going east who knew the motel was ahead could get off new 421 at the clover-leaf intersection with No. 66 west of the motel, go north on No. 66 to old 421, turn right and go into the back of the motel. However, this was the situation facing travelers going east prior to the taking of the access.

Petitioners instituted this action to recover just compensation for the taking of the access point and for damage caused the remainder of their property by reason of the taking. Respondent concedes that it has permanently terminated the petitioners' direct access to new 421 which had theretofore been reserved and granted and that in closing the access it had actually taken 2,232 square feet of ground not previously acquired. Respondent did not resist petitioners' prayer that just compensation be determined as set forth in Article 2 of Chapter 40 of the General Statutes and in G.S. 136-19, but prayed that "benefits both general and special be assessed as offsets against the damages, if any, as provided therein."

Commissioners were duly appointed and, from the judgment of the clerk affirming their report, all parties appealed to the Superior Court. On the trial petitioners offered evidence tending to show that the value of the motel property after the access point had been taken was from $14,500.00 to $40,000.00 less than it had been before. Two witnesses for the respondent testified that in their opinion the diminution in value was $221.00; one witness said $350.00. These witnesses did not place any value on the loss of access but valued the square feet taken at ten and fifteen cents a square foot. One witness for the respondent estimated that the property had been damaged twenty per cent or $2,000.00. The jury assessed damages of $24,000.00, and from judgment on the verdict the State Highway Commission appealed, assigning three errors.

W. P. Sandridge; Charles F. Vance, Jr.; and Wade M. Gallant, Jr., for petitioner appellees; Womble, Carlyle, Sandridge and Rice of Counsel.

Attorney General Bruton, Assistant Attorney General Lewis, James F. Bullock, Ray Brady and Blackwell, Blackwell, Canady and Eller for respondent appellant.

SHARP, J. Respondent's first assignment of error is to the failure of the trial judge to strike the evidence of Dr. O. L. Joyner, witness for the petitioners, who testified that in his opinion the property in question was worth $80,000.00 before the access to new 421 was taken and only $45,000.00 to $50,000.00 thereafter. On cross-examination he said

that in arriving at his valuations he had taken into consideration the fact that the property was less valuable for motel and restaurant purposes after access had been lost to the new highway because the barricade resulted in a loss of business. Neither Dr. Joyner nor any other witness attempted to measure the loss of business in percentage or in money.

Loss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain. *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258. However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself. If it is found to do so, the diminution is a proper item for inclusion in the award. The condemner is not required to pay compensation for a loss of business but only for the diminished value of land which results from the taking. When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking. *Palmer v. Highway Commission,* 195 N.C. 1, 141 S.E. 338.

Respondent's appraisers conceded that in the operation of a motel and restaurant, petitioners were making the highest and best use of their property at the time the access point was taken. The highest and most profitable use for which property is adaptable is one of the factors properly considered in arriving at its market value. *Williams v. Highway Commission,* 252 N.C. 514, 114 S.E. 2d 340. Dr. Joyner's testimony, to which objection is made, was that in arriving at the valuation of the property after the taking he had considered the obvious fact that it was not as valuable motel and restaurant property as it had been before. In other words, its highest and best use had been damaged. The first assignment of error is not sustained.

Respondent's second assignment of error is to the failure of the judge to charge the jury that any damages sustained by the petitioners should be offset by general and special benefits. On August 15, 1958, the time of the taking of respondent's access to new 421, G.S. 136-19 provided that when the State Highway Commission condemned land ". . . in all instances the general and special benefits shall be offset against damages."

It is firmly established in this State "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract

immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion *which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway*". (Emphasis added) *Proctor v. Highway Commission,* 230 N.C. 687, 691, 55 S.E. 2d 479. This rule has been approved many times: *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *Robinson v. Highway Commission,* 249 N.C. 120, 105 S.E. 2d 287; *Williams v. Highway Commission, supra; Templeton v. Highway Commission,* 254 N.C. 337, 118 S.E. 2d 918.

The respondent apparently contends that this rule is a fixed formula which the trial judge is required to give in any condemnation proceeding to which the State Highway Commission is a party, and that the omission of the trial judge to charge the italicized lines in the instant case constituted reversible error.

In each of the cited cases respondent had condemned a right of way *for the construction of a highway* across the owner's property and, as the law required, the judge gave "the formula". In the instant case, however, the property taken was not for the construction of a highway; it was the respondent's access point and right of access to a highway which had already been constructed.

Whether benefits are general or special, "it is generally agreed that only those benefits can be taken into consideration which arise from the particular improvement for the purpose of which the owner's land is taken or damaged and not those which have no causal connection with such improvements but are derived from other previous or subsequent improvements, even though made by the condemner. . ." Anno. — Eminent Domain — Deduction of Benefits, 145 A.L.R. 110. In the negotiations in which petitioners conveyed to respondent the rights of way for new 421 and Interstate 40, the parties had already taken into consideration the question of general and special benefits from the construction of both highways. "A benefit once allowed cannot be reasserted in a further proceeding to condemn." C. F. Randolph, *The Law of Eminent Domain,* Section 268.

Special benefits are defined as "those which arise from the peculiar relation of the land in question to the public improvement", *Templeton v. Highway Commission, supra.* Tested by this definition it is obvious that no special benefit arose from the peculiar relation of the Pony Motel property to the barricaded access to new 421. In his paper entitled "Compensable Damages Due to Construction of Limited Access Highways," delivered at the Second Annual Institute on Eminent

Domain, held at the Southwestern Legal Center in Dallas, Texas, in 1960, Alfred C. Jahr, author of *Eminent Domains Valuation and Procedure,* said: "We can see no special benefits peculiar to the remainder of the property when access to the new highway is specifically excluded from the abutting property", page 85 of the *Proceedings.*

General benefits are defined as "those which arise from the fulfillment of the public object which justified the taking. . . . general benefits are those which resulted from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such employment", *Templeton v. Highway Commission, supra.* Presumably the public object in barricading the access was to increase highway safety by the elimination of traffic entering new 421 from the motel. Conceding that the elimination of this access did remove one more traffic hazard on new 421, it is impossible to say that it benefited the community to such an extent that it had any effect on property values in the community. "Of course, any alleged benefit to have any standing in court at all, must be genuine and capable of estimation in money value." 18 Am. Jur. Eminent Domain, Section 297. "They must be actual and appreciable and not merely conjectural and they must be the direct and proximate result of the improvement, remote benefits not being taken into consideration," 29 C.J.S., Eminent Domain, Section 183. "Whether benefits are special or general, the courts are agreed on the proposition that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical or hypothetical benefits cannot, under any circumstances, be taken into consideration." Anno. — Eminent Domain — Deduction of Benefits, 145 A.L.R. 124. *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591.

The burden of proving the existence and the amount of benefits is on the condemner. 29 C.J.S., Eminent Domain, Section 184. It would have been error for the Court to charge upon general and special benefits as an abstract principle of law which was not presented by the evidence in the case. *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51. Indeed, had the judge charged the jury that they could offset petitioners' recovery by the value of general and special benefits, when they had previously heard no evidence of such benefits, confusion would have been the only result. Assignment No. Two is without merit.

As its third assignment of error, respondent asserts that the trial judge expressed an opinion to the jury that they should compensate the petitioners in "a substantial amount". For this assignment respondent lifted out of context a part of a sentence.

The Court, while stating the contentions of the petitioners that they were entitled to recover a substantial sum because this was the only time they could ask for damages, inserted parenthetically the following:

"—and the Court charges you this is the only time they can recover; this is the only time that they can ask to be compensated for any injury to this land now—". He then resumed his statement of petitioners' contentions by saying: "—and that you should compensate them in a fair and reasonable amount, which should be a substantial amount, because according to all the evidence he has a substantial investment there which has been permanently damaged". When stating the law the Court used the present tense; when he resumed his statement of petitioners' contentions he returned to the subjunctive. Immediately thereafter, in his next sentence, the judge began to state the respondent's contention by saying: "Now the respondent, on the other hand, insists and contends that . . ."

The sentence which ended the statement of petitioners' contentions was a long one but, when construed as a whole, it is apparent that the judge was merely stating a contention of the petitioners and not expressing an opinion.

We fail to find anything in this record which indicates that the respondent did not have a fair trial.

No error.

SLEDGE LUMBER CORPORATION v.
SOUTHERN BUILDERS EQUIPMENT COMPANY, INCORPORATED.

(Filed 15 June 1962.)

1. Usury § 1— Evidence held insufficient to be submitted to jury on question of usury.

Evidence that plaintiff corporation loaned money to defendant corporation evidenced by a note bearing five per cent interest, that at the same time the president, acting manager and major stockholder of plaintiff corporation gave his personal check for the purchase of a chattel from defendant corporation for a grossly inadequate price and gave defendant corporation an option to repurchase the chattel within a year at more than twice the sales price, without evidence that the sale-option was made a condition for the loan or that plaintiff corporation received any benefit therefrom, *is held* insufficient to support defendant corporation's counterclaim for usury in plaintiff corporation's action on the note.

2. Corporations § 6—

While ordinarily the knowledge of the officers and agents of a corporation in connection with the corporate business will be imputed to the corporation, this rule does not apply when such officer or agent receives the knowledge while acting in his own behalf or for his personal gain, and not in any official or representative capacity for the corporation.

APPEAL by defendant from *McKinnon, J.*, October 1961 Term of CUMBERLAND.

This is an action to recover the sum of $15,579.34, the balance alleged to be due on a promissory note, and to foreclose the chattel mortgage securing it. In its complaint the plaintiff alleges that on January 26, 1959, for money borrowed, the defendant executed and delivered to the plaintiff a note for $42,000.00 payable in fourteen installments with interest at five per cent per annum; that after paying $28,550.00, the defendant defaulted. The defendant in its answer admits the execution of the note and payments amounting to $28,550.00 but alleges as a further defense and counterclaim that W. F. Sledge is the principal stockholder and sole owner of the plaintiff corporation; that Sledge, acting as agent for and on behalf of plaintiff, negotiated the loan and, as a part of the inducement for making it, required defendant at the time of executing the note to execute to Sledge a bill of sale for a 15-B Erie Crawler Crane worth over $12,000.00; that the actual consideration for the bill of sale was $3,500.00 and, at the time of paying it, Sledge executed an option giving defendant the right to repurchase the crane at any time within one year for $8,500.00; and that the crane was left in the possession of the defendant. Defendant further alleges that the purpose of the sale-option agreement was to exact usury in the sum of $5,000.00; that plaintiff thereby forfeited all right to interest; and that defendant is entitled to have the payments it has made to plaintiff applied in reduction of the principal of the loan. Defendant offered to pay plaintiff $13,450.00 which it contended would be the balance due. In its reply plaintiff denied the charge of usury and alleged that it had been renting the crane to the defendant for a stipulated monthly rental. In a FURTHER REPLY plaintiff alleged as a plea in bar that there is presently pending in the Superior Court of Cumberland County an action by W. F. Sledge, plaintiff, against this defendant which involves the bill of sale and option to repurchase the crane and that that action "presents the exact question which this defendant attempts to present in this action, and to allow the defendant to maintain the counterclaim in this action would be to allow it twice to realize its remedy for usury recognized by the statutes of the State of North Carolina."

On the trial plaintiff offered evidence which tended to show the following facts:

In January 1959, W. F. Sledge was the president and acting manager of plaintiff corporation. He owned 582 of its 820 outstanding shares of stock; his wife owned 210 shares; his brothers and sisters owned the balance. Consummating negotiations which he began in November, 1958 with defendant's manager, Joe Stout, on January 26, 1959 plain-

tiff made a loan to the defendant in the amount of $42,000.00, secured by a chattel mortgage payable in specified installments and bearing interest at five per cent. On the same day, for $3,500.00 Sledge purchased from the defendant, for himself individually, a 15-B Erie Crawler Crane and at the same time gave defendant an option to repurchase it for $8,500.00 at any time prior to January 26, 1960. On January 21, 1959 Sledge wrote Mr. J. O. Tally, Jr., an attorney of Fayetteville, North Carolina, enclosing his personal check for $3,500.00 and the plaintiff's check for $36,000.00, advising him that the checks were to be used to pay all outstanding indebtedness on the equipment covered in the chattel mortgage and instructing him how to prepare the note and bill of sale. On February 2, 1959 Sledge transmitted "certain papers" to the attorney and, on the letterhead of the plaintiff, wrote him that the bill of sale should be made to Sledge personally and not to the plaintiff. The crane described in the bill of sale was left in the possession of the defendant from January 1959 until the spring of 1960 without any agreement on the part of the defendant to pay rent for it. Sledge testified that he got no rent for it until July 1st, but that before he took claim and delivery for the crane in 1960 defendant agreed in April to pay monthly a rental for it.

Defendant offered evidence which tended to show that in January 1959 Joe Stout was the general manager of the defendant, but during June C. E. Bruns became the general manager; that the 15-B Erie Crawler Crane which was the subject of the bill of sale to Sledge on January 26, 1959 was then worth $12,000.00; that defendant still has the crane and has never paid any rent for it; that sometime after June 1st, 1959, Sledge told Bruns he wanted payments to begin on the crane, and from September 1959 to January 1960 payments totaling $2,698.76 were made on it. Defendant offered in evidence the allegation in plaintiff's FURTHER REPLY with reference to the action pending in Cumberland County between W. F. Sledge and the defendant.

At the close of all the evidence plaintiff's motion to dismiss defendant's counterclaim was allowed. The parties agreed that without the forfeiture of interest alleged in the counterclaim the balance of principal and interest due on the note was $16,875.51. The Court entered judgment for this amount. The defendant appealed assigning as errors the dismissal of its claim for a forfeiture of interest and the entry of judgment in accordance with that ruling.

Tally, Tally, Taylor & Strickland and Jesse M. Henley, Jr., for plaintiff appellee.

Robert B. Morgan and Lake, Boyce & Lake for defendant appellant.

SHARP, J. By disallowing defendant's claim that plaintiff had forfeited all right to collect interest on the note which is the subject of this action and by entering judgment for the balance of the principal due with interest at five per cent after crediting defendant with all payments, the trial judge held that the defendant had offered no evidence tending to show that plaintiff had reserved or charged a greater rate of interest than six per cent for the use of the $42,000.00 lent defendant. The correctness of this ruling is the question presented by this appeal. The answer to it depends upon whether or not the evidence will justify an inference that the president of the plaintiff corporation, W. F. Sledge, made the sale-option transaction involving the 15-B Erie Crawler Crane a condition precedent for the loan.

If Sledge were the payee in the note and the plaintiff in this action, the ruling on the motion to dismiss the claim for forfeiture of interest would clearly have been error. The circumstances surrounding the execution and delivery of the bill of sale and the option to repurchase the crane and the retention of the crane thereafter by the defendant for more than a year without any agreement for rent would raise a question of fact to be determined by the jury as to whether that transaction were in fact a *bona fide* sale or a disguised loan made with the corrupt intent to evade the statute against usury. A contract of this kind is frequently a cloak to cover up a scheme to collect usurious interest. However, whether it is such a device depends upon the real intent of the parties which is a question of fact to be determined by the jury from all the circumstances of the particular case. 55 Am. Jur., Usury, Sections 24, 30. Anno., 154 A.L.R. 1063. A profit, even if excessive, is not usury unless it is a mere device to cover and conceal a usurious transaction. *Yarborough v. Hughes,* 139 N.C. 199, 51 S.E. 904.

There is no suggestion, either in the pleadings or the evidence, that the $42,000.00 note considered alone, is tainted with usury. The interest charged was only five per cent and the $36,000.00 check which closed the loan was apparently the unpaid balance due the defendant at that time. Therefore, if the crane sale-option deal was, in fact, unrelated to the loan and a separate transaction between Sledge and the defendant, the nonsuit would clearly be proper.

The defendant in its answer alleges that plaintiff is "a corporation wholly owned by W. F. Sledge" . . . that W. F. Sledge "is the sole owner of the stock in the corporation" . . . that W. F. Sledge "acting as agent, servant, and employee for and on behalf of the said Sledge Lumber Corporation, negotiated the $42,000.00 loan but that "acting as agent, servant and employee of the said plaintiff, Sledge Lumber Corporation, simultaneously therewith required the defendant corporation as a part of the inducement to make said loan, to execute a bill

of sale . . . wherein . . . a 15-B Erie Crawler Crane was conveyed to the said W. F. Sledge, the said W. F. Sledge being the principal and majority stockholder in the plaintiff corporation, and at the said time acting as agent, servant, and employee of said corporation, and did receive the said bill of sale while acting in said capacity, . . ."

No evidence supports the defendant's allegation that Sledge was the sole owner of the plaintiff corporation; others owned 238 shares. The theory of the counterclaim is not that Sledge is the alter ego of plaintiff or that plaintiff is a one-man dominated corporation, and the ends of Justice require that the corporate entity be disregarded so that Sledge is revealed as the real party in interest. *Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584. The repeated allegations are that Sledge, acting as the agent of the plaintiff, required the defendant, as a condition for the loan, to execute to him personally a bill of sale for the crane for the grossly inadequate price of $3500.00, taking back an option to repurchase for $8,500.00.

Sledge was the president and acting manager of the plaintiff corporation. He handled the loan with defendant. His position as chief executive officer of the corporation was such that his acts and knowledge would be the acts and knowledge of the corporation which can act only through its agents. If, as a condition for the corporation's loan and as a cloak for usury, Sledge required defendant to sell the crane to him individually for a grossly inadequate price giving back to the defendant an option to repurchase at more than twice the sales price, then the corporation would be held responsible for his acts. *Williams v. Rich,* 117 N.C. 235, 23 S.E. 257; Annotations, 7 A.L.R. 139; 52 A.L.R. 2d 747, 748; 105 A.L.R. 807. However, unless Sledge made the sale of the crane to himself one of the conditions for the loan from the corporation, the corporation's loan could not be tainted with usury because of the personal dealings between its president and the defendant on an unrelated transaction however usurious the latter transaction might have been. It is the general doctrine "that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in any official or representative capacity for the corporation." *Brite v. Penny et al,* 157 N.C. 110, 72 S.E. 964; *Brinson v. Supply Co.*, 219 N.C. 505, 14 S.E. 2d 509.

As we have said, the evidence on this record would sustain a finding that Sledge himself intended to collect usury by means of the crane transaction, but there is no evidence to support defendant's allegation that he made the sale of the crane, for which he gave his personal check, a condition for the loan. The negotiations for the loan were conducted by Sledge and Joe Stout who was then defendant's general

manager. Stout is no longer general manager, but he is a second vice-president of the defendant corporation. Nevertheless, he did not testify at the trial of this action. The evidence does not disclose any acceptance of benefits from the crane deal by the plaintiff. The evidence is that all payments on the crane were made to Sledge himself. There is no evidence as to when the negotiations between Sledge and defendant began with reference to the crane deal. The record is silent as to any connection between the loan and the crane transaction except that they were both closed at the same time by the same attorney and that the proceeds of both were used to pay off prior debts of the defendant. We do not think that this was sufficient to sustain a finding that the sale was a condition for the loan.

In any event, it appears that no injury can come to the defendant by treating the note and the crane deal as separate transactions. In the instant case judgment has been entered on the note for the balance which defendant agreed was due. According to the allegation in plaintiff's reply, introduced in evidence by the defendant prior to the institution of this action by the plaintiff corporation, Sledge individually had commenced an action for the possession of the crane, and in that action defendant has properly raised the question of usury which it sought to raise here. Defendant, therefore, still has the right and opportunity to have a jury find the true nature of the crane transaction.

For the reasons stated the ruling of the trial judge is

Affirmed.

FRED L. PREYER AND G. ALLEN MEBANE v.
J. D. PARKER AND WIFE, HELEN H. PARKER.

(Filed 15 June 1962.)

1. Usury § 1—

In order to constitute usury there must be a loan, express or implied, with an understanding between the parties that the money lent should be repaid, and a greater rate of interest than allowed by law must be exacted or promised, with the corrupt intent to take more than the legal rate of interest for use of the money.

2. Same— Contract held ambiguous and not to establish as a matter of law unlawful intent to charge usury.

The writing in question gave plaintiffs the option to purchase certain land and timber owned by defendants, with provisions specifying in detail the method and time for payments in the event the timber alone were purchased and in the event the land were purchased, with further

provision that if defendants wished to sell the timber during the term of the option, defendants should repay the sum advanced by plaintiffs, evidenced by a note, and an additional sum in a specified amount "for the use of" the sum advanced, and further provision for a division of the profits in the event defendants sold the timber for more than a specified price. The evidence further tended to show a course of conduct between the parties indicating that they themselves regarded the agreement as an option with reservation to the optionor to sell. *Held:* While the agreement to repay the sum advanced plus the specified sum "for the use of" the sum advanced, standing alone, would constitute a usurious agreement, if the purport of the agreement was that defendants should pay the specified sum as compensation to plaintiffs for loss of prospective profits in the event defendants elected to sell during the life of the option, the agreement would not be usurious, and therefore nonsuit of plaintiffs' action to recover the specified sum upon the sale of the timber by defendants was improperly entered.

3. Trial § 21—

On motion for nonsuit, plaintiffs are entitled to have the evidence considered in the light most favorable to them.

4. Contracts § 12—

The conduct of the parties indicating the manner in which they themselves construe the agreement will be given weight in the interpretation of the instrument by the courts.

APPEAL by plaintiffs from *Olive, J.*, November 20, 1961 Civil Term of GUILFORD, Greensboro Division.

Plaintiffs instituted this action on September 22, 1960, alleging that they are entitled to recover the sum of $14,500.00, with interest, from the defendants as the balance due on a contract made between them on January 3, 1956. Plaintiffs contend this contract constituted a "joint adventure" between the parties for the sale of timber. The defendants admitted the execution of the contract, a copy of which they attached to their answer. However, they alleged it constituted a loan of $35,000.00 by the plaintiffs to the defendants and that, after sixty-five days, they repaid the principal plus $3,000.00 in interest. They alleged that the loan was usurious, denied plaintiffs' right to recover any sum whatever, and set up a counterclaim for $6,000.00, double the amount of the alleged interest.

Plaintiffs' evidence tended to show the following facts:

In the fall of 1955 the defendants owned 23,000 acres of timber land in Hyde County. The land was mortgaged. Defendants were hard pressed for money and desired to sell both the land and the timber. This situation was brought to the attention of the plaintiff Preyer, then twenty-six years old, by an acquaintance who inquired if he "would be interested in entering into the situation." Preyer was interested and he interested his co-plaintiff Mebane in the "situation."

The two made several trips to Hyde County to evaluate the property as an investment. They investigated the salability of the property by talking to people with knowledge of the timber business, and they studied the report of a certified cruiser as to the board feet of timber on the land.

On or about January 3, 1956, for the purpose of selling the timber at a profit to be shared, the plaintiffs and defendants made an oral agreement. This agreement was reduced to writing and signed by the parties on July 24, 1956 as follows:

"January 3, 1956

"F. L. Preyer and G. Allen Mebane

"This is to confirm our oral agreement regarding the 23,000 acre tract of timber land located south of Intercoastal Waterway (south side) in Hyde County, N. C.

"I will sell you or your assigns all standing trees 10 inches DBN or 12 inch stump for the price of $1,450,000.00 with 10 years to cut out the trees (cutting shall be once over). I shall build timber roads. Roads will be built so that no reasonable amount of timber will be over one-half mile from the nearest road, and maintained by you.

"I will sell you in 'fee simple' land and timber and all for $1,650,000.00. There is a mortgage against property and any sales terms are subject to mortgage holders approval.

"*TERMS:* $200,000.00 cash and 1% per month with the removal of 1% of the timber; 2% if over 1% of timber is removed; 3% if over 2% of timber is removed; 3% per annum interest payable quarterly on principal.

"There will be a cutting report submitted to me weekly or biweekly according to settlement date with cutter.

"Fee simple sale $200,000.00 down, 1% per month on principal and 3% interest per annum payable quarterly.

"In event that I wish to sell this timber before such time as you have contracted a sale the following settlements will be made:

"(a) For the use of $35,000.00 received from you I will repay $35,000.00 plus $17,500 *at time of sale of this timber.*

"(b) In event that the sale price of this timber is above $1,400,000.00 the difference between $1,400,000.00 and the actual sale price will be divided equally and paid proportionately, as received, between you and me.

"(c) In case of 'Fee Simple' the above remains the same except that the amount is $1,600,000.00 instead of $1,400,000.00.

"This agreement will remain in force for one year from the date of this letter, and upon agreement of both parties this agreement might be renewed.

"WITNESS our hands and seals this 3rd day of January, 1956.

(s) J. D. Parker (SEAL)
(s) Helen H. Parker (SEAL)"

(Emphasis added)

At the time the contract was signed, plaintiffs deposited to the credit of Mr. Parker in the Security National Bank at Greensboro the sum of $35,000.00. This was the only money the plaintiffs ever advanced to the defendants. At the suggestion of Mr. Parker, the defendants also executed and delivered to the plaintiffs the following note:

"Greensboro, North Carolina, July 24th, 1956. Ninety days after date for value received we promise to pay to the order of F. L. Preyer and G. Allen Mebane on demand thirty-five thousand dollars negotiable and payable at Greensboro, North Carolina. The subscribers and endorsers hereby agree to continue and remain bound for the payment of this note and all interest thereon notwithstanding any extension of time granted to the principal and notwithstanding any failure or omission to protest this note for non-payment or to give notice of non-payment or dishonor for protest or to make presentment or demand for payment hereby expressly waiving any protest and any and all notice of any extension of time or of non-payment or dishonor or protest in any form or any presentment or demand or any other notice whatsoever. Witness our hands and seals. Signed J. D. Parker (seal); signed Helen H. Parker (seal)."

The plaintiff Mebane testified: "Mr. Parker owed us the contract for which the note was collateral. The note was securing our position with Mr. Parker . . . We had no other way."

After the contract was signed and in order to sell the property, plaintiffs brought in two other people who had knowledge of this business: Mr. Hubbard, a wholesale lumber dealer, and Mr. Clark, a salesman. Thereafter it was their job "to pursue this contract further", and Mr. Clark showed the property to at least one prospective buyer.

In September, 1956, while Clark and Hubbard were attempting to sell it, plaintiffs heard that defendants had conveyed the property. They verified this fact from the public records and on September 28, 1956, plaintiffs and Mr. Hubbard went to see Mr. Parker and asked him if he had sold the property. Parker denied it but was told that plaintiffs had searched the records and found his deed. He then said

that he had not received the entire purchase price for the property but that he did have on hand some funds derived from the sale of tobacco. On that day he gave plaintiffs his check for $38,000.00 and acknowledged that under the contract he owed them a balance of $14,500.00 which he promised to pay as soon as he collected the balance due him from the sale of the timber. At that time Parker was told by the plaintiffs that "being investors they had to bring other people into the situation to share in their part of the profits."

Thereafter plaintiffs saw Mr. Parker several times. Every time he informed them he had some negotiations going on from which he would realize funds in the near future. One time he was going to "close a situation in New York"; in the fall of 1959, he was going to sell his lumber mill and pay plaintiffs out of the proceeds. He said that plaintiffs had helped him at a time he needed help, that he was grateful and would live up to his obligation. The last promise made by the defendant was about one and a half years before the institution of the suit.

Plaintiffs never offered Mr. Parker $1,400,000.00 for the lumber or $1,600,000.00 for the land and timber, although Mebane testified he had secured someone who he thought would do this.

At the conclusion of the plaintiffs' evidence defendants' motion for nonsuit was allowed. Plaintiffs excepted and appealed.

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

Bailey and Bailey for defendant appellees.

SHARP, J. The sole question presented by this appeal is whether the plaintiffs' evidence establishes as a matter of law that the contract upon which they sued was a usurious transaction.

"In order to constitute a usurious transaction, four requisites must appear: (1) There must be a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. . . . unless these four things concur in every transaction it is safe to say that no case of usury can be declared. . . .

"Where the facts are admitted and the unlawful intent plainly manifest from them, the Court may declare a transaction usurious as a matter of law." *Doster v. English,* 152 N.C. 339, 67 S.E. 754.

Applying these well settled principles, as was said in *Doster,* it is plain that the Court could not declare the transaction between plaintiffs and defendants in the instant case usurious as a matter of law.

On the motion for nonsuit plaintiffs are entitled to have the evidence considered in the light most favorable to them. *Rouse v. Jones*, 254 N.C. 575, 119 S.E. 2d 628.

The contract and note which form the basis of plaintiffs' action were obviously not the work of a skilled, legal craftsman. Without doubt, the source of this controversy is paragraph (a) of the settlement provisions of the contract which became pertinent only in the event defendants themselves should sell the property. This paragraph reads as follows: "For the use of $35,000.00 received from you I will repay $35,000.00 plus $17,500.00 at time of sale of this timber." Standing alone this paragraph would have justified the nonsuit on the ground of usury. However, when the contract is read as a whole it is unambiguous, and the intent of the parties at the moment of its execution emerges clearly.

The parties themselves would make this case turn upon whether or not the transaction between the plaintiffs and defendants constituted a loan or a joint adventure. The briefs are evidence that much research has been done on the law of joint adventure. We do not think the agreement between the parties constituted a joint adventure nor do we think the only alternative to a joint adventure is a usurious loan requiring a nonsuit of plaintiffs' cause of action. As we construe the agreement it was a twelve-months option which, for a consideration, reserved to the optionors the right to cancel it and to sell the property themselves at any time before it was exercised by the optionees.

Between January 3, 1956 and July 24, 1956, plaintiffs had attempted to sell the defendants' land under an oral agreement. On July 24, 1956 plaintiffs lent defendants $35,000.00 for ninety days without interest. On that date defendants executed a note and an option under seal whereby they granted to the plaintiffs or their assigns the right at any time during one year from January 3, 1956 to buy the timber on defendants' 23,000 acre tract of land in Hyde County for $1,450,000.00 or to buy the land and timber for $1,650,000.00. The contract specified in detail the method and time for payments, and it limited the time in which the timber might be cut if timber alone were purchased. In the agreement, however, the defendants retained the right to sell the property themselves but, if they did so, they were to repay the plaintiffs the $35,000.00 plus $17,500.00 specified in Paragraph (a) out of the sale proceeds. It is implicit in the agreement and the dealings between the parties that if plaintiffs had exercised the option, the $35,000.00 would have been applied to the purchase price of the property sold. If plaintiffs had not exercised the option and defendants had not sold the land during the twelve-months period involved, the defendants would have been obligated to pay the note with interest at 6% after

the ninety days specified in the note. While plaintiffs were to have a return of the $35,000.00 in all events, the obligation to pay the $17,500.00 arose only in the event defendants themselves sold the property during the time of plaintiffs' option.

The defendants admitted in their answer that during August 1956, before plaintiffs' option had expired, they sold both the land and the timber for $900,000.00. They further alleged in the answer that plaintiffs expected to make a large profit out of this transaction. Under the facts in this case it appears to us that the sum of $17,500.00 specified in Paragraph (a) of the contract was neither interest, penalty, nor liquidated damages; it was the consideration which defendants agreed to pay the plaintiffs for the privilege of canceling the option they had granted plaintiffs under seal. Both had expected to make a large profit at the time defendants signed the contract and plaintiffs advanced the $35,000.00. "A provision for payment of a specified sum as compensation for acts contemplated by the contract, and not for any breach of the contract, is neither a penalty nor liquidated damages." 15 Am. Jur., Damages, Section 241; *Kirby v. U. S.*, 260 U.S. 423; 43 S. Ct. 144, 67 L. ed. 329. However, even if the sum of $17,500.00 could be considered liquidated damages, in view of the amounts involved and the expectation of the parties at the time the contract was made, it is clearly reasonable and not disproportionate to the presumable loss. See Annotation entitled "Stipulations in Land Contract for Payment of Specified Sum by Vendor in Case of Default as Provision for Liquidated Damages," 48 A.L.R. 899.

Our interpretation of the dealings between these parties is corroborated and sustained by the action of the defendants themselves. As soon as the plaintiffs discovered that defendants had canceled their option by selling the property, they demanded compliance with the contract. Mr. Parker complied in part by repaying the $35,000.00 and making a payment of $3,000.00 on the $17,500.00. At the same time he promised to pay the balance of $14,500.00 out of the proceeds of the sale as soon as he collected. This promise to pay was repeated from time to time; the defense of usury came three years later, after the suit was started and after the statute of limitations had run against any action to recover the penalty for usury. G.S. 1-53. "The conduct of the parties in dealing with the contract indicating the manner in which they themselves construe it is important, sometimes said to be controlling in its construction by the court." *Bank v. Supply Co.*, 226 N.C. 416, 432, 38 S.E. 2d 503.

The judgment of involuntary nonsuit is

Reversed.

BETTY B. DUNLAP v. WILLIAM EDWARD LEE.

(Filed 15 June 1962.)

1. Automobile §§ 6, 64—

The violation of either subsection of G.S. 20-140 constitutes culpable negligence and gives rise to both civil and criminal liability.

2. Same—

Failure to keep a reasonable lookout does not constitute reckless driving unless the failure is accompanied by a dangerous speed or perilous operation, G.S. 20-140(b), and therefore evidence supporting the conclusion that defendant failed to keep a proper lookout, without evidence of excessive speed or perilous operation, does not present the question of defendant's violation of that statute.

3. Automobiles § 41f—

The mere fact of collision with the rear of a preceding vehicle furnishes some evidence that the following motorist was negligent as to speed, in following too closely, or in failing to keep a proper lookout, but whether such accident is the result of culpable negligence depends upon the circumstances of each particular case, and evidence tending to show that failure to keep a proper lookout was the sole proximate cause of the rear-end collision is insufficient to present the question of defendant's violation of the reckless driving statute.

4. Automobiles § 46—

The evidence tended to show that defendant ran into the rear of plaintiff's car when plaintiff stopped in her proper lane of travel to permit a car preceding her to turn right into a driveway. The evidence further tended to show that the impact was slight and there was no evidence that defendant was traveling at excessive speed or was following plaintiff's vehicle too closely. *Held:* It was prejudicial error for the court to instruct the jury in regard to defendant's violation of G.S. 20-140(b).

5. Trial § 32—

A prime purpose of the charge is to eliminate irrelevant matter and causes of action, or allegations not supported by evidence, so that the jury may understand and appreciate the precise facts that are material and determinative.

6. Trial § 33—

It is error for the court to charge on an abstract principle of law which is not raised by proper pleading and supported by evidence.

7. Damages § 15—

In a personal injury suit it is error for the court to instruct the jury to the effect that the jurors, in fixing the amount of damages for pain and suffering, should each put himself in plaintiff's place and see how much it would be worth to him to suffer the pain inflicted upon plaintiff, since such instruction tends to permit the admeasurement of such damages through sympathy and thus varies and supersedes the established legal rule for the admeasurement of such damages.

DUNLAP *v.* LEE.

APPEAL by defendant from *Phillips, J.*, October 1961 Civil Term of STOKES.

Action to recover damages for personal injury suffered by plaintiff when the automobile she was driving was struck in the rear by a pick-up truck operated by defendant. The collision occurred about 1:00 P. M., 26 November 1959, on Highway 311 about 6 miles north of Walnut Cove, in Stokes County. Plaintiff was proceeding southwardly following another car. Her car was struck in the rear by the pickup when she stopped to permit the car in front to make a right turn into a driveway.

Plaintiff alleges that defendant was guilty of negligence, proximately causing injury to her person, in that he was (1) operating the pickup at a speed greater than was reasonable and prudent under the circumstances, in violation of G.S. 20-141, (2) violating the reckless driving statute, G.S. 20-140, subsections (a) and (b), (3) failing to keep a reasonable lookout, (4) neglecting to keep his vehicle under proper control, and (5) following too closely in violation of G.S. 20-152(a).

Defendant denies negligence on his part, but does not allege contributory negligence on the part of plaintiff.

Plaintiff's evidence is summarized in part as follows: The driver of the car in front of plaintiff gave a hand signal for a right turn for a distance of 75 to 100 feet before turning. Plaintiff gave a mechanical right turn signal for about 75 feet, though she did not intend to turn, and came to a complete stop in her proper lane of travel. She was not aware that defendant was following her. About the time the car in front cleared the highway, the collision occurred and plaintiff was knocked forward about a car's length. Highway 311 is a two-lane highway and is straight for 400 feet north of the point of collision. There was no traffic approaching from the south. The car plaintiff was driving had slight damage — there were small dents in the bumper, fender and trunk lid; the tail light was mashed in and broken and the tail pipe knocked loose. Defendant's bumper run under plaintiff's bumper. Defendant's grill was slightly damaged. Plaintiff lost 9 to 14 days from work. Her injury was diagnosed as a whiplash injury to her neck. Treatment consisted of physical therapy and medication for pain. She experiences soreness and stiffness in her neck and shoulders, especially in damp weather.

Defendant offered no evidence, but was examined adversely before trial. His testimony on adverse examination was introduced by plaintiff. It is to this effect: Defendant followed at about four car lengths behind plaintiff for a considerable distance. Both cars were travelling at the rate of 35 to 40 miles per hour. A passenger in the pickup said:

"Watch that car in front of you." Defendant "stepped on" his brakes and "skidded into her (plaintiff's) bumper." He left tire marks on the highway "approximately six feet in length." Plaintiff told defendant that the car in front did not give a signal and she did not have time to give a signal. She said she was not hurt. Both agreed not to wait for a patrolman — she was in a hurry to get back to work.

The jury answered the negligence issue in favor of plaintiff and awarded her $5,573.00 in damages. From judgment in accordance with the verdict, defendant appeals.

John F. Ray, Robert F. Rush and Charles T. Myers for plaintiff.
Jordan, Wright, Henson & Nichols for defendant.

MOORE, J. Defendant makes five assignments of error based on fifteen exceptions. All, except formal exceptions, are to the charge.

Defendant contends that the court erred in charging that reckless driving was an element of negligence to be considered by the jury in this case. We agree.

Plaintiff alleged that defendant's conduct violated both subsections of the reckless driving statute. G.S. 20-140. The court charged only as to subsection (b), read the subsection to the jury, and stated: ". . . (T)he plaintiff insists and contends . . . that he (defendant) violated one section of the reckless driving statute which the court has read to you; and that you should find that the evidence of herself and defendant's own evidence in his Adverse Examination and all the evidence in the case that he did not drive his car at such a speed and in such a manner that he did not endanger or was not likely to endanger the plaintiff in the way and manner in which he drove his car, in that he was looking some other way than straight ahead. . . ."

A person may violate the reckless driving statute by either one of the two courses of conduct defined in subsections (a) and (b), or in both respects. *State v. Folger,* 211 N.C. 695, 191 S.E. 747. The language of each subsection constitutes culpable negligence. *State v. Roberson,* 240 N.C. 745, 83 S.E. 2d 798. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or heedless indifference to the safety and rights of others." *State v. Cope,* 204 N.C. 28, 30, 167 S.E. 456. A violation of G.S. 20-140 is negligence *per se. Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115. It gives rise to both criminal and civil liability. *State v. McLean,* 234 N.C. 283, 67 S.E. 2d 75. A person who drives a vehicle upon a highway without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving.

G.S. 20-140(b). Mere failure to keep a reasonable lookout does not constitute reckless driving. To this must be added dangerous speed or perilous operation.

There was testimony from only two eyewitnesses to the accident, plaintiff and defendant. Plaintiff was unaware that defendant was following, and did not see him or his vehicle until after the collision. The impact was relatively slight. "Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804; *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184. But the nature of the negligence, if any, depends upon the circumstances in each particular case. *Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707. Defendant's testimony permits the inference that he was not keeping a reasonable lookout. There is no direct evidence in the record of excessive speed or that defendant was following too closely; the direct evidence is to the contrary. The evidence does not support the allegation of reckless driving. *Clark v. Scheld, supra; Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560.

Furthermore, when the complaint is stripped of the allegations of law and the conclusions of the pleader, reckless driving is not alleged. Plaintiff merely alleges that defendant violated G.S. 20-140(b) "in that he failed to use due caution and circumspection and failed to keep his speed within proper driving range."

One of the most important purposes of the charge is "the elimination of irrelevant matters, and causes of action or allegations as to which no evidence has been offered, and (to) thereby let the jury understand and appreciate the precise facts that are material and determinative." *Irvin v. R. R.,* 164 N.C. 5, 18, 80 S.E. 78; *Fish Co. v. Snowden,* 233 N.C. 269, 63 S.E. 2d 557; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *State v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858. An instruction about a material matter not based on sufficient evidence is erroneous. In other words, it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence. *McGinnis v. Robinson,* 252 N.C. 574, 114 S.E. 2d 365; *Andrews v. Sprott, supra.* There was sufficient allegation and proof of negligence, other than reckless driving, to justify the jury's verdict on the negligence issue, but we cannot say that the verdict was not influenced by the court's view that recklessness was involved.

The court, after explaining to the jury the proper rule for measuring and assessing damages, further instructed them as follows: ". . . (S)he (plaintiff) insists and contends . . . that pain and suffering is

very difficult to evaluate in dollars and cents, but that the only way that you can do it is to use your good, common sense and *put yourself in her place and say how much it would be worth to you* to suffer approximately two years up until now, and then how much it would be worth to you to suffer especially in bad weather from six to twelve more months in the future, and put that down in round dollars and cents. . . ." Such expressions as that in italics have been universally held erroneous, and in some cases sufficiently prejudicial to warrant a new trial.

". . . (T)he court . . . should not draw their (the jury's) attention to the price for which they would be willing to suffer the injury for which they are to assess damages." 15 Am. Jur., Damages, s. 370, p. 809.

In *Paschall v. Williams,* 11 N.C. 292, plaintiff sued for damages suffered by reason of an assault and battery upon his person. The judge told the jury "to imagine themselves placed in a similar situation with the Plaintiff, what sum would they think sufficient to compensate them for such an injury; that in viewing the subject in this light, by giving to the Plaintiff what they would be willing to take, the justice of the case might be reached." While the court did not approve the instruction when taken literally, and deemed it impracticable as a rule for measuring damage, it thought that the jury might have considered it a direction "to estimate the damages from the view of all the circumstances," and declined to disturb the verdict.

In other jurisdictions the following instructions in personal injury suits were condemned, with the result and in the cases indicated: "You would not be willing to lose your arm for the world, or for the wealth of a Vanderbilt." Undesirable form, new trial on other grounds. *Kehler v. Schwenk,* 22 A. 910, 13 L.R.A. 374 (Pa. 1891). "A good many jurors do put themselves right in his place and say: 'What under the circumstances would I want for injuries and suffering of that kind.'" Further: "Not what they would take, but what they would want." Prejudicial error. *Greer v. Union Ry. Co.,* 103 N.Y.S. 88 (1907). "You may put yourself in her place and consider what you would be willing to take under the circumstances." New trial. *Rhodes v. Union Ry. Co.,* 102 N.Y.S. 510 (1907). "You know that the child will undergo much humiliation by reason of this disfiguring accident. You can appraise that by thinking of what would be your own humiliation and sense of mental suffering if you had to go through life with an arm off above the elbow and the other arm off below the elbow." Instruction not approved. *Virginia Ry. Co. v. Armentrout,* 166 F. 2d 400 (CC4C 1948). ". . . as you yourself would want to be awarded if you were the plaintiff and were entitled to have damages awarded." Erroneous,

new trial on other grounds. *McNamara v. Dionne,* 298 F. 2d 352 (CC2C 1961).

Such instructions in personal injury suits are considered erroneous for several reasons. They encourage verdicts based on sympathy in areas of the law in which jurors are already prone to sympathize. They tend to vary and supersede the established legal rule for the admeasurement of damages. If literally applied as a rule for assessing damages, such would be impracticable. "Collectively, the jury could not place themselves in the paintiff's situation, unless their temper, fortune, feelings, and standing in society, resemble his; and the attempt to do it, individually, would be an insuperable bar to an unanimous verdict." *Paschall v. Williams, supra.*

Damages for pain and suffering should be objectively arrived at. "The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed. In making the estimate the jury may consider the nature and extent of the injuries and the suffering occasioned by them and the duration thereof. They may also consider the age, health, habits, and pursuit of the injured party and his health and condition before the injury as compared with his condition in consequence thereof." 15 Am. Jur., Damages, s. 72, pp. 482, 483.

New trial.

STATE v. LACY MATHEW THOMPSON.

(Filed 15 June 1962.)

1. Criminal Law § 107—

An exception to the charge on the ground that the court failed to refer specifically to certain portions of defendant's testimony cannot be sustained when the charge applies the law to the evidence in the case and gives the position taken by the parties as to each essential feature, a recapitulation of all of the evidence not being required. G.S. 1-180.

2. Criminal Law § 100—

The sufficiency of the State's evidence as to any essential element of the offense should be raised by motion to nonsuit and cannot be properly raised by exceptions to excerpts from the charge of the court.

3. Automobiles § 72—

The evidence, considered in the light most favorable to the State, *is held* sufficient to be submitted to the jury on the question of defendant's intoxication and his operation of a vehicle on a public street of a municipality while so intoxicated.

4. Criminal Law § 154—

An exception to the entry and signing of the judgment raises the sole question whether error of law appears on the face of the record proper.

5. Criminal Law § 121; Indictment and Warrant § 14—

By failing to move to quash and by going to trial upon a warrant charging that defendant operated a motor vehicle on a public street while under the influence of "intoxicating liquor or bitters, morphine or other opiates," defendant waives duplicity in the warrant and may not later raise the question by motion in arrest of judgment.

6. Criminal Law § 118—

An apparently ambiguous verdict may be given significance and correctly interpreted by reference to the charge, the facts in evidence, and the instructions of the court.

7. Automobiles § 75—

Where the warrant charges defendant with operating a motor vehicle on a public street while under the influence of intoxicating liquor or opiates, a verdict of guilty as charged in the warrant will be upheld when the theory of trial, the evidence, and the charge of the court all relate solely to acts of defendant while under the influence of intoxicating liquor, since in such instance the ambiguity in the verdict is resolved.

8. Indictment and Warrant § 9—

An indictment and warrant need not refer to the statute under which it is drawn, and even when it charges the offense in the language of a former statute, it will be upheld when the language is sufficient to charge the offense under an existing statute.

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

APPEAL by defendant from *Sharp, Special Judge,* January 1962 Criminal Term of ALAMANCE.

Criminal prosecution on a warrant charging that defendant, on December 17, 1960, "did unlawfully, wilfully operate a motor vehicle on the public streets of Graham while under the influence of intoxicating liquor, bitters, morphine or other opiates, against the statute in such case made and provided, and against the peace and dignity of the State and/or in violation of Town Ordinance, Section ....."

Upon trial *de novo* in the superior court, after appeal by defendant from conviction and judgment in the Graham Municipal Recorder's Court, the State's evidence consisted of the testimony of M. E. Guy, a Graham police officer. Defendant, who was not represented at trial by counsel, cross-examined the State's witness and thereafter testified as the sole defense witness.

The jury returned a verdict of "guilty as charged in the warrant." From judgment, imposing a prison sentence, defendant appealed.

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

Clarence Ross, B. F. Wood and W. R. Dalton for defendant appellant.

BOBBITT, J. Defendant, in his case on appeal, noted five exceptions to the court's charge. Assignments of Error Nos. 1 and 2, based on Exceptions Nos. 1, 2, 4 and 5, attack the charge on the ground the court, in reviewing what defendant's evidence tended to show, did not refer specifically to certain portions of defendant's testimony. "The recapitulation of all the evidence is not required under G.S. 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case." *S. v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823. The court's charge complies with this statutory requirement and Assignments of Error Nos. 1 and 2 are overruled.

Assignment of Error No. 3, based on Exception No. 3, attacks this excerpt from the charge: "Now if the State has satisfied you beyond a reasonable doubt that the defendant on the occasion in question was operating a motor vehicle on the public highway of this State, or a public street of the City of Graham at a time when he had drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, either one or the other, to such an extent that there was an appreciable impairment of either one or both, then it would be your duty to return a verdict of Guilty as Charged in the Warrant."

Defendant asserts the quoted excerpt is erroneous because the court "permitted the jury to find that the defendant was under the influence of intoxicating beverages when there was no evidence in the record that his intoxication was due to any intoxicating beverages, and permitted the jury to find that the street in Graham was a public street or highway when there was no evidence to that effect . . ." Defendant undertakes, by this assignment of error, to challenge the sufficiency of the State's evidence to warrant submission to the jury. As in *S. v.*

Gaston, 236 N.C. 499, 73 S.E. 2d 311, defendant did not move for a compulsory nonsuit under G.S. § 15-173, or tender to the court any request for instructions to the jury, or object in any way to any of the proceedings of the superior court preceding the return of the verdict. However, apart from defendant's failure to raise and present the question in apt time and manner, consideration of the evidence in the light most favorable to the State impels the conclusion it was sufficient to warrant submission to the jury with reference to the matters referred to in Assignment of Error No. 3 and otherwise. Hence, Assignment of Error No. 3 is overruled.

Defendant's Assignment of Error No. 4 is directed "to the entry and signing of the judgment." The appeal itself is considered an exception to the judgment and any other matter appearing on the face of the record. "And the record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict and judgment." *Gibson v. Insurance Co.*, 232 N.C. 712, 715, 62 S.E. 2d 320, and cases cited. "An exception to a judgment raises the question whether any error of law appears on the face of the record." *Moore v. Owens*, 255 N.C. 336, 338, 121 S.E. 2d 540; *S. v. Beam*, 255 N.C. 347, 121 S.E. 2d 558.

In this Court, defendant moved "to arrest the judgment for that the warrant charges the defendant, disjunctively, with having been under the influence of mutually inclusive substances without stating which of the respective commandments of the statutes he violated."

We now consider the vital question presented by defendant's appeal, namely, whether error of law appears on the face of the record.

A statute, codified as § 14-387 in the General Statutes of 1943, provided: "Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this section for a period of not more than twelve months nor less than ninety days." This statute was repealed by Chapter 635 of the Session Laws of 1945.

The statute codified as G.S. § 20-138 has been in full force and effect since its enactment in 1937. It provides: "It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is

under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

The warrant, while it contains no reference to any specific statute or town ordinance, discloses on its face that it was drafted in the language of former G.S. § 14-387. Even so, the conduct charged in the warrant is a violation of G.S. § 20-138. The fact the warrant contains no reference to G.S. § 20-138 is immaterial. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263. One purpose of Chapter 635, Session Laws of 1945, which relates to many sections of the General Statutes, was to eliminate unnecessary duplications. In our opinion, and we so decide, the warrant was sufficient to charge defendant with operating a motor vehicle upon the public streets of Graham while "under the influence of intoxicating liquor or narcotic drugs," the language of G.S. § 20-138.

G.S. § 20-138 creates and defines three separate criminal offenses. Under its provisions, it is unlawful and punishable as provided in G.S. § 20-179 for any person, whether licensed or not, (1) who is a habitual user of narcotic drugs, *or* (2) who is under the influence of intoxicating liquor, *or* (3) who is under the influence of narcotic drugs, to drive any vehicle upon the highways within this State. Here, the warrant, in a single count, charges alternatively, that is, in the disjunctive, the commission by defendant of the second or of the third criminal offense created and defined by G.S. § 20-138. See *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241.

In *S. v. Williams,* 210 N.C. 159, 185 S.E. 661, an indictment, based on G.S. § 90-88, charged in one count, *in the disjunctive,* several separate and distinct criminal offenses. This Court held the defendant's motion to quash, aptly made, should have been allowed. Here, defendant did not at any time move to quash the warrant. Moreover, defendant's motion in arrest of judgment was first made in this Court.

With reference to the drafting of criminal warrants based on violations of G.S. § 20-138, it is appropriate to emphasize: If it be intended to charge only one of the criminal offenses created and defined by G.S. § 20-138, *e.g.,* the operation of a motor vehicle upon the public highway within this State while under the influence of intoxicating liquor, the warrant should charge this criminal offense and no other. If it be intended to charge two or more of the criminal offenses created and defined in G.S. § 20-138, the warrant should contain a separate count, complete within itself, as to each criminal offense.

In a similar factual situation, this Court held: "By going to trial without making a motion to quash, he (the defendant) waived any duplicity which might exist in the bill." *S. v. Merritt,* 244 N.C. 687, 94 S.E. 2d 825, and cases cited.

In holding defendant has waived the right to attack the warrant on the ground of duplicity, we are not unmindful that defendant was not represented by counsel at trial. Even so, every feature of the trial discloses both the State and defendant considered this criminal prosecution related solely to whether defendant was operating an automobile on the public street of Graham while under the influence of intoxicating liquor. The evidence and charge do not refer in any way to narcotic drugs. In short, the point is technical; and we perceive no prejudice to defendant.

Even so, defendant, relying on *S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381, contends the verdict, "guilty as charged in the warrant," is invalid for uncertainty in that it is not sufficiently definite and specific to identify the crime of which defendant was convicted. At first impression the point seems well taken; but, as indicated below, consideration of the record in *S. v. Albarty, supra,* discloses a clear distinction between that case and the present case.

With reference to the verdict, there is a distinction between *S. v. Merritt, supra,* and the present case. There the jury found the defendant "guilty of operating a motor vehicle under the influence of intoxicating liquor," but here the verdict was "guilty as charged in the warrant." But there can be no doubt as to the identity of the criminal offense of which defendant was convicted. The court, in instructing the jury, treated the warrant as charging only one criminal offense, namely, the operation of an automobile on the public street of Graham while under the influence of intoxicating liquor. Whether he was guilty of *this* criminal offense was the only question submitted to the jury; and, as set forth in the excerpt quoted above to which defendant's Assignment of Error No. 3 is directed, the court instructed the jury if they found defendant guilty of *this* criminal offense, it would be their duty "to return a verdict of Guilty as Charged in the Warrant." Immediately thereafter, the court instructed the jury: "If the State has failed to so satisfy you, it would be your duty to return a verdict of Not Guilty."

A verdict, apparently ambiguous, "may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Beam, supra.* "The verdict should be taken in connection with the charge of his Honor and the evidence in the case." *S. v. Gilchrist,* 113 N.C. 673, 676, 18 S.E. 319, and cases cited; *S. v. Gregory,* 153 N.C. 646, 69 S.E. 674; *S. v. Wiggins,* 171 N.C. 813, 89 S.E. 58. When the warrant, the evidence and the charge are considered, it appears clearly the jury, by their verdict, found defendant

guilty of operating a motor vehicle on the public street of Graham while under the influence of intoxicating liquor.

The record in *S. v. Albarty, supra,* discloses: Near the beginning of the charge, the jury were instructed they could return "one of two verdicts, namely: First, 'Guilty, as charged in this warrant;' or second, 'Not Guilty,' " etc. The jury returned a verdict of "Guilty of Lottery as Charged in the Warrant." In concluding the charge, this instruction was given: "Now the Court charges you that if the State of North Carolina has satisfied you, from the evidence and beyond a reasonable doubt, that the defendant, Albarty, on the occasion mentioned in the warrant; to-wit, on or about the 28th day of October 1952 was operating a lottery; that is, had sold *or* bartered, *or* caused to be sold *or* bartered tickets, tokens, or certificates for shares in a lottery as the Court has defined a lottery to be, either by himself, *or* if he aided and abetted another or others in selling *or* bartering tickets, tokens, or certificates for shares in a lottery, as the court has defined a lottery to be, he would be guilty, as charged in the warrant in this case, and it would be your duty to return a verdict of 'Guilty.' On the contrary, however, if the State of North Carolina has failed to so satisfy you, from the evidence and beyond a reasonable doubt, it would be your duty to acquit him; that is, to return a verdict of 'Not guilty.' " (Our italics) Suffice to say, the court's (quoted) instruction in *S. v. Albarty, supra,* did not remove or tend to remove the ambiguity in the verdict.

The record discloses no error of law deemed sufficient to justify the award of a new trial.

No error.

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

DAVID HALL, PLAINTIFF, v. ZELMA FARRISH POTEAT AND ROBERT L. SATTERFIELD, GUARDIAN AD LITEM OF CHARLIE JENNINGS, JR., ORIGINAL DEFENDANTS. — AND — DONALD M. TERRELL, BY HIS GUARDIAN AD LITEM MRS. EVELYN TERRELL, ADDITIONAL DEFENDANT.

(Filed 15 June 1962.)

1. Pleadings § 28—

In order to be entitled to recover, plaintiffs allegation and proof must correspond without material variance, and whether a variance is material must be determined upon the facts of each particular case.

2. Automobiles § 41a— Nonsuit for variance held proper in this case.

When plaintiff's action is based upon allegations of the complaint, as amended, to the effect that defendant drove his vehicle, without lights, from the right shoulder of the road into plaintiff's lane of travel, without signal and without keeping a proper lookout, so suddenly and so immediately in front of plaintiff's vehicle that plaintiff, faced with oncoming traffic, could not stop before striking the rear of defendant's vehicle, but plaintiff's evidence is to the effect that defendant's vehicle was standing, without lights, blocking plaintiff's lane of travel, and that plaintiff could not stop before hitting the vehicle, there is a fatal variance between the allegation and proof, and defendant's evidence to the effect that defendant's car had been driven onto the highway cannot aid plaintiff when defendant's evidence is further to the effect that his vehicle had entered and proceeded for some distance along the highway before it was struck by plaintiff's vehicle.

3. Judgments § 33—

A judgment of nonsuit for variance between allegation and proof does not preclude plaintiff from instituting a new action.

APPEAL by plaintiff from *Williams, J.*, September-October 1961 Regular Civil Term of ORANGE.

Civil action growing out of a collision that occurred April 2, 1960, between 10:00 and 10:30 p.m. on (east-west) U. S. Highway #70, a mile or so west of the corporate limits of Hillsboro, between a 1959 Ford, owned and operated by plaintiff, and a 1952 Ford operated by defendant Jennings.

Plaintiff's action, to recover for the damage to his 1959 Ford caused by said collision, is against defendants Jennings and Poteat. Plaintiff alleged the negligence of Jennings was the sole proximate cause of the collision and of the damages he sustained. He alleged defendant Poteat was the owner of the 1952 Ford; that Jennings was operating it "with her full and express consent and as agent for her"; and that all acts of negligence on the part of defendant Jennings are imputed to defendant Poteat "by reason of the above-mentioned agency relationship."

The paved highway had a broken white line down the center. Each of the two traffic lanes, the north lane for westbound traffic and the south lane for eastbound traffic, was eleven feet wide. Both cars were in the north lane, headed west. Plaintiff's 1959 Ford struck the rear of the 1952 Ford.

The facts alleged by plaintiff, summarized or quoted, are as follows: Plaintiff was operating his 1959 Ford in a careful, prudent and lawful manner, when "suddenly" the 1952 Ford operated by Jennings "pulled onto the highway from the right-hand shoulder directly into plaintiff's path." Plaintiff "had absolutely no time in which to stop his vehicle

before striking" the 1952 Ford. "(B)ecause of the suddenness" of the appearance of the 1952 Ford in plaintiff's lane of traffic and also "because of the fact . . . a large transport truck was coming down the highway in an opposite direction," plaintiff had no opportunity to pull to his left to avoid a collision. Plaintiff applied his brakes and made every effort to avoid a collision but "the sudden appearance of (the 1952 Ford) on the highway made the same impossible and plaintiff struck (the 1952 Ford) thus causing the damage the plaintiff complains of herein." Prior to pulling the 1952 Ford onto the highway from the right-hand shoulder of the road, Jennings "failed to give a proper hand signal or mechanical signal and pulled onto the highway in such a sudden and reckless manner that plaintiff, coming down the highway, was absolutely unable to avoid colliding with him."

Based on these factual allegations, plaintiff, in paragraph 7 of his complaint, specified the respects in which Jennings was negligent "at the time of and immediately preceding the said collision." (1) Plaintiff alleged (in general terms) that Jennings operated the 1952 Ford carelessly and heedlessly, in wilful and wanton disregard of the rights and safety of others, and without due caution and circumspection, and at a speed and in a manner so as to endanger persons and property, in violation of G.S. § 20-140. (2) Plaintiff alleged (in general terms) that Jennings operated the 1952 Ford without keeping a careful and proper lookout. (3) Plaintiff alleged Jennings "pulled onto a highway from the right-hand shoulder without giving a proper mechanical or hand signal indicating his intention to do so . . ."

In a joint answer, the original defendants, Jennings and Poteat, denied all essential allegations of the complaint; alleged the negligence of plaintiff was the sole proximate cause of the collision referred to in the complaint; pleaded plaintiff's contributory negligence in bar of his right to recover; and alleged a cross action for contribution under G.S. § 1-240 against defendant Terrell.

In said cross action, the original defendants, in brief summary, alleged: Immediately after the collision referred to in the complaint, defendant Terrell, operating an automobile in said lane for westbound traffic in the negligent manner particularly set forth, crashed into the rear of plaintiff's 1959 Ford and knocked it into the 1952 Ford. Defendant Terrell, answering the cross action of the original defendants, denied all the essential allegations thereof and alleged the (second) collision was caused solely by the negligence of defendant Jennings or by the joint and concurrent negligence of Jennings and of plaintiff. (Note: The complaint does not refer to the second collision.)

When the case was called for trial, the court, over objection by original defendants, permitted plaintiff to amend paragraph 7 of the

complaint by inserting therein a new sub-paragraph, to wit: "(4) He (Jennings) drove his automobile on a public highway in the State of North Carolina during the nighttime without any lights on his automobile in violation of and contrary to the laws of the State of North Carolina."

The evidence offered by plaintiff consisted of his own testimony and of the testimony of State Highway Patrolman Parnell and of Deputy Sheriff Gilmore. At the conclusion thereof, the court denied the motion of the original defendants for judgment of nonsuit. Thereupon, the original defendants offered evidence, consisting of the testimony of Henry Atkinson Jennings, a brother of defendant Jennings, and the testimony of defendant Poteat. No evidence was offered by defendant Terrell.

At the conclusion of all the evidence, the original defendants renewed their motion for judgment of nonsuit as to plaintiff's action, and the additional defendant moved for judgment of nonsuit as to the cross action alleged against him by original defendants.

The court entered judgment "that the plaintiff be, and he is hereby nonsuited, and that said case be, and it is hereby dismissed, and the cross action against the additional defendant be dismissed, and that the defendants recover of the plaintiff the costs, to be taxed by the Clerk." Plaintiff excepted and appealed.

Booth, Osteen, Upchurch & Fish for plaintiff appellant.

Haywood & Denny and George W. Miller, Jr., for original defendants, appellees.

BOBBITT, J. The rule is well established that judgment of nonsuit is proper when there is a fatal variance between a plaintiff's *allegata* and *probata*. Proof without allegation is no better than allegation without proof. A plaintiff must make out his case *secundum allegata*. He cannot recover except on the case made by his pleading. *Vickers v. Russell*, 253 N.C. 394, 117 S.E. 2d 45; *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387; *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 101 S.E. 2d 458, and cases cited. Whether the variance is to be deemed material (fatal) must be resolved in the light of the facts of each case. *Spaugh v. Winston-Salem*, 249 N.C. 194, 197, 105 S.E. 2d 610.

The ground on which the court granted the motion of original defendants for judgment of nonsuit does not appear. However, as indicated below, plaintiff's evidence tends to show a basic factual situation different from that alleged in the complaint.

The sole proximate cause of the (first) collision, according to plaintiff's positive and repeated allegations, was the fact that Jennings,

without giving a proper hand or mechanical signal and without keeping a proper lookout, *suddenly* drove the 1952 Ford from the right-hand shoulder into the lane for westbound traffic *directly* into plaintiff's path when plaintiff had *absolutely no time* in which to stop and avoid striking the 1952 Ford. Nothing in the *original* complaint suggests there were no lights on the 1952 Ford or that plaintiff did not see it when it made such sudden movement from the right-hand shoulder into the lane for westbound traffic.

The amendment, permitted "prior to the reading of the pleadings," alleged Jennings drove the 1952 Ford "on a public highway . . . during the nighttime without any lights on his automobile . . ." This amendment, permitted over their objection, advised original defendants for the first time plaintiff contended there were no lights on the 1952 Ford. Be that as it may, while the amendment alleged a new specification of negligence, it did not amend in any manner plaintiff's original factual allegations as to the proximate cause of the collision.

According to plaintiff's testimony: The 1952 Ford was twenty to thirty feet in front of him, "sitting still," when he first saw it. It had no lights. Plaintiff "had in mind" to pull out and pass the 1952 Ford but did not do so because a tractor-trailer, then two hundred feet away, was approaching in the lane for eastbound traffic. He decided to stop, put on his brakes and struck the rear of the 1952 Ford. "The car (presumably plaintiff's 1959 Ford) was not damaged greatly in the first collision."

Plaintiff's positive and repeated *testimony* is that the 1952 Ford was stopped, without lights, in the lane for westbound traffic when he first saw it. Nothing in his testimony supports his positive and repeated factual *allegations* that Jennings, without giving a proper hand or mechanical signal and without keeping a proper lookout, *suddenly* drove the 1952 Ford from the right-hand shoulder onto the lane for westbound traffic directly into plaintiff's path.

There was evidence the 1952 Ford, prior to the (first) collision, had been on the right shoulder. Parnell testified to statements made by defendant Jennings at the scene of the collisions. Jennings then stated, according to Parnell, that he pulled onto the right-hand shoulder where two passengers in his car got out; that his lights were on; that, when he pulled back onto the highway, he saw plaintiff's lights some two hundred to three hundred feet back; and that "he was driving 20 to 25 miles per hour when the Hall car ran into his car." Jennings' brother, a defense witness, testified that, when he and another passenger got out of the 1952 Ford, defendant Jennings drove off, headed west; and that he and his fellow passenger had walked east on their left side of the highway about 150 feet when he heard the noise from

the (first) collision. In this connection, the fact that this evidence tends to contradict the testimony of plaintiff is immaterial. The significant fact is that it tends to show defendant Jennings had entered upon the lane for westbound traffic when plaintiff was an appreciable distance away and had proceeded some distance therein before the 1952 Ford was struck by plaintiff's 1959 Ford. Hence, this evidence does not support plaintiff's factual allegations with reference to the proximate cause of the first collision.

The evidence with reference to the second collision is not pertinent to this appeal. Nor do we deem it necessary to review the evidence pertinent to whether plaintiff was guilty of contributory negligence as a matter of law. Decision is based on the ground there is a material and fatal variance between plaintiff's factual allegations as to the proximate cause of the (first) collision and plaintiff's evidence with reference thereto.

Conceding plaintiff's testimony, when considered in the light most favorable to him, was sufficient to support a finding that the (first) collision was proximately caused by the negligence of defendant Jennings, it was not sufficient to support a finding that it was proximately caused by the negligence of the original defendants *as alleged in the complaint.* "Plaintiff must prove his case in conformity with the facts he alleges to create liability." *Bundy v. Belue,* 253 N.C. 31, 116 S.E. 2d 200. Confronted by the material variance between plaintiff's allegations and proof, the court below properly entered judgment of involuntary nonsuit.

It is noted that judgment of involuntary nonsuit for material variance between *allegata* and *probata* does not preclude plaintiff from instituting a new action. *Vickers v. Russell, supra.*

In view of the ground of decision, we need not consider whether the complaint sufficiently alleges that defendant Jennings was the agent of defendant Poteat "at the time and in respect of the very transaction out of which the injury arose." *Whiteside v. McCarson,* 250 N.C. 673, 678, 110 S.E. 2d 295, and cases cited; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911, and cases cited; *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427, and cases cited.

On the ground stated, the judgment of involuntary nonsuit, as to plaintiff's action against the original defendants, is affirmed. It is noted that the additional defendant is not a party to this appeal.

Affirmed.

STATE v. ERNEST OVERMAN.

(Filed 15 June 1962.)

1. Criminal Law § 32—

Defendant's plea of not guilty places the burden upon the State to satisfy the jury beyond a reasonable doubt of every element of the offense charged in the bill of indictment.

2. Automobiles § 76—

In order to sustain a conviction under G.S. 20-166(a), the State must prove that defendant was operating a motor vehicle at the time alleged in the indictment, that the vehicle was involved in a collision resulting in injury to the person named in the indictment, and that defendant failed to stop his vehicle immediately at the scene.

3. Same—

In order to sustain a conviction in a prosecution under G.S. 20-166(c) the State must prove that defendant was the operator of a motor vehicle involved in an accident or collision which resulted in injury to the named victim, that defendant failed to give his name, address, operator's license number, and the registration number of his vehicle to such victim, that it was apparent that medical treatment was necessary to the victim but that defendant failed to render the victim reasonable assistance.

4. Criminal Law § 108—

In charging the jury, the court may not assume as true the existence or non-existence of any material fact in issue.

5. Automobiles § 76—

Where, in a prosecution for violation of G.S. 20-166(a) and G.S. 20-166(c), defendant contends that he was not the driver of the vehicle which struck the pedestrian and also that there was no collision between the pedestrian and any vehicle, it is prejudicial error for the court to assume that the vehicle in question collided with the pedestrian and that thereafter the party injured needed medical attention.

6. Criminal Law § 107—

It is error for the court, after charging that if the jury were satisfied beyond a reasonable doubt that a stated hypothesis were the facts the jury should return a verdict of guilty, to fail to charge that if the jury were not so satisfied they should acquit the defendant.

7. Criminal Law § 102; Indictment and Warrant § 11—

Where the indictment in a prosecution under G.S. 20-166(a) and G.S. 20-166(c) charges the name of the injured person as "Frank E. Nutley" while the proof is that the injured person is "Frank E. Hatley," there is a material variance warranting nonsuit.

8. Criminal Law § 139—

Where defendant does not assign as error the failure of the trial court to allow his motion for judgment as of nonsuit, the Supreme Court cannot consider any of the questions raised by the motion. Rules of Practice in the Supreme Court Nos. 21 and 28.

BOBBITT, J., concurs in result.

STATE *v.* OVERMAN.

APPEAL by defendant from *Williams, J.*, December 1961 Criminal Term of ALAMANCE.

The defendant was tried upon a bill of indictment which, in two counts, charged a violation of G.S. 20-166, subsections (a) and (c), commonly referred to as the hit-and-run statute. The name of the victim was alleged to be Frank E. Nutley. The defendant plead not guilty.

The State's evidence tended to show the following facts:

Delaware Avenue in Burlington runs north and south and is one block east of Queen Anne Street which also runs north and south. Stonewall Street runs east and west and intersects both streets. Defendant's house is about the middle of a "long curving block" on the east side of Delaware Avenue about 900 feet south of Stonewall. On Sunday, October 1, 1961, between 5:00 and 5:30 P. M. Frank E. Hatley, a ten-year old boy carrying a bag of Pepsi-Colas, was walking west toward Queen Anne Street on the right side of Stonewall Street between the pavement and the shoulder which was dotted with little holes. About the middle of the block, and in front of the property of N. E. Jones, he was struck on his left side by a 1957 two-tone green Chevrolet which was traveling west. The impact knocked him down, and he lay in the street until an ambulance took him to the hospital. One of the bottles of Pepsi-Cola was broken. The car which struck him did not stop but continued at a speed of from 20 to 25 miles an hour toward Queen Anne Street, turned to the left and disappeared. The boy did not see who was driving the car but he saw only one person in the vehicle, a man wearing a hat. N. E. Jones, who lived on the north side of Stonewall Street, heard a "kind of bumping noise" and immediately went into the street where he saw the boy in a sitting position leaning back on one hand on the north side of the street. The boy pointed to the green Chevrolet going west and hollered "that car hit me". Jones ran after the car, calling to the driver to stop, but he was unable to get the license number or to see the driver. The car was dark green at the bottom and light green at the top. On the right side of the vehicle, which was the one next to Jones, he observed a dent or crease in the back door from the window to the bottom. It was toward the front where the door hinged and, in his opinion, was from two to three inches deep and five to six inches wide.

Frank Hatley had no broken bones after the accident. The palm of one of his hands was scratched, and his left side and left arm above the elbow were bruised. He stayed at the hospital fifteen minutes and was released.

On Monday morning when the police officers investigating the case attempted to talk to defendant he was too drunk for them to put any credence in what he said. On Tuesday, he told the officers that he had

been drunk on Sunday; that sometime during the day — he did not know when — he had driven to Graham for more liquor, but he had not been on Stonewall Street; and that when he left home he had gone south on Delaware Avenue. The officers told him that neighbors had seen him leave his home between 5:00 and 6:00 P. M. on Sunday and turn north on Delaware in the direction of Stonewall Street. He then admitted that he had been on Stonewall Street, but said that he had turned right, or east, on Stonewall which was the most direct route to the Graham Depot. The two neighbors who had seen defendant driving toward Stonewall Street could not see the intersection and did not know where he went. He insisted that he had not driven on Stonewall Street in the block between Delaware and Queen Anne Streets. The defendant admitted ownership of the 1957 two-tone green Chevrolet — dark green at the bottom, light green at the top — which was parked in his yard on Monday morning, October 1st. The only evidence of recent damage to the car was a place about the size of a dime where the paint had been chipped off on the right front door about eighteen inches from the ground level. The right rear door had been mashed in but this was "rusted over" and was obviously old damage. On Tuesday, N. E. Jones went with officers to the defendant's home and identified his 1957 green Chevrolet as the car he had seen on Stonewall Street driving west on Sunday afternoon when he found the Hatley boy in the street.

At the trial the defendant did not testify, but he offered evidence which tended to show that a garage man examined his car after October 1st, during the first week in October, and could find no place where paint had been knocked off; that all the damage to the outside of his car had occurred more than a year prior to October 1, 1961; and that the V-shaped dent or crease on the right side of his car was five to six inches back from the edge of the back door and was approximately twelve inches wide and about four inches deep in the center — "a noticeably scooped out place".

The verdict was guilty; the sentence, not less than eighteen months nor more than three years. The defendant appealed assigning errors in the charge.

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

Clarence Ross, B. F. Wood and W. R. Dalton for the defendant appellant.

SHARP, J. The defendant's plea of not guilty placed the burden upon the State to satisfy the jury beyond a reasonable doubt of every

element of the offenses charged in the bill of indictment. Therefore, in order to convict the defendant on the first count which charged a violation of G.S. 20-166(a), it was necessary for the State to prove that on the occasion in question, the defendant was the operator of the 1957 two-tone green Chevrolet automobile which the State contended drove westerly down Stonewall Street between Delaware Avenue and Queen Anne Street; that this vehicle was involved in an accident or collision with Frank E. Nutley; and that knowing he had struck Nutley, the defendant failed to stop his vehicle immediately at the scene. *State v. Ray,* 229 N.C. 40, 47 S.E. 2d 494.

To secure a conviction on the second count, which charged a violation of G.S. 20-166(c), the State was required to prove that the defendant was the operator of a vehicle which had been involved in an accident or collision which resulted in injury to Frank E. Nutley; that defendant failed to give his name, address, operator's license number, and the registration number of his vehicle to Frank E. Nutley; that it was apparent that medical treatment was necessary to Frank E. Nutley but that defendant failed to render him reasonable assistance, including carrying him to a physician or surgeon for medical treatment. *State v. Brown,* 226 N.C. 681, 40 S.E. 2d 34.

The State could not assume any one of the foregoing facts. "The rule is that the trial court in charging a jury may not give an instruction which assumes as true the existence or non-existence of any material fact in issue". *State v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233.

The defendant not only contended that he was not the driver of the green Chevrolet which Frank E. Hatley testified collided with him, but he also contended that there was no collision between the boy and any automobile. He contended that the slight injuries the boy sustained necessitated no medical treatment and were so inconsequential that they could not have been inflicted by an automobile. He contended that the boy must have stumbled in one of the holes in the street and fallen with his bag of Pepsi-Colas when the automobile approached thereby causing the scratches and minor bruises he sustained.

However, the judge charged the jury as follows — those portions between the lines (O) and (P) being the subject of assignment of error No. 8.

> "Now, I instruct you, this case presents nothing but a simple question of fact. It has been extensively argued to you, there has been a lot of evidence in the case that may or may not aid you in arriving at a verdict, (O) but if you find from this evidence and beyond a reasonable doubt that on this day the defendant

was operating the automobile involved in the collision, striking this little boy on the highway, and that he knew he had hit him and failed to stop, it would be your duty to return a verdict of guilty on the first count in the Bill of Indictment. If you also find in addition to that beyond a reasonable doubt that he failed to give his name and address, render any aid or assistance or that he failed to see that the boy needed medical attention to take him to the doctor or determine if he needed hospitalization, it would be your duty to return a verdict of Guilty on the second count. (P) If you have a reasonable doubt about it, you will return a verdict of Not Guilty."

From the foregoing, it appears that His Honor assumed that if defendant were the driver of the green Chevrolet automobile which went west on Stonewall Street at the time in question then (1) it collided with the boy and (2) that thereafter the boy needed medical attention. This was error.

Furthermore, when the trial judge undertook to apply the law to the evidence with reference to the first count, he told the jury that if they were satisfied beyond a reasonable doubt that the stated hypotheses were the facts it would be their duty to return a verdict of guilty as charged. However, he failed to give the converse or alternative view and to tell the jury that if they were not satisfied beyond a reasonable doubt that those were the facts, they would acquit the defendant. This likewise was error. *State v. Altson*, 228 N.C. 555, 46 S.E. 2d 567. In his mandate with reference to the second count, he did give the alternative instruction.

It is noted that there is a fatal variance between the indictment and the proof on this record. The indictment charged in both counts that Frank E. Nutley was the person injured. The proof is that the person was Frank E. Hatley.

The defendant in a criminal action may raise the question of variance between the indictment and the proof by a motion of nonsuit. *State v. Grace,* 196 N.C. 280, 145 S.E. 399. The defendant in this case made a motion of nonsuit at the close of the State's evidence and again at the close of all the evidence. The motions were overruled. The motion for judgment of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment if so advised. *State v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497.

However, the defendant did not assign the failure to allow his motion of nonsuit as error and, on this appeal, we cannot consider any of the questions which were raised by the motion for nonsuit. Rules

21 and 28, Rules of Practice in the Supreme Court of North Carolina. *State v. Stantliff*, 240 N.C. 332, 82 S.E. 2d 84.

Since the case goes back for a new trial upon assignment of Error No. 8, we do not deem it necessary to consider the other assignments as those questions may not arise again.

New trial.

BOBBITT, J., concurs in result.

W. B. GATLIN, JR., v. JOSEPH L. PARSONS, JR., ORIGINAL DEFENDANT AND LELAND GLENN GOSS AND CAROLINA COACH COMPANY, ADDITIONAL DEFENDANTS.

(Filed 15 June 1962.)

1. Automobiles §§ 41c, 44—

Evidence that defendant lost control of his vehicle, skidded to the left, and crashed head-on into plaintiff's vehicle, which was approaching from the opposite direction on its right side of the highway, *is held* sufficient to be submitted to the jury on the question of defendant's negligence and is insufficient to raise the issue of contributory negligence on the part of plaintiff.

2. Evidence § 44—

It is competent to ask a physician who had examined plaintiff, particularly scars and depressed areas on plaintiff's forehead, etc., whether the headaches which plaintiff testified he habitually suffered could be the result of the injuries, and if a part of the testimony is not responsive to the question, defendant waives the right to object thereto by not moving to strike the unresponsive part of the answer.

3. Automobiles § 43; Damages § 7; Negligence § 8—

Where the evidence discloses that plaintiff's car and the car of one of defendants collided head-on, that then plaintiff's car was struck from the rear by a bus driven by the additional defendant, and that the second collision resulted in some damage to plaintiff's car but did not contribute to plaintiff's personal injuries, with some evidence that the bus was following plaintiff's vehicle too closely, the question of the liability of the bus driver and the bus company is properly submitted to the jury, but is properly limited to contribution for the damages to plaintiff's car.

APPEAL by defendants from *Olive, J.*, November 6, 1961 Civil Term High Point Division, GUILFORD Superior Court.

This civil action was instituted by W. B. Gatlin, Jr., to recover for his personal injury and damage to his automobile resulting from a

head-on collision between a 1952 Ford operated by the plaintiff and a 1956 Ford operated by the defendant Joseph L. Parsons, Jr. The collision occurred about 7:45 on the morning of December 31, 1960, on Highway No. 68, a short distance west of the Deep River bridge within the corporate limits of High Point. The temperature was near freezing. There was some fog near the river.

As the parties approached the scene of the collision the plaintiff was driving east and the defendant was driving west. The point of collision, according to all the evidence, was in the south travel lane 150 to 400 feet west of the bridge. For several hundred yards both east and west of the bridge the road was straight. The decline to the bridge was gradual.

The defendant Parsons passed a pickup truck about 50 feet east of the bridge. At the time, Parsons was driving, according to his evidence, about 35 miles per hour; according to the truck driver, 40-50 miles per hour, and according to the defendant Goss, 55-60 miles per hour.

As the plaintiff approached the Deep River bridge from the west he was driving in the south lane at 25-30 miles per hour. He was followed by the Carolina Coach Company bus driven by Leland Glenn Goss. The bus carried a tape recording device which the investigating officer examined and found the speed prior to the collision to have been 30-32 miles per hour, which corroborated the statements made to the officer by both Goss and the plaintiff.

According to all the evidence, the defendant's Ford, after passing the truck, struck a thin coat of ice near the bridge. The ice caused the vehicle to skid into the south lane and, as the original defendant attempted to return to his proper lane, struck additional ice, lost control, and again skidded to the south lane immediately in front of the plaintiff. The two Fords struck head-on in the south traffic lane. The impact, according to the evidence, drove the plaintiff's vehicle up the road a few feet and the two vehicles came to a stop in contact with each other. As the vehicles came to rest, the bus driver, in attempting to stop, also ran onto the thin coat of ice, released his brakes to prevent skidding, and struck the rear of the plaintiff's vehicle. At the point of the collision the shoulders of the road were very narrow. A ditch three feet deep was on either side. The defendant Goss, according to his testimony, kept in the highway in order to protect the passengers in his bus.

The defendant Parsons answered, denied negligence, pleaded contributory negligence, and set up a counterclaim for his personal injury and damage to his vehicle. On his motion, the Carolina Coach Company and its bus driver, Goss, were made parties defendant for purposes of contribution.

The court submitted six issues which the jury answered as here indicated:

"1. Was the plaintiff injured and damaged by the negligence of Joseph L. Parsons, Jr., as alleged in the Complaint?
"Answer: Yes.
"2. Was the plaintiff damaged by the negligence of Leland Glenn Goss as alleged in the cross action?
"Answer: Yes.
"3. Did the plaintiff contribute to his injury and damage by his own negligence as alleged in the Answer?
"Answer: No.
"4. What amount of damages, if any, is the plaintiff entitled to recover?
"(a) For his personal injury?
"Answer: $8,308.00.
"(b) For his property damage?
"Answer: $285.00.
"5. Was Joseph L. Parsons, Jr., damaged by the negligence of the plaintiff W. B. Gatlin, Jr., as alleged in the Answer?
"Answer: No.
"6. What amount of damages, if any, is the defendant Joseph L. Parsons, Jr., entitled to recover of the plaintiff, W. B. Gatlin, Jr., on his counterclaim?
"(a) For his personal injury?
"Answer: _____.
"(b) For property damage?
"Answer: _____."

However, the court instructed the jury:

"Now the court instructs you as a matter of law that on this issue (6b) it is only submitted to you as to whether the automobile of the plaintiff was damaged as a proximate cause of the negligence of the defendant Goss. The Court is not submitting to you anything about the personal injuries as to the defendant and agent Goss and the Carolina Coach Company as the court does not deem there is any evidence that there were any personal injuries on their account, or any evidence at all from which you could find, and it is only submitted to you about any damage to the automobile, whether there was any damage to the automobile of the plaintiff as the proximate cause of the negligence of the defendant and agent Goss and Carolina Coach Company."

Upon the jury's verdict, the court entered judgment that the plaintiff recover of Joseph L. Parsons $8,308.00 for personal injury and $285.00 for the damage to his automobile. The court further adjudged that the defendant Parsons recover of Leland Glenn Goss and Carolina Coach Company the sum of $142.50 as contribution for the damage to the plaintiff's vehicle. The judgment further provided that the additional defendants be not taxed with any part of the expert witness fees.

The defendants appealed, separately assigning errors both as to the admission of evidence and to the court's charge.

Silas B. Casey for plaintiff appellee.

James B. Lovelace for defendants Goss and Carolina Coach Company, appellees.

James B. Lovelace for defendants Leland Glenn Goss and Carolina Coach Company, appellants.

Booth, Osteen, Upchurch & Fish for defendant Joseph L. Parsons, Jr., appellant.

HIGGINS, J. The evidence is in conflict as to how closely the bus was following the plaintiff as they approached the point of collision. All the evidence, however, is to the effect that Parsons lost control of his vehicle, skidded to the left, and crashed head-on into the plaintiff's oncoming Ford. The evidence of negligence on the part of the defendant Parsons was sufficient to survive the motion for nonsuit. It was insufficient to raise any issue of negligence on the part of the plaintiff.

The plaintiff was treated by two physicians, both of whom testified to his injuries which involved his forehead, face, chest, hands, knees, and legs. Another physician, Dr. L. L. Wilkinson, a general surgeon, examined the plaintiff on October 20, 1961, more than nine months after the accident. Dr. Wilkinson described in detail his findings, in particular the scars, depressed areas, changes of major muscular textures due to injury as disclosed by scar tissues, muscular limitations, etc. The scar on the forehead was of sufficient size and of such depth as to indicate a "very sizeable blow" was necessary to create it. The plaintiff testified he had been bothered with headaches. His counsel asked Dr. Wilkinson if, in his opinion, the headaches could come from the head injury. The witness entered into a long and detailed discussion of possible brain injury, what was the probable cause of it, etc. The question was based on the head injury which the witness had described. The question was not incompetent. Much of the answer could be supported only upon a properly worded hypothetical ques-

tion based on proper factual findings. The defendants, however, did not move to strike the nonresponsive parts of the doctor's answers. Hence the objection was waived. *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; *Edgerton v. Johnson,* 217 N.C. 314, 7 S.E. 2d 535; *Bryant v. Construction Co.,* 197 N.C. 639, 150 S.E. 122.

This case is strikingly similar to *Riddle v. Artis,* reported in 243 N.C. 668, 91 S.E. 2d 894, and 246 N.C. 629, 99 S.E. 2d 857. In the instant case, as in *Riddle,* there was a perceptible time interval between the first and the second collision. In *Riddle* there was no evidence the Morris vehicle caused or contributed to the plaintiff's injuries, though the vehicle did come in contact. Hence, the court held nonsuit proper.

In the instant case, however, the bus did strike and damage Gatlin's Ford after it and the original defendant's vehicle had come to rest in the highway. There was evidence upon which the jury could find the bus was following Gatlin too closely. The original defendant testified as they approached him from the west the bus was within 20 feet of the plaintiff's Ford. There was much evidence to the contrary by witnesses who apparently had better opportunity to observe the vehicles involved. However, the conflict in the testimony was for the jury. There was evidence the bus caused some damage to the plaintiff's Ford. This required the court to submit the issue of resulting property damage to the jury. The limitation was proper by reason of the total lack of any evidence the bus caused or contributed in any way to the plaintiff's personal injury. *Riddle v. Artis, supra.*

We have examined all assignments, and find

No error.

LULA HARDY v. CHARLIE INGRAM.

(Filed 15 June 1962.)

1. Carriers § 1; Taxicabs—

Those who operate taxicabs are common carriers.

2. Carriers § 18; Taxicabs—

Operators of taxicabs, like other common carriers, are not insurers of the safety of their passengers, but owe them the highest degree of care to transport them to their destination with an opportunity to alight in safety at a safe place.

3. Same—

The assistance, if any, which a carrier must provide a passenger in alighting at destination depends on the carrier's knowledge, actual or im-

plied, of the passenger's need for, and extent of, assistance reasonably necessary to terminate the journey in safety.

4. Same— Evidence held insufficient to show negligence on part of taxicab operator in failing to assist plaintiff to alight.

The evidence tended to show that plaintiff had theretofore ridden a number of times in the taxicabs operated by defendant, that plaintiff was old and infirm but was able to walk without assistance, that on the occasion in question plaintiff entered the cab without assistance, was transported to her destination, and the cab stopped at the curb, that while the cab driver's hands were still on the steering wheel plaintiff attempted to alight and put her hand on the door post to pull herself up, and that the door closed on her thumb, causing the injury in suit. The evidence further tended to show that plaintiff did not request assistance in alighting on this or any other occasion, and there was no evidence as to how long after the cab stopped that the injury occurred. *Held:* The evidence is insufficient to establish negligence on the part of the taxicab operator in failing to assist plaintiff to alight.

5. Damages § 7—

Where defendant is not liable for the injury received by plaintiff, defendant cannot be held liable for failure to provide plaintiff medical assistance or for injuries received by plaintiff in a fall thereafter occurring.

APPEAL by plaintiff from *Stevens, J.*, November 1961 Term of LENOIR.

Plaintiff, a passenger in defendant's taxicab, had a thumb broken when the rear door closed on her hand while she was alighting from the cab. She seeks compensation for the injury then sustained and damages because of defendant's failure to provide medical attention. Her action is based on the asserted negligent failure of defendant to perform his duty by assisting her to alight.

Defendant denied the allegations of negligence and pleaded contributory negligence.

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

White & Aycock by Chas. Aycock and C. E. Gerrans for plaintiff appellant.

Whitaker & Jeffress for defendant appellee.

RODMAN, J. Summarized, plaintiff's allegations are: She resides at Dover in Craven County; she is "old, infirm, and in poor health"; defendant owns and operates a Chevrolet automobile as a taxicab in Kinston; on 9 June 1960 she traveled as defendant's passenger from Globe Taxi Stand to the Kinston Clinic; she paid periodic visits to her physician, who had offices at the Kinston Clinic; she was on her way

to see her physician on the day she was injured; because of her age and health, she had difficulty in getting in and out of a taxi unassisted; defendant, although her condition was known to him, did not assist her in alighting; to get out she put her hand on the post separating the front and rear doors; as she was getting out, the door closed on her hand, breaking her thumb; she pushed the door back and alighted without assistance from defendant; notwithstanding defendant's knowledge of the injury sustained by the closing of the door, he made no effort to procure medical assistance.

Based on the factual allegations, plaintiff concluded defendant was negligent:

"(a) In that he failed and neglected to render aid and assistance to the plaintiff when he knew, or in the exercise of due care should have known, that the plaintiff in her aged, infirm and weakened condition needed assistance in alighting from his taxi.

"(b) In that he failed and neglected to render aid and assistance to plaintiff after he had knowledge that she had sustained serious and painful injuries in his taxi.

"(c) In that he failed and neglected to perform the duties imposed upon him by law as a common carrier for hire.

"(d) In that he did not see that plaintiff received immediate medical attention for her injuries sustained in his taxi."

Obviously, conclusion (c) is, on the facts alleged, a mere repetition of conclusion (a). The same is true of conclusions (d) and (b).

These legal principles are well established: (1) Those who operate taxicabs are common carriers. *Smith v. Cab Co.*, 227 N.C. 572, 42 S.E. 2d 657. (2) Operators of taxicabs, like other common carriers, are not insurers of the safety of their passengers, but owe them the highest degree of care to transport them to their destination with an opportunity to alight in safety at a safe place. *Harris v. Greyhound Corporation*, 243 N.C. 346, 90 S.E. 710; *Garvey v. Greyhound Corp.*, 228 N.C. 166, 45 S.E. 2d 58; *White v. Chappell*, 219 N.C. 652, 14 S.E. 2d 843. (3) The assistance, if any, which a carrier must provide a passenger in alighting at destination depends on carrier's knowledge, actual or implied, of passenger's need for, and extent of, assistance reasonably necessary to terminate the journey in safety. *White v. Chappel, supra; Graham v. R.R.*, 174 N.C. 1, 93 S.E. 428; *Morarity v. Traction Co.*, 154 N.C. 586, 70 S.E. 938; *Clark v. Traction Co.*, 138 N.C. 77; *King v. Vets Cab*, 295 P. 2d 605, 56 A.L.R. 2d 1249; 13 C.J.S. 1362-1363; 10 Am. Jur., Carriers, sec. 1376, 1381.

Plaintiff's testimony is sufficient to warrant a jury in finding these facts: Plaintiff was 73 years old; she lived in Dover and came to Kinston by bus the morning she was injured; she was a frequent

visitor to Kinston; when she reached Kinston on the day she was injured, she walked from the bus station to a taxi stand on Shine Street; not locating a taxi there, she walked to defendant's stand on Queen Street; she "walked kinda bad" and used a walking stick; she and defendant had known each other for many years; she had ridden as a passenger in defendant's cab on previous occasions; she entered the cab on the day in question without requesting or receiving assistance; after she was seated, defendant drove her "right up to the curb at the clinic, at the side where the drug store is. He stopped in front of the clinic. He didn't ever take his hand off of the steering wheel. I was getting out as fast as I could. I was sick and weak and when I got out and caught the door the cab trembled because I was so slow, and that door came to on my hand. I said that my thumb was broke, but Charlie didn't get out. He did not offer to get out and get the door off of my finger, which was bleeding. The door hit on my left thumb. It was caught between the door and the door post. I had to push the door open and take my hand out." On cross-examination she said: "I didn't ask him to open the door and let me out because it was his place to do it. I opened the door. Instead of putting my hand on the seat to pull myself up I put my hand on the door post right where the door closed on it. I turned around; I had to get out; he didn't attempt to move. When the door came to on my hand I told him I had broken my hand. He said: 'What a pity.'

"When I pulled myself up, I pulled up by the door. . . . When I got out of the cab I did not slam the door on my hand. I did not say Charlie closed the door on my hand, because he was sitting under the steering wheel. He didn't move. I wasn't heavy enough to close that door on my thumb, but my weight might have done it. It closed on my whole hand."

Plaintiff, to recover, must have both *allegata* and *probata*. The complaint does not charge defendant with fault in the operation of his vehicle or in the place selected to end the trip. The breach of duty charged is the failure of defendant to assist plaintiff, who, because of her infirmities, could not alight without assistance. Viewed in the light of the allegations of negligence, plaintiff's statement ". . . when I got out and caught the door the cab trembled because I was so slow" should not, particularly when viewed in the light of her statement "When I pulled myself up, I pulled up by the door," be construed to mean there was negligence in the manner in which the cab was operated.

Plaintiff's evidence, given all favorable inferences, shows that she was old and infirm, but able to walk without assistance. Considering this evidence in the light of the other facts apparent from plaintiff's

testimony, is it sufficient to impose a duty on defendant to assist her in alighting? It affirmatively appears that plaintiff and defendant were acquaintances of many years. Plaintiff nowhere suggests that she had ever requested assistance from defendant, although she had ridden as his passenger on previous occasions. It affirmatively appears that plaintiff did not request assistance in alighting. It does not appear what period elapsed between the stopping of the taxi and the attempt to alight. It appears that defendant had his hands on the wheel when plaintiff was injured. Was that because he had not had opportunity to move them when plaintiff started to alight? It does appear that she opened the door. It does appear from her testimony that she put her hands on the post and on the door to pull herself up. It does not appear where she put her hands on the door nor how fully the door had been opened when she started to pull herself up. We conclude plaintiff's evidence is insufficient to establish a negligent failure to assist her in alighting from defendant's taxicab.

Plaintiff, having failed to establish defendant's liability for the injury to her hand, could not impose liability on defendant because he failed to provide medical assistance, nor can he be held liable for injuries sustained by a fall in going from the taxi to the doctor's office. *Parrish v. R.R.*, 221 N.C. 292, 20 S.E. 2d 299; 65 C.J.S. 549-550. We do not understand plaintiff to disagree with this statement of the law.

Affirmed.

R. H. NYE v. THE PURE OIL COMPANY, A CORPORATION, AND HARRY HALSTEAD, INDIVIDUAL.

(Filed 15 June 1962.)

1. Pleadings § 2—

The complaint should contain a plain and concise statement of the facts constituting the cause of action. G.S. 1-122.

2. Pleadings § 12—

Upon demurrer, the complaint will be construed liberally in favor of the pleador with a view to substantial justice between the parties. G.S. 1-151.

3. Torts § 2—

If each defendant is liable to plaintiff only for the wrong separately done by such defendant, each defendant must be sued separately, but if there is a joint invasion of plaintiff's rights by separate parties, warrant-

ing a judgment against them jointly, plaintiff may join all such defendants in one action.

4. Same; Conspiracy § 1— Complaint held to state one cause of action for conspiracy to destroy plaintiff's business.

The complaint alleged that plaintiff, an oil distributor, owned a number of filling stations, leased others and had others as regular customers, that plaintiff leased his business properties for a term of five years to corporate defendant with option to the corporate defendant to purchase during the term of the lease, with provision that if it did not exercise the option it would reassign to plaintiff all the service lease agreements and would not conduct any transactions inimical to the best interests of the business, that defendant corporation fraudulently misrepresented to plaintiff that it would exercise the option, thereby inducing plaintiff to make changes in certain of the filling stations which destroyed their usefulness as outlets for petroleum products, that the individual defendant, for his own benefit and for the benefit of the corporate defendant, made contracts with various service station operators in order to defraud plaintiff of his rightful business and good will, and that after defendants had made it impossible for plaintiff to re-engage in the petroleum business, the corporate defendant refused to exercise the option to purchase. *Held:* The complaint alleged a single cause of action to recover for a completed conspiracy to destroy plaintiff's business, and demurrer for misjoinder of parties and causes of action was properly overruled and motion of the corporate defendant to strike all allegations with respect to the fraudulent conspiracy was properly denied.

APPEALS by defendants from *Williams, J.*, January 1962 Civil Term of ROBESON.

This action was begun in October 1960. Plaintiff, on a date not disclosed, filed an amended complaint verified 18 April 1961. On 15 July 1961 defendant Halstead demurred to the amended complaint for that it (a) failed to state a cause of action, and (b) if a cause of action was stated, several were stated, resulting in a misjoinder of parties and causes. Defendant Oil Co. demurred for similar reasons. It also moved to strike numerous parts of the complaint and for an order requiring plaintiff to make the complaint definite and certain. The demurrers and motions were overruled. Defendants appealed as permitted by Rule 4(a), 254 N.C. 785.

Charles B. Nye for plaintiff appellee.

R. A. McIntyre, Ingram P. Hedgpeth, Everett L. Henry, and Ozmer L. Henry by Ozmer L. Henry for defendant appellants.

RODMAN, J. This question is determinative of the appeal: What cause or causes of action, if any, has plaintiff stated?

Our statute, G.S. 1-122, says the complaint must contain "a plain and concise statement of the facts constituting a cause of action,

without unnecessary repetition." Strict adherence to this statutory requirement would perhaps have made this appeal unnecessary.

G.S. 1-151 says: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." With this command in mind, we have examined the complaint to ascertain the facts alleged warranting a recovery against defendants jointly. If the facts alleged are sufficient to warrant recoveries against each defendant for wrongs done only by that defendant, there is a misjoinder of parties and causes. *Williams v. Gooch*, 206 N.C. 330, 173 S.E. 342; *Lucas v. Bank*, 206 N.C. 909, 174 S.E. 301. In that event the demurrer should be sustained. If, however, the facts alleged show a joint invasion of plaintiff's rights warranting a judgment against defendants jointly, there has been no misjoinder.

Summarized, the complaint is, we think, sufficient to allege, but not in the order here stated, these facts: 1. The residence of the parties. 2. Plaintiff was a distributor of petroleum products in Robeson County. The physical assets used in the operation of his business consisted of (a) a bulk storage plant, (b) 15 retail outlets or service stations owned in fee, and (c) "40 service stations or outlets which were either leased to plaintiff or else were regular customers of plaintiff." 3. Oil Co. is a producer of petroleum products which it distributes to retail outlets, either directly or through independent bulk storage plants operated by wholesale distributors. 4. Prior to November 1954 defendant Oil Co. had no facilities "for servicing service stations located in Robeson County and was only operating one or two service stations in said County." 5. Oil Co. wished to increase the sale and consumption of its products in Robeson County. Halstead was desirous of handling the products of Oil Co. as an independent jobber. These desires of defendants could be obtained by the acquisition of plaintiff's valuable business and good will, built by forty years of operation. 6. The aspirations of defendants could be accomplished by a contractual arrangement seemingly fair on its face but made without any intent on the part of defendants to comply with its provisions. Pursuant to this plan, plaintiff and Oil Co., in November 1954, entered into a written contract by which plaintiff leased to Oil Co. his business and properties for a term of five years. This contract gave defendant Oil Co. an option to purchase the business at any time during the period of the lease. The contract further provided: "In the event the option was not exercised and/or the term of the lease was not extended, there was a specific understanding and agreement that defendant Pure would return the petroleum business to plaintiff by reassigning to plaintiff all service lease agreements along with any

extensions of said service leases obtained by defendant Pure during the period it was operating plaintiff's petroleum business pursuant to the November 4, 1954, lease. It being clearly understood, covenanted, and agreed that the plaintiff was to resume operation of his petroleum business at the termination of the original agreement of November 4, 1954, if the corporate defendant did not exercise the option set forth therein, so that the plaintiff could have a going, complete and substantially the same petroleum business as he had theretofore leased and sublet unto the corporate defendant. And it was specifically understood, covenanted and agreed that if any of the subleases between the plaintiff and the corporate defendant expired during the term of said agreement of November 4, 1954, the same would be extended and be reassigned to the plaintiff by the corporate defendant on or about December 1, 1959, if the corporate defendant did not exercise the said option. It being further understood from the terms of the agreement that the corporate defendant, because of its position of dominion and control over plaintiff's petroleum business, was not to conduct any transactions related to the retail petroleum business in or around Robeson County in any manner that would in any way be inimical to the best interests of plaintiff's pertoleum business." 7. Notwithstanding the covenants contained in the lease, Halstead "did actively, for his own benefit and for the benefit of the Pure Oil Company, contact and contract with various service station operators in order to defraud the plaintiff of his rightful business and of his good will with the public, all for the benefit of both defendants." 8. Defendants assured plaintiff that Oil Co. would exercise its option and purchase plaintiff's business. Defendants knew these assurances were false and Oil Co. would not purchase. The assurances so given led plaintiff, as defendants had planned, to consent to changes in certain of the service stations owned by plaintiff in fee, thereby destroying their usefulness as outlets for petroleum products, and led plaintiff to assent to the taking and renewal of leases on other service stations in the name of Oil Co. These things were done to prevent plaintiff from re-entering the business of selling petroleum products. 9. Defendants, having made it impossible for plaintiff to re-engage in the petroleum business as they had conspired to do, then refused to exercise the option to purchase.

In short, plaintiff alleges a completed conspiracy to destroy his business by means of a contract which he made in good faith, but which defendants knew would never be complied with. Plaintiff does not seek damages for breach of the contract. He seeks damages for the tortious act of destroying his business accomplished by a perversion of the contractual relationship existing between plaintiff and Oil Co.

The complaint does not allege several causes of action based on breach of contract by Oil Co. at the suggestion of Halstead. It alleges a single cause of action based on fraud to which each defendant was a party. The cause of action alleged is a tort. *Griggs v. Griggs,* 218 N.C. 574, 11 S.E. 2d 878; *Trice v. Comstock,* 121 F. 620; *Peitzman v. City of Illmo,* 141 F. 2d 956; *Sanderson v. Crowley,* 180 F. 2d 124; McIntosh, N. C. P. & P., vol. 1, p. 344-5; 36 C.J.S., Torts, sec. 3; 52 Am. Jur. 380. The court properly overruled the demurrers.

The motion of Oil Co. to strike the allegations would, if allowed, have defeated plaintiff's right of action by deleting all allegations with respect to the fraudulent conspiracy. That motion was properly denied.

Affirmed.

MARIE THOMPSON CARTER v. JOSEPH CHARLES BRADFORD.

(Filed 15 June 1962.)

1. Automobiles § 47—

Evidence tending to show that defendant was assisting his 64 year old guest-passenger to enter his automobile, during daylight, that he opened the door, holding her arm, that she placed her right hand on the gooseneck casement, or cowl, which enclosed the curved windshield, and that as she was in the act of seating herself defendant closed the door, crushing plaintiff's hand between the protruding windshield casement and the steel portion of the door, causing serious injury, *is held* sufficient to be submitted to the jury on the question of defendant's negligence.

2. Evidence § 38—

Plaintiff, a bookkeeper and stenographer, had her hand seriously crushed in the door of an automobile. *Held:* It was competent for plaintiff to testify that at the time of testifying she had lost 90 per cent of the use of her right hand, since a lay witness may express an opinion about his present state of health, ability to do work, etc.

APPEAL by defendant from *Clark, J.,* September 1961 Civil Term, ROBESON Superior Court.

The plaintiff instituted this civil action to recover damages for personal injuries allegedly caused by the actionable negligence of the defendant. The complaint alleged in substance: The plaintiff accepted the invitation of the defendant to accompany him in his Oldsmobile to the home of friends in a different section of the town of Lumberton. The defendant escorted the plaintiff to the street in front of her residence where his 1957 Model, two-door Oldsmobile was parked. He

opened the right door of the vehicle, assisted the plaintiff to enter, holding her arm as she did so, and as she was in the act of taking her seat, holding her purse in her left hand, she placed her right hand on the gooseneck casement, or cowl, which enclosed the curved windshield. This gooseneck cowl was only about 18 inches from the floor. "That because . . . of the protruding . . . gooseneck formation . . . the windshield and the low hinging area of the front door and the relationship of the seat thereto, . . . it was necessary that plaintiff support herself by grasping the protruding area of the gooseneck . . . with her right hand; that as she was so doing and in the act of becoming seated . . . the defendant . . . carelessly, negligently, . . . and without warning, slammed the right door . . . with such speed and force that plaintiff's right hand was caught between the hard steel formation of the protruding windshield casement . . . and the hard steel of that portion of the right front door that fits tightly against the same, causing plaintiff's right hand to be seriously crushed . . . and the four fingers so mangled . . . that natural healing processes were ineffective; . . . That plaintiff is a trained bookkeeper and stenographer, . . . and that her ability to perform either of these business occupations has been totally and completely lost for the remainder of her natural life."

The defendant, by answer, denied negligence and by way of further defense alleged the plaintiff was negligent in placing her hand in the door jamb and that her negligence was the sole, or one of the contributing causes of her injury.

The plaintiff testified:

"When I got to the automobile and he opened the door, I put my hand on this cowl in order to get in the car. At that time, he was holding my right elbow, helping me in. As he was holding my right elbow and I had my right hand on the cowl, my other hand and my pocketbook was over here on the left and I was in the act of sitting down. When I was in the act of sitting down, Mr. Bradford closed the door on my hand. The door closed entirely, hard.

"As he closed the door, he took his hand from my elbow and closed the door on my hand. As he took his hand from my elbow, his face was about that far from my hand on the windshield cowl (demonstrating). There was no obstruction between his face and eyes and my hand. . . ."

The plaintiff further testified as to pain, suffering, medical and surgical expenses. She offered medical evidence of her injuries. On direct examination her counsel asked this question: "What percentage of loss of use do you have of your right hand from the period im-

mediately before the injury and the period right now?" She answered: "Ninety per cent, at least."

The defendant testified Mrs. Carter was seated before he closed the door lightly and that he did not see her hand or have any knowledge or notice that it was exposed; that the door and ventilating window prevented him from seeing the position of her hand.

The court submitted and the jury answered the following issues as indicated:

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

"Answer: Yes.

"2. If so, did the plaintiff, by her own negligence, contribute to her injury and damage, as alleged in the Answer?

"Answer: No.

"3. What damage, if any, is plaintiff entitled to recover of the defendant?

"Answer: $11,000.00."

From the judgment on the verdict, the defendant appealed, assigning as error the failure of the court (1) to allow the motions for involuntary nonsuit, (2) to exclude plaintiff's evidence as to 90 per cent loss of use of her hand, (3) to comply with G.S. 1-180.

William E. Timberlake, Nance, Barrington, Collier & Singleton, By James R. Nance for plaintiff appellee.

Johnson, Biggs & Britt By I. M. Biggs for defendant appellant.

HIGGINS, J. The trial court properly denied the motions for nonsuit. The evidence permitted an inference of defendant's negligence in closing the door to the vehicle while the plaintiff "was in the act of sitting down." At the time, her hand was on the cowl against which the heavy steel door fitted snugly. At the time of the injury, the afternoon of August 24, 1958, the plaintiff was 64 years old. Ordinary care under the circumstances would seem to require the defendant to ascertain the door could be closed in safety before closing it. This he did not do.

The defendant relies heavily on *Patterson v. Moffitt*, 236 N.C. 405, 72 S.E. 2d 863. The cases are readily distinguishable. In *Moffitt* the plaintiff was riding in the rear seat. It was dark. The defendant, driver, closed the left front door which caught the plaintiff's fingers as he was getting out by the left rear door. Here, it was daylight. The defendant closed the door by which the plaintiff had entered and at the time she was "leaning over" in the act of taking her seat.

The plaintiff had been a typist and bookkeeper for 35 years. She testified: "I have had to do everything with my left hand . . . I can make very little use of my right hand at this time. . . . Prior to this time I was doing all my housework and everything with my right hand." The testimony to which objection was made involved her statement that from the date of her injury to the date of her testimony she had lost 90 per cent of the use of her right hand. The defendant insists this evidence involves the expression of opinion which plaintiff is not qualified to give and that the objection should have been sustained on that ground. However, a lay witness may express opinion about his present state of health, ability to do work, etc. Stansbury on Evidence, § 129; *Lee v. Ins. Co.*, 188 N.C. 538, 125 S.E. 186. "The ability of a party to perform physical or mental labor is not a question of such exclusively technical significance as to permit expert testimony to be given conclusive effect." *Bulluck v. Ins. Co.*, 200 N.C. 642, 158 S.E. 185.

The plaintiff, a typist and bookkeeper, was in a better position than any other person to know what she had done with her right hand prior to the injury and what she was able to do with it afterwards. The testimony does not attempt to project the disability or to anticipate its future effect. She was merely testifying as to how the injury had handicapped her to the date of the testimony. Its admission was not error.

The evidence presented issues for the jury. These were answered in favor of the plaintiff upon competent testimony and after a charge that is free from valid objection.

No error.

JOHN LOWTHER v. EDWIN G. WILSON AND DR. C. NASH HERNDON.

(Filed 15 June 1962.)

Appeal and Error § 46; Venue § 8—

It is premature for the court to grant a motion for change of venue for the convenience of witnesses before defendants have filed any pleadings, since prior to the joinder of issues there is no basis for the exercise by the court of its discretionary power to order change of venue on this ground.

APPEAL by plaintiff from *Shaw, J.*, January 1962 Civil Term of ALAMANCE.

Action to recover damages for false arrest and false imprisonment, instituted in the Superior Court of Alamance County.

The complaint alleges: Defendant Herndon is a physician and defendant Wilson is Dean of Wake Forest College, and they are resi-

dents of Forsyth County. Plaintiff is a citizen of Alamance County and at the Fall Semester 1960 was a ministerial student at Wake Forest College. On 7 November 1960 defendants, pursuant to a conspiracy between them, illegally, wrongfully and maliciously caused plaintiff to be arrested and committed to Umstead Hospital for the mentally ill at Camp Butner, where he was detained until 25 November 1960. Plaintiff is entitled to recover compensatory and punitive damages.

Defendants, before otherwise pleading, moved for a change of venue as a matter of right and for convenience of witnesses, and assigned the following grounds: (1) Neither plaintiff nor defendants are residents of Alamance County; (2) plaintiff is a resident of the State of Illinois, and is temporarily residing in Forsyth County, North Carolina, and in Virginia; (3) the acts of defendants, complained of in the complaint, were done and performed to aid and assist public officials of Forsyth County; and (4) a great number of witnesses, many of them public officials, who will be required to testify at the trial, reside in Forsyth County.

The court made no express ruling on the first three grounds, but, as a matter of discretion and on the basis of facts found, ordered the cause removed to Forsyth County for convenience of witnesses.

Plaintiff appeals.

Dalton, Long & Latham for plaintiff.
Deal, Hutchins & Minor for defendants.

PER CURIAM. The court's discretionary ruling was premature. ". . . (I)t is impossible to anticipate what issues may be raised, when answer or other pleadings are filed. But, until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. If issues of fact are raised when the answer is filed, which will necessitate a jury trial and the attendance of witnesses, the court may in its discretion grant (the) motion to remove . . . for convenience of witnesses and the promotion of justice." *Indemnity Co. v. Hood, Comr.*, 225 N.C. 361, 34 S.E. 2d 204. Defendants' contention that plaintiff has waived his right to invoke the well settled rule of the *Hood* case is not sustained.

The judgment below will be vacated *in toto*. Defendants, if so advised, may, before answering, insist upon a ruling on the components of their motion asserted as a matter of right. And after answers are filed, if issues are joined, they may insist upon a ruling on the motion for removal for convenience of witnesses and promotion of justice.

Reversed.

GERALDINE F. PRATT FOR THE ADOPTION OF GERRI LEIGH GRAHAM v. GEORGE W. BISHOP.

(Filed 10 July 1962.)

1. Appeal and Error § 19—

Assignments of error must clearly present within themselves the alleged errors relied on without the necessity of an examination of the record, and assignments of error which do not point out the matters complained of but refer only to the exceptions and the page of the record where the matter is set forth, are ineffectual. Rule of Practice in the Supreme Court, No. 19(3).

2. Appeal and Error § 40—

Where respondent is permitted to read not only the portion of his answer denying the material allegations of the petition but also his further answer, except for certain portions which are clearly improper and would have been stricken upon motion, respondent is not prejudiced by the refusal of the court to permit him to read to the jury each paragraph of the answer.

3. Pleadings § 14—

A demurrer which merely charges that the petition fails to state a cause of action is a broadside demurrer and ineffectual, it being required that a demurrer point out specifically the alleged defects of the pleading.

4. Adoption § 3—

Where a proceeding for the adoption of a child is predicated upon abandonment of the child by its parent, it is the better practice for the petition to allege that the parent had wilfully abandoned the child during the six consecutive months immediately preceding the institution of the proceeding, but allegations to the effect that the parent had abandoned the child continuously since its birth three years prior to the institution of the proceeding are sufficient. G.S. 48-2(3).

5. Adoption § 2; Pleadings § 20—

Where the petition in adoption proceedings against the father of the child fails to allege that the child's mother had consented in writing to the adoption, the defect in the petition is cured when the father's verified answer admits that the mother had filed a written consent to the adoption after the institution of the proceeding.

6. Adoption § 3—

An abandonment of a child so as to obviate the consent of the parent to the adoption of the child imports a wilful and intentional course of conduct of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.

7. Same— Evidence of abandonment of child by parent held sufficient to be submitted to the jury.

Evidence in this case tending to show that the father of the child,

sought to be adopted by petitioner, failed to pay any expenses incident to the birth of the child, that the child was left in the custody of its maternal grandmother except for a short period of a few months when the parents made a home for the child, and that the grandmother paid the living expenses of the child and provided a home for the child, and, further, that the father showed no affection for or interest in the child and regarded the child solely as a means of obtaining money from the grandmother in exchange for his consent that she retain custody of the child, *is held* amply sufficient on the issue of the father's abandonment of the child.

8. Same—

Where the evidence tends to show a course of conduct on the part of the child's father evincing an intentional purpose to forego all parental duties and relinguish all parental claims to the child for a period of more than six months prior to the institution of adoption proceedings, the mere fact that on one occasion within six months of the institution of the proceedings the father visited for a period of several days the home of his mother-in-law, who had custody of the child, does not preclude a finding by the jury that the father had abandoned the child.

9. Trial § 15—

Where a deposition introduced in evidence is set out in narrative form in the record, an objection to the introduction of the deposition is a broadside objection to the deposition *en masse*, notwithstanding that the assignment of error is to "each and every question and each and every answer contained therein," and such objection cannot be sustained if any part of the evidence contained in the deposition is competent.

10. Same; Evidence § 21—

Objection made to the introduction of a deposition in evidence immediately before the jury is empaneled is not made before trial within the purview of G.S. 8-81, and therefore the right to object to the competency of the deposition is waived.

11. Trial § 15—

Where objection to the admission of evidence is based upon a specified ground, the competency of the evidence will be determined solely on the basis of the ground specified, even though there may be another ground upon which the evidence might be held incompetent.

12. Adoption § 3; Evidence § 16.1—

In proceedings for adoption based upon the abandonment of the child by its parent, evidence that after the institution of the proceedings the parent obtained possession of the child from petitioner by false pretense in violation of a restraining order theretofore issued in the cause, negotiated for the return of the child to the petitioner for a large sum of money, and revealed the whereabouts of the child only after being ordered to do so in a *habeas corpus* proceeding in another state, *is held* competent as disclosing conduct on the part of the parent indicating a consciousness on his part that his cause was a bad or weak one.

13. Adoption § 3—

An instruction upon the issue of abandonment that in order for the jury to return an affirmative answer to the issue it must find that the abandonment was wilful and without just cause or excuse, etc., *is held* sufficient, and objection that the court failed to charge that the abandonment must have been accomplished purposefully and deliberately in violation of the law, is untenable.

APPEAL by respondent from *Crissman, J.*, January 23, 1961 Term of FORSYTH, docketed and argued as No. 390 at Fall Term, 1961.

Petitioner, Mrs. Geraldine Fleshman Pratt, the maternal grandmother of Gerri Leigh Bishop, instituted this proceeding on May 28, 1959, to adopt her for life. In her petition she alleged, *inter alia,* that Gerri was born on April 29, 1956, and on or about that date the child was placed with petitioner by her parents; that the child's mother, Ann Leigh Graham Bishop, has verbally consented to the adoption; that the mother is presently out of the State, but petitioner will take immediate steps to obtain her written consent and file it in the proceedings.

With reference to the father, the respondent, George W. Bishop, the allegation of the petition is as follows:

> "15. That said child's father has abandoned said child, in that he has wilfully and negligently absented himself from said child, who, at all times since her birth, has been in the custody and control of petitioner at her home; that he has wilfully abandoned the care, custody, nurture and maintenance of said child to petitioner; that he has completely and consistently failed to provide for said child, even to the extent that petitioner was required to pay the medical fees and expenses connected with the birth of said child; and that he has never shown any interest in the said child's health and welfare, and that in these and other respects he has abandoned said child."

The petitioner prayed that the relation of parent and child be established between her and Gerri; that the child's father be made a party to the proceeding; that the court determine and adjudicate that said child had been abandoned by its father; and that the court set a date for the determination of the issue of abandonment.

Summons was issued for the respondent on May 28, 1959. Thereafter it was duly served, and respondent filed an answer in which he denied that he had abandoned the child. He further denied that petitioner was a proper person to adopt the child.

On May 29, 1959 the mother of the child signed a written consent to its adoption by petitioner. This consent was filed in the cause on June 2, 1959.

After the answer was filed the proceeding was transferred to the civil issue docket for the trial of the issue of abandonment raised by the pleadings as provided by G.S. 48-5(c).

On November 9, 1959, Honorable Walter E. Johnston, Jr., Resident Judge, 21st Judicial District, signed a restraining order in the proceeding enjoining respondent "from interfering in any manner with the present actual custody or control of a certain child, namely, Gerri Leigh Graham, the said child being the daughter of said George W. Bishop, or in any manner disturbing said child in the present custody or control of petitioner, or others acting in behalf of petitioner, or in any manner removing, or seeking to remove said child from the custody or control of petitioner, or from the State of North Carolina." On the 15th day of December 1959 respondent accepted service of this restraining order.

On a date undisclosed by the record, but prior to December 18, 1959, and presumably after the institution of this adoption proceeding, respondent instituted a *habeas corpus* proceeding to obtain the custody of Gerri or to secure visitorial rights. This proceeding is referred to in the record but is not set out. On December 18, 1959 the judge entered an order allowing respondent certain visitorial rights, but only upon condition that he be bound by the restraining order entered on November 9, 1959 in this adoption proceeding.

Thereafter on April 1, 1960, under circumstances which will be set out in more detail in the statement of the evidence, respondent abducted the child in violation of the restraining order and took her to the State of New York. As a result, on April 30, 1960, Judge Johnston revoked the order of December 18, 1959, enjoined respondent from interfering with or in any manner disturbing the custody and control of petitioner over Gerri, and committed the child to the exclusive custody of petitioner until the further orders of the court. This injunction is still in force.

When the case was called for trial on January 24, 1961, the respondent demurred to the petition. The demurrer was overruled. Both parties offered evidence.

The petitioner's evidence tended to show the following facts:

Petitioner and her mother, Mrs. Mina Pepper Fleshman, live together in the home of Mrs. Fleshman at 1087 Kent Road in Winston-Salem. They are ladies of considerable means. In 1954, immediately after being divorced from a former husband, Ann Leigh Graham, the daughter of petitioner, married George W. Bishop, the respondent. The petitioner and her mother opposed the marriage because respondent frequented race tracks and had no job. However, Mrs. Fleshman gave them the apartment over the garage on the side of her house

as a home when they were in Winston-Salem. Thereafter they used the apartment as a place to sleep when they were passing through Winston-Salem. Apparently, during the first year and a half of their marriage, the Bishops made the Middleburg Inn at Middleburg, Virginia, their headquarters because it was easily accessible to New York and strategically located near a number of horse and dog race tracks. Mrs. Bishop kept a room at the Inn, and respondent came from New York and elsewhere for the week-end. Respondent would arrive at the Inn under the influence of intoxicants and drink continuously while he was there. From the beginning of the marriage in 1954 through the events which ended in the Supreme Court of New York in April 1960, the evidence discloses that respondent continuously drank intoxicants to excess. One witness, who met him shortly after his marriage, had known him five or six years and during that time had seen him fifteen or twenty times and had never seen respondent sober.

Mrs. Bishop was very much in love with her husband, and he was in a good humor with her when he wanted money. He would frequently incur gambling debts, "get in a jam," and require from one to five thousand dollars from his wife. He normally bet about $2,000.00 a day when at a race track. When drinking his language was foul and profane. He appeared to enjoy embarrassing his wife in public by hurling vile and degrading epithets at her. He frequently and publicly accused his wife of infidelity while boasting in crude language of his own. He admitted that he had used his wife's money to pay for an abortion upon a girl in Florida. On numerous occasions he threatened his wife with bodily harm.

Respondent told the operator of the Middleburg Inn that he was going to break his wife if it were the last thing he did. She understood him to mean that "he was going to take all her money." He wanted a farm, and "wanted to fox hunt" like all the wealthy people did; so his wife bought a farm near Washington, D. C. He then refused to live there with her.

During the winter of 1955, before the child was born in Winston-Salem on April 29, 1956, Mr. and Mrs. Bishop stayed in the garage apartment at 1087 Kent Road.

The child, Gerri, was very small and delicate and remained in the hospital for ten days longer than the mother did. Respondent was not there when the child was brought from the hospital to petitioner's home. Four or five days after the birth of the child he had gone to a race track. After three weeks he came back, stayed one night and left again. In June of 1956, when petitioner and her mother went to their summer home at Kitty Hawk, Gerri and a nurse went with them.

The record does not disclose the continuous whereabouts of Mr. and Mrs. Bishop. However, in July 1956, when Gerri was less than two months old, they were guests of William M. Bellamy at his home on Long Island. At the beginning of the visit respondent absented himself for two days without explanation and without letting his wife know where he was. This visit was a prolonged drunk during which respondent abused his wife continuously, calling her indecent names in the presence of their host and beating her until she was bruised extensively. On one occasion he razed her skin with a lighted cigarette and burned her dog's ears. One evening he passed out just before a dinner party given in their honor.

Later in the month of July 1956 at a restaurant in Delaware respondent requested Joseph D. Wood, Jr., who had also been a Bellamy guest, to go to Kitty Hawk and take some pictures of Gerri so that he could identify her for some people he said he had lined up to take the child away from Mrs. Pratt's house there. He told Wood "that Mrs. Pratt and Mrs. Fleshman would never let anything happen to that child; that they were crazy about the child and that she was the only weapon that he had to see that he was taken care of." He talked about having lawyers in various states and introduced Wood to one named Buzz. He also asked Mr. Wood to size up the child's German nurse with the view to seeing whether she could be bribed to participate in the child's abduction. When Wood asked him if he was going to take the child to the house Mrs. Bishop had bought in Virginia, he said that he thought he would be traveling around pretty fast and wouldn't be there.

Gerri continued to live with petitioner and Mrs. Fleshman. In Winston-Salem she had her own upstairs room in the main house. During the first and second years of the child's life, respondent had almost no contact with her. In a year's time he would be in Winston-Salem only two or three days and then just when passing through from one race track to another. He would stay there a few days at Christmas. He never played with the child, picked her up, or showed any sign of affection prior to the institution of these adoption proceedings. Mrs. Fleshman frequently requested him to get a good job, quit the horse business, and make a home for his wife and child, but he never made any response to her. She offered to build a house for them, but this offer was not accepted. Mrs. Fleshman and Mrs. Pratt wanted the child to grow up in their home but were ready to give her up if the Bishops would establish a proper home for the little girl. From the time of the child's birth until the institution of the adoption proceedings he never said anything about wanting the child.

Respondent always wore expensive clothes and drove a Cadillac but Mrs. Fleshman paid the expense of the child's birth. Mrs. Pratt and Mrs. Fleshman have provided a home for her, paid for her food, clothing and maintenance since the date of her birth. Respondent has paid nothing. Petitioner and Mrs. Fleshman never made any request of the respondent for any expenses. On the contrary, Mrs. Fleshman lent the respondent money from time to time. He now owes her $9,000.00. The Bishops were always hard up when they came to her house. He never had any money at all, and Mrs. Bishop paid all the bills incident to his visits which Mrs. Fleshman did not pay.

On one occasion before the child was two years old, Mrs. Fleshman and her nurse took Gerri for a visit to Mr. and Mrs. Bishop at a house in Southern Pines which Mrs. Bishop had rented for three months Thereafter the Bishops left Southern Pines, and the child returned to 1087 Kent Road. That was the only time the child ever left 1087 Kent Road to be with her parents.

In the summer of 1957, the Bishops again visited Mr. Bellamy on Long Island. Again respondent was drunk during the entire visit. He constantly subjected his wife to embarrassment and humiliating abuse, making obscene charges of immoral acts and calling her filthy names. On one occasion he knocked her across the face several times until she fell upon the sofa. On another, he struck her to the floor where he kicked and abused her before walking out of the house. According to one of the witnesses to these scenes, "Mrs. Bishop remained calm and conciliatory and displayed a great affection for Mr. Bishop and appeared to be under his sway." Respondent told Mr. Bellamy that the child was his ace up his sleeve.

In 1958, on one occasion when Mrs. Bishop was at the Middleburg Inn, respondent came there with another man. Respondent was drinking and refused to share Mrs. Bishop's room. In the night respondent came to her room and assaulted her with knucks while she was asleep. In the dark she did not recognize her assailant. The proprietor of the Inn, her son, and the man who had accompanied him to the Inn finally restrained respondent who was knocking Mrs. Bishop down as fast as she could get up. After the assault the room was a shambles; the curtains, dresser scarf, bed and floor were bloody. Six or seven stitches were required to sew up Mrs. Bishop's head.

The operator of the Inn caused respondent to be arrested but, at Mrs. Bishop's request, she later dropped the charges. Mrs. Bishop represented to her that she and Mr. Bishop were "going back together and get our baby and try to raise it." After that he gave Mrs. Bishop another beating in New York. On one occasion about this time when his wife was away respondent occupied a bedroom at the Inn with another woman.

In December 1958, Mr. and Mrs. Bishop came to 1087 Kent Road two days before Christmas to spend the holidays there. Mrs. Bishop had a present for the child but Mr. Bishop did not. Prior to Christmas, 1959, when he gave her a doll after the adoption proceedings had been started, respondent had never given the child a present or sent her a card. On December 23, 1958, Mrs. Bishop and Mrs. Fleshman were in conversation at the dinner table. Respondent said to Mrs. Fleshman, his eighty-year old hostess, "Shut up old woman." When Mrs. Bishop told him he could not talk to her grandmother like that he got up from the table and "smacked her as hard as he could." They both got up, and he went into the hall beating his wife as hard as he could. Mrs. Fleshman attempted to protect her granddaughter with her cane.

On the day after Christmas Mrs. Bishop was committed by respondent to Pinebluff Sanatorium, apparently for acute alcoholism. Upon his return from this mission Mrs. Pratt asked respondent how much liquor he was accustomed to drinking and he replied "Well, I can drink as much as four or five 5ths every day." Thereafter he immediately left for the races in Florida and Mrs. Pratt did not see him again. He was not in Winston-Salem from December, 1958 until May, 1959 after the adoption proceedings were started.

In April or May 1959, just before the adoption proceedings were instituted, respondent and his wife became estranged because of "some deal he pulled in Florida." He attacked her in a most violent manner and broke her arm when she discovered some canceled checks he had written. Thereafter he started legal proceedings against her — "a divorce proceeding or what not" — in which he asked for custody of the child. This was the first time he had ever mentioned wanting the child, and petitioner found out about the action from the newspaper. He never demanded the child from the petitioner who had her.

Respondent, in addition to horse racing, was interested in dog racing. In May 1959, at a hunt club near Philadelphia in the presence of at least fifty people, he called his wife a degrading name and accused various people of having improper relations with her. At a dog show in Madison Square Garden where Mrs. Bishop was displaying some dogs which belonged to her respondent attempted to take the dogs. When the keeper, on instructions from Mrs. Bishop, refused to let him have them, he threatened the keeper with violence from the "syndicate." He told the keeper that his body would be found floating in the river or that he would get a bullet hole between the ribs.

After the adoption was started Mr. Bishop began to make inquiries about Gerri's welfare. Occasionally he would call petitioner on the phone from various race tracks along the east coast from New Hamp-

shire to Florida and from Ohio and West Virginia. On one occasion he telephoned petitioner and told her he might leave the family alone for $200,000.00.

On November 11, 1959, respondent had prepared a proposed agreement between petitioner, Mrs. Fleshman, and himself in which he agreed that they should have the custody of the child during their lifetimes in consideration of $90,000.00 in cash plus a guaranteed yearly income to him of $45,000.00 or one-half of the income from a certain trust, whichever was smaller, for a period of twenty years from January 1, 1960 or until the child's death, whichever occurred first. Respondent signed this agreement and tendered it to petitioner and Mrs. Fleshman who declined to sign it.

On April 1, 1960 respondent, after promising to return Gerri by 5:00 P. M. to Mrs. Fleshman, obtained permission to take the child to a park to ride the horses. Instead of returning her, he took her on an all-night ride to New York where he turned her over to two Negro servants or caretakers of a closed house on an estate in Long Island.

Petitioner offered in evidence the depositions of Walter L. Stratton, an attorney of New York City, and of Robert W. Kuhn, a detective. Respondent objected to the introduction of any part of each of these depositions on the ground that the entire deposition "is concerned solely with events that transpired several months after the institution of the action and are completely irrelevant to the issues raised by the petition and answer." The objection was overruled.

The Stratton deposition tends to show the following facts: Stratton, a New York attorney, was brought into the case on April 2nd after the child had been taken from the home of petitioner. On April 4th Stratton received a call from an attorney who said he was representing respondent. He arranged a meeting between counsel for petitioner and respondent in New York on May 5, 1960. At this conference respondent did not appear but Mr. Buzz Beler, attorney for Mr. Bishop, did. Beler stated to petitioner's attorneys that he did not know where the child was; that he had advised Mr. Bishop not to tell him, but both Bishop and the child would be available at the proper time. Beler said he had come "to talk money." Stratton then asked him what his proposition was for the return of Gerri to Mrs. Pratt's custody. His first proposition was $60,000.00. He then left the group for a telephone conversation with respondent; when he returned the demand was increased to $100,000.00. Counsel for petitioner told him that was hardly a good faith attempt to reach an agreement, and Mr. Beler again went to the phone. When he came back he stated that the final price for the return of Gerri was $150,000.00. Beler continually referred to Mrs. Pratt as "Money." He said that Mrs. Fleshman would not live

long; that she would not leave her money to Mrs. Bishop; that Gerri would inherit $20,000,000.00 and that respondent intended to get custody of Gerri while she was still a minor and that ought to be worth something to Mrs. Pratt and Mrs. Fleshman. This conference broke up about midnight with Beler promising to get in touch with the attorneys the next day.

On the next day counsel for petitioner obtained from a Judge of the Supreme Court of New York County a writ of *habeas corpus* for Gerri and an order of arrest for respondent. The following day the parties appeared before the Judge who ordered respondent to reveal the whereabouts of the child. As a result, he revealed that the child was on Long Island at the home of Mr. Henry Lewis who told the Judge that he had not known the child was there. Mrs. Pratt and Mrs. Fleshman found the child in the care of Negro servants in a cold house which had been closed for some time. She was in bed, sick with a cold, clothed only in underwear and socks. The servant said that the only clothes Gerri had were those she had on and the thin summer dress she was wearing when she arrived. The frightened child was hysterical with joy at the sight of Mrs. Pratt and Mrs. Fleshman.

Back in New York, later in the day, Beler told attorneys for petitioner that respondent had reduced the price for his consent to the adoption to $25,000.00. Next day, at the hearing on the writ of *habeas corpus,* respondent withdrew his opposition to the writ and consented that Gerri might be returned to North Carolina in the custody of Mrs. Pratt.

The deposition of Detective Kuhn tended to show that he made the acquaintance of the respondent on April 6, 1960 in a bar on 7th Avenue and talked to him for four and a half hours. Respondent told the detective he had brought his child up from the south; that his attorney had told him not to go near her as he would be followed; that the child was three or four years old and the worse thing he could have done was to have a child; that the child was his ace in the hole; that his mother-in-law wanted the child and his wife to whom he referred in very profane terms, did not; that he had the child to obtain money from his mother-in-law which he expected to be a large sum; that the child was more or less a pawn; that during the time the detective spent with him respondent took approximately thirteen drinks of scotch and became quite drunk.

Respondent offered evidence which tended to show that he was in the horse-racing business; that he married Mrs. Bishop in 1954; that he left the child at 1087 Kent Road in the custody of his mother-in-law and Mrs. Fleshman because it was the only practical thing to do; that he was running the horses in New York and Mrs. Bishop was

running the Middleburg, Virginia, operation; that "You can race in New York for about six months without moving and Maryland, about three months"; that "The actual winter" they spent in Southern Pines until the winter of 1958 when he went to Florida; that Mrs. Fleshman "has had complete custody of it (Gerri) since it was born"; that in 1958 Mrs. Bishop was committed to an institution for ninety days; that at that time he had a horse with a potential of $100,000.00 in Florida; that it cost $6,000.00 to run him in the handicap; that he made six visits to his wife while she was in the hospital and he saw the child on those trips, playing with her and taking her presents; that he and Mrs. Bishop discussed taking the child to Florida and starting a new life as soon as she got out of the Sanatorium; he hired a nurse in Florida although the child was never brought to Florida; that during Christmas 1958 he had constant contact with the child; that they had plenty of money and would have paid any bills for the child that they had been asked to pay; that he was never approached with the hospital bill for the child's birth; that he offered to pay the child's nurse in Winston-Salem but Mrs. Flesman refused to permit him to do so.

That when he took the child to New York there was a restraining order against his doing so; that he did this to draw things to a head and get a property settlement; that he took the child in a rented car with a chauffeur, another man and a woman he had met the day before and drove all night to New York; that he left her with colored servants in "a real nice rambling Long Island estate."

That in July 1959 he had written bad checks but he subsequently made them good; that the Maryland Racing Commission had suspended him as a trainer; that after April 1959 he sued for divorce in Forsyth County; that he also instituted a divorce action in Baltimore; that Mrs. Bishop instituted an action for divorce in Alabama, and that in a property settlement he got one half of the Southern Pines property or $20,000.00

Mrs. Bishop, testifying for the respondent, said that she had bought the farm in Virginia in 1958 so that they would have a permanent home where they could raise and train horses and respondent could commute to the Maryland tracks but that it did not work out that way; that they had offered to pay the bills for Gerri but were refused; that respondent had always wanted the child and showed Gerri great affection and much attention, but that she thought the child was better off with its grandmother than with them, because horse training is a seven-day business; that they had the child with them in Southern Pines from January, 1957 to April, 1957 when they went back to the track; that thereafter they made as frequent trips as possible to see

her, both together and separately, and in January, 1958 they again took the child with them to Southern Pines for three months; that they spent each Christmas with the child in Winston-Salem until 1958 when she was committed to Pinebluff where she stayed for three months while respondent lived in Florida; that before her commitment they had discussed taking the child to Florida and Mrs. Fleshman had objected strenuously. She rejoined respondent in Florida after her release from Pinebluff.

Mrs. Bishop denied that respondent had attacked her at the Middleburg Inn but said that when he came to her room in the night she did not recognize him in the dark and she attacked him.

Mrs. Bishop admitted on cross-examination that she had gotten marks on her face from being slapped by respondent; that on one occasion he had broken her nose, but she denied that he had ever hit her with his fist. She admitted that in her divorce complaint she had alleged he broke her arm in Florida, split her head open in Virginia, and that he had never provided any support for her or the child. She did not know whether she was divorced from respondent or not. They were living together during Christmas, 1960. At the time of the trial Mrs. Bishop was 31 years old; Mr. Bishop, 34.

Respondent made timely motions for nonsuit which were overruled. This issue was submitted to the jury and answered as follows:

> "Did George W. Bishop wilfully abandon the child, Gerri Leigh Bishop, for at least six consecutive months immediately prior to May 28, 1959?
> "ANSWER: Yes."

The trial judge entered an order decreeing that the issue of abandonment had been determined against respondent and that Gerri was an abandoned child. He remanded the case to the clerk for further proceedings under the adoption law. The respondent appealed to this court assigning errors.

Deal, Hutchins and Minor for petitioner appellee.
Eugene H. Phillips for respondent appellant.

SHARP, J. Respondent asked for a dismissal of this adoption proceeding or for a new trial on the basis of eighteen groupings of assignments of error. Only those which are properly presented will be expressly considered.

Assignments Nos. 3 and 5 through 8 relate to alleged errors in the admission or exclusion of evidence. We quote Assignment No. 7 which is typical:

"VII. The Court erred in refusing to permit Respondent to introduce evidence as to his plans and those of his wife about making a home for the child during the six months period immediately preceding the filing of this action, such evidence being material to the issue of his purported wilful abandonment of said child.

"As shown by Exceptions Nos. 36, 37, 38, 39, 44, and 45 (R. pp. 126, 127, 128 and 140)."

The following statement from *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294 is applicable here:

"Rule 19 (3), Rules of Practice in the Supreme Court, 221 N.C. 554, 555, as interpreted in the decisions of this Court, require: 'Always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. (Citing cases) The objectionable assignments in their present form would require the Court to undertake a voyage of discovery through the record to ascertain what the assignments involve. This the Court will not do.' "

Assignments of error Nos. 9 through 16 relate to alleged errors of commission or omission in the charge. As this court said in *Darden v. Bone,* 254 N.C. 599, 601, 119 S.E. 2d 634:

"Assignments of Error 9, 10, 11, 12, 13, 14, 15 and 16 relate to the court's charge and are insufficient in that they do not present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is and the particular portion of the charge to which the defendant objects is not specifically pointed out. 'The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence.' (Citing cases)

"It is clear that the Rules of the Court have not been complied with in the assignments of error as herein above enumerated. Rule 21 requires an appellant to state briefly and clearly his exceptions. Rule 19 (3) requires that the exceptions taken be grouped and the error complained of concisely but definitely set out as a part of the assignment. 'The Court will not consider assignments not based on specific exceptions and which do not comply with its rules.' *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94. What the Court requires is that exceptions which are presented to the Court for decision shall be stated clearly and intelligibly

> by the assignment of error, and not by referring to the record and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of."

Assignment of error No. 4 is to the failure of the court to permit each paragraph of respondent's answer to be read to the jury. The assignment of error itself does not disclose which paragraphs were not read to the jury. However, it appears from an examination of the record that only paragraph 15 of the petition was read to the jury. Paragraph 15 alleged that Gerri Bishop was an abandoned child and raised the one issue in the case. Paragraph 15 of respondent's answer which denied the alleged abandonment was read to the jury. His further answer was likewise read except for certain portions which were clearly improper pleadings and which would have been stricken upon motion. No conceivable prejudice could have resulted to the respondent from the ruling of the court of which he complains in purported assignment of error No. 4.

The failure of the respondent to comply with the rules of practice limits consideration to assignments of error Nos. 1, 2, 3, 17 and 19. There is no assignment No. 18 in the record.

Respondent's assignment of error No. 1 is to the order of the judge overruling his demurrer to the petition. The demurrer is in writing and the only ground specified therein is "that no cause of action is stated in accordance with the laws governing adoption." G.S. 1-128 declares that a demurrer must distinctly specify the grounds of the objection or it may be disregarded. A demurrer which merely charges that the petition does not state a cause of action is broadside and will be disregarded. *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555. However, in his assignment of error and brief, respondent states that the ground for the demurrer is that the petition contains no allegation substantially in the words of General Statutes 48-2(3) that respondent had wilfully abandoned the child for at least six consecutive months immediately preceding the institution of the action. In paragraph 15 petitioner clearly intended to allege that respondent had abandoned the child since birth. It would have been the better practice, and required fewer words, had petitioner alleged that Gerri Bishop was an abandoned child within the definition of the statute. *Smith v. Crivello,* 338 Ill. App. 503, 88 N.E. 2d 107. Nevertheless, interpreting paragraph 15 of the petition liberally as we are required to do upon a de-

murrer, it is apparent that petitioner has sufficiently alleged the ultimate jurisdictional fact that Gerri was an abandoned child at the time of the institution of the proceeding. *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661. Having alleged it, the burden then developed upon the petitioner to prove at the trial the abandonment in conformity with the statute, *i. e.,* that respondent had wilfully abandoned Gerri for at least six consecutive months immediately prior to the institution of the proceedings. This was the sole issue in the trial in the Superior Court. The adoption statute does not place the allegation with reference to abandonment in the same category as the divorce statute, G.S. 50-8, places the allegation of residence and knowledge of the grounds of divorce. The demurrer was properly overruled and assignment of error No. 1 is not sustained.

In this court the respondent demurred *ore tenus* to the complaint because it showed that the mother's written consent to the adoption had not been executed at the time the petition was filed. The petition alleged in paragraph 12 that the mother had orally consented to the adoption and that her written consent would be filed. The record shows that her written consent was filed five days later. G.S. 48-15(12) requires that the petition shall state "that there has been full compliance with the law in regard to consent to adoption." The respondent, in his answer to paragraph 12 of the petition which he verified on the 14th day of August, 1959, admitted that the mother had filed a written consent to the adoption. By this admission respondent supplied the omission in the petition and cured the defect. 71 C.J.S. Pleading, Section 590(b); *Johnson v. Finch,* 93 N.C. 205; *Shuford v. Phillips,* 235 N.C. 387, 70 S.E. 2d 193; *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. The demurrer *ore tenus* is overruled.

Assignment of error No. 2 is to the failure of the judge to nonsuit the proceeding "in that no evidence was before the court, that respondent wilfully abandoned said child for six consecutive months immediately preceding the filing of the action as required by law." The effect of assignment of error No. 17 which relates to the judge's charge, is to allege that the failure of the judge to direct a verdict in favor of the respondent on the same grounds as specified in the motion of nonsuit was error. These two assignments will be considered together.

G.S. 48-2 defines an abandoned child as "any child under the age of 18 years who has been wilfully abandoned at least six consecutive months immediately preceding the institution of an action or proceeding to declare the child to be an abandoned child."

This court in *Truelove v. Parker,* 191 N.C. 430, 438, 132 S.E. 295, discussed the abandonment which would remove the necessity for a parent's consent. In the *Truelove* case the mother of the child was

never made a party to the adoption proceeding. Her written consent was not secured and there was no judicial determination of abandonment. In that opinion we find the following:

> "In 1 C. J., 1387(76) it is said: 'To constitute such an abandonment by a parent as will deprive him of the right to prevent the adoption of his child, and dispense with the necessity of his consent, there must be some conduct on his part which evinces a settled purpose to forego all parental duties. But merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment.' By the terms of the statute it is necessary that such abandonment be wilful,—that is, accomplished purposely and deliberately in violation of law."

To frame a precise definition of abandonment which would cover all cases would be difficult indeed. The most frequently approved definition is that abandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. 35 A.L.R. 2d, Anno.: Adoption-Abandoned or Deserted Child, 662, 665, 668; 2 C.J.S., Adoption of Children, Section 21(2). Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. In *Winans v. Luppie,* 47 N.J. Eq. 302, 304, 20 A. 969, 970, the court said with reference to abandonment in adoption cases:

> "It fairly may, and in our judgment does, import any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. * * * Such a purpose, clearly manifested, certainly forms a more reasonable ground for permitting judicial discretion to decide whether another may assume these claims and duties, than does the signature of the parent, which a mere impulse may induce."

Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. *In re Davison's Adoption,* 44 N.Y.S. 2d 763.

Certainly a continued wilful failure to perform the parental duty to support and maintain a child would be evidence that a parent had relinquished his claim to the child. However, a mere failure of the parent of a minor child in the custody of a third person to contribute

to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wilful intent to abandon.

Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent. *In re Bair's Adoption,* 393 Pa. 296, 141 A. 2d 873. In *Bair's* case the Pennsylvania Court said this:

> "A parent's intent to abandon a child soon becomes evident, especially in the case of an infant, by reason of the inexorable circumstances attending its physical being. A child's natural needs for food, clothing and shelter demand that someone immediately assume the attendant responsibility which an abandoning parent has ignored; and, that responsibility endures constantly. It does not await the capricious decision of an uncertain parent, perhaps, years later. * * *
>
> "Abandonment is not an ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child."

Measured by the yardstick of any definition of abandonment to be found in the books, it is apparent that the petitioner in the instant case has offered sufficient evidence of respondent's abandonment of his child to require the issue to be submitted to the jury. The record is replete with testimony of a most damaging character. It tends to show that from the date of her birth respondent has been more interested in horses than in his child; more interested in gambling than in earning a livelihood which would enable him to fulfill his legal and natural obligations to his child; more interested in living a life of debauchery than in making a home for his child. Indeed he has shown a total lack of parental interest. To him she has been merely "an ace up his sleeve" or "a pawn." It is a permissible inference from the evidence that his present ambulatory interest in Gerri is merely "to retain title to her" so that she may be bartered for sufficient cash to enable him to continue to frequent the races and live a profligate life. He did not pay the expenses of her birth. The petitioner and maternal grandmother have given the child the only affection she has ever known according to this record. It was the petitioner who rescued the terrified child from strange and cold surroundings and brought her back to the only home she has ever known.

Respondent's contention that his visit in the home of the petitioner where he saw the child at Christmas 1958, within six months of the institution of the adoption proceedings, conclusively refutes any abandonment on his part within six months is untenable. Such a visit to the

child, if it could be called a visit to her under the circumstances shown by the evidence, would not be analagous to a marital visit within two years of the institution of a divorce action.

To constitute an abandonment within the meaning of the adoption statute it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. If his conduct over the six months period evinces a settled purpose and a wilful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been an abandonment within the meaning of the statute. *Winans v. Luppie, supra.*

There was a superabundant excess of evidence to overrule the motion of nonsuit. Assignments of error Nos. 2 and 17 are overruled.

Assignment of error No. 3 is to the admission in evidence of the depositions of Detective Kuhn and Attorney Walter J. Stratton of New York City. The reason for the objection is stated as follows: "* * * the proffered testimony of each witness is concerned solely with events that transpired several months after the institution of the action and completely irrelevant to the issues raised by the petition and answer." For that reason respondent objected "to each and every question" and "each and every answer." The deposition is not set out in question and answer form anywhere in the record. It appears only in narrative form as a part of the admitted evidence.

Respondent's objection to the depositions, even though stated to be an objection to each and every question and answer, was a general, broadside objection and should have been overruled if any part of the evidence contained in the deposition was admissible. The court below did not rule upon the competency of the various questions and answers, and unless this had been done it is not given to us to make specific rulings thereon. The trial court merely overruled the broadside objection to the *en masse* contents of the deposition. *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807.

No objection was made to the deposition on the grounds of notice or irregularity in the taking. It was stipulated that the two depositions were taken in compliance with statutory requirements and that they were passed upon by the clerk after notice and without objection by the respondent at that time. No objection was made to any question or answer at the time the deposition was taken. The record shows that the trial of this proceeding was begun on the afternoon of January 24, 1961. The first objection to these depositions appeared in a written motion dated January 24, 1961. The record states: "Before jury impaneled the following proceedings occurred: (Respondent objected to

the introduction of depositions of the following witnesses * * * Walter L. Stratton, Robert William Kuhn.)"

G.S. 8-81 provides, *inter alia,* that *"At any time before the trial,* * * * any party may make a motion to the judge or court to reject a deposition for * * * incompetency of the testimony, * * * The objecting party shall state his exceptions in writing."

The purpose of this section is to give the party in whose behalf a deposition has been taken notice of any objection to the deposition and of the grounds for same before the trial. Parties going to trial without such notice may be taken at a great disadvantage if this is not done. *Ivey v. Cotton Mills,* 143 N.C. 189, 55 S.E. 613; *Sugg v. Engine Co.,* 193 N.C. 814, 138 S.E. 169. It has been uniformly held that objection to the incompetency of testimony and motion to reject the evidence must be made in writing before trial unless the parties shall consent to a waiver of this provision. *Morgan v. Fraternal Assoc.,* 170 N.C. 75, 86 S.E. 975; *Hudson v. R. R.,* 176 N.C. 488, 97 S.E. 388; *Bixler v. Britton,* 192 N.C. 199, 134 S.E. 488; *Steel Co. v. Ford,* 173 N.C. 195, 91 S.E. 844; *Grandy v. Walker, supra.*

In *Carroll v. Hodges,* 98 N.C. 418, 4 S.E. 199, objection was made to the competency of the questions and answers in a deposition at the trial. Referring to the applicable statute, now G.S. 8-81, the court said: "Such a provision is expedient, convenient, and not at all unjust. Fair opportunity is afforded every litigant to make objection to the deposition in every aspect of it, not in the hurry of a trial or hearing but upon deliberation and scrutiny. Unless such objection is made in apt time the statute makes the deposition evidence." *Houston v. Sledge,* 98 N.C. 414, 4 S.E. 197.

The record does not state that respondent's motion was filed before the trial commenced or before the trial. It says, "before jury impaneled." When a trial commences is a difficult question, and the answer may vary according to the statute being construed and according to the circumstances in a particular case. "In general, it has been held that the trial begins when the jury are called into the box for examination as to their qualifications — when the work of impaneling the jury begins — and that the calling of a jury is a part of the trial." 53 Am. Jur., Trial, Section 4. Certainly the purpose of G.S. 8-81 would not be served by a holding that the trial did not begin until after the jury was empaneled. Once the case is reached on the calendar and the jury called into the box, "the hurry of a trial" has begun and the time for deliberation and scrutiny of a deposition has passed.

On this record appellant has not shown timely objection to the admission of this deposition as evidence.

Furthermore, the respondent's objection to the entire deposition was based on the specific ground that it related to matters occurring after the institution of the action. "A specific objection, if overruled, will be effective only to the extent of the grounds specified. It makes no difference that there was another ground which would be found valid unless there is no purpose at all for which the evidence would have been admissible." Stansbury, Evidence, Section 27.

The substance of the evidence contained in these depositions was that respondent, in wilful violation of a restraining order entered by the Superior Court of Forsyth County in this proceeding and after it had been pending for about six months, obtained possession of the child by false pretenses and positive misrepresentations; that thereafter he took her out of the jurisdiction to the State of New York where he left the child without adequate clothing in strange, cold surroundings with Negro servants while he, through counsel, negotiated for her return to petitioner — first for $60,000.00 then $100,000.00 and finally $150,000.00; that he revealed the whereabouts of the child only after being arrested and forced to do so in a *habeas corpus* hearing before a Judge of the Supreme Court of New York.

Kidnapping his child and negotiating for her ransom is hardly the conduct of a father who expected to retain his paternal rights in the trial of this proceeding. We think that respondent's conduct, as evidenced by these depositions, tended to show such a lack of confidence in the merits and justice of his cause as to amount to an implied admission that he was not entitled to prevail.

In discussing "Conduct as Evidencing a Weak Cause", Wigmore in his monumental work on Evidence, 3rd Edition, Sections 276 and 278, concluded that from the conduct of a party which indicates a consciousness on his part that his cause is a bad or weak one, the jury may infer the fact that it is bad or weak. "* * * such conduct in a party opponent even if treated as a plain assertion, is at any rate an admission and is therefore receivable as such in any case"; Vol. II, p. 95.

In support of this reasoning, *inter alia,* Wigmore quotes from the following authorities:

> "1870, *Cockburn, C.J.,* in *Moriarty v. R. Co.,* L.R. 5 Q.B. 319: 'The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just, — just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that recourse to falsehoods leads fairly to an inference of guilt. Anything

from which such an inference can be drawn is cogent and important evidence with a view to the issue.' "

"1905, *Phillimore, J.*, in *R. v. Watt*, 20 Cox Cr. 852: 'The principle is in fact well established. * * * It is this, that the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieves in his own case, may be proved and used as evidence against him.' "

In Criminal actions it is universally conceded that the fact of an accused's flight and his related conduct, are admissible as evidence of consciousness of guilt and thus of guilt itself. Wigmore, Section 276. In civil actions, says Wigmore in Section 278, "It has always been understood — the inference, indeed, is one of the simplest of human experience — that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all *similar conduct,* is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit." (Emphasis added)

As *similar conduct* Wigmore lists, *inter alia,* concealment of material objects. He cites also the conveyance of property during litigation as evidence of the transferror's consciousness that he ought to lose. Wigmore, Section 282. In *State v. Kincaid,* 142 N.C. 657, 55 S.E. 647, it was held competent to ask a defendant upon his trial for seduction if he had not transferred his property to avoid the result of the indictment. He admitted it, and the court said, "It would have been equally as competent to ask him if he had not fled from the charge."

In the instant case the respondent denied that he had abandoned the child during the period prescribed by the statute. Whether or not he had was the one issue in the case. In violation of a restraining order, and before the trial in which the issue of abandonment was to be judicially determined, the respondent fraudulently spirited the child out of the jurisdiction of the court and attempted to bargain with petitioner for her return. Instead of waiting for the jury to vindicate his parental right to his child, he offered to relinquish his claim and return the child for a sum of money. The jury might logically infer from such conduct that respondent lacked confidence in the merit of his cause. It certainly qualified for inclusion in Wigmore's list of *similar conduct.*

Assignment of error No. 3 must be overruled both on the merits and on procedural grounds.

Assignment of error No. 19 charges that the trial judge failed to instruct the jury "that to constitute an abandonment the same must be accomplished purposely and deliberately in violation of law." An examination of the charge reveals that the judge told the jury many times that in order to answer the issue "Yes" they must find the abandonment to have been wilful. He explained that "wilful means that the abandonment would be without just cause or excuse, unjustifiable and wrong; that the respondent had a purpose to do it without authority, careless of whether he had a right or not." This was sufficient. *State v. Hinson,* 209 N.C. 187, 183 S.E. 397. Assignment of error No. 19 is overruled.

Although the respondent's assignments of error did not properly present his objections to the charge we think it appropriate to say that we have carefully examined it. When considered as a whole, the charge discloses no error prejudicial to the respondent. It appears that the judge stated every contention in behalf of respondent's case which could be culled from the evidence. On the evidence the jury decided against him. In the trial below we find no error. The order of Judge Crissman judicially decreeing Gerri Leigh Bishop an abandoned child and remanding the cause to the special proceeding docket for further action by the clerk in accordance with provisions of the adoption law is

Affirmed.

J. B. BARNES, PETITIONER v. THE NORTH CAROLINA STATE HIGHWAY COMMISSION; H. T. BUTTS; HUGH B. BEAL, TRUSTEE; SECURITY NATIONAL BANK OF GREENSBORO; STANDARD OIL COMPANY OF NEW JERSEY; W. O. McGIBONY, TRUSTEE; THE FEDERAL LAND BANK OF COLUMBIA; AND LATTIE D. MATTHEWS, EXECUTRIX OF THE ESTATE OF M. A. MATTHEWS, DECEASED, RESPONDENTS.

(Filed 10 July 1962.)

1. Eminent Domain § 11—

Instructions as to the measure of damages generally for the taking of a part of a tract of land in eminent domain, approved.

2. Eminent Domain § 2—

While just compensation must be paid for the taking of land or any interest or easement appurtenant thereto, where a part of a tract of land is taken for highway purposes, any damages resulting to the remaining land from traffic regulations promulgated in the interest of public safety are restrictions imposed on all members of the public alike in the exer-

cise of the police power, and do not constitute a taking for which compensation must be paid.

3. Same; Eminent Domain § 5—

A part of petitioner's land was taken to widen a two-lane highway into a four-lane highway with a median dividing the two northbound and two southbound lanes. *Held:* Any diminution in value of the businesses located on petitioner's remaining land by reason of the fact that there was direct access therefrom to the southbound traffic lanes only, so that northbound traffic had no direct access to such businesses, is not damage for which compensation may be recovered, since such damage results not from the taking of any interest in the land but from a police regulation governing the use of the highway by the public generally.

4. Same—

Where the Highway Commission constructs curbing along a highway adjacent to petitioner's land so as to limit access to the land except at definite spaces provided in the curbing, petitioner is entitled to recover compensation to the extent, if any, such curbing substantially impairs free and easy access to his land and the improvements thereon. Such restriction does not constitute the highway a limited access highway within the purview of G.S. 136-89.48, *et seq.*, the right of access to abutting land not being entirely cut off.

5. Eminent Domain § 11—

In proceedings to assess compensation for the taking of a part of a tract of land for highway purposes, the court has discretionary power to submit to the jury in addition to the issue of damages resulting from the entire taking, issues as to what portion of the damages should be allocated to leasehold estates held by lessees of the owner, there being no dispute as to the ownership of the leasehold estates or their validity G.S. 40-12, G.S. 40-23.

6. Same—

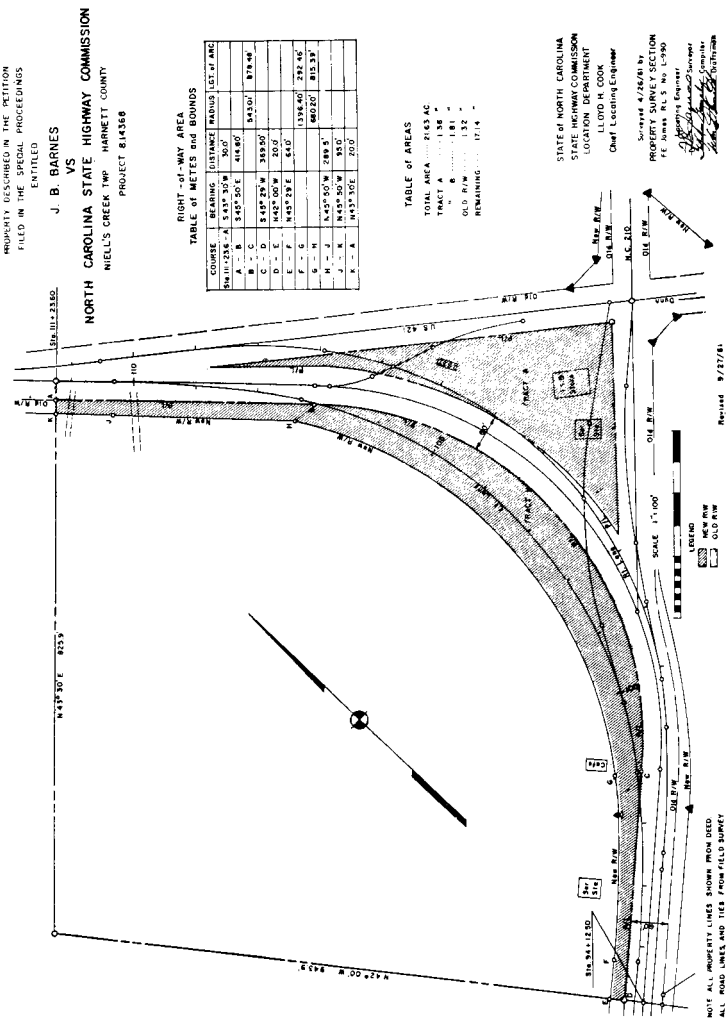
Chapter 1025 of the Session Laws of 1959 does not apply to any taking or causes of action arising prior to 1 July 1960.

APPEAL by respondent State Highway Commission from *Clark, Special Judge*, September 11, 1961 Term of HARNETT.

Special proceeding in accordance with the procedure prescribed by G.S. § 40-11 *et seq.*, as authorized by G.S. § 136-19, to recover compensation for the condemnation by respondent Highway Commission of a permanent easement for highway purposes over 3.17 acres of petitioner's land.

The 3.17 acres is part of petitioner's tract of 21.63 acres in Neill's Creek Township, Harnett County, about one mile north of Lillington. It was appropriated for highway purposes in connection with Project No. 8.14368, which involved the relocation and improvement of U. S. Highway No. 401 at its intersection with N. C. Highway No. 210 and U. S. Highway No. 421.

It was stipulated that "(t)he date of taking was January 1, 1960." Prior to January 1, 1960, 1.32 acres of petitioner's 21.63-acre tract was subject to a 60-foot right of way previously acquired by the Highway Commission. This 60-foot right of way, on which #401 was then located, separated a triangular area containing 1.36 acres, referred to hereafter as Tract A and located east thereof, from the remaining area of 18.95 acres located west thereof.



In connection with Project No. 8.14368, the Highway Commission appropriated: (1) Tract A, being all of petitioner's land (1.36 acres) east of #401; and (2) Tract B, containing 1.81 acres, consisting of a strip of petitioner's land west of and abutting on #401 and extending at varying widths, in the shape of a crescent, along petitioner's entire frontage (1662.78 feet) on #401. As indicated, all of petitioner's remaining 17.14 acres, after January 1, 1960, is the area west of Tract B.

The map (reproduced herewith), on which the judgment is based, shows (shaded areas) the location of Tracts A and B as of January 1, 1960, and the general location of the buildings on each tract.

Tract A, prior to January 1, 1960, was bounded on all three sides by paved highways. Since all of Tract A was appropriated by the Highway Commission, the questions for decision do not require further explanation as to original location and relocation of highways with reference thereto.

With reference to Tract B: Prior to January 1, 1960, proceeding north or northeast from Lillington, the highway then constituting #401, as it reached petitioner's land, was also #421 and #210; but shortly thereafter #401 diverged from #421 and #210 and curved to the left as indicated on the map. #421 and #210 continued on the original course until reaching and passing Tract A.

On Tract A, when appropriated, there were (1) a store building and adjacent premises theretofore leased by petitioner to respondent Butts, (2) a service station building and premises theretofore leased by petitioner to Standard Oil Company of New Jersey, and (3) a one-story, three-room frame dwelling. The premises covered by the Standard Oil Company lease were subject to a deed of trust to respondent Beal, Trustee, securing an indebtedness of petitioner to respondent Security National Bank of Greensboro.

Prior to January 1, 1960, there were located, west of and fronting on #401 as then located, (1) filling station and bulk oil premises theretofore leased by petitioner to M. A. Matthews, whose executrix is a respondent herein, and (2) premises occupied by a place of business referred to in the evidence as the Frozen Custard Place and indicated on the map by the word "Cafe." A portion thereof, but not the buildings or other improvements thereon, was appropriated by the Highway Commission on January 1, 1960, and is included in Tract B.

Tract B, together with other property, was subject to a deed of trust to respondent McGibony, Trustee, securing an indebtedness of petitioner to respondent Federal Land Bank of Columbia.

Hereafter, we refer to petitioner's remaining property (17.14 acres) as being on the west side of #401 as relocated; and we refer to traffic

from Lillington toward Raleigh on #401 as northbound and to traffic from Raleigh toward Lillington on #401 as southbound.

Prior to January 1, 1960, #401 was a single (two-lane) highway designed and used for northbound and southbound travel. As relocated, #401 is a dual highway, having two lanes exclusively for northbound travel and two lanes exclusively for southbound travel. Petitioner's remaining property (17.14 acres), including the portion subject to the Matthews lease and the portion occupied by the Frozen Custard Place, is west of and abuts on the lanes of #401 as relocated for southbound traffic.

After completion of Project No. 8.14368, proceeding north or northeast from Lillington, the highway now constituting #401, as it reaches petitioner's land, is also #421 and #210; but, after passing a portion of petitioner's land (where the Matthews and Frozen Custard Place premises abut), #401 diverges from #421 and #210 and curves to the left as shown on the map. From Lillington until it reaches "just about to the (north) end of the (petitioner's) property," #401 is a dual highway, the lanes for northbound traffic thereon being separated from the lanes for southbound traffic by a median or divider, with this exception: There is a break or crossover, "just a little bit south of the front of" the Matthews premises, where southbound traffic may turn left, cross over to the lanes for northbound traffic and then proceed north thereon. Northbound traffic may use this crossover but only for the purpose of reaching the lanes for southbound traffic and proceeding south thereon. Petitioner, entering #401 from his abutting property, must proceed south thereon in the lanes reserved exclusively for southbound traffic until he reaches said crossover, at which point he may cross over to the lanes for northbound traffic and proceed north thereon. Where #401 ceases to be a dual highway, "just about to the (north) end of the (petitioner's) property," petitioner may make a left turn, cross over and then proceed south on the lanes reserved exclusively for southbound traffic to any portion of his property abutting thereon. (Note: The foregoing is in accord with the evidence when taken in the light most favorable to petitioner.)

It was stipulated that the special interests and rights of respondents Beal, Trustee, Security National Bank of Greensboro, McGibony, Trustee, Federal Land Bank of Columbia, and Standard Oil Company of New Jersey "are readily determinable and not now in controversy, and these interests shall be transferred from the land to the fund allowed as damages herein, and then apportioned by the Court among the parties as their interests may appear."

Petitioner, after alleging facts as to the nature and extent of the damages he sustained on account of said Project No. 8.14368, asserted

he was entitled to recover $60,000.00 for the appropriation by the Highway Commission of Tract A and $40,000.00 for its appropriation of Tract B.

Respondent Highway Commission, in its answer, denied particular allegations of the petition and thereafter asserted: "respondent does not resist prayer that just compensation be determined according to law by the applicable procedure set forth in Article 2 of Chapter 40 of the General Statutes insofar as the same is made to apply by G.S. 136-19, and respondent prays that benefits, both general and special, be assessed as offsets against the damages, if any, as is provided therein."

Respondents Butts and Matthews, in a joint answer, admitted the allegations of the petition and prayed that the damages to their leasehold interests be assessed.

The remaining respondents did not answer or otherwise plead.

Commissioners appointed by the clerk filed three separate reports, one assessing petitioner's damages at $78,000.00, another assessing the damages of respondent Butts at $20,000.00, and another assessing the damages of the Matthews estate at $13,000.00. The clerk, in separate orders, confirmed each report. In addition, in a separate and final order of confirmation, the clerk ordered, adjudged and decreed "that the interested parties herein have and recover of the N. C. State Highway Commission the total sum of $111,000 and that the costs of this action be taxed to the N. C. State Highway Commission."

At trial, the court submitted, and the jury answered, three issues, to wit:

> "1. What gross sum are the parties in interest entitled to recover of the respondent, N. C. State Highway Commission, for the appropriation and damage to lands of the petitioner described in the petition, over and above all general and special benefits accruing to petitioner's land by reason of the appropriation for highway purposes? ANSWER: $77,000.00.
>
> "2. What part of the above gross sum awarded is the respondent, H. T. Butts, entitled to recover? ANSWER: $13,000.00.
>
> "3. What part of the above gross sum awarded is the respondent, Lattie D. Matthews, Executrix of the Estate of M. A. Matthews, Deceased, entitled to recover? ANSWER: $5,000.00."

The Highway Commission contended only the first issue should have been submitted and objected and excepted to the submission of the second and third issues.

The court, in accordance with the verdict, entered judgment providing, in pertinent part: "(t)hat respondent, State Highway Commission,

pay into Court the sum of EIGHTY-FOUR THOUSAND, NINE HUNDRED NINETY-FIVE AND 16/100 DOLLARS ($84,995.16) as full compensation to the petitioner, and the respondents, H. T. Butts and Lattie D. Matthews, Executrix of the Estate of M. A. Matthews, deceased, for the taking of the easement of right of way across said property of petitioner and the taking of all improvements located thereon and for all damages caused by the construction of the aforesaid State Highway Project." (Note: The gross sum of $84,995.16 consists of $77,000.00 plus $7,995.16, the sum of $7,995.16 being interest on $77,000.00 at six per centum per annum from January 1, 1960, to September 23, 1961.)

Provisions as to the respective interests of petitioner and respondents other than the Highway Commission in said gross sum of $84,995.16 are not pertinent to the questions presented on this appeal.

The Highway Commission excepted to said judgment and appealed.

M. O. Lee, Wilson & Bain and Wiley F. Bowen for petitioner appellee.

Attorney General Bruton, Assistant Attorney General Lewis, Millard R. Rich, Jr., Member of Staff, and Bryan & Bryan for respondent State Highway Commission, appellant.

Robert Morgan for respondents Butts and Matthews, appellees.

BOBBITT, J. As to the measure of damages, the court instructed the jury, *inter alia,* as follows: ". . . where only a part . . . of a tract of land is appropriated by the State Highway Commission for public purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion which is to be offset under the terms of the controlling statute by any general or special benefit resulting to the landowner from the utilization of property taken for a highway." This instruction is in accord with our decisions. *Proctor v. Highway Commission,* 230 N.C. 687, 691, 55 S.E. 2d 479; *Robinson v. Highway Commission,* 249 N.C. 120, 105 S.E. 2d 287, and cases cited.

There is no controversy as to petitioner's right to recover compensation for the part taken, to wit, Tract A (including improvements thereon) and Tract B.

The primary question for decision is whether, in determining the injury, if any, *to the remaining portion* (17.14 acres) of his land, petitioner is entitled to compensation for diminution in the value thereof

caused by the fact he now has *direct* access therefrom only to the lanes of #401 (as relocated) reserved exclusively for southbound traffic and only southbound traffic has *direct* access thereto. The question is drawn sharply into focus by exceptions and assignments of error relating to portions of petitioner's pleading and evidence and to portions of the court's instructions, including the allegations, evidence and instructions set forth in the following three paragraphs.

Petitioner alleged his remaining property, particularly the portions occupied by the Matthews filling station and bulk oil premises and the Frozen Custard Place, was greatly damaged "by the division of the lanes of travel in such a manner that said property can only attract and serve potential customers traveling in a southerly direction along said highway."

Petitioner offered evidence, which, as stated by the court, tended to show "that the sum of $40,000.00 damage to the remainder of his tract which was not taken consisted primarily of diminution in value because of the way in which the highway was constructed, particularly the construction of what has been referred to as a median strip, . . ."

The court instructed the jury that petitioner had offered evidence tending to show that, after the taking on January 1, 1960, #401 (as relocated) "had four lanes divided by an elevated median strip or divider, ten (10) to twelve (12) inches high above the surface of the highway and that traffic bound in only one direction had access to his property; further that the State Highway Commission had constructed elevated islands, 10 to 12 inches high above the surface of the highway, in front of . . . the Matthews property and the Frozen Custard property, so as to control and restrict access of the petitioner and others to the property. That if the petitioner has so satisfied you of this by the greater weight of the evidence then the court instructs you that this is relevant as circumstances tending to show diminution in the overall fair market value of the property *as an element* of damage to the remainder of that tract of land by reason of the location and construction of the highway." (Our italics)

"The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." McQuillin, Municipal Corporations, Third Edition, Volume 11, § 32.27. "The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable." *State v. Fox* (Wash), 332 P. 2d 943, 946; *Walker v. State* (Wash.), 295 P. 2d 328, and cases cited.

Petitioner contends the Highway Commission, by the relocation of #401 so that he now has direct access only to the lanes thereof reserved exclusively for southbound traffic, has appropriated a property right for which, under the law of eminent domain, he is entitled to compensation. The Highway Commission contends the relocation of #401 and the separation of the lanes for northbound and southbound traffic by a median is a traffic regulation adopted in the exercise of the police power vested in it by G.S. Chapter 136, Article 2, and injury to petitioner's remaining land caused thereby is not compensable.

Prior to January 1, 1960, the paved portion of #401 was twenty-four feet. Petitioner testified the traffic on the highways then passing his property "was tremendous." Project No. 8.14368, in its entirety and with reference to #401, was designed to promote the safety and convenience of the public by reducing the hazards of travel and expediting the flow of traffic. Petitioner does not allege, nor does he contend, the public safety and convenience were not served thereby.

"An individual proprietor has no right to insist that the entire volume of traffic that would naturally flow over a highway of which he owns the fee pass undiverted and unobstructed. In fact, while under some circumstances and conditions he has a right of access to and from his own premises, he has no constitutional right to have anyone pass by his premises at all." Nichols on Eminent Domain, Third Edition, Volume 2, § 6.445; *Board of Com'rs. of Santa Fe County v. Slaughter* (N.M.), 158 P. 2d 859; *City of Memphis v. Hood* (Tenn.), 345 S.W. 2d 887.

As stated by *Kyle, J.*, in *Muse v. Mississippi State Highway Commission,* 103 So. 2d 839: "Multiple lane highways have been constructed in all parts of the country; and median strips or neutral zones between lanes of traffic on multiple lane highways, with interchanges or crossovers at reasonable intervals to enable motorists to pass from one traffic lane to another, have been authorized and provided for in the standards of design adopted for the construction of such highways. Such median strips or neutral zones provide for a complete separation of traffic moving in opposite directions, and reduce the hazards incident to motor vehicle travel; and the establishment of such median strips or neutral zones have been recognized as a proper exercise of the police power."

In *Walker v. State, supra,* the plaintiffs owned property fronting five hundred feet on the south side of a primary four-lane state highway on which they operated a motel. The State Highway Commission installed a concrete center line curb, thereby preventing direct access from the plaintiffs' property to the lanes for westbound traffic. In

holding that the plaintiffs were not entitled to injunctive relief or compensation, the court, in opinion by *Weaver, J.*, said:

> "Plaintiffs have no property right in the continuation or maintenance of the flow of traffic past their property. They still have free and unhampered ingress and egress to their property. Once on the Highway, to which they have free access, they are in the same position and subject to the same police power regulations as every other member of the traveling public. Plaintiffs, and every member of the traveling public subject to traffic regulations, have the same right of free access *to* the property *from* the highway. Re-routing and diversion of traffic are police power regulations. Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right.
>
> "We have found no authority, nor has any been called to our attention, which allows, to the abutting property owner, damages allegedly arising from statutes or ordinances (a) establishing one-way streets; (b) forbidding 'U' and left turns; or (c) authorizing the use of other suitable traffic-control devices deemed necessary by the proper authorities to warn, regulate, and guide traffic upon public thoroughfares.
>
> "Although an abutting property owner may be inconvenienced by one-way traffic regulation immediately in front of his property, he has no remedy if such regulation be reasonably adapted to the benefit of the traveling public. The property owner must point to illegality, fraud, or arbitrary or capricious conduct."

In accord: *Department of Public Works and Bldgs. v. Mabee* (Ill.), 174 N.E. 2d 801; *Iowa State Highway Commission v. Smith* (Iowa), 82 N.W. 2d 755, 73 A.L.R. 2d 680; *State v. Ensley* (Indiana), 164 N.E. 2d 342; *State v. Fox* (Wash.), *supra; People v. Ayon* (California), 352 P. 2d 519, *certiorari* denied *sub nomine Yor-Way Markets v. California,* 364 U.S. 827, 81 S. Ct. 65, 5 L. Ed. 2d 55; *State v. Linzell* (Ohio), 126 N.E. 2d 53; *In re Appropriation of Easements for Highway* (Ohio), 137 N.E. 2d 595, appeal dismissed, 131 N.E. 2d 395. See Annotation, "Abutter's Access-Traffic Regulation," 73 A.L.R. 2d 689, *692,* where the author states: "In no case has a court held unreasonable, on account of interference with access, a regulation of the general direction, flow, or division of all traffic on a given street or highway."

As stated in *People v. Ayon, supra:* "The compensable right of an abutting property owner is to direct access to the adjacent street and to the through traffic which passes along that street. (Citation) If this

basic right is not adversely affected, a public agency may enact and enforce reasonable and proper traffic regulations without the payment of compensation although such regulations may impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuity of travel to reach a given destination."

Except as noted below, petitioner, from his entire frontage, has direct and unrestricted access to and from the lanes of #401 (as relocated) reserved exclusively for southbound traffic. The Highway Commission (as indicated in the quoted portion of the court's instructions) constructed curbing at certain points in front of that part of petitioner's remaining property occupied by the Matthews filling station and bulk oil premises and the Frozen Custard Place. In this way, entrance into and exit from these places of business is restricted to the spaces provided therefor.

"While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway; if he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint." 39 C.J.S., Highways § 141; Elliott on Roads and Streets, Fourth Edition, Volume II, § 882; *Iowa State Highway Commission v. Smith, supra,* and cases cited; *State v. Ensley, supra;* Annotation, "Traffic regulations which interfere with or restrict access to and from abutting property," 100 A.L.R. 491.

With reference to said restriction on direct access between said places of business and the lanes of #401 (as relocated) reserved exclusively for southbound traffic, plaintiff is entitled to recover compensation on account of injury to this portion of his remaining property to the extent, if any, such curbing substantially impairs free and convenient access thereto and the improvements thereon.

Petitioner, in his brief, states: "In the cases cited and relied on by the appellant, all that was done was to divide the lanes of travel or establish one-way traffic, etc., and no additional land of the abutting owner had been taken. Certainly if the appellant in this case had only divided the lanes of travel in the existing right of way and had not taken additional land, the petitioner would not have been entitled to recover damages for the exercise of the police power in dividing the lanes of travel. In the present case, however, additional land was taken and in the reconstruction of said highway the lanes of travel were divided."

In *State v. Ensley, supra,* a strip taken off the entire east side of the Ensley property, to wit, the frontage on Keystone Avenue as originally located, was appropriated "for the purpose of widening Key-

stone Avenue and constructing thereon" an improved and divided highway on which the remaining portion of the Ensley property fronted. A similar factual situation was involved in *People v. Ayon, supra,* and in *City of Memphis v. Hood, supra,* and in *In re Appropriation of Easements for Highway, supra.*

Here, #401 as relocated is essentially the same highway. The Highway Commission's original right of way is included in the right of way on which #401 is now located. All of petitioner's remaining property is west of said highway. Whether petitioner is entitled to compensation for diminution in the value of the remaining portion (17.14 acres) of his land by reason of the fact he now has *direct* access only to the lanes of #401 (as relocated) reserved exclusively for southbound traffic and only southbound traffic has *direct* access to his property does not depend upon whether a portion of his land was appropriated in connection with Project No. 8.14368. The separation of the lanes of #401 for northbound traffic from the lanes thereof for southbound traffic was and is a valid traffic regulation adopted by the Highway Commission in the exercise of the police power vested in it by G.S. Chapter 136, Article 2, and injury, if any, to petitioner's remaining property *caused thereby* is not compensable. We conclude, therefore, that the instruction that injury, if any, *caused thereby* was for consideration by the jury as an element of petitioner's damages, and the admission of evidence as to the injury to the remaining portion (17.14 acres) of petitioner's property *caused thereby,* were erroneous and entitle the Highway Commission to a new trial.

The present factual situation is quite different from that considered in *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129, and in *Kirkman v. Highway Commission, ante,* 428, ... S.E. 2d ..... These decisions involved limited access highways where ingress to and egress from the abutting land was entirely cut off and the owner's right of direct access completely destroyed.

Shortly after our decision in *Hedrick v. Graham, supra,* the General Assembly enacted Chapter 993, Session Laws of 1957, now codified as G.S. § 136-89.48 *et seq.* Petitioner contends #401 (as relocated) is a "controlled-access facility" as defined therein.

In *Hedrick v. Graham, supra,* the plaintiff contended the defendants, *under existing statutes,* had no authority to condemn his right of direct access to and from the highway on which his property abutted. This Court held the State Highway Commission had *implied* statutory authority to do so. The 1957 Act conferred *express* statutory authority to do so. In our opinion, and we so hold, a "controlled-access facility," as defined in the 1957 Act, is a limited access highway where the Highway Commission acquires the legal right to cut off entirely the abutting

owner's right of direct access to and from the highway on which his property abuts.

Here, the Highway Commission has not designated #401 (as relocated) as a "controlled-access facility." It asserts no right to bar petitioner from direct access to the traffic lanes of #401 (as relocated) on which his property abuts. The judgment does not purport to vest such rights in the Highway Commission. It adjudges the Highway Commission has acquired an easement of right of way over Tracts A and B "for highway purposes."

Petitioner cites *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748, and *Thompson v. R. R.,* 248 N.C. 577, 104 S.E. 2d 181. These decisions are discussed by *Parker, J.,* in *Smith v. Highway Commission, ante,* 410, ... S.E. 2d ....., and further discussion is unnecessary. Suffice to say, they involve different factual situations and different legal principles are applicable.

Since it is probable the same question will arise at the next trial, we consider the Highway Commission's exceptions and assignments of error directed to the court's submission of the second and third issues.

The Highway Commission contends only the first issue should have been submitted; that the second and third issues involved matters with which it was not concerned; and that the respective interests of petitioner, Butts and the Mattews estate, *inter se,* in the gross amount the Highway Commission is required to pay, should be subsequently determined. Appellees contend it was for the court, in its discretion, to determine whether all issues should be determined in a single trial.

G.S. § 40-12 required the petitioner to state in his petition the names of all parties "who own or have, or claim to own or have, estates or interests in the said real estate," and that summons be served "on all persons whose interests are to be affected by the proceedings." *Hill v. Mining Co.,* 113 N.C. 259, 18 S.E. 171; *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; *Tyson v. Highway Commission,* 249 N.C. 732, 107 S.E. 2d 630. While this statute contemplates the respective interests of all parties who claim an estate or assert an interest in the real estate are to be determined in such proceedings, it contains no provision as to *when* or *in what manner* such determination is to be made.

G.S. § 40-23 provides: "If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court *may* direct the money to be paid into the said court by the corporation, and *may* determine who is entitled to the same and direct to whom the same shall be paid, and *may* in its

discretion order a reference to ascertain the facts on which such determination and order are to be made." (Our italics)

G.S. § 40-23 refers specifically to "adverse and conflicting claimants." Manifestly, the provision that the court "may determine who is entitled to the same and direct to whom the same shall be paid" contemplates a situation where such determination may be made *as a matter of law*. It does not deprive any claimant of his right to a jury trial as to controverted issues of fact. Moreover, the provision that the court "may in its discretion order a reference to ascertain the facts on which such determination and order are to be made" does not deprive any claimant of his right to except to an order of compulsory reference and preserve his right to a jury trial as to controverted issues of fact. See *Light Co. v. Horton*, 249 N.C. 300, 106 S.E. 2d 461. G.S. § 40-23 contains no mandatory provision as to *when* or *in what manner* the respective interests are to be determined.

"The rule is generally recognized (though not invariably followed) that, where there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof, or damage thereto, separately." 18 Am. Jur., Eminent Domain § 239; Nichols on Eminent Domain, Third Edition, Volume 4, § 12.36(1); Lewis on Eminent Domain, Third Edition, Volume II, § 716; Annotations, 69 A.L.R. 1263 and 166 A.L.R. 1211.

In accordance with this general rule, the court properly submitted the first issue, relating to the gross amount the Highway Commission is required to pay on account of the appropriation of the land and the improvements thereon without regard to the separate interests of Butts, the Matthews estate, and other respondents. The court was required, then or later, to order disbursement of the gross amount the Highway Commission was required to pay. To determine what part thereof, if any, should be paid to Butts and the Matthews estate, it was necessary, then or later, that the damages each had suffered be determined.

Tract A included the land and improvements subject to the Butts lease. Butts lost his lease by reason of the appropriation by the Highway Commission of Tract A. To the extent he suffered loss on account thereof, Butts is entitled to compensation. Tract B included a portion of the land, but not the improvements thereon, subject to the Matthews lease. To the extent the appropriation of Tract B decreased the value of the Matthews lease, the Matthews estate suffered loss for

which it is entitled to compensation. There is no controversy as to the validity of the Butts lease or of the Matthews lease or as to any of the terms thereof. The second and third issues relate solely to the damage, if any, suffered by the lessees; and much of the evidence relevant and competent in relation to these issues was also relevant and competent in relation to the first issue.

Under these circumstances, whether the issues relating to the damages, if any, sustained by Butts and the Matthews estate, should be determined by the same jury upon the same evidence in a single trial, or deferred for trial by another jury upon other evidence, was determinable by the court in the exercise of its discretion. Hence, in our opinion, and we so decide, appellant's exceptions and assignments of error to the submission of the second and third issues are without merit.

It should be noted that we are not presently concerned with a factual situation where the pleadings raise issues (1) as to who owns the land or particular interests therein, or (2) as to the validity or terms of a contract, lease, mortgage, etc. Ordinarily, the trial of such collateral issues, involving a determination of *what* the respective claimants own, should be separate from the trial to determine the gross amount the Highway Commission is required to pay.

In *Light Co. v. Horton, supra,* the controversy between respondents Horton and respondents Strikeleather, *et al.,* related to what interest each owned in the condemned land. In *Miller v. Asheville,* 112 N.C. 759, 16 S.E. 762, cited by appellant, the property was owned by a life tenant and (contingent) remaindermen; and the only factual element, in determining their respective interests in the gross amount, related to the life expectancy of the life tenant. See also, *Miller v. Asheville,* 112 N.C. 769, 16 S.E. 765. In *Meadows v. United States* (C.C.A. 4th), 144 F. 2d 751, the question was whether the court erred in submitting one issue as to the gross amount rather than separate issues (1) as to the land and improvements and (2) as to the timber.

We have considered the decisions from other jurisdictions cited by appellant. Different statutory provisions were involved and discussion thereof would serve no useful purpose.

It seems appropriate to refer to the comprehensive statute, Session Laws of 1959, Chapter 1025, entitled, "AN ACT TO AMEND G.S. 136-19 AND TO ADD A NEW ARTICLE TO CHAPTER 136 OF THE GENERAL STATUTES RELATING TO CONDEMNATION PROCEDURE APPLICABLE TO THE STATE HIGHWAY COMMISSION." However, this statute does not apply "to any takings or causes of actions arising prior to the effective date" thereof, to wit, July 1, 1960. Present decision relates to the law applicable on January 1, 1960.

Appellant's remaining exceptions and assignments of error relate to questions as to the competency of certain evidence. Since the questions presented thereby may not arise at the next trial, discussion thereof is deemed unnecessary.

On the ground stated above, a new trial is awarded.

New trial.

NELLO L. TEER COMPANY v. DICKERSON, INC.

(Filed 10 July 1962.)

1. Evidence § 50—

It is competent for an expert accountant to testify as to what the books examined by him disclosed as to the amount due by defendant to plaintiff, the entries in the books of defendant being competent as admissions and the accountant's testimony not purporting to state the ultimate fact as to the amount due, if any, by defendant to plaintiff.

2. Account Stated § 1—

An agreement between the parties as to the amount or balance due by the one to the other as the result of prior transactions between them constitutes an account stated.

3. Account Stated § 2—

An account stated constitutes a new and independent cause of action conclusive upon the parties in the absence of fraud or mistake, but the agreement as to the amount due cannot preclude items not included in the account or a claim for adjustment agreed upon at that time to be the subject of subsequent negotiation.

4. Account Stated § 1—

Failure to object to an account within a reasonable time may amount to an acquiescence constituting it an account stated, but what is a reasonable time is to be determined upon the basis of the circumstances of each case, and is ordinarily a question for the jury, certainly when there is conflict in the evidence or if adverse inferences may be drawn therefrom.

5. Account Stated § 2—

Where defendant's evidence is to the effect that the parties had reached an agreement as to the amount due upon the account in suit but that at that time it was agreed that defendant's claim of an offset for failure of the material furnished by plaintiff to meet the specifications should be subject to later negotiation, it is error for the court to instruct the jury to the effect that the account had become an account stated by reason of defendant's failure to object thereto within a reasonable time without further instructing the jury upon defendant's contention that defendant

was not precluded from asserting an adjustment or counterclaim for failure of the material furnished to meet the specifications.

6. Appeal and Error § 45—

An erroneous instruction on one issue must be held prejudicial even though such instruction may not have affected the jury's answer to such issue if it is apparent from the record that such instruction must have influenced the jury in their answers to subsequent issues.

7. Contracts § 29; Damages § 5—

Where the contract specifically provides that if defendant could not furnish the subject materials in the quantities needed by plaintiff in plaintiff's performance of his contract with a third person, plaintiff should purchase the additional materials needed on the open market, plaintiff may not recover any damages for delay in the performance of his contract with such third person because of defendant's failure to furnish the materials in the quantity required, since it is clear that damages for such delay were not within the contemplation of the parties when the contract was made.

APPEAL by defendant from *Williams, J.*, May 1961 Civil Term of DURHAM.

Plaintiff instituted this action on December 3, 1958 to recover the principal sum of $10,720.90, the balance it alleged to be due for crushed aggregate (rock) furnished defendant in November 1957 for use in supplying asphalt for North Carolina Highway Project No. 2435, Johnston-Sampson Counties. The rock was furnished under an express contract consisting of a purchase order dated April 2, 1954 from defendant to plaintiff and an acknowledgment of this order by the defendant on April 6, 1957.

The purchase order contained the following:

"This purchase order is based upon the firm guarantee made by Nello L. Teer Company that a minimum of 50% of the job requirements of coarse aggregate and screenings will be available at the Princeton Quarry not later than August 1, 1957 at the rate of 800 tons per day (total aggregates). Should the seller, Nello L. Teer Company, be unable to fulfill this guarantee any cost incurred by the purchaser, Dickerson, Inc., over and above his delivered cost to asphalt plant will be for the account of the seller. It is further guaranteed that approximately 50% of the estimated job requirements of coarse aggregates and screenings are currently available from the seller's Raleigh quarry and Erwin gravel pit in quantities of not less than 800 tons per day (total aggregates).

"The seller further guarantees that the purchaser may secure all of the coarse aggregates and screenings from the Princeton quarries after August 1, 1957 at the rate of 800 tons per day

(total aggregates); however, if these materials are available at the Princeton Quarry prior to August 1, 1957 the purchaser has the right to request delivery from there at the above rate at the time the materials are available."

The acknowledgment provided that plaintiff would furnish the defendant, F. O. B. from its quarries at Raleigh, Princeton or Erwin its total requirements of coarse aggregates and screenings for project No. 2435 at specified amounts per ton when called for at the rate of 800 tons daily. The acknowledgment provided "If seller unable to furnish from own quarries, the right is reserved for seller to purchase on open market then if unable to procure same, purchaser has right to purchase on open market."

In its answer defendant admitted that it purchased aggregates from the plaintiff under an express contract and took delivery of same. However, it alleged that the aggregates did not meet the required specifications and were not worth the agreed price. It, therefore, denied that it was indebted to the plaintiff in the amount sued for. As a setoff and counterclaim defendant alleged: (1) that plaintiff failed to deliver the aggregate within the time specified thereby delaying the defendant's work to its damage in the sum of $21,441.40; and (2) that because the aggregate did not come up to the specifications, defendant was required to use more aggregate and less screenings to its damage in the sum of $9,454.75. Defendant prayed for a recovery in the sum of $30,986.15.

Plaintiff replied, alleging in substance: (1) that at all times it had available at its Raleigh, Erwin, and Princeton quarries aggregate sufficient to fill defendant's orders and did deliver it to defendant as ordered; (2) that the written contract of April 2, 1957 which bound plaintiff to furnish defendant at least 800 tons of aggregate per day after August 1, 1957 from its Princeton quarry, was verbally altered prior to August, 1957; that in order to save transportation cost defendant desired to purchase all the aggregate from the Princeton quarry and, in consideration of plaintiff's furnishing it there, the defendant agreed to coordinate its work with the ability of the Princeton quarry to produce; that defendant did this and plaintiff furnished all the necessary material for the job; that even had plaintiff failed to deliver the needed aggregate, under the contract, it would have been the duty of the defendant to procure it elsewhere; (3) that prior to August 1, 1957 plaintiff allegedly delivered to defendant a small amount of crushed aggregate containing more screenings than the parties contemplated; that this matter was adjusted on September 21, 1957 when plaintiff gave defendant a credit of $838.18 in full settlement; that

thereafter defendant took delivery of over $200,000.00 worth of aggregate without complaint and is thereby estopped to complain now; (4) that plaintiff sent defendant various invoices and, since December 1, 1957, defendant has paid plaintiff over $200,000.00 on its account; that at the end of each month during the period defendant purchased crushed aggregate from plaintiff, plaintiff furnished defendant with copies of all invoices and with monthly statements showing the exact amount of the remaining balance due plaintiff; that defendant continued to make purchases and payments and as a result the defendant's account with plaintiff became an account stated.

The amount for which the plaintiff sues is made up of two invoices, one dated November 16, 1957 for 1,983.3 tons of No. 11 aggregate for $4,859.09; the other, dated November 23, 1957 for 2,339.7 tons of No. 11 aggregate (plus 107.95 tons of screenings) for $5,861.81, making a total of $10,720.90.

Complying with a notice to produce, defendant brought to the trial the ledger sheets showing its account with plaintiff. Mr. A. B. Umstead, plaintiff's chief accountant in charge of its bookkeeping and records, was admitted to be an expert accountant. He examined defendant's records and explained its system of bookkeeping. He also explained the plaintiff's system. The two systems did not vary appreciably. Plaintiff would send an invoice to the defendant; defendant would record it on a ledger sheet entitled "The Nello L. Teer Company" as an account payable to the plaintiff. At the trial the books of both companies showed the two unpaid invoices totaling $10,720.90 to be due the plaintiff. They went on the defendant's ledger on December 31, 1957. On that date, including these two invoices, the defendant owed plaintiff $78,658.94. Between that date and the institution of this action, plaintiff sent defendant 127 invoices and, in thirteen payments, the defendant paid plaintiff in excess of $200,000.00. After project No. 2435 was completed — the record does not contain this date — the defendant continued to purchase aggregate for other jobs from plaintiff.

Beginning February 1, 1958 plaintiff's auditor started sending monthly statements to the defendant. Every statement contained the $10,720.90 item. No protest was ever made to him that defendant did not owe the account. There was nothing on the books of defendant at any time to show that it was in dispute. In conformity with approved auditing practices, the independent accountant auditing defendant's books requested confirmation from plaintiff that the amount of $10,720.90 was due. On April 30, 1960 plaintiff's auditor advised defendant that the amount was due and unpaid. Defendant's auditor did not know of the controversy but he testified that even though the account

were in controversy it would be normal practice to leave it on the books until it was finally settled.

At the trial defendant conceded that the aggregates specified on the two invoices were received and used. With reference to these two items, N. K. Dickerson, the chairman of defendant's board, testified, "These aggregates were used by our company; we don't question that." He further testified, "Our books and records show, for bookkeeping purposes, that after proper invoicing and proper credits were made on our account, * * * that our company owed Nello L. Teer Company the sum of $10,720.90." Defendant contended that these invoices were not paid because they amounted to approximately the sum which plaintiff owed defendant because the aggregate furnished on the whole project after September 21, 1957 was "out of specification." On cross-examination Dickerson said: "I testified that I received the aggregate, that I received the invoices, and that I used every bit of the aggregate, that I would not allow the correct amount to be paid because I had not received the adjustment."

Defendant's evidence tended to show the following situation:

The two invoices in question cover 4,323 tons of No. 11 aggregate. Defendant used 23,072.3 tons of No. 11 aggregate on project No. 2435. All the aggregate furnished by the plaintiff, both No. 4 and No. 11, was finer than specified by the contract, and for that reason the defendant had to cut down on the cheaper screenings and local sand and to use more expensive stone in order to provide an asphalt mix which would comply with State Highway specifications.

Complaints were frequently made to Mr. Champion, plaintiff's sales manager, and to Mr. Dean, superintendent of the Princeton quarry. As a result, on September 21, 1957, Champion and H. G. Shirley, defendant's vice-president and general manager, agreed on an adjustment of $838.18 in settlement of claims up to that time. Defendant was assured that from then on the aggregate would be satisfactory, but it was not. On or about October 4th, Dickerson and Shirley met with Champion and Dean to discuss the matter further. At that time Champion told defendant's representatives that if they would continue to use aggregate from the Princeton quarry, upon completion of the project they would go over the situation and work out an equitable adjustment if excessive amounts had been required. As a result of that conversation, defendant continued to use the material.

After the job was completed Dickerson informed Champion that he was withholding payment of several invoices pending the adjustment they had discussed. Thereafter the matter was discussed on about five different occasions. Once Champion suggested that defendant be given a credit of from four to five thousand dollars in settlement, but de-

fendant refused this offer. On July 7, 1958, the parties attempted to work out a settlement at a conference in Monroe. At this conference plaintiff had the advice of an independent paving expert whom it had employed to check the job and advise plaintiff what its obligations were. No agreement was reached. Defendant claimed it was entitled to an offset of $9,454.76 on the two unpaid invoices because all the aggregate furnished after September 21, 1957 was "out of specification"; plaintiff contended that the aggregate was according to specification and that no excessive amount was required.

In addition to the two invoices dated November 16th and 23rd, there was one other invoice which remained unpaid after the completion of the job, an invoice dated November 9, 1957 in the amount of $7,380.13. This invoice was paid on October 25, 1958 after plaintiff's sales manager had pointed out to defendant that it was holding a total of nearly $18,000.00 in unpaid invoices which was in excess of the amount in dispute between them.

Neither at the July conference, nor in any previous discussion, did defendant ever make any claim for damages on account of delay in receiving sufficient quantities of aggregate. Its claim related only to the aggregate being "out of specification." Dickerson testified that defendant first made a claim for damages for delay in its answer.

On the trial defendant's evidence tended to show that it had intended to begin producing asphalt for project No. 2435 on August 14, 1957, but was delayed until September 20th because aggregate only became available at plaintiff's Princeton quarry in limited quantities about September 3, 1957. Defendant contended that, including working hours lost because the days became shorter as winter approached, it thereby lost forty-seven days work on the project.

Under its contract with the State, the defendant had 185 days in which to finish its work on project No. 2435; it used 180 days. Plaintiff furnished from its Princeton quarry all the coarse aggregate which was needed and used on the job.

The Chairman of the Board of Dickerson, Inc., the defendant, testified that the contract contemplated and "set forth that if Teer couldn't, (furnish the aggregate) we would purchase somewhere else and Teer would have to pay us the difference."

The defendant tendered two issues: (1) What amount, if any, is the plaintiff entitled to recover of the defendant, and (2) What amount, if any, is the defendant entitled to recover of the plaintiff. The judge refused these issues.

Issues were submitted to the jury and answered as follows:

"1. Is the defendant Dickerson, Inc. indebted to the plaintiff Nello L. Teer Company in the sum of $10,720.90, plus interest, for crushed aggregates, as alleged in the Complaint?

"ANSWER: Yes.

"2. Did the plaintiff Nello L. Teer Company breach its contract with the defendant by failing to furnish the materials purchased by the defendant within the time specified, as alleged in the defendant's Counterclaim?

"ANSWER: No.

"3. Did the crushed aggregates and screenings purchased by the defendant fail to meet the required specifications, as alleged in the defendant's Counterclaim?

"ANSWER: No.

"4. Is the defendant estopped from making any claim by reason of an 'account stated'?

"ANSWER: _____

"5. Did the defendant Dickerson, Inc. waive any claim it might have against the plaintiff by failure to minimize its damages?

"ANSWER: _____

"6. Is the defendant estopped from asserting any claim against the plaintiff by reason of its continually purchasing and paying for aggregates without complaint?

"ANSWER: _____

"7. Did the defendant waive its right to any claim against the plaintiff by reason of a compromise and settlement September 21, 1957, as alleged?

"ANSWER: _____

"8. What amount, if any, is the defendant entitled to recover of the plaintiff for delay in delivery or for inferior materials purchased and used by the defendant?

"ANSWER: _____"

From judgment on the verdict, the defendant appealed assigning 152 errors.

Charles B. Nye and Watkins and Jarvis for plaintiff appellee.

McCleneghan, Miller and Creasy and Bryant, Lipton, Bryant and Battle for defendant appellant.

SHARP, J. Assignments of error 1 through 13 relate to the testimony of plaintiff's auditor who interpreted the ledgers of both plaintiff and defendant. The purport of his testimony was that the books of both corporations showed that the defendant owed the plaintiff the two invoices totaling $10,720.90.

Entries in the books of the defendant were clearly admissible against it as admissions. Stansbury on Evidence, Section 156. It was permissible for the auditor, an expert accountant, to interpret the books and testify what the books showed; he did not purport to say what amount was, in fact, due. Whether the books were correct or not, in the absence of a stipulation, was, of course, for the jury. In *LaVecchia v. Land Bank,* 218 N.C. 35, 41, 9 S.E. 2d 489, an expert accountant, after examining the books of a corporation, testified that they did not indicate that the corporation was indebted to its president in any amount. The court said: "The witness being an expert accountant, his testimony, based upon personal examination of the books and records of the corporation, is clearly competent." Assignments of error 1 through 13 are not sustained.

In the instant case, although the record contains no such stipulation, there seems to be no dispute between the parties that the two invoices in suit represent crushed stone in the amount of $10,720.90 delivered by plaintiff to the defendant and used by it. The defendant offered no evidence of any difference in the value of the aggregate delivered (which it claims did not meet specifications) and the aggregate specified in the contract. Its complaint is that because the aggregate did not meet specifications, more of it had to be used. Defendant contends that it is entitled to a setoff for the excess used.

The plaintiff contends that all the aggregate it delivered to defendant did meet specifications but that, in any event, on September 21, 1957 it had compromised and settled the defendant's claim that it did not. On the trial the defendant's general manager conceded that all claims prior to September 21st had been compromised, but defendant offered evidence tending to show that thereafter the aggregate continued "out of specification"; that there was another conference early in October between plaintiff's sales manager and defendant's chairman at which it was agreed that defendant would continue to use aggregate from the Princeton quarry but, at the completion of the project, plaintiff would make "an equitable adjustment" if the aggregate failed to meet specifications. The essence of this controversy is whether the aggregate furnished after September 21st met specifications and, if it didn't, what amount would be an "equitable adjustment" for the excess required.

The plaintiff's theory of this case is, (1) that the two invoices in suit had become an account stated because defendant, which received periodic statements of its account with plaintiff, never protested to plaintiff's business office that those two items shown thereon were not due, and (2) that the account stated is not subject to a setoff or counterclaim. However, this conclusion does not necessarily follow. The

defendant's theory of the case seems to be that although it did not dispute the amounts plaintiff had charged it for the aggregate represented by the two invoices, those charges did not represent an *account stated* in the sense of an agreement with respect to the *totality* of the transactions between plaintiff and defendant, *i.e.*, a final settlement between them. Defendant denied that the parties had either expressly or impliedly struck a balance in their claims against each other and agreed upon $10,720.90 as the amount which defendant should pay to plaintiff in final settlement of all claims existing between them. It contended that defendant had repeatedly pressed its setoff upon plaintiff's sales manager who had promised an adjustment, and that this was a sufficient protest or denial of the account to prevent its becoming an account stated.

"An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items; it is a liquidated debt, as binding as if evidence by a note, bill or bond." 1 Am. Jur. 272, Accounts and Accounting, Section 16. An account stated operates as a bar to any subsequent accounting except upon a specific allegation of facts constituting fraud or mistake. *Costin v. Baxter,* 41 N.C. 197; *Morganton v. Millner,* 181 N.C. 364, 107 S.E. 209.

An account can only become an account stated by an admission of its correctness by the party charged, or by its receipt and failure to deny liability within a reasonable time. *Brooks v. White,* 187 N.C. 656, 122 S.E. 561; *Savage v. Currin,* 207 N.C. 222, 176 S.E. 569.

The following succinct statement of the law with reference to account stated appears in *Little v. Shores,* 220 N.C. 429, 17 S.E. 2d 503: "To constitute a stated account there must be a balance struck and agreed upon as correct after examination and adjustment of the account. However, express examination or assent need not be shown — it may be implied from the circumstances. * * * An account becomes stated and binding on both parties if after examination the party sought to be charged unqualifiedly approves of it and expresses his intention to pay it. * * * The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due, * * * or makes a part payment and promises to pay the balance. * * * It is

accepted law in this jurisdiction that when an account is rendered and accepted, or when so rendered there is no protest or objection to its correctness within a reasonable time, such acceptance or failure to so object creates a new contract to pay the amount due."

Where parties, who have had business dealings resulting in claims against each other, consider the claims in their entirety and have a complete accounting of all transactions between them, agreeing upon a final balance in favor of one or the other, such an agreement is certainly an account stated. It has also been called "a burnt-book settlement of all matters and things in controversy." However, an account stated need not cover all the dealings or all the claims between the parties; it may include certain items and leave others open for future adjustment. In that event it becomes an account stated only as to the items admitted to be correct. Anno. 175 A.L.R. 248.

An account stated extends only to those transactions contemplated by the parties. "In the last analysis, an account stated is nothing more than an agreement between the parties as to the items considered." 1 Am. Jur. 2d 397. In an action on an account stated, the party against whom the balance is claimed may set off against it any balance which he claims from items not included in the settlement. 1 Am. Jur. 2d 415.

"Where there is no attempt to dispute or question the items of an account, there is very little difference between an account and an account stated. Neither is it inconsistent to sustain a claim upon cross-petition as a counterclaim where its items are independent of the adjustment contained in the account stated." *Reed v. Thomas,* 134 Kan. 849, 8 Pac. 2d 379, 84 A.L.R. 110.

In this case the trial judge instructed the jury to answer the first issue YES if it found that the defendant was indebted to the plaintiff "in the sum of $10,720.80, either from account stated or the balance due upon open account." In explaining what constituted an account stated the judge told the jury that when an account is rendered "and there is no protest or objection to its correctness within a reasonable time, such failure to object creates a new contract or obligation to pay the amount due." He then gave the jury the following instruction:

> "Now, with respect, gentlemen, to the obligation upon the debtor to reject or deny an account stated, it must be done within a reasonable time. (And I instruct you that under the evidence in this case there was no evidence of a rejection of the account within a reasonable time, referring solely to the time limit.)"

That portion of the charge in parenthesis constitutes defendant's assignment of error No. 93, and it is the only portion of the charge on the first issue to which it excepts. The exception must be sustained.

Nowhere in his charge on the first issue did the judge instruct the jury as to the defendant's theory of the case. The vice in the challenged instruction is that it accepted plaintiff's theory that its monthly statement had become an account stated with respect to the totality of all transactions between the parties, and it completely ignored the negotiations which defendant's evidence tended to show were going on at the quarry in October between plaintiff's sales manager and defendant's engineer with reference to the defendant's protest that the aggregate being furnished did not meet specifications. Throughout this transaction, both the plaintiff and the defendant seem to have operated on two separate levels. According to the defendant's evidence, while the plaintiff's accounting department was sending out invoices and bills to the defendant and the defendant's bookkeepers were entering the charges and carrying them forward on its ledgers, the defendant's engineer and superintendent on the job were complaining to the plaintiff's sales manager and quarry superintendent that the aggregate was upsetting the formula and increasing costs, and the sales manager was promising "an adjustment" when the job was complete. Plaintiff's evidence is silent about this; the sales manager did not testify.

Plaintiff's invoices were prepared in Durham from daily reports which the quarry manager mailed in. The mail clerk turned the reports over to the price clerk who turned them over to the billing clerk who made out the invoices and sent them to the statistical clerk who mailed them to the defendant. Plaintiff's auditor never saw them unless some discrepancy developed or a customer protested. He knew nothing of the complaint which resulted in the sales manager, Mr. Champion, giving defendant an adjustment of $838.18 on September 21, 1957. This matter first came to his attention when the credit was entered on the plaintiff's books. Under these circumstances, the fact that defendant's treasurer made no protest to plaintiff's auditor did not justify a charge that there was no evidence of a rejection of the account within a reasonable time.

Furthermore, "What is a reasonable time within which objection must be made to an account rendered in order to preclude a presumption of acquiescence therein will depend upon the circumstances, among which may be enumerated the nature of the transaction, the relation of the parties, their distance from each other and the means of communication between them, their business capacity, their intelligence or want of intelligence and the usual course of their business." 1 Am. Jur., Accounts and Accounting, Section 28. Ordinarily what is a reasonable time is a question for the jury. Certainly if there is any conflict in the evidence, or if adverse inferences may be reasonably drawn from it, it is for the jury. Anno. 27 L.R.A. 825; 29 L.R.A. (N.S.) 341.

On this record it is doubtful that the challenged instruction affected the jury's answer to the first issue, and ordinarily an error in the charge on one issue is not presumed to have influenced the jury's answer to another issue. *Fleming v. Drye,* 253 N.C. 545, 117 S.E. 2d 416. However, error relating to one issue may not be disregarded when it is probable that it affected the answer to another. N. C. Index, Appeal and Error, Section 45. In this case, when the judge told the jury in his charge on the first issue that an account rendered would become an account stated if it were not rejected within a reasonable time and then stated that there was no evidence of a rejection within a reasonable time, it is apparent that this erroneous statement could have influenced the jury's consideration of the third issue. The third issue posed the question whether the aggregate failed to meet the required specifications. When it came to consider this issue, having been previously told by the judge that there was no evidence of any rejection of the account within a reasonable time, the jury may have concluded that there had been no breach of specifications because there had been no protest. In any event, the challenged portion of the charge amounted to an instruction to the jury to disregard the evidence of the protests by defendant's chairman and general manager and their negotiations with plaintiff's sales manager with reference to the aggregate being "out of specification." This was prejudicial error. G.S. 1-180.

Although the judge told the jury to answer the first issue YES if it found that defendant owed plaintiff $10,720.80, *either upon open account or an account stated,* when he came to the fourth issue, "Is the defendant estopped from making any claim by reason of an 'account stated'?", he charged the jury that if it had answered the first issue YES it would answer the fourth issue YES. This amounted to an instruction that a finding that defendant owed plaintiff the account eliminated any setoff. The jury did not answer the fourth issue, but this interrelation points up the fact that the effect of this erroneous charge could not be confined to the first issue.

Since there must be a new trial, a detailed consideration of the other assignments of error is not required as they may not arise again.

However, we deem it appropriate to point out that this record presents a somewhat anomalous situation. Plaintiff alleged in its reply that the written contract had been altered by a subsequent parol agreement, but offered no evidence to prove the allegation. Defendant alleged no change in the written contract but offered evidence tending to show modification of it. If so advised, defendant may consider the desirability of moving in the Superior Court for permission to amend its pleadings to conform to its evidence. What issues will arise upon

the evidence in the next trial cannot now be predicted. However, upon this record, no question of damages arises for plaintiff's alleged delay in delivering aggregate. The contract provided that if plaintiff was not able to furnish the aggregate the defendant would secure it elsewhere and plaintiff would be liable for any difference in defendant's costs. The Chairman of the Board of Dickerson, Inc. so testified. Thus, it is clear that damages for delay were not within the contemplation of the parties when the contract was made. *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277. There was no evidence that this provision of the written contract was ever altered, and the plaintiff, in fact, did furnish all the aggregate required for the project.

For the reasons stated herein there must be a new trial.

New trial.

IN THE MATTER OF OTTWAY BURTON.

(Filed 10 July 1962.)

1. Habeas Corpus § 2—

The right of any person imprisoned or restrained of his liberty to apply to any Judge or Justice for *habeas corpus* extends to a person sentenced for contempt of court.

2. Same—

Upon the hearing of *habeas corpus* at the instance of a person restrained of his liberty, the only question is whether petitioner is being held pursuant to a valid judgment of a court of competent jurisdiction.

3. Same—

Upon the hearing of *habeas corpus* upon petition of a person sentenced for contempt of court, an order staying execution so that contemnor might have notice and time to prepare his defense, and setting a time for another hearing, in effect sets aside the order of contempt and provides a rehearing after notice, and such order as well as the subsequent hearing pursuant thereto are nullities, since the sole authority of the hearing judge is to inquire into the legality of contemnor's restraint on the then existing record.

4. Habeas Corpus § 1—

Habeas corpus may not be used as a substitute for appeal.

5. Courts § 9—

One Superior Court judge may not modify, reverse, or set aside judgment of another Superior Court judge as being erroneous.

6. Divorce and Alimony §§ 18, 22—

A judge of the Superior Court has no authority out of term to inquire into the matter of alimony *pendente lite* or custody of a child of the marriage at the instance of one party without notice to the other.

7. Divorce and Alimony § 22—

Consent of the parties as to the custody of the child and the monthly payments the father should make for its support cannot bind the court, or give it jurisdiction to approve it *pro forma*, but it is the duty of the court upon a hearing after notice to award custody of the child and order payments for its support in accordance with the best interests of the child.

8. Attorney and Client § 9—

Disciplinary action or disbarment may be imposed upon attorneys either under statutory or judicial procedure, both of which partake of the nature of civil actions, but the right to practice is a property right of which an attorney cannot be deprived without due process of law.

9. Same—

The statutory procedure for the disbarment of attorneys does not deprive the courts of their inherent authority over attorneys as officers of the court, but as to alleged misconduct not committed in the presence of the court, the court may administer disciplinary action only upon an order to show cause based upon a sworn, written complaint.

10. Contempt of Court § 3—

Where there has been no sworn complaint in regard to the conduct of an attorney and no show cause order issued, a judge of the Superior Court has no authority to order an attorney to appear before him for investigation of the matter, and such order being void *ab initio*, the wilful disobedience of such order by the attorney cannot be made the basis for contempt.

11. Contempt of Court § 2—

Contempt committed in the view and presence of the court may be punished summarily, but conduct which would amount to contempt in the presence of a duly constituted court of proper jurisdiction would not necessarily be contemptuous in a *de facto* court, and a person may always insist upon his rights.

12. Same—

In holding a person in contempt for conduct in the presence of the court, the court must specify the particulars of the offense on the record by stating the words, acts, or gestures amounting to the direct contempt, and when the record fails to specify such words, acts, or gestures but contains only conclusions that the conduct of the party in question was contemptuous, contemnor is entitled to his discharge.

13. Appeal and Error § 16—

Certiorari brings the entire record before the Supreme Court for review.

14. Appeal and Error § 2—

The Supreme Court is given supervisory jurisdiction over the lower courts by Article IV, § 8, of the Constitution, and will exercise such jurisdiction to prevent a manifest miscarriage of justice, and in the exercise of this jurisdiction, will take notice *ex mero motu* of a fatal error appearing on the face of the record.

On writ of *Certiorari* to the Superior Court of RANDOLPH County.

Walker, S.J., made an order on 29 December 1961 imposing a prison sentence of ten days on Ottway Burton for contempt of court. Contemnor applied for writ of *certiorari* which was allowed by the Supreme Court on 20 March 1962. Arguments were heard 23 May 1962.

Cahoon, Egerton & Alspaugh for petitioner contemnor.

Attorney General Bruton and Staff Attorneys Richard T. Sanders, Theodore C. Brown, Jr., and Harold D. Coley, Jr., for the State.

MOORE, J. On 28 December 1961 Hal H. Walker, Special Judge of Superior Court, was at his home in Asheboro, Randolph County. The superior court was not in session and Judge Walker was in vacation. Ottway Burton is a practicing attorney, a member of the Randolph County Bar, and a resident of Asheboro.

The order signed by Judge Walker on 29 December 1961 makes recitals, which are summarized except where quoted verbatim, as follows: On 28 December 1961 the Judge had a telephone call from Moleta Louise Luther Bodsford. She was plaintiff in an action against her husband, James Herman Bodsford, for alimony without divorce and custody of child, then pending in Randolph County Superior Court. She stated to Judge Walker "that she and her husband had agreed as to the custody of the child and that she had informed her attorney, Ottway Burton, that she wanted to take a nonsuit in the case," and that Burton had told her "he would not take a nonsuit or permit her to do so unless and until she had paid him the sum of $300.00 as attorney fees." Judge Walker called Burton and "requested that he and his client together with the attorney for the defendant be present at 10:30 A.M." on the following day in the judge's chambers at the courthouse "to hear the matters relating to the complaint made by" Mrs. Bodsford to the Judge. About 9:30 A. M. the following morning Burton telephoned Judge Walker and stated "that he would not be present at the hearing and that the Court had no jurisdiction of the hearing, and therefore he would not attend." In the telephone conversation the Judge ordered Burton to be present at 10:30 that day "with his client, for a hearing on this cause and . . . Burton again refused to be present." At 10:30 Mrs. Bodsford, her husband's attorney,

and the Assistant Clerk of Superior Court, were present but Burton did not appear. The Judge ordered Deputy Sheriff Neal J. Cockerham to take Burton "into custody . . . and bring him immediately before the (Judge) for a hearing for Contempt of Court."

The order continues as follows:

"The undersigned Judge finds as a fact that the conduct of Ottway Burton, Attorney, in his failing and refusing to appear before the undersigned as ordered and in his attitude toward the Court constitutes direct Contempt of Court, and his actions and conduct committed in the presence of the Court and in conversations with the Court hindered and delayed the due administration of the law.

"It is now, therefore, ordered, adjudged and decreed that the said Ottway Burton be placed in the common jail of Randolph County for a period of ten days for direct Contempt of Court."

The contemnor applied to Superior Court Judge Allen H. Gwyn for writ of *habeas corpus* alleging in substance that his imprisonment was illegal and that he had been denied due process of law. The application recites contemnor's version of the incident.

Judge Gwyn entered an order allowing a stay of execution "so that he (Burton) may have five days' notice of the contempt proceeding against him in which to prepare his defense and . . . obtain counsel," and directing contemnor to appear before Judge Walker for a further hearing on 6 January 1962.

Contemnor was released under Judge Gwyn's order, upon giving bond, after having been incarcerated for eleven hours.

At the hearing before Judge Walker on 6 January 1962 contemnor (1) made a special appearance and moved that the proceeding be dismissed for that no process had been served on him and the court had no jurisdiction of his person, (2) moved that the Judge disqualify himself because of interest and bias, and (3) demurred and moved to dismiss proceedings for that there was no matter before the Judge at the time of the alleged contempt of which the Judge had jurisdiction. All motions were overruled and contemnor excepted. The Judge reaffirmed the original contempt order and Burton was again committed to jail (this time for 9 days — credit for a full day was given for the eleven hours served). Upon application to Supreme Court, bond was fixed and execution stayed. As above indicated, *certiorari* was allowed.

The recitals in the order of Judge Walker of 6 January 1962 are more elaborate than in the former order. There are the following additional factual statements and conclusions (paraphrased except where copied verbatim): After talking with Mrs. Bodsford on 28 December 1961 the Judge was of the opinion "that inquiry should be made into the complaint of" Mrs. Bodsford "and into the care, custody, control

and tuition of" the child. The Judge caused the Assistant Clerk of Superior Court to call Burton on the telephone and inform him that the Judge requested that he and his client be present at 10:30 the following morning for the Judge to "hear matters relating to the complaint made by" Mrs. Bodsford "and the custody, care, tuition and control of" the child. ". . . (O)n the morning of 29th day of December 1961, while Court was in session in Chambers, the . . . Judge being engaged in hearing a motion duly before him of G. Edward Miller Esq., attorney of Asheboro, and at approximately 9:30 A. M. . . . Burton called . . . on the telephone in the Judge's Chambers and told him he would not be present at the hearing, that this Court had no jurisdiction of the matter and that he would not attend; whereupon the . . . Judge, over the telephone" ordered him to be present. Burton, "in a belligerent and contemptuous manner, again refused to attend and refused to obey the orders of the Court." About 11:00 A. M. the Deputy Sheriff "returned to the Superior Courtroom . . . accompanied by . . . Burton; that the Court was then in session for the purpose of hearing the matter and at this particular time the . . . Judge was sitting on the bench." The Judge questioned Burton "in regard to the matter into which the Court was making inquiry, the same being the Bodsford case, and in particular making inquiry as to why . . . Burton was not present at the time he was ordered to be present; that . . . Burton refused to answer the questions propounded . . . and addressed the Court in a tone of voice and manner both contemptuous and contumacious, surly, antagonistic and belligerent, and otherwise behaved in a contemptuous and insolent manner, showing complete disrespect for the Court during the sitting of said Court, in the immediate view, presence and hearing of the Court, which disorderly, insolent, contemptuous and contumacious behavior . . . directly tended to interrupt the proceedings of the Court and to impair the respect due the authority of the Court, and did in fact impair the respect due the authority of the Court, he being at that time and place an officer of the Court and subject to the jurisdiction of the Court." The conduct of Burton "constituted a direct contempt of this Court."

While we are not permitted to find or consider facts beyond those set out in the order of Judge Walker, we consider it appropriate to state contemnor's version of the matter. The following is a summary of the statement made by him in affidavits: Mrs. Bodsford employed him as counsel, representing that her husband had abandoned her without providing support and had assaulted and threatened to kill her. Burton represented her in a peace bond proceeding against her husband, and in the suit in question. He moved for alimony *pendente lite* and custody of child before Gambill, J., on 12 December 1961, but Judge Gambill

continued the matter to the January Term 1962 because defendant was in John W. Umstead Hospital. Burton held many conferences in an effort to settle the case. On 27 December 1961 Mrs. Bodsford told Burton she wanted to settle the case on terms whereby she would have custody of the child, receive $45 per month for the child's support and nothing for herself. Burton advised strongly against such settlement since her husband was earning approximately $150 per week. On the morning of 28 December 1961 Mrs. Bodsford came to Burton's office and stated that she wanted to take a nonsuit and was terminating his employment. Burton told her that he would not assist her in taking a nonsuit, he advised against it, it was against her best interest, and she had the right to discharge him, hire another lawyer and take a nonsuit. He asked her to pay him the $300 fee they had agreed upon, which was the minimum fee set by the Randolph County Bar for such matters. She refused to pay the fee and stated that she was discharging him. That afternoon the Assistant Clerk of Superior Court called him on the telephone and told him that Judge Walker requested his presence in his chambers the following morning at 10:30. He immediately called Judge Walker and asked the nature of the proceedings, and was told that Mrs. Bodsford had made a complaint by telephone, and the Judge desired him to appear "with respect to the complaint." On the following morning he called Judge Walker and asked him if there was any written order or notice requiring him to appear, and was told there was not. He then stated to the Judge that it did not appear that there were any proceedings pending, that the Judge was without jurisdiction to require him to appear, and that he respectfully declined to appear. He "never spoke or acted in any disrespectful manner." About 10:45 Deputy Sheriff Neal Cockerham appeared in Burton's office and stated that Judge Walker had sent for him. Burton asked if he had a warrant or any process, and was advised that he did not but had instructions to take him before the Judge. Burton was required to go before the Judge involuntarily, and as he reached the courtroom the Judge entered and asked why Burton had not appeared at 10:30. Burton inquired if he was under arrest and stated that if he was he desired counsel. The Judge stated that Burton was under arrest, and forthwith, without a hearing, sentenced the latter to jail for ten days. Burton gave notice of appeal, but was advised that the matter was not appealable and no appeal would be allowed. Burton was placed in jail and the Judge signed the order which had been dictated before contemnor was brought before him.

For *habeas corpus* contemnor applied to Judge Gwyn, resident Judge of another judicial district. This was not improper. *Habeas corpus* is a high prerogative writ and by statute the application for the writ may

be made to any one of the Justices of the Supreme Court or any one of the Superior Court judges, either in term or in vacation. G.S. 17-6; *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684. Any person imprisoned or restrained of his liberty for any pretense may prosecute a writ. G.S. 17-3. The judge issuing the writ may make it returnable before himself, or, for convenience, before any other judge. *McEachern v. McEachern, supra.* The particular judge before whom it is returnable need not be either the resident or presiding judge of a particular judicial district or the presiding judge of any particular term of court. And the sole question for determination at *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully restrained of his liberty. *In re Renfrow,* 247 N.C. 55, 100 S.E. 2d 315. The only questions open to inquiry are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers. *State v. Hooker,* 183 N.C. 763, 111 S.E. 351. A valid judgment of a court of competent jurisdiction is the real and only authority for the lawful imprisonment of a person. *In re Swink,* 243 N.C. 86, 89 S.E. 2d 792.

It would seem that Judge Gwyn probably believed that the Judge and attorney, after mature reflection, might reach a more just result if given another opportunity to consider and dispose of the matter. That his action in remanding the case for rehearing evinced a large measure of human kindness, an abiding faith in his fellowmen, and anxiety to uphold the dignity of the courts, cannot be denied. Be that as it may, the order entered by Judge Gwyn is not in accord with our law and practice. The order stayed execution so that contemnor might have "five days' notice of the contempt proceeding against him in which to prepare his defense and to obtain counsel." A time for hearing was fixed. In effect, it purported to set aside Judge Walker's order of 29 December 1961 as erroneous, and to provide a rehearing after notice. In short, it ordered a new trial — not an inquiry into the legality of contemnor's restraint on the existing record. The question to be determined by Judge Walker on 6 January 1962 was not whether his former order was void, but whether upon a rehearing, after notice and opportunity for defense, contemnor should be adjudged guilty of contempt. We do not reach the question of recusation of Judge Walker, that is, whether he was disqualified by interest or bias to hear the matter had it been properly returned before him. *Ponder v. Davis,* 233 N.C. 699, 65 S.E. 2d 356.

It is well settled that, in *habeas corpus* proceedings, the court is not permitted to act as one of errors and appeals, but the right to afford relief, on such hearings, arises only when the petitioner is held unlawfully or on a sentence manifestly entered by the court without power

to impose it. The judgment must be void as distinguished from erroneous. *State v. Edwards,* 192 N.C. 321, 135 S.E. 37. In *habeas corpus* proceedings, the court has jurisdiction to discharge petitioner only when the record discloses that the court which imprisoned him did not have jurisdiction of the offense or of the person of defendant, or that the judgment was not authorized by law. *Habeas corpus* is not available as a substitute for appeal. *State v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339; *In re Smith,* 218 N.C. 462, 11 S.E. 2d 317; *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163. Where upon *habeas corpus* it appears that petitioner is serving a sentence under a void judgment, petitioner is entitled to his immediate release. G.S. 17-32; *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550. But one superior court judge may not modify, reverse or set aside a judgment of another superior court judge as being erroneous. *Davis v. Jenkins,* 239 N.C. 533, 80 S.E. 2d 257; *In re Adams, supra; Newton and Co. v. Manufacturing Co.,* 206 N.C. 533, 174 S.E. 449.

The order entered by Judge Gwyn was without legal authority and is a nullity. *Chappel v. Stallings,* 237 N.C. 213, 74 S.E. 2d 624; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377. *A fortiori,* the order of Judge Walker of 6 January 1962 is a nullity. He could not act pursuant to a void directive. Neither could he retry the matter and modify his former order, even on his own motion, in the absence of a proper mandate from an appellate court. We must determine the effect and validity of the order of 29 December 1961. Parenthetically, we are of the opinion that the order of 6 January 1962, had it not been void for the reasons indicated, adds no substance to the order of 29 December 1961.

We now reach the question, whether on 28 and 29 December 1961 there was any judicable matter pending before Judge Walker which constituted him, while in chambers and in vacation, a court, and which authorized him to compel the petitioner to appear before him.

The resident judge of a judicial district and the judge regularly presiding over the courts of the district and any special judge residing in the district have concurrent jurisdiction in all matters and proceedings wherein the superior court has jurisdiction out of term; and matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived may be heard in vacation. G.S. 7-65. In an action for alimony without divorce, a motion for alimony *pendente lite* may be heard out of term, after five days notice to the husband. G.S. 50-16. But an order allowing alimony *pendente lite* without notice is void. *Barnwell v. Barnwell,* 241 N.C. 565, 85 S.E. 2d 916. Custody of children may be determined out of term after notice. G.S. 17-39; G.S. 50-16; *Weddington v. Weddington,* 243 N.C. 702, 92 S.E.

2d 71; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617. But the inherent and statutory authority of the court to protect the interests and provide for the welfare of infants cannot be affected by agreement entered into by the child's parents. 2 Strong: N. C. Index, Divorce and Alimony, s. 22, p. 115. "Consent of all the parties confers jurisdiction 'in chambers' of any matter before the proper judge, not requiring a jury trial or in which trial by jury has been waived." 1 McIntosh: N. C. Practice and Procedure, s. 125, p. 70; *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576. A judgment of voluntary nonsuit may be entered before the clerk of superior court at any time, or before the judge at term. G.S. 1-209; *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833.

Mrs. Bodsford told Judge Walker that she desired to take a voluntary nonsuit. This conferred no jurisdiction. If the Judge was desirous of assisting her in this regard, he could have advised that the proper course was to enter the nonsuit before the clerk. G.S. 1-209. The Judge's second order suggests that the Judge intended to hold a custody hearing. Contemnor's statement indicated that it had been proposed between the parties that Mrs. Bodsford should have the custody of the child and Mr. Bodsford would pay $45 per month for the support of the child. Had the matter been heard by the Judge, his disposition as to custody and support would not have been limited to or affected by this agreement or proposal. As to the Judge it would have been a matter *in rem,* and it would have been his duty to provide for the best interests of the child both as to custody and support, the agreement or proposal notwithstanding. There was no request or consent for such hearing by either of the parties. It does not appear that Mr. Bodsford was present or had authorized his attorney to consent to such hearing. No proper notice for such hearing had been given. The matter was not before the Judge. The Judge had no jurisdiction of the Bodsford case in any aspect so far as the record discloses.

Mrs. Bodsford in her unsworn statement to Judge Walker over the telephone complained "that Ottway Burton had stated . . . that he would not take a nonsuit or permit her to do so unless and until she had paid him the sum of $300.00 as attorney fees." According to the order of 29 December 1961 it was this complaint that was to be heard, not the Bodsford case. The Judge proposed to inquire into Burton's professional conduct.

"Attorneys are answerable to the summary jurisdiction of the court for any dereliction of duty except mere negligence or mismanagement. A court may enforce honorable conduct on the part of its attorneys and compel them to act honestly toward their clients by means of fine, imprisonment or disbarment. The power is based upon the relationship

of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. . . . Nor will a court desist from requiring its own attorney to do his duty simply because the transaction in question arose in litigation in another court. . . ." 5 Am. Jur., Attorneys at Law, s. 143, pp. 344-5.

"The usual method of instituting summary proceedings against an attorney is by motion or petition addressed to the court and asking for a rule against the attorney to appear and show cause why the prayer of the complaint should not be granted." The court "may create a committee to assist it in the investigation of the complaint. . . ." *ibid,* s. 146, pp. 346-7.

A proceeding against an attorney for alleged dishonest or unethical conduct may result in disbarment. "A license to engage in business or practice a profession is a property right which cannot be taken away without due process of law. The granting of such license is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process." *State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786. So we must inquire what due process is in judicial proceedings against attorneys for misconduct.

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. And the proceedings under each partake of the nature of civil actions. *In re Gilliland,* 248 N.C. 517, 103 S.E. 2d 807; *In re West,* 212 N.C. 189, 193 S.E. 134.

The statutory method provides, *inter alia,* for written complaint, notice to accused, opportunity to answer and be represented by counsel, hearing before a committee conducting proceedings in the nature of a reference, and trial by jury unless waived. G.S. 84-24 to 32; *In re Gilliland, supra.* But nothing contained in the statutes is to be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. G.S. 84-36. However, it was said in *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231, that "While the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, under our present statute questions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., which is now vested with jurisdiction over such matters."

While it is incontrovertible that our courts have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not depending in the particular court exercising that authority, "it is not after the manner of our courts, however, to

deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law." *In re West, supra.* Where an attorney is on trial, charged with a criminal offense involving moral turpitude and amounting to a felony, and pleads guilty, or is convicted, or pleads *nolo contendere* with agreement that he will surrender his license, the court conducting the criminal trial has authority to disbar him summarily without further proceedings, and on appeal the Supreme Court may do likewise upon motion of the Attorney General. *In re Brittain,* 214 N.C. 95, 197 S.E. 705; *State v. Spivey,* 213 N.C. 45, 195 S.E. 1; *State v. Hollingsworth,* 206 N.C. 739, 175 S.E. 99; *State v. Harwood,* 206 N.C. 87, 173 S.E. 24. But where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorney's alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense. Where issues of fact are raised the court may appoint a committee to investigate and make report. *Attorney-General v. Gorson,* 209 N.C. 320, 183 S.E. 392; *Attorney-General v. Winburn,* 206 N.C. 923, 175 S.E. 498; *In re Stiers,* 204 N.C. 48, 167 S.E. 382; *Committee v. Strickland,* 200 N.C. 630, 158 S.E. 110.

In the instant case the requisite procedure was not followed. The sufficiency of the content of the complaint is not before us and we express no opinion with respect thereto. The Judge acted upon the oral and unsworn complaint of a disgruntled client. Immediate parol notice by telephone was given the attorney of a hearing to be held the following morning. The charges against him were not particularized. The verbal order and notice were not in accordance with law and were void. No cause for investigation and hearing had been properly instituted, and the Judge was without authority to issue such order. The attorney was under no duty to appear. Wilful disobedience to an order, void *ab initio* for want of jurisdiction, may not be made the basis for contempt proceedings. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658.

Judge Walker found that contemnor's conduct "in his attitude toward the Court constitutes direct Contempt of Court." A lawyer, or any person for that matter, whose conduct is disrespectful in the view and presence of a judge, sitting judicially under the mistaken but *bona fide* belief that he has jurisdiction to act as a court, is liable

to punishment for direct contempt. But particular conduct, which would amount to contempt in the presence of a duly constituted court of proper jurisdiction, would not necessarily be contemptuous in a *de facto* court. A person may always insist upon his rights, and what his rights are in a given situation depends upon the totality of circumstances. "Contempt committed in the view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record. . . ." G.S. 5-5; *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822. Judge Walker's orders recite the transaction, find facts and make conclusions. No word, act or gesture is specified in either order which amounts to a direct contempt. Burton was within his rights in refusing to explain his failure to appear. Furthermore, he was taken into custody and brought before the Judge against his will and in violation of his rights. The elaborate conclusions are not based on facts particularized. Contemnor is entitled to his discharge. *In re Deaton,* 105 N.C. 59, 62, 11 S.E. 244.

It is suggested by the Attorney General that, since Judge Walker had no jurisdiction to act pursuant to Judge Gwyn's order and the second hearing and the order made pursuant thereto are nullities, the Supreme Court is without derivative jurisdiction and the appeal should be dismissed. This proposition is based on the assumption that only Judge Walker's second hearing and order are before us. We brought the entire record here by *certiorari.* Contemnor has at every stage raised the question of jurisdiction as to all proceedings before Judge Walker. Further, "The Supreme Court is given supervisory jurisdiction over the lower courts by the Constitution (N. C. Constitution, Art. IV, s. 8), and will exercise this jurisdiction to prevent a manifest miscarriage of justice, or to prevent unnecessary delay in the administration of justice. . . . The Supreme Court will take notice of a defect of jurisdiction . . . or any fatal error appearing on the face of the record, *ex mero motu.*" (Parentheses added.) 1 Strong: N. C. Index, Appeal and Error, s. 2, pp. 70, 71, and cases cited therein.

The Superior Court of Randolph County at its next civil term after this decision is certified thereto shall enter judgment vacating the orders of Judge Walker in this cause, dated 29 December 1961 and 6 January 1962, and the order of Judge Gwyn dated 29 December 1961, and discharging contemnor, Ottway Burton. The order for stay of execution issued by the Supreme Court shall be and remain in full force and effect until the said judgment shall be entered by the Superior Court of Randolph County.

Reversed.

CITY OF DURHAM, A MUNICIPAL CORPORATION v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

(Filed 10 July 1962.)

1. Injunctions § 13—

Upon the hearing of an order to show cause why a temporary restraining order should not be issued pending the determination of the action on the merits, the ultimate merits of the action are not before the court, and, while the court, in treating the complaint as an affidavit, must consider the facts alleged in determining in its sound discretion whether interlocutory injunction should be issued, an adjudication of the merits contained in the order for temporary injunctive relief must be stricken.

2. Appeal and Error § 50—

Upon defendant's appeal from an order granting in part plaintiff's prayer for an interlocutory injunction, the sole question on appeal is whether there was error in enjoining the particular acts specified in the order pending the hearing on the merits.

3. Same—

On appeal from an order granting a temporary injunction, the Supreme Court has the power to find the facts.

4. Injunctions § 3—

Ordinarily, an injunction will not lie where there is a full, adequate and complete remedy at law which is as practical and efficient as is the equitable remedy.

5. Injunctions § 13— Injunction should not issue when defendant has filed bond providing complete and efficient remedy if plaintiff prevails on merits.

Where a public service Company has filed bond with the Utilities Commission pursuant to G.S. 62-71 and obtained authority from the Commission to put into effect an increase in rates in the territory served by it, a municipal corporation is not entitled to a temporary order restraining the service company from putting the rates into effect within the municipality upon the assertion that the increase in rates was contrary to contractual provisions in the franchise granted the public service company by the city, since an adequate and efficient remedy is afforded the city and its inhabitants by suit upon the bond in the event the increase in rate was not justified in law, and therefore the municipality could not suffer irreparable injury.

6. Injunctions § 1—

A party may not be enjoined from doing what it has already done.

7. Appeal and Error § 19—

An assignment of error should present the asserted error without the necessity of going beyond the assignment itself.

APPEAL by defendant from *Mintz, J.*, July 1961 Term of DURHAM.

The complaint alleges in substance:

On 19 November 1951 the City Council of the city of Durham duly adopted and passed on final reading an ordinance granting a natural gas franchise in the city to the defendant. Defendant accepted the franchise on 30 November 1951.

Section ten of the franchise is as follows:

> "Section 10. It is recognized that under present law the North Carolina Utilities Commission is vested with legal authority to supervise, fix, and change rates and charges authorized to be charged by the COMPANY to consumers of natural gas, but it is also recognized by both the COMPANY and the CITY that matters involving rate charges and changes are peculiarly local in their application and effect and that the CITY should be afforded access to all information and records and data of the COMPANY which would have any bearing upon the reasonableness of rates and charges in order to determine to its own satisfaction whether such rates and the proposed revised rates are or would, if allowed, be reasonable, and the parties should undertake to reach a mutual understanding as to rates before any action is requested of the Utilities Commission. To that end, the COMPANY shall not file any application or petition or request in any form with the North Carolina Utilities Commission, or any other regulatory body vested by law with authority and jurisdiction to authorize a change of rates and charges, for an increase in or authority to increase rates and charges, or for any revision or change which would have the effect of increasing the rates and prices to be paid to the COMPANY by consumers of natural gas in this CITY, unless and until said COMPANY shall have, at least 30 days prior to the filing of such request, petition, or application, filed with the City Manager of the CITY a written notice stating that it intends to make such application for a rate increase and stating in such written notice in a clear and definite way the amount of such increase of rate to be requested as applied to each class of consumer use, the reasons upon which such request for increased rates is to be made and the data supporting said reasons for such increased rates, the value of the plant and properties of the COMPANY located in or supplying service to the Durham area, set out in adequate detail to permit the CITY to reasonably spot check values, separate from the value of all plant and property of the COMPANY in its entire system, the gross income and expenditures of the COMPANY for each of the three immediately pre-

ceding years from the operations of its plant and business located in or supplying service to the Durham area, separated from the income and expenditures for the remainder of its system, and said COMPANY shall, in good faith, consult, confer and negotiate with the CITY in an effort to first determine to the mutual satisfaction of the CITY and the COMPANY whether a revision of such rates should actually be made and, if so, in what amount and to what extent; and, in addition, the CITY shall have the right and privilege, either by its own regular employees or by and through others employed and paid by the CITY for such purposes, to inspect and examine all records, books, papers, properties and interests of the COMPANY and make computations, analyses, audits, reports, schedules, charges for depreciation, valuations, and receive and compile any and all other information as may be in the possession or control of said COMPANY, and the COMPANY shall make all of said records and properties available to the CITY and its duly authorized representatives at all times upon request made by said CITY in writing through its City Manager or any other person authorized by the Governing Body, and shall cooperate with the CITY and its representatives in all reasonable ways in assisting the CITY and representatives to ascertain the true facts and conditions.

"(b) If, during the term of this franchise, the cost to the COMPANY for natural gas is increased or decreased above or below the cost as now or hereafter may from time to time be established by the Federal Power Commission, the COMPANY shall immediately notify the CITY of Durham in writing of such change."

In disregard of the provisions of section ten of the franchise, during December 1959 defendant filed with the North Carolina Utilities Commission an application for an increase in rates for the furnishing of natural gas to its consumers, without notifying plaintiff, or its city manager. Plaintiff did not learn of the filing of this application, until the newspapers stated the president of defendant had testified before the Utilities Commission in support of its application for increased rates. After receiving this information plaintiff on 18 December 1959 wrote and sent a letter to defendant stating it had not complied with section ten of the franchise, and requesting information what, if anything, defendant proposed to do to comply with the terms of this section.

By letter dated 28 December 1959 defendant wrote plaintiff that it was not its intention to disregard the provisions of the franchise in filing with the Utilities Commission its application for a rate increase.

Plaintiff learned from the newspapers that defendant on 31 May 1961, in Docket No. G-5, Sub 38, had filed another application with the Utilities Commission for an increase in rates, and for authority to put into effect certain rate schedules referred to in the application. Defendant, before filing a second application for a rate increase, did not file with its city manager any notice that it intended to make an application for a rate increase, setting forth in the notice the information required by section ten of the franchise, and this constitutes a breach of this section of the franchise.

By reason of defendant's breach of the provisions of section ten of the franchise, plaintiff is not in a position to determine whether, in its opinion, defendant's application for an increase in rates is, or is not, justified, and thereby to determine whether to oppose or not the application.

Unless restrained by the court, defendant will increase its rates and charges to its consumers in the city of Durham by posting a bond with the Utilities Commission, and thereby collecting such increased rates from its customers of natural gas in the city of Durham without a formal or final order by the Utilities Commission based on the merits, as a result of which the plaintiff and the gas consumers in the city will suffer irreparable injury and damages for which there is no adequate remedy at law.

Plaintiff has no adequate remedy at law, and its only effective remedy is for a court of equity to require specific performance of the terms and provisions of the franchise.

Wherefore, plaintiff prays:

One. That judgment be rendered requiring defendant to specifically perform, carry out, and abide by all of the obligations and things provided in the franchise to be done by it.

Two. That defendant be ordered to withdraw from the Utilities Commission its application for a rate increase denominated Docket No. G-5, Sub 38, in the records of the Utilities Commission, including all papers, petitions, motions, and proceedings of every kind in connection with the application.

Three. That defendant be permanently enjoined during the life of the franchise from filing with the Utilities Commission any application, petition or request for a rate increase, unless and until it complies with the requirements of section ten of the franchise.

Four. That the court enter an order requiring defendant to appear at a stated time, and show cause, if any it can, why the relief prayed for should not be granted.

On 26 June 1961 Judge Williams entered an order for defendant to appear at a stated time and "show cause, if any, why the temporary

restraining order or orders should not be made permanent." This language is inaccurate, for, so far as the record before us discloses, no temporary order had issued. Further, the record shows the complaint was verified the day Judge Williams issued his show cause order.

The show cause order came on to be heard before Judge Mintz, and was heard by him on the complaint treated as an affidavit, on the franchise, on the application and exhibits attached thereto filed by defendant with the Utilities Commission in Docket No. G-5, Sub 38, the orders, reply and undertaking filed with and entered by the Utilities Commission in Docket No. G-5, Sub 38, on two affidavits filed by plaintiff, and two affidavits by the persident of defendant filed by it. Judge Mintz entered what he terms an "order and judgment."

This is a summary of Judge Mintz's findings of fact, so far as relevant to this appeal:

Defendant is a public utility corporation authorized to operate a natural gas distribution system in Durham and other cities in the State of North Carolina, for which it has obtained certificates of convenience and necessity, and it does operate such a system. Defendant has a natural gas franchise from the city of Durham for a period of thirty years from November 1951. Section nineteen of the franchise provides, in part, that during the period of the franchise the books and records of defendant shall contain accurate records of defendant's property in Durham, the estimated and actual accrued depreciation thereof, and the revenues and expenses resulting from its operations in Durham, according to an accounting system which will show such information separate and apart from the other properties, revenues, and expenses of the entire system operated by defendant. Then follows a summary of the provisions of section ten of the franchise, which we do not set forth, because this section is set forth verbatim above. The provisions of sections ten and nineteen of the franchise are material and of value to the city of Durham for the purposes stated in those sections. During December 1959 defendant filed with the Utilities Commission an application for an increase in rates without notifying plaintiff, or its city manager, of its intention to file such application, and in breach of the franchise's provisions. On 31 May 1961 defendant filed another application with the State Utilities Commission for another increase in its rates without any notice to plaintiff, or its city manager, and without any effort by it to comply with the provisions of section ten of the franchise. This second application is denominated Docket No. G-5, Sub 38, in the records of the Commission. On 5 June 1961 the Commission entered an order suspending the use of the proposed rate schedule pending an investigation and hearing on 24 October 1961. On 19 June 1961 defendant filed with the Commission a

reply to its order, and an undertaking, requesting the Commission under the provisions of G.S. 62-71 to modify its previous order so as to permit defendant to put its proposed rate schedule into effect 1 July 1961. The Commission amended its order as requested, and defendant began billing its customers on its proposed rate schedule as of 1 July 1961, notwithstanding plaintiff's action was instituted 26 June 1961. Defendant does not keep books and records as required by sections ten and nineteen of its franchise, and plaintiff has not waived or modified the requirements of those sections.

Judge Mintz's findings of fact ten and eleven are set forth verbatim:

"10. In or about the first week of June, 1961, and immediately following notice referred to in paragraph 8, the Company delivered to the City a copy of its application to the North Carolina Utilities Commission filed May 31, 1961, and all data and documents filed therewith. During the pendency of this action, and during hearings in Durham on July 17, 1961, and Raleigh on July 27, 1961, and prior to or following 'observations' made by the Court the Company announced that it could and would furnish certain information, indicating a schedule it could maintain for the delivery of the same, the last item of which was promised on August 31, 1961, and thereafter the Company delivered to the City letters directed to the City Manager, Honorable George Aull, containing certain data. Attached to the letter of August 31, 1961, and delivered therewith to the City Manager was a report of the American Appraisal Company dated August 30, 1961, with reference to the properties of the Company in the City of Durham, all of which letters and data, including the said report, have been filed with the Court as part of the record in this proceeding. Thereby, as of the date of the entry of this Order, the Company has in the opinion of the Court, and the Court so finds, furnished to the City the information specified by Section 10 of the Franchise Ordinance, and the Court is of the opinion that negotiations between the parties under provision of Section 10 at this stage are impracticable, and would probably have the effect of pre-empting the province reserved for the Commission.

"11. As of the date of the entry of this order the Company has not complied with the provisions of Section 19 of the Franchise Ordinance with reference to the keeping of books and records to show the Company's property in Durham, the estimated and actual accrued depreciation thereof, and the revenues and expenses resulting from the operations in Durham under this franchise ordinance, separate and apart from the other properties,

revenues and expenses of the entire system operated by the Company, and the Court is of the opinion, and so finds, that the immediate installation and maintenance of such records at this time would be an imposition of the Company when compared to any valid use the City could make of such records."

We summarize the Judge's conclusions of law, so far as relevant to this appeal:

The court has jurisdiction to hear and determine the matters set forth in the complaint. The provisions of sections ten and nineteen of the franchise are valid and binding obligations upon the parties, and plaintiff has not by conduct or acquiescence waived their performance by defendant. Defendant has breached the said provisions by failing to keep its records as required by sections ten and nineteen of the franchise, and by failing to furnish information to plaintiff, or its city manager, before filing an application for increase of rates with the Utilities Commission, as required by section ten of the franchise. The breach by defendant of section ten of the franchise has caused plaintiff to suffer irreparable damage for which it has no adequate remedy at law. Plaintiff is entitled to have a suspension of the proposed rates on gas sold and delivered within the city of Durham for thirty days following a final and complete compliance by defendant with respect to the information required by section ten of the franchise, which information was furnished by defendant in substantial compliance with said section on 31 August 1961.

Based upon his findings of fact and conclusions of law Judge Mintz entered "an order and judgment" adjudging and decreeing as follows:

"1. That the defendant, Public Service Company of North Carolina, Inc., is hereby enjoined and restrained from the collection of any increased rates and charges as shown on schedule filed in Docket No. G-5, Sub 38, for natural gas furnished and to be furnished to consumers in the City of Durham during the period between August 1, 1961, and October 1, 1961.

"2. Except as provided in the next preceding paragraph, nothing in this order shall be construed to enjoin or restrain the defendant from proceeding with its application to the North Carolina Utilities Commission filed May 30, 1961, in the proceeding designated by that Commission as Docket No. G-5, Sub 38, or from complying with any order of the North Carolina Utilities Commission entered therein, including the order therein entered by the Commission on June 23, 1961, or from charging and collecting for its services any rate or rates approved, authorized or ordered by the North Carolina Utilities Commission; and nothing in this order

shall be construed to enjoin or restrain the defendant from charging and collecting from any person, firm or corporation for gas or any other service supplied to him or it by the defendant at any location outside the corporate limits of the City of Durham the rates and charges put in effect therefor by the defendant on July 1, 1961, pursuant to the order of the North Carolina Utilities Commission dated June 23, 1961, or pursuant to any other order of the said Commission heretofore or hereafter issued.

"3. The motion of the plaintiff that the defendant be ordered and required to withdraw its application filed with the North Carolina Utilities Commission on May 31, 1961, in the proceeding designated by the Commission Docket No. G-5, Sub 38, and all other papers, petitions, motions and proceedings of every kind in connection with the said matter is hereby denied.

"4. The motion of the plaintiff that the defendant be enjoined and restrained from putting into effect any increase in the rates charged by it immediately prior to the first day of July, 1961, is hereby denied with respect to the charging of such increase in rates to any person, firm or corporation for gas or other service to him or it at any location outside the corporate limits of the City of Durham.

"5. On bills rendered by it on and after October 1, 1961, the defendant is permitted to charge to persons, firms and corporations for gas or other service to them at locations within the City of Durham, the rates authorized by the order of the North Carolina Utilities Commission dated June 23, 1961, in its proceeding entitled Docket No. G-5, Sub 38, subject to any further order or orders lawfully issued by the North Carolina Utilities Commission in that or any subsequent proceeding.

"6. Except as hereinabove provided the relief prayed for by the plaintiff prior to the final hearing and determination of this action is denied.

"7. As a condition precedent to the taking effect of this order, the Clerk shall take from the plaintiff a written undertaking, with sufficient sureties to be justified before and approved by the Clerk, in the amount of $1,500 to the effect that the plaintiff will pay to the defendant such damages, not exceeding $1,500 as it sustains by reason of the issuance of this order if, upon the final hearing of this action, the Court decides that the plaintiff was not entitled to the issuance of this order.

"8. This cause is retained for trial after the filing of the defendant's answer to the complaint."

From this "order and judgment" defendant appeals to the Supreme Court.

Bryant, Lipton, Bryant & Battle and Lake, Boyce & Lake by I. Beverly Lake for defendant appellant.

Claude V. Jones for plaintiff appellee.

PARKER, J. Defendant has not, so far as this record discloses, filed an answer, and yet two-thirds of its brief is taken up with a discussion of what would seem from the briefs to be the ultimate issues when it files its answer, and the answers to which issues will dispose of the case. Defendant in its brief discusses these questions under two headings, which it entitles as follows: One. "The provision in section 10 of the franchise limiting the defendant's right to apply to the Utilities Commission for authority to increase its rates is beyond the authority of the city and is not an enforceable provision." Two. "Section 19 of the franchise ordinance is unreasonable and unenforceable." A large part of plaintiff's brief discusses the same questions.

Plaintiff states in its brief: "The attention of the Court is called to the fact that no Answer has yet been filed, and, therefore, the pleadings do not set up any contention that sections 10 and 19 are unreasonable or for other reasons unenforceable. In the event the defendant ever files an Answer and makes this contention, it is the purpose of the City to reply and plead Waiver and Estoppel."

The above questions do not properly arise on this appeal. All the pleadings have not been filed and the aforesaid questions discussed in the briefs, if they arise on the pleadings when finally filed, must await a final hearing on the merits. "While equity does not permit the judge who hears the application (for an interlocutory injunction) to decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused." *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. Judge Mintz apparently recognized this for the last part of his "order and judgment" is "this cause is retained for trial after the filing of the defendant's answer to the complaint." The sole question before us on this appeal is whether or not Judge Mintz erred in granting the temporary injunction enjoining defendant "from the collection of any increased rates and charges as shown on schedule filed in Docket No. G-5, Sub 38, for natural gas furnished and to be furnished to consumers in the City of Durham during the period between August 1, 1961, and October 1, 1961," because defendant is not enjoined from doing anything else. *Service Co. v. Shelby,* 252 N.C. 816, 115

S.E. 2d 12; *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619.

Acting pursuant to the authority vested in us to find the facts in respect to an interlocutory injunction, *Huskins v. Hospital, supra,* we find the following facts, which amplify and clarify Judge Mintz's findings of fact:

On 31 May 1961 defendant acting under the provisions of G.S. 62-71, and without giving any notice to plaintiff, or its city manager, filed with the Utilities Commission a schedule of increased rates applicable to the entire territory served by it to become effective on all bills rendered by it on and after 1 July 1961, thus giving to the Commission the thirty days' notice required by the statute. This proceeding is designated Docket No. G-5, Sub 38, in the records of the Commission. On 5 June 1961 the Commission, acting under the provisions of G.S. 62-71, issued an order suspending the putting into effect of increased rates by defendant on 1 July 1961 until 28 September 1961, unless authorized by the Commission, and ordering a hearing of defendant's schedule of increased rates on 24 October 1961.

A few days after the rendition of the Commission's suspension order, defendant, pursuant to Rule 15 (3) of the Rules of Practice and Procedure before the Commission, filed a reply to the suspension order stating that it has, pursuant to the provisions of G.S. 62-71, this day filed with the clerk of the Commission an undertaking under its corporate seal, and praying that the Commission modify its order of 5 June 1961, so as to eliminate therefrom the provision suspending the putting into effect of its increased rates on 1 July 1961. The material part of the undertaking is:

> "(1) If, as a result of the above mentioned hearing, the Commission enters its order lawfully finding any rate for any class of service described in any of the said proposed schedules of rates to be excessive, and lawfully fixing a lower rate to be charged for such service and directing Public Service to refund to its customers the excess of payments made by them pursuant to such schedule over the amounts which would have been paid by such customers had the rate so fixed by the Commission been applied, Public Service will make such refund to each such customer within such time and in such manner as the Commission shall prescribe by its order, together with interest thereon at six per cent per annum from the dates of the collections by Public Service of such excess amounts."

The Commission on 23 June 1961 entered an order as follows:

"Public Service Company of North Carolina, Inc. has filed with the North Carolina Utilities Commission its undertaking and assurances in compliance with G.S. 62-71 in order to put into effect the increased rates which it filed on May 31, 1961, to be effective on all bills rendered on and after July 1, 1961, which were suspended by the Commission on June 5, 1961.

"It is the opinion of the Commission that said undertaking to refund the excess, if any, of the increased rates over the rates finally approved to be put into effect by Public Service Company of North Carolina, Inc. to the persons who may become entitled thereto is a satisfactory arrangement for the protection of the parties involved and complies with the requirements of G.S. 62-71.

"IT IS THEREFORE ORDERED That said undertaking of Public Service Company of North Carolina, Inc. constitutes satisfactory arrangements for the protection of the parties' interest, and complies with G.S. 62-71 and said undertaking is hereby approved for the purpose of and in order that Public Service Company of North Carolina, Inc. may properly put into effect the aforesaid rates, pursuant to G.S. 62-71 to be effective as of the date specified in said undertaking of Public Service Company of North Carolina, Inc."

Pursuant to the provisions of G.S. 62-71, and the order of the Commission, defendant on 1 July 1961 put into effect its proposed increased rates throughout the entire area served by it.

G.S. 62-71 provides this remedy in respect to the undertaking under seal of defendant:

"* * * Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective, if not so suspended, by filing with the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission to the persons entitled thereto of the amount of the excess and interest at the rate of six per cent (6%) per annum from the date that such rates were put into effect, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the Commission for the protection of the parties interested. If the public utility fails to make refund within thirty (30) days after such final determination any person entitled to such refund may sue there-

for, in any court of this State of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within two years after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear."

It would seem unquestionable that Judge Mintz in enjoining defendant from collecting from its customers in the city of Durham any increased rates between 1 August 1961 and 1 October 1961 acted under the provisions of section ten of the franchise to the effect that defendant shall not apply to the Commission for increased rates unless and until the defendant, at least 30 days prior to the filing of such application, shall have filed with the city manager of plaintiff a written notice setting forth the matters and things required by the provisions of that section, and that defendant did not furnish plaintiff that information until 31 August 1961.

In *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455, the Court said: "However, it must be borne in mind that the proceedings on the show cause order, including the findings of fact, are significant only with respect to the immediate issue—whether the order should be continued to the hearing or dissolved; and the findings of fact are not binding on the court upon the final hearing."

Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy. *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Cotton Mills Co. v. Duplan Corp.,* 245 N.C. 496, 96 S.E. 2d 267; *Armstrong v. Armstrong,* 230 N.C. 201, 52 S.E. 2d 362; *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; *Whitford v. Bank,* 207 N.C. 229, 176 S.E. 740; 43 C.J.S., Injunctions, pp. 450-453.

Defendant, as authorized by the provisions of G.S. 62-71, and by order of the Commission, put into effect on 1 July 1961 increased rates for its customers in the city of Durham and throughout the entire area served by it. Judge Mintz, under such circumstances, should not have enjoined defendant from collecting such increased rates as shown on schedule filed with the Commission in Docket No. G-5, Sub 38, for natural gas furnished and to be furnished to consumers in the city of Durham during the period between 1 August 1961 and 1 October 1961, for the reason that if it should finally be determined by the Commission that such increased rates put into effect by defendant on 1 July 1961 were excessive, then the obligations of the undertaking or bond filed by

defendant with the Commission, and the provisions of G.S. 62-71, giving plaintiff and any customers of defendant in the city of Durham an adequate and complete remedy at law to recover from defendant such excess amount or amounts paid by it or them with interest at the rate of 6% per annum from the date that such excess rates were put into effect and paid by it or them, furnish it and them full, adequate and complete relief, which is as practical and efficient as is the equitable remedy of an injunction. Plaintiff could hardly regard such payments with an adequate and complete legal remedy to recover back any excess amount paid as an irreparable injury. *Loose-Wiles Biscuit Co. v. Sanford,* 200 N.C. 467, 157 S.E. 432. Judge Mintz's order enjoining defendant "from the collection of any increased rates and charges as shown on schedule filed in Docket No. G-5, Sub 38, for natural gas furnished and to be furnished to consumers in the city of Durham during the period between August 1, 1961, and October 1, 1961," was improvidently entered, is error, and is reversed.

Further, Judge Mintz's "order and judgment" enjoining defendant from collecting the increased rates from its customers in the city of Durham between 1 August 1961 and 1 October 1961 was signed 29 September 1961. Though the record does not show whether defendant had collected any increased rates put into effect 1 July 1961 from its customers in the city of Durham during the period between 1 August 1961 and 1 October 1961, it would seem reasonable to assume that it had. If so, Judge Mintz enjoined a *fait accompli,* so far as any collections had been made. A preventive injunction cannot be used to undo what has been done. *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143.

For reasons stated above, Judge Mintz was in error in making the following conclusions of law: The breach by defendant of section ten of the franchise has caused plaintiff to suffer irreparable damage for which it has no adequate remedy at law. Plaintiff is entitled to have a suspension of the proposed rates on gas sold and delivered within the city of Durham for thirty days following a final and complete compliance by defendant with respect to the information required by section ten of the franchise.

As we have said above, defendant, as appears from its argument in over two-thirds of its brief, is seeking here to have the provisions of sections ten and nineteen of the franchise adjudged unreasonable and unenforceable, though, so far as this record shows it has filed no answer raising such issues or questions of law. It seems certain from its brief that it will raise such ultimate issues or questions of law, when and if it answers. Plaintiff's counsel in oral argument before us said he brought this action to see if the provisions of these sections were valid.

"The granting or denying of a temporary injunction does not involve a determination of the merits, and the decision should not be made in reference to matters which will come up for consideration at such hearing." 28 Am. Jur., Injunctions, sec. 278, p. 790. To the same effect 43 C.J.S., Injunctions, sec. 2.

Judge Mintz went too far in the hearing on a show cause order as to whether or not an interlocutory order should be granted in making conclusions of law to the effect that the provisions of sections ten and nineteen of the franchise are valid and binding obligations upon the parties, and that plaintiff has not by conduct or acquiescence waived their performance by defendant, thereby deciding what would certainly seem to be the ultimate issues or questions of law upon the merits. These conclusions of law will be vacated. *Huskins v. Hospital, supra.*

It is to be understood that nothing herein said shall be construed as the expression of an opinion as to whether or not the provisions of sections ten and nineteen of the franchise are valid and enforceable. These are matters for the Superior Court on the final hearing when all the pleadings have been filed, if such pleadings raise such issues or questions of law.

Our task in writing this opinion has been made laborious by the fact that the assignments of error do not comply with our rules of practice. This is typical of all the assignments of error, except the one to the judgment:

> "DEFENDANT'S ASSIGNMENT OF ERROR #5:
> "The defendant excepts to Conclusion of Law #2 contained in the judgment and to the Court's including the said conclusion of law in its judgment and basing its judgment thereon. This is Defendant's EXCEPTION #5 (R. pp. 30 and 33.)"

These assignments of error have compelled us to go beyond them on a voyage through the record to find out what they refer to. This we well might have refused to do. *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294.

Judge Mintz's "order and judgment" enjoins defendant only in respect to what we have discussed above. With the exception of the errors above set forth, the "order and judgment" will not be disturbed.

Error in part.

Affirmed in part.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. CAROLINAS COMMITTEE FOR INDUSTRIAL POWER RATES AND AREA DEVELOPMENT, INC.; HARRIET COTTON MILLS; HENDERSON COTTON MILLS; ALEO MANUFACTURING COMPANY; BLADENBORO COTTON MILLS; BURLINGTON INDUSTRIES, INC.; CAROLINA BAGGING CO., A DIVISION OF TEXTRON, INC.; CLAYTON SPINNING COMPANY; HADLEY PEOPLES MANUFACTURING COMPANY; HOLT-WILLIAMSON MFG. CO.; JORDAN SPINNING COMPANY; LEDBETTER MANUFACTURING COMPANY; LIBERTY HOSIERY MILLS, INC.; LITTLE COTTON MANUFACTURING COMPANY; PECK MANUFACTURING COMPANY; COLLINS AND AIKMAN CORPORATION; FRED WHITAKER COMPANY; PILOT MILLS COMPANY; RAMSEUR INTER-LOCK KNITTING COMPANY; ROCKFISH MEBANE YARN MILLS; ROSEBORO SPINNING MILLS PLANT; ROXBORO COTTON MILLS; ROYAL COTTON MILLS COMPANY; RUSSELL HOSIERY MILLS; SILER CITY MANUFACTURING COMPANY, INC.; SPOFFORD MILLS, INC.; STERLING COTTON MILLS, INC.; STEVENS & COMPANY; TOLAR, HART AND HOLT MILLS; WADE MANUFACTURING COMPANY.

(Filed 10 July 1962.)

1. Utilities Commission § 1—

The Utilities Commission may regulate its own procedure and prescribe and adopt reasonable rules with respect thereto provided it does not infringe upon statutory provisions governing its actions. G.S. 62-12, G.S. 62-26.

2. Same; Utilities Commission § 6—

The Utilities Commission must determine whether a hearing brought before it is a general rate case or a complaint proceeding, and its determination thereof will not be disturbed in the absence of a clear showing of prejudice to the complaining party.

3. Same— Determination by Commission that hearing was a complaint proceeding held not prejudicial to respondents.

Change in the rate schedules of a power company, increasing the charge for maintaining facilities to provide for the maximum demand for energy used by a customer and decreasing the charge per KWH of energy furnished, had been approved and put into effect on nearly all of the company's schedules, but action on the fuel clause provision was deferred until all other rate revisals should be approved or disapproved. This proceeding was instituted to obtain approval of such revised rate schedule for a particular class of customers. The allegations of the petition were to the effect that the new schedule did not appreciably affect petitioner's rate of return, and did not alter the relationship between respondents and other classes of customers. The allegations in respondent's answer attacked the general rate structure of petitioner on the ground that the revised rates, as well as the prior rates, resulted in an excessive rate of return, and requested in effect, a reduction rates by striking out the fuel clause rider from the schedules theretofore in effect. *Held:* The burden was on petitioner to make out its case in accordance with its allegations, and the act of the Commission in treating the proceeding as a

complaint proceeding rather than a general rate case was not prejudicial to respondents and will not be disturbed, since the order of the Commission would not be *res judicata* in regard to the fuel clause provision, and the question of a general rate hearing may be raised later upon proper procedure by either the Commission or the respondents, and could be determined more properly in such proceeding in which all classes of customers would be given opportunity to be heard.

4. Same; Electricity § 3—

Evidence tending to show that the cost of facilities necessary to provide energy to meet the maximum demand of customers has increased, while the cost of producing a KWH of energy has decreased, *held* to support the order of the Utilities Commission approving a rate schedule which, while not increasing the total revenue to the utility, would increase the percentage of revenue from the demand component while decreasing the revenue per KWH of energy furnished.

5. Same—

A rate schedule must be fair, just and reasonable to the utility as well as to the consumer.

6. Utilities Commission § 9—

The courts have no authority to regulate utilities but may consider only questions of law presented on appeal from orders of the Utilities Commission.

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

APPEAL by protestants from *Fountain, S.J.*, September 18, 1961, Civil Term of WAKE.

Application to the North Carolina Utilities Commission (Commission) by Carolina Power & Light Company (Carolina) for approval of revised rate schedule applicable to electric service to textile mills. Carolinas Committee for Industrial Power Rates and Area Development, Inc., and twenty-nine textile mill companies (protestants) were permitted to intervene and filed protest.

After hearing, the Commission approved the revised schedule. The order of the Commission approving the schedule was affirmed on appeal to Superior Court.

Protestants appeal to Supreme Court.

Broughton and Broughton, and Lake, Boyce and Lake for appellants.
Joyner and Howison and Shearon Harris for appellee.

MOORE, J. Protestants contend that the judgment below should be reversed and the cause remanded to the Commission for further proceedings. They maintain that the Commission erred as a matter of law in that it (1) restricted the cause to a "complaint proceeding"

when the facts alleged by protestants made a "general rate case" mandatory, (2) refused to admit evidence offered by protestants tending to show an excessive rate of return to Carolina, and (3) made findings of fact not supported by competent, material and substantial evidence.

A summary of proceedings before the Commission is necessary to an understanding and determination of the legal questions involved.

Beginning in 1959 Carolina instituted proceedings before the Commission to revise all of its rate schedules for each class of its customers. The revised schedules were not designed to increase or decrease the amount of revenue which the old rate would exact from each class of customers, nor to increase or decrease the total amount of revenue which the old schedules would produce, nor to disturb the ratio of revenues as between the several classes of customers. The announced purpose of the schedule revisals was "modernization" of the rate schedules, and application of a "fuel adjustment clause" to all classes of customers alike.

According to Carolina, the proposed "modernization" was to bring "established rates and practices in line with present day economic and service conditions." Electric rates are generally based on the cost of rendering service. Many rate schedules consist of two parts, a *demand* charge and an *energy* charge. The energy charge is for the actual number of kilowatt-hours (KWH) of electricity used. The demand charge is for kilo-watt (KW) capacity the power company must maintain to meet the demand or requirement of the customer, though not used. "The revenue effect with respect to the demand charge is largely determined by the load factor, that is, the extent of the use of the services. A customer with a high-load factor pays less in proportion to use than the customer with a low-load factor." The power company must construct, equip and maintain plant and facilities sufficient to produce and provide current to meet the demands of its customers at all times. The *demand* component of the rate schedule is devised to provide for the expenses incident to furnishing facilities and plant to meet customer demand. The *energy* component is designed to meet fuel costs for generating current and day to day operating expenses. Carolina pointed out that the costs for constructing, equipping and maintaining plant and facilities per KW of electric capacity has increased measurably since the old rates were established, and that, because of increased plant efficiency and good management, the cost per KWH for generating current has decreased. Therefore, it was the position of Carolina that the rate schedules should be "modernized" to realistically reflect the increase in *demand* cost and decrease in *energy* cost, by shifting a part of the rate from the energy component to the demand component.

Historically the unit cost of coal has fluctuated. Coal is used to generate most of the electricity produced by Carolina. A "fuel adjustment clause" in a rate schedule provides that for changes in the price of coal per ton a certain increment will be added to, or, in case of reduction in price, subtracted from, the rate per KWH of electric power. The nature and effect of a fuel adjustment clause (Rider 4 applicable to textile mill Rate Schedule P-28) are described in *Utilities Commission v. Light Co.*, 250 N.C. 421, 424, 109 S.E. 2d 253. In the past, fuel adjustment clauses have been applied to some of the rate schedules of Carolina. Carolina asserted that logically such clause should be uniformly applied to all schedules for all classes of customers, and filed a proposed clause to that end.

Prior to 24 May 1960 the Commission had approved the revised rate schedules for all classes of customers of Carolina except textile mills (and a few others not concerned on this appeal). However, the proposed uniform fuel adjustment clause had not been approved — the Commission deferred action on the fuel clause until all other rate revisals had been approved or disapproved.

On 24 May 1960 Carolina filed a revised rate schedule (TM-1) applicable to textile mill service. This schedule provides for a shift of 12% of the total charge from the energy component of the rate to the demand component, and is designed to produce the same revenue as the old schedule or schedules it is to replace.

Carolina filed a petition, and later an amendment thereto, asking for approval of Schedule TM-1 and alleging in substance as follows: Schedule TM-1 has been designed to recover substantially the same revenue as the schedule it replaces; is not designed to produce any effect upon the earnings or rate of return of petitioner and has no discernible effect thereon; and is not designed to, and does not, alter the relationship of textile mill customers as a class to other classes of customers in petitioner's total rate structure. It shifts a portion of the charges previously collected through the energy component to the demand component, and this shifting is just and reasonable, and there has been a similar shifting in other two-part revised rates. Upon approval of TM-1, other schedules and riders applicable to textile mill service, including schedule P-28 and Rider 4, are to be deleted and cancelled. The purpose of TM-1 is to make the rate more modern and equitable, to make it uniform and consistent with other revised rates, and to make the service subject to the same uniform fuel adjustment clause contained in all filed schedules.

On motion, protestants were allowed to intervene. They filed protest which, as amended, alleges in summary: TM-1, and particularly the increase in the demand component of the rate, is unjust, unreasonable,

excessive and prejudicial to protestants. During the 12-months period ending March 1960, under TM-1 "the total revenue paid . . . by all of the textile mills . . . would have been approximately the same as the total revenue paid by them . . . under the combination of Rate Schedule P-28 and . . . Rider 4." But TM-1 is no more equitable than the former rates and, as to protestants, constitutes an increase in rates and, as to Carolina, an increase in return. Former Schedule P-28, without Rider 4 (the fuel adjustment clause), is fair, just and reasonable. Rider 4 is unfair, unjust and unreasonable. The textile mill business is variable and experiences periods of curtailed operations. The Schedule would discriminate against textile mills in favor of other classes of customers, and cause the textile mills to furnish a disproportionate share of Carolina revenue. TM-1 is part of a unified over-all rate revisal which will produce more gross revenue than is necessary for the needs of petitioner to pay all proper charges and expenses, and to earn a fair and reasonable return upon its properties used and useful in rendering electric service.

Carolina filed a written motion to strike from the protest all allegations respecting gross revenues, entire rate structure and rate of return on the properties of petitioner, on the ground that these allegations are unrelated to the subject matter of the petition. And Carolina requested a pre-hearing conference to determine the scope of the hearing to be conducted, and the issues to be considered.

On their part protestants moved: (1) that the Commission order its director of accounting to make an examination of the operations of Carolina and determine its rate of return by reference to a twelve-months test period, and make the results available for the hearing; and (2) that the Commission require Carolina to make a cost of service study as to all classes of customers, and to supply the Commission and protestants with copies of the study prior to the hearing.

The Commission had previously ordered a hearing as to the lawfulness and reasonableness of Schedule TM-1, except for the fuel adjustment provision thereof. As to the fuel clause, hearing was deferred pending investigation; the fuel clause of the schedule was ordered to be heard in relation to all revised schedules for all classes of customers.

In the pre-hearing conference called to consider the motions filed by the parties, Carolina's motion to strike was denied. The Commission's order commented that the protest alleges "matters somewhat foreign to the matters at issue," but "they do not seem to offer any serious threat to the determination of the real matter in interest, and matters pertaining thereto may well be controlled by allowance or disallowance of testimony relating thereto if same is offered at the hearing." The Commission also ruled: "The matter before the Commission

is the one rate schedule, TM-1. Use and application of this schedule requires neither a cost of service study nor a determination of the rate of return of the power company at this time."

At the hearing on the merits, the Commission limited proceedings to a determination of three issues: (1) whether the proposed schedule would produce substantially the same revenue as old Schedule P-28, plus Rider 4; (2) whether there is "any discrimination or disparity with respect to the demand charge and the energy charge components of TM-1 as compared with or as it relates to the class of service to which it applies, or as between those in this class of service and other schedules of the (Power) Company"; and (3) whether the 12% shift from the energy component to the demand component by TM-1 is just and reasonable.

Robert S. Quig, a rate consultant and an expert in regulatory procedure, testified for Carolina in substance as follows: Schedule P-28 came into effect in 1945. For the 12-months period ending in March 1960 (test period), the demand component of P-28 produced (in round numbers) $1,600,000 of the revenue paid by textile mills, or 27%, and the energy component produced $4,300,000, or 73%. TM-1 shifts 12% of the total textile mill revenue from the energy to the demand component, and for the test period its demand component would have produced $2,300,000 revenue, or 39%, and its energy component $3,600,000, or 61%. From 1945 to 1959 the original cost of plant per KW increased 32%. Largely because of inflation, cost of plant increased more rapidly than KW capacity and use. The trend is still upward. Because of more efficient equipment and good management, the cost of coal per KWH has, since 1945, decreased 35%. Technological improvement in generating machinery has caused better production of power per unit of coal. Coal is by far the greatest item of expense in energy cost. 72% of the current sold by Carolina is generated from coal, and the percentage is increasing. Power rates should reflect the changes in costs — rate making should follow the incidence of costs. Carolina's rate revisals are not drastic. TM-1 is consistent with increased costs related to demand, is a sound rate provision, is consistent with events, and is a more equitable distribution of averages in the same class having varying load factors. The more power the mill uses, the more both it and Carolina saves. The other schedule revisals were on the same basis; rates were balanced so as to make them consistent with each other, and all are designed to, and will, produce the same revenue for each class as the former schedules. The proper relation between demand and energy charges is a matter of judgment. TM-1 during the test period would have produced $6000 less revenue from textile mills than P-28 plus Rider 4. Thirty-three customers

would have individually experienced slight increases, sixty-six slight decreases. Within the class, increases and decreases are within a 3% range up and down. The slight variation is due to load factor. A load factor above 65% results in a decrease, but an increase below that breaking point. The breaking point of P-28 was at about 58% load factor. During the 5-year period, 1955 to 1959, the textile mills, as a class, would have had a savings each year under TM-1. It is a fairer schedule than P-28 plus Rider 4. When in operation textile mills generally operate a high load factor — three shifts, five days a week. Textile customers are treated very favorably and are underpriced. Textile mills consume 15% of Carolina's KWH production, pay only 9% of its revenue, and have a rate of 8 mills. This is the lowest rate of any class of customers, except REA and four municipalities having their own generating plants and buying only supplementary current. The price of coal fluctuates, and a uniform fuel adjustment clause should apply to all schedules of Carolina's rate structure. In a sense Rider 4 is frozen into TM-1. The proposed fuel clause has relatively small revenue effect. It would have accounted for only $3000 of the $5,900,000 of textile mill revenue during the test period; and only $15,000 of the total revenue of $63,000,000. It produces much less than Rider 4. Carolina's revised rate schedules will produce the same revenue within each class, and the same over-all revenue, as the former schedules.

David A. Kosh, public utilities consultant and expert in public utilities financing, testified for protestants in substance as follows: Carolina's rate revisals are not justifiable. Costs are the basic guides for rates. Equitable rating requires comprehensive cost analysis. Costs should be added to the class of customers giving rise thereto. Joint costs should be allocated to all classes. The proposed rate protects Carolina from future decline in use of electricity. Increases in load factor in textile mills are not as greatly to be anticipated as decreases. The effect of TM-1 depends on load factor. A consumer should pay for his demand, and demand costs do not necessarily fall in proportion to falling load factors. TM-1 is a built-in rate increase for the future.

The Commission excluded from consideration evidence tendered by protestants tending to show: From an analysis of the annual reports of Carolina to its stockholders and to the Commission, covering several of the years from 1949 to 1959, petitioner has had an excessive rate of return, an increase in gross revenues, a decrease in revenue per KWH, an increase in earnings per share of common stock, and increases in maintenance costs, depreciation, taxes, salaries and wages, plant investment, capital, interest, net income, dividends and surplus.

After reviewing proceedings, pleadings, evidence and contentions, the Commission found facts as follows:

"1. Schedule TM-1, . . . replaces . . . Schedule P-28 and Rider No. 4, retains the same over-all revenue for Carolina, and the same over-all cost to the customers under the schedule, but transfers 12 per cent of the energy component to the demand component, producing a more equitable, reasonable and proper spread between demand cost and energy cost.

"2. Cost of plant, construction, equipment and facilities necessary to meet the customer demand has increased tremendously during the periods the replaced schedules have been in use, while during the same periods technological improvements in plant and the decrease in cost of fuel have reduced the energy cost, resulting in imbalance between the energy and the demand components.

"3. Carolina has recently revised its many other schedules on the same basis as Schedule TM-1, . . . to produce a more equitable, reasonable, just and proper spread between demand and energy components.

"4. The same relationship is maintained between customers receiving service under Schedule TM-1, . . . as existed between customers under replaced schedules, and the same relationship is maintained between customers receiving service under Schedule TM-1 and other customers receiving service under other schedules of Carolina as existed under replaced schedules.

"5. Schedule TM-1, Textile Mill Service, constitutes an equitable, just, reasonable and proper revision of the schedules it replaces and more adequately, equitably, justly and properly distributes the cost as between demand charge and energy charge than was the case in the replaced schedules."

The Commission approved Schedule TM-1 and ordered that it become effective as of August 1, 1960. Former schedules, including P-28 and Rider 4, were cancelled.

Protestants contend that the pleadings and the general nature of the proceedings constitute a "general rate case" as a matter of law, requiring the procedure outlined in G.S. 62-124, and that the Commission erred in limiting its hearing to a "complaint proceeding."

We said in *Utilities Commission v. Light Co., supra:*

"In fixing the rate schedules and rate classifications, or in revising said rates and classifications, or a substantial part thereof, the procedure indicated by G.S. 62-124 must be observed. Where the whole or a substantial portion of the rate structure of a public utility is being initially established or is under review, and where the required procedure under G.S. 62-124 is being carried out, the hearing before

the Commission to establish or revise the rates is referred to as a 'general rate case'. . . ."

"Where a public utility has many rate schedules applying to many different classes of service customers and only one rate or a few rates are involved in a petition for amendment, modification or rescission, ordinarily it is not required that the utility's property be valued and that the provisions of G.S. 62-124 be observed in such case. . . ."

"A hearing . . . which involves a single rate or a small part of the rate structure . . . is called a 'complaint proceeding.' It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure . . . and may be resolved without involving the procedure outlined in G.S. 62-124, and does not justify the expense and loss of time involved in such procedure."

The petition in this case was drawn pursuant to G.S. 62-71 and involves only a small portion of Carolina's rate structure. It seeks approval of Schedule TM-1 which allegedly is not designed to increase the revenue to be recovered from the textile mill class to which it applies, nor to affect total revenue, nor to disturb the ratio of revenue between classes of users, but proposes an adjustment between the components of the rate more in keeping with changes in costs. The petitioner has the burden of proving these allegations. G.S. 62-26. The proof of these matters does not require determination of rate base or a detailed cost of service showing. No change in rate of return is proposed. The determination of the questions posed by the petition may be had in a complaint proceeding and within the scope of the hearing fixed by the Commission.

The protest is for the most part a general denial of the allegations of the petition. It also purports to allege new matter which might be termed a counterclaim. It alleges that former Schedule P-28, without Rider 4, is just and reasonable, but that Rider 4 (fuel adjustment clause) is unjust, unreasonable and excessive. It also alleges that TM-1 would result in an excessive rate of return. The challenge to Rider 4, a part of an old schedule, is new matter and not germane to the allegations of the petition. The allegation that TM-1 would give Carolina an excessive rate of return seems to be based on the idea (as the tendered evidence tends to show) that Carolina already has an excessive rate of return. It is clear that protestants are, by way of counterclaim, asking for a rate reduction by striking out Rider 4 and leaving schedule components unchanged, and procedure under G.S. 62-124 to show justification for this result.

The Commission had prior to the hearing herein "directed an examination of the books and records of the company (Carolina) looking

to a determination of rate of return." The examination was incomplete at the time of this hearing. The Commission had also deferred consideration of the proposed uniform fuel adjustment clause. It seems that the Commission thought it should first consider TM-1 on the basis alleged in the petition, and determine the reasonableness of the adjustment between its components and whether it was consistent with revisals made in the schedule of other classes of customers, and later, when the examination of Carolina's books was completed, have a general rate hearing in relation to all schedules and the fuel clause, if the examination justifies such procedure. In any event, the Commission determined that only a complaint hearing should be held.

Ordinarily, the procedure before the Commisison is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling. In the absence of statutory inhibition, the Commission may regulate its own procedure within broad limits, and may prescribe and adopt reasonable rules and regulations with respect thereto, provided such rules are consistent with the statutes governing its actions. G.S. 62-12; G.S. 62-26; 73 C.J.S., Public Utilities, s. 49, pp. 1115-6. Great liberality is indulged in pleadings in proceedings before the Commission, and the technical and strict rules of pleading applicable in ordinary court proceedings do not apply. The Commission may adopt its own rules governing pleadings, and has the power to waive or suspend the rules. It may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. 73 C.J.S., s. 52, p. 1119. Such liberality and informality is essential to the workings of the Commission. In a real sense regulation of public utilities is a continuing and continuous process as to each utility, in order that regulation may be consistent with changing conditions. To bind the Commission strictly by matters pleaded might well hamper its work to the point of ineffectiveness. If by pleading excessive rate of return parties could bring into play G.S. 62-124 and have a complete review of rate structure on every occasion that a matter relating to rate arises, the reasonable regulation of rates would be impossible. "It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. Indeed it is necessary as a matter of procedure that such determination be made in every hearing involving the establishment, modification or revocation of rates. The findings of the Commission on this point will not be disturbed in any case in the absence of a clear showing that the right of the parties have been prejudiced." *Utilities Commission v. Light Co., supra.*

In our opinion protestants were not prejudiced by the Commission's ruling as to the scope of the hearing. The matters alleged in the protest

but excluded from the hearing are not *res judicata.* Only specific questions actually heard and finally determined by the Commission in its judicial character are *res judicata,* and then only as to the parties to the hearing. Protestants, if they have grounds therefor and are so advised, may upon complaint and petition assert their right to a general rate inquiry at any time. This fact notwithstanding, it is suggested that protestants are prejudiced because such a complaint and proceeding would cast upon them the burden of proof. The suggestion is invalid. Had the Commission allowed a general rate hearing in this case, the burden as to rate of return would have been upon protestants. Carolina did not propose a change in amount of revenue or rate of return. The challenge to the rate of return arose from protestants' counterclaim. The protestants were therefore complainants, and the burden was upon them. G.S. 62-26. As already indicated, the Commission is considering such inquiry on its own motion. If this materializes, the burden will be cast on Carolina. G.S. 62-26. The deferment of consideration of the fuel clause does not prejudice protestants. Not only protestants but all classes of customers may be heard with respect thereto when it is considered, and it would seem that its effect may be better explored and more clearly shown when it is considered in relation to the total rate structure. It is true that the Commission did not strike the counterclaim in express terms at the pre-hearing conference, but the declaration of the scope of the hearing amounted to a deletion thereof. The protest was so phrased that allegations amounting to a general denial of facts stated in the petition were commingled with the allegations of the counterclaim. The Commission's ruling on the motion to strike and its comments thereon were realistically appropriate. TM-1 is a part of a general scheme of rate revisal. Yet, nearly all of the schedules had been considered and put into effect prior to this hearing.

We find no error in the Commission's ruling as to the scope of the hearing. It follows that there was no error in excluding protestants' tendered evidence as to the general financial affairs of Carolina and its rate of return. Furthermore, it will be observed that none of this evidence is related to the effect of TM-1 but deals with conditions and revenues arising under the former rates. The conclusions reached only affect TM-1 inferentially. Protestants admitted that TM-1 would have produced in the test period approximately the same revenues that P-28 and Rider 4 produced. The contention seems to be that since the old rate resulted in excessive rate of return, according to protestants' witnesses, TM-1 would likewise. Protestants contend that *Utilities Commission v. Light Co., supra,* is authority for the admissibility of such evidence even in a complaint proceeding. We do not so construe it.

The pertinancy and admissibility of such evidence was not under consideration in the *Light Co.* case. The holdings in that case should be considered within the framework of the facts there peculiarly presented. That case merely holds that the sufficiency of a rate is not a one-way street, and where the Commission allows a rate increase in a complaint proceeding to create a sufficiency of income upon consideration of general financial condition, it may reduce the rate in a subsequent complaint proceeding upon the same consideration. It creates no rule of evidence.

The Commission's findings of fact are supported by competent, material and substantial evidence, and they support the order entered. All of the evidence tends to show that TM-1 will exact substantially the same revenue from textile mill customers as did the former schedules, that it will not increase Carolina's total revenues and will not disturb the revenue ratios between classes of consumers. While a proper apportionment of the rate between its demand and energy components is a matter of judgment, there is ample evidence that TM-1 is just, reasonable and proper, is consistent with the incidence of costs, and is more equitable than the former schedule. P-28 was put into effect in 1945. There is no suggestion that its demand and energy components were not in proper adjustment at that time — the presumption is that the components were proper, reasonable and just. On this premise, the evidence shows sufficient increase in demand costs and decrease in energy costs to fully justify the shift embodied in TM-1. Protestants' witness Kosh testified that TM-1 is a built-in rate increase for the future. He predicates this remark on the assumption that the load factor of the textile mills as a whole will substantially decline. While the assumption is mere conjecture, it has been demonstrated that the lower load factor increases the cost of current per KWH within very narrow limits. Mr. Kosh also stated that demand costs do not necessarily fall in proportion to falling load factors. A rate must not only be fair, just and reasonable to the consumer, but fair, just and reasonable to the utility. It is upon this matter that the Commission must make judgment. The Supreme Court has no authority to regulate utilities, it can only consider questions of law. We find in this record no error of law sufficient to disturb the judgment below.

The judgment of the superior court is

Affirmed.

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

RUFUS L. DUDLEY v. W. LONNIE STATON AND WIFE, BETTIE RUTH STATON.

(Filed 10 July 1962.)

Husband and Wife § 4; Wills § 60—

G.S. 30-1, G.S. 30-2, and G.S. 30-3, insofar as they give a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate are unconstitutional to the extent that they diminish *pro tonto* a devise of her separate estate in accordance with a will executed by her. Constitution of North Carolina, Art. X, § 6.

APPEAL by respondents from *Parker (J. W.), J.*, 26 March 1962 Term of PITT.

Special proceeding for the actual partition of four tracts of land in Pitt County.

The petition, the admissions in the answer, and a stipulation of the parties show these facts:

The petitioner, Rufus L. Dudley, and Eva Staton Harris were lawfully married on 7 January 1947. From then until her death on 14 February 1961 they continuously lived together as man and wife. They had no children by their marriage. This was petitioner's second marriage, and Eva Staton Harris's third marriage. Eva Staton Harris bore only one child, W. Lonnie Staton, a respondent here, by a former marriage. The *feme* respondent is his wife.

Eva Staton Harris Dudley at the time of her death owned in fee simple and was in possession of the four tracts of land described in the petition. By her last will and testament executed on 28 January 1961 she devised and bequeathed all her property, both real and personal, to her son, W. Lonnie Staton, and made no provision in her will for her husband, petitioner. Following her death her will was duly probated on 1 May 1961, and appears of record in Will Book 11, page 284, in the office of the clerk of the superior court of Pitt County.

On 1 May 1961, and within the time prescribed by G.S. 30-2, petitioner filed a dissent from the will of his deceased wife. Thereafter, on 1 February 1962 he commenced this special proceeding for actual partition, alleging that by virtue of his dissent he is the owner of a one-fourth undivided interest in the four tracts of land owned by his deceased wife, and that her son, W. Lonnie Staton, is the owner of a three-fourths undivided interest in the said tracts of land.

Respondents in their answer allege that the provisions of G.S. Chapter 30, Article I, as it was written and in force at the time of Eva Staton Harris Dudley's death on 14 February 1961, insofar as it permits a husband to dissent from his deceased wife's will and take a share of her real and personal property is in conflict with the provisions

of Article X, section 6, of our State Constitution, and therefore petitioner owns no interest in the four tracts of land described in the petition, and the respondent, W. Lonnie Staton, owns the said tracts of land in fee simple.

When the special proceeding came on to be heard before the clerk of the superior court of Pitt County, he adjudged that petitioner and respondent, W. Lonnie Staton, are tenants in common of the four tracts of land described in the petition, petitioner owning a one-fourth undivided interest, and respondent, W. Lonnie Staton, owning a three-fourths undivided interest. Whereupon, he ordered an actual partition of the four tracts of land. Respondents appealed.

When the appeal came on to be heard by the judge, the parties stipulated: "The sole question for determination by the court is the constitutionality of Article I, Chapter 30 of the General Statutes of North Carolina, pertaining to and giving the surviving spouse the right of dissent from the will of his or her deceased spouse." The judge held that the right of dissent given by G.S., Article I, Chapter 30, is in all respects constitutional, and affirmed the clerk's order. Whereupon, he remanded the special proceeding to the clerk to the end that actual partition be had according to law.

From the judgment entered by the judge, respondents appeal.

Blount & Taft by Fred T. Mattox for respondent appellants.
Lewis G. Cooper and Louis W. Gaylord, Jr., for petitioner appellee.

PARKER, J. The Constitution of North Carolina adopted 24 April 1868 contains the following words:

> "ARTICLE X, SECTION 6. PROPERTY OF MARRIED WOMEN SECURED TO THEM.—The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

A one sentence amendment to this section adopted by a vote of the people of the State at a general election held 8 September 1956, giving a married woman the right to exercise powers of attorney conferred upon her by her husband, including power to execute and acknowledge deeds to property, is not relevant to this appeal.

The power conferred by Article X, section 6, of the 1868 Constitution upon married women in this State to devise and bequeath their real and personal property as if they were unmarried is confirmed by statute, G.S. 52-1, in the same words as set forth in the constitutional section. This constitutional power conferred upon married women is further confirmed by statute. G.S. 52-8 provides that "every married woman 21 years of age or over has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills." This statute, except for the words "21 years of age or over," was enacted by the General Assembly at its 1871-72 session, and appears in Public Laws of North Carolina, session 1871-72 in Chapter 193, section 31.

The General Assembly at its 1959 session enacted a statute, which appears in the 1959 Session Laws of North Carolina in Chapter 880 (codified in the 1959 Cumulative Supplement to Recompiled Vol. 2A of G.S. as sections 30-1, 30-2, and 30-3), and is entitled "AN ACT TO REWRITE THE STATUTES ON DISSENT FROM WILLS." Section 30-1 (a) of this statute, and as it is codified, provides: "Except as provided in subsection (b) of this section, any surviving spouse may dissent from his or her deceased spouse's will." Section 30-2 of the statute, and as it is codified, provides as to the time and manner of dissent. Section 30-3 of the statute, and as it is codified, provides as to the effect of a dissent. Subsection (a) provides that "upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate," with a proviso that if the deceased spouse is not survived by a child, children, or any lineal descendant of such, or by a parent, the surviving spouse shall receive only one-half of the deceased spouse's estate, which one-half shall be determined before any federal estate tax is deducted or paid, and shall be free of such tax. Subsection (b) provides that whenever the surviving spouse is a second spouse, as here, he or she shall take only one-half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage, as here, but there are no lineal descendants surviving him by the second or successive marriage. Subsection (c) provides: "If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, *diminished pro rata unless the will otherwise provides.*" Emphasis ours. The statute

provides that it shall become effective on 1 July 1960, and shall be applicable only to estates of persons dying on or after 1 July 1960.

Eva Staton Harris Dudley, the testatrix here, died on 14 February 1961. The parties have stipulated that none of the exceptions set forth in G.S. 30-1, subsection (b), exist, which would prevent petitioner from filing a dissent. It is admitted that on 1 May 1961, and within the time and in the manner prescribed by G.S. 30-2, petitioner filed a dissent from the will of his deceased wife. The parties have further stipulated that the four parcels of realty described in the petition were acquired by the testatrix subsequent to the year 1868.

The General Assembly at its 1961 session enacted a statute, which appears in the 1961 Session Laws in Chapter 959 (codified in the 1961 Cumulative Supplement to Recompiled Vol. 2A of G.S. as sections 30-1, 30-2, and 30-3), and is entitled "AN ACT TO AMEND CHAPTER 30 OF THE GENERAL STATUTES RELATING TO SURVIVING SPOUSES." Section 30-1 of the 1959 Act, and as it is codified, was rewritten to read as follows: "Section 30-1. Right of dissent. (a) A spouse may dissent from his deceased spouse's will in those cases where * * *." The statute then sets forth in detail the cases in which a dissent may be filed. The 1961 Act became effective on 1 July 1961. It seems certain from the pleadings, admissions, and stipulations here that nothing exists as set forth in the 1961 Act, which would prevent petitioner from dissenting from his deceased wife's will, if she had died after 1 July 1961. G.S. 30-2 of the 1959 Act, and as it is codified, as to time and manner of dissent was rewritten. If petitioner's wife had died after 1 July 1961, petitioner's dissent complies with this section as rewritten. G.S. 30-3 of the 1959 Act, and as it is codified, was not rewritten, but merely amended as to a part of subsection (a), and that as to the proviso therein.

The 1961 Act did not repeal the right given by the 1959 Act to a husband to dissent from his deceased spouse's will, though it more elaborately defines the circumstances when he may dissent, and did not repeal the provisions of subsection (a) of section 30-3 of the 1959 Act, and as it is codified, that "upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate," though it amended the proviso, and it did not change the provisions of subsections (b) and (c) of the 1959 Act, and as it is codified.

The question for decision here is this: Do the provisions of G.S. 30-1, 30-2, and 30-3, insofar as they give a husband a right in certain cases to dissent from his deceased wife's will, and to take a specified share of his deceased wife's real and personal property, whereby the residue

of his deceased wife's net estate, as defined in G.S. 29-2, shall be distributed to the devisees and legatees, as provided in her last will, *diminished pro rata* by the share taken by the husband, violate the provisions of Article X, section 6, of the North Carolina Constitution? The answer is, Yes.

The Court in a scholarly opinion, written by *Judge Gaston,* who was one of the most eminent jurists who ever sat upon this Court, said in *Newlin v. Freeman,* 23 N.C. 514:

> "By the common law of England, after the conquest, lands could not be devised; but the Statute of Wills, 32 H. VIII., ch. 1, explained, because of abundant caution, by Stat. 34 H. VIII, ch. 5, enacted that all persons seized in fee simple (except *femes covert,* infants, idiots, and persons of nonsane memory) might devise to any other person, except bodies corporate, two-thirds of their land held in chivalry, and the whole of those holden in socage. This was the law brought over to this country by our ancestors, and, as all tenures here before the Revolution were by free and common socage, this power of devising applied to all lands within the colony. Many laws have since the Revolution been enacted by our Legislature on the subject of devises, but none extending or abridging the *power* of tenant in fee simple, such as it existed at the Revolution. A married woman, neither in the country of our ancestors nor with us, ever had capacity to devise. It is true that she might by means of a power, properly created, appoint a disposition of her real estate after death, which power must be executed, like the will of a *feme sole,* and is subject very much to the same rules of construction. But the act, if good, is valid as an *appointment* under a power, and it is not a devise; for to hold it such would be to give to a married woman a capacity which she did not possess at common law and which no statute has conferred upon her."

The General Assembly at its Session of 1844-45, it would seem as a result of the decision in *Newlin v. Freeman,* enacted a statute set forth in Chapter LXXXVIII, subsection VIII, Public Laws of North Carolina from 1844 to 1847, as follows:

> "That when any married woman, under any will, deed, settlement, or articles, shall have power, by an instrument in nature of a will, to appoint or dispose of any property, real or personal, and she shall have executed, or shall execute any such instrument, the same may be admitted to probate in the proper Court of Pleas and Quarter Sessions, or may be proved originally in a Court

of Equity, upon a proper bill for that purpose; and either mode of probate shall be conclusive as to the due execution thereof."

This subsection was codified in Rev. Code, Ch. 119, sec. 3.

Article X, section 6, of the 1868 State Constitution completely abolished the general doctrine of the common law that as to property husband and wife are in legal contemplation but one person, and the husband is that one, and made very material and far-reaching changes as to the rights respectively of husband and wife in respect to her property, both real and personal, and enlarged her power in respect to and control over her property. *Walker v. Long,* 109 N.C. 510, 14 S.E. 299; 41 C.J.S., Husband and Wife, sec. 5 (a). This section of the State Constitution established for a married woman the ownership and control of all her property, real and personal, as her sole and separate estate and property, and further provided that it shall not be liable for any debts, obligations, or engagements of her husband. It further established for a married woman that she could devise and bequeath all her property *as if she were unmarried,* and with the written assent of her husband conveyed by her as if she were unmarried.

In *Walker v. Long, supra,* the Court held, *inter alia,* that the common law estate of the husband as tenant by the curtesy *initiate* in the lands of his wife was abolished by section 6, Article X of the 1868 State Constitution. *Chief Justice Merrimon* writing the opinion for the Court said in respect to this constitutional provision:

> "This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property, as if she were unmarried, except in the single respect of conveying it. She must convey the same with the *assent* of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right, or estate, he might at one time have had as tenant by the curtesy *initiate.*"

In *Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512, the Court held "that the limitation upon the right of a married woman to convey her real property, contained in Art. X, sec. 6, of the Constitution, applies only to conveyances executed by her to third parties, that is, persons other than her husband." This decision does not abridge the wife's rights, but enlarges them.

In *Tiddy v. Graves,* 126 N.C. 620, 36 S.E. 127, (1900), the Court held, *inter alia,* that "it is clear that under the present Constitution there is no curtesy after the death of the wife in property which she has devised." The opinion written by *Clark, J.,* after quoting exten-

sively from *Walker v. Long, supra*—a part of which we have quoted above—then says:

> "This is necessarily so, as the separate estate *remains* the wife's during coverture with unrestricted power to devise and bequeath it. With this explicit provision in the Constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had *remained unmarried.*
>
> "The plaintiff insists that curtesy in the husband of the whole of the wife's realty is the correlative of dower in the wife of one-third of the husband's realty, and if the Legislature can confer dower it can retain curtesy. That is true, when the *feme covert* dies intestate, as is pointed out in *Walker v. Long, supra,* but the Constitution having guaranteed that a married woman *shall be and remain* sole owner of her property with unrestricted power to devise it, the Legislature can not restrict it. Blackstone justly says that no one has the natural right to dispose of any property after death. The power to do so is conferred by law, and varies in different countries. In England it did not exist after the Conquest, till the Statute of Wills, 32 Henry VIII. Of course, as the Legislature confers the right to devise, in the absence of constitutional inhibition it can repeal or restrict the power of devise, and, till the Constitution of 1868, which gave a married woman the unrestricted power to devise and bequeath her property, as if unmarried, the limitation of such power could be made by legislation allowing curtesy as well as dower. If the Constitution had gone further and provided that the property rights of a married man should remain as if he were single, and expressly conferred the unrestricted right to devise his realty, then, certainly, when he had devised it in fee there could be no right of dower. The Legislature could only prescribe for dower in realty not devised, as it can now only confer curtesy in realty not devised."

The learned dean of the Law School of Trinity College, now Duke University, states in his Law Lectures, Vol. 1, p. 371, (1916):

> "They [married women] had no power to make any will in this state prior to the constitution of 1868, except when such a power was given them in some instrument by which property was vested in them; but they could make testamentary dispositions of their property with the consent of their husbands, and if the husband had agreed, by marriage settlement, that the wife should have this right, he could not revoke such agreement * * * But now,

married women can devise and bequeath their separate estates just as though they were femes sole; and an act of the Legislature attempting to forbid their devising their lands so as to deprive their husbands of an estate by the curtesy, is unconstitutional." Dean Mordecai cites in support of the last sentence quoted Article X, section 6, of the present Constitution; *Walker v. Long, supra; Tiddy v. Graves, supra;* Rev., secs. 3112, 2102, 2098; *Hallyburton v. Slagle,* 132 N.C. 947, 44 S.E. 655; *Watts v. Griffin,* 137 N.C. 572, 50 S.E. 218.

Walker v. Long and *Tiddy v. Graves* we have above discussed and quoted from. Revisal sec. 3112 stated: "A married woman owning real or personal property may dispose of the same by will." Revisal sec. 2102 is in respect to an estate by the curtesy. The Intestate Succession Act, enacted by the 1959 General Assembly, and applicable only to estates of persons dying on or after 1 July 1960, abolished the estates of curtesy and dower. 1959 Session Laws of North Carolina, Chapter 879, sec. 1—codified G.S. 29-4 in the 1959 and 1961 Cumulative Supplement to Recompiled Volume 2A of G.S. Revisal 2098 (now G.S. 52-8) we have quoted above, including the words "21 years of age or over" inserted by the 1953 amendment. *Hallyburton v. Slagle* and *Watts v. Griffin* hold that since the 1868 Constitution a married woman may by will deprive her husband of curtesy in her separate estate.

Petitioner relies upon the case of *Flanner v. Flanner,* 160 N.C. 126, 75 S.E. 936, (1912), which he contends is controlling here. In that case it was contended by defendant that section 3145 of the 1905 Revisal, which provides that "children born after the making of the parent's will and where parent shall die without making any provision for them, shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate," is unconstitutional, in that it deprives a married woman of the right to dispose of her property by will as if she were unmarried, as provided in Article X, section 6, of the State Constitution of 1868. The Court said:

"Under the principles of the common law as understood and allowed to prevail in this State, the subsequent birth of a child did not of itself amount to revocation of a testator's will. *McCay v. McCay,* 5 N.C. 447. That case presented at *nisi prius* in Rowan County at October Term, 1808, seems to have attracted the attention of the Legislature, and at November session following a statute was enacted regulating the subject and in terms substantially similar to the provision as it now appears in Revisal 1905, sec. 3145."

The Court in its opinion, after stating that defendant's contention cannot be upheld, because the contention involves a misconception of the meaning of Article X, section 6, of the 1868 Constitution, as applied to the facts of the present case, says:

> "The section referred to, after providing that the property of a married woman acquired before marriage and all to which she may become entitled afterwards shall remain her sole and separate estate, etc., continues as follows: 'and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried.' This right to dispose of property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature except where and to the extent that same is restricted by constitutional inhibition. *Thomason v. Julian, supra* [133 N.C. 309, 45 S.E. 636]; 1 Underhill on Wills, p. 1; 2 Blackstone Common., pp. 488-492.
>
> "Being properly advertent to this principle, a perusal of the section relied upon will disclose that its principal purpose in this connection was to remove to the extent stated the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation. The right conferred is not absolute, but qualified."

The case of *Thomason v. Julian* holds a will of a father expressly excluding the children of the testator born after the execution thereof makes a provision for them within the meaning of The Code, sec. 2145, and such children do not share in the estate as though the testator had died intestate. Article X, section 6, of the present Constitution had no application, and is not mentioned in the case. 1 Underhill on Wills, p. 1; 2 Blackstone Common., pp. 488-492 make no reference to our constitutional provision here, or any one of similar import.

When the opinion in the *Flanner* case was filed, the writer of the opinion in *Tiddy v. Graves, supra,* was *Chief Justice.* Why that case and *Walker v. Long, supra,* were not mentioned in the *Flanner* case, we can never know. Article X, section 6, of our present Constitution expresses as directly, plainly, clearly, unambiguously, and explicitly as words can that "the real and personal property of any female in this State * * *, shall be and remain the sole and separate estate and property of such female, * * * and may be devised and bequeathed, * * * by her as if she were unmarried." It seems perfectly clear and plain to us that these words used by the framers of our present Constitution plainly and explicitly and directly and unambiguously show an intention on their part not only to remove the incapacity of a mar-

ried woman to dispose of her property by will, but also to write into the Constitution that a married woman could dispose of her property by will as if she were unmarried, so as to put it beyond the power of the General Assembly to restrict, or abridge, or impair, or destroy such right, and that they did so effect their intent by the words they used. It is difficult, if not impossible, to conceive of any words that the framers of our present Constitution could have used to express such an intent and purpose more directly, plainly, clearly, unambiguously, and explicitly. We are not convinced by the reasoning in the *Flanner* case that this constitutional right of a married woman to dispose of her property by will is not absolute, but qualified so that the General Assembly can impair or abridge it; if the General Assembly can impair or abridge it, the General Assembly can destroy it. Even if we concede that the statement in *Tiddy v. Graves, supra,* "with this explicit provision in the Constitution [Article X, section 6], no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had *remained unmarried,*" is *obiter dictum,* it is sufficiently persuasive to be followed here. 21 C.J.S., Courts, sec. 190, p. 314. The decision and the reasoning in the *Flanner* case are not controlling here.

The Court has held that there is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader, because Article X, section 6, of the 1868 Constitution "was not intended to disable, but to protect her." *Hall v. Walker,* 118 N.C. 377, 24 S.E. 6. It has also been held by this Court that where a husband has abandoned his wife, she may convey her property without his consent under C.S. 2530 and that such statute was not inhibited by Article X, section 6, of the 1868 Constitution, for the reason this section of the Constitution "was not intended to disable, but to protect her." *Keys v. Tuten,* 199 N.C. 368, 154 S.E. 631. Clearly, these cases, and others of similar import, are plainly distinguishable from the instant case, because the statutes we are considering giving to a surviving husband the right, in certain cases, to dissent from his deceased wife's will, and thereby to take a specified share of her property, diminish her estate disposed of by her will to that extent, and restrict and abridge her constitutional power to dispose of her property by will as if she were unmarried: this is not a protection of, but an abridgment of her constitutional right.

Under all the facts here petitioner owns no interest in the four tracts of land described in the petition, and devised by his deceased wife in her last will to her son W. Lonnie Staton, pursuant to the right given

her by Article X, section 6, of our present Constitution. When this case is certified down to the superior court, it will enter a judgment reversing the judgment below, and dismissing the case.

Reversed.

BOYLAN-PEARCE, INC. v. WILLIAM A. JOHNSON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 10 July 1962.)

1. Trial § 57—

Where more than one inference of fact may be drawn from the evidentiary facts stipulated by the parties, the court, in a trial by the court under agreement of the parties, may find the ultimate facts from the evidence stipulated.

2. Taxation §§ 27, 28c— Reasonable payments to widow after employee's death in recognition of his services is not subject to income or gift taxes against employer.

The stipulated facts were to the effect that the executive officer and main stockholder of a family corporation had been active in the direction of its affairs over a number of years, and that after his death the board of directors directed payments to the widow for a period of two years in amounts equal to the prior remuneration for the said period. *Held:* The stipulations support findings by the court that the payments were made by the corporation in recognition of services rendered by the employee prior to his death, and, there being no contention that the payments were unreasonable in amount, judgment that such payments were allowable as deductions in computing the corporation's net income, G.S. 105-147(23), and were not taxable as gifts made by the corporation to the widow, G.S. 105-188, is affirmed, notwithstanding that the corporation was not under legal obligation to make such payments at the time of the employee's death.

APPEAL by defendant from *Fountain, Special Judge,* October 1961 (Assigned) Civil Term of WAKE.

After complaint and answer had been filed, the cause was heard upon the following stipulation:

"The parties hereto, through their respective counsel of record, do hereby consent that trial by jury of the issues involved in this action is waived and that this cause shall be submitted to and heard and determined by the Presiding Judge upon the following facts hereby stipulated by the parties:

"1. This is a civil action commenced on 4 May 1961 by Boylan-

Pearce, Inc. against William A. Johnson, Commissioner of Revenue of the State of North Carolina, pursuant to the provisions of General Statutes, Sections 105-241.4 and 105-267 for the recovery of certain gift taxes and additional income taxes assessed by the defendant Commissioner of Revenue and paid under protest by the plaintiff corporation.

"2. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office located in the City of Raleigh, Wake County.

"3. The defendant William A. Johnson is the duly appointed, qualified and acting Commissioner of Revenue of the State of North Carolina, appointed and holding office pursuant to the provisions of Section 147-87 of the General Statutes of North Carolina, with his powers and duties prescribed by the General Statutes of North Carolina.

"4. From 14 September 1940 until the date of his death on 17 May 1958, Dallas Holoman was President and a Director of Boylan-Pearce, Inc. He was survived by his widow, Virginia B. Holoman, of Raleigh, N. C., and by four sons, Dallas Holoman, Chreston Holoman, Boyce Holoman and Kern Holoman, all of Raleigh. Virginia B. Holoman, widow, is the second wife of Dallas Holoman, deceased. His first wife was the mother of all four of the surviving sons of the decedent.

"5. Following the death of Dallas Holoman, his four sons, named above, have been the only officers and directors of the corporation, and have been and are the owners of all of the common stock thereof.

"6. Dallas Holoman, as President of Boylan-Pearce, Inc. received compensation in the total sum of $18,000 for the fiscal year ended 31 January 1958, the fiscal year immediately preceding the fiscal year in which his death occurred.

"7. At a special meeting of the Board of Directors of Boylan-Pearce, Inc. held on 14 August 1958, the following resolution was unanimously adopted:

> 'Resolved, that the Vice President and Treasurer of the corporation be appointed as a committee to confer with the corporation attorney and to consider the desirability, possibility and feasibility of a plan under which the corporation might pay to Mrs. Virginia B. Holoman, widow of Dallas Holoman, deceased, former officer and employee, a certain sum (or sums) as set forth below, said funds to be paid out of the corporation but pursuant to and in accordance with the Federal and State Tax codes:

1. Some amount to be paid by reason of the death of Dallas Holoman, or

2. A continuation of the salary of Dallas Holoman in whole or in part for a limited period of time,

3. Or both,

and to report back to the Board with their recommendations at the next meeting.'

"The minutes of the next succeeding meeting of the Board, which was held on 20 September 1958, contain the following: 'The committee appointed at the last meeting to study the possibility of payments to the widow of Dallas Holoman stated that they had no report to make at this time but that the situation was receiving careful study and a report would be forthcoming at a later meeting.'

"8. At a meeting held on 26 June 1959, the Board of Directors of the plaintiff Boylan-Pearce, Inc. duly adopted a resolution, a true and accurate copy of which is set forth on EXHIBIT A, attached to this Stipulation and made a part hereof.

"9. From 14 September 1940 until his death on 17 May 1958, Dallas Holoman was the principal officer of Boylan-Pearce, Inc. and as such had the chief responsibility for the welfare and success of the corporation.

"10. The annual compensation paid by the plaintiff corporation to Dallas Holoman and to his sons, respectively, as officers of Boylan-Pearce, Inc. during the period 1940-1958 is shown on EXHIBIT B attached to this Stipulation and made a part hereof.

"11. The volume of sales, the net income before income taxes, the assets, liabilities, and net worth of the plaintiff corporation for the period 1940-1961 were as shown on the statement attached hereto marked EXHIBIT C and made a part of this Stipulation.

"12. Pursuant to the aforesaid resolution (EXHIBIT A), the plaintiff Boylan-Pearce, Inc. made payments to the said Virginia B. Holoman, as follows:

(a) The sum of $15,000 paid on the 30th day of June 1959;

(b) The sum of $21,000 paid on the 18th day of February 1960.

"13. In her North Carolina Income Tax Returns for the calendar years 1959 and 1960, Virginia B. Holoman, reported, but excluded from taxable income, the said amounts paid to her by the plaintiff corporation, in the following language:

'The taxpayer received $15,000.00 (in 1959—$21,000.00 in 1960) from Boylan-Pearce, Inc., by whom her husband was employed to the date of his death on May 17, 1958. The amount in question was paid by the corporation by reason of the death of

Dallas Holoman. This amount is excluded from gross federal income under the provisions of Section 101(b) of the Internal Revenue Code of 1954 and under authority of decided cases in point, and from gross state income on the basis that the amount represents a gift and not taxable compensation.'

The said income tax returns of Virginia B. Holoman were filed with and accepted by the North Carolina Department of Revenue.

"14. On the 5th day of April 1961, the plaintiff Boylan-Pearce, Inc., was notified for the first time that the defendant Commissioner of Revenue had made a decision under date of 30 March 1961, as follows:

'The Commissioner of Revenue is of the opinion that the amounts in question constituted a gift from the corporation to Mrs. Holoman and are, therefore, not deductible as a business expense of the corporation. Gift tax is due on such payments by the corporation.' "

(Pursuant to said decision, defendant assessed against plaintiff gift taxes and additional income taxes for the years 1959 and 1960 on account of said payments to Virginia B. Holoman. The amounts of these assessments are set forth in detail in paragraphs 15 and 16; and the facts relating to the payment thereof under protest, timely demand for refund, etc., are set forth in detail in paragraphs 17 and 18.)

"19. If it should be determined by a final judgment in this action that the said gift tax assessments against the plaintiff were invalid, the plaintiff is entitled to recover from the defendant Commissioner of Revenue the sum of $1141.88, together with interest thereon at the rate of six per cent per annum from 7 April 1961, until paid and the sum of $1671.12, together with interest thereon at the rate of six per cent per annum from 19 April 1961 until paid.

"20. If it should be determined by a final judgment in this action that the said additional income tax assessments against the plaintiff were invalid, the plaintiff is entitled to recover from the defendant Commissioner of Revenue the sum of $954.00, together with interest thereon at the rate of six per cent per annum from 14 April 1961 until paid; and the sum of $1260.00, together with interest thereon at the rate of six per cent per annum from 17 April 1961 until paid."

It is deemed unnecessary to set forth Exhibits B and C referred to in paragraphs 10 and 11 of said stipulation.

Exhibit A, referred to in paragraph 8 of said stipulation, is an excerpt from the minutes of the meeting of plaintiff's board of directors held June 26, 1959, showing the adoption, by unanimous vote, of the following resolution:

"WHEREAS, from the 14th day of September 1940, until the date of his death on the 17th day of May 1958, Dallas Holoman was President and a Director of Boylan-Pearce, Inc., and the success of the corporation has been and is largely the result of the sound business judgment, wise counsel, and active interest and participation of Dallas Holoman in the conduct, development and enlargement of the company's business through his many years of untiring effort and constant attention to the affairs of the corporation, and the corporation will continue indefinitely to enjoy the fruits of the services rendered by Dallas Holoman; and

"WHEREAS, notwithstanding his contribution to the success of the corporation through the years, and the continuing benefits inuring to the business, the compensation of Dallas Holoman, as such principal executive officer and guiding spirit of Boylan-Pearce, Inc., has not been commensurate with the inestimable value of his services; and

"WHEREAS, in the sound and progressive conduct of the affairs of a modern business corporation it is essential that adequate provision be made for the continuation of the compensation of important executive officers of the corporation to their widows or other dependents, upon the death of such corporate officers, so as to encourage living executives to continue in their employment with the corporation and to decrease or eliminate the concern and anxiety of such living officers with respect to the financial situation of their widows and other dependents following their deaths to the end that such executives may give full thought, attention and effort to the affairs of the corporation; and

"WHEREAS, it is considered by the members of this Board of Directors that the continuation of compensation of the corporate officers to their widows or other dependents in a reasonable amount and for a reasonable period of time following the death of any such officer constitutes an ordinary and necessary expense of doing business, and that, as a policy of this corporation, upon the death of an active corporate officer, who has been so employed by the corporation for a continuous period of at least ten (10) years, his compensation for services during the last completed fiscal year of service of such officer prior to his death should be continued (payable to his widow or other dependents) for a period

of two years, or an equivalent amount payable over a reasonable period of time; and

"WHEREAS, Dallas Holoman, as President of Boylan-Pearce, Inc., received compensation in the total sum of $18,000 for the fiscal year ended 31 January 1958, the fiscal year immediately preceding the fiscal year in which his death occurred; now, therefore,

"BE IT RESOLVED BY THE BOARD OF DIRECTORS OF BOYLAN-PEARCE, INC.,

"That a policy of this corporation is hereby established, that upon the death of a corporate officer of Boylan-Pearce, Inc., who shall have then been so employed continuously by the corporation as an officer thereof for at least ten (10) years, the corporation shall continue the annual compensation paid to such deceased officer during the last completed fiscal year of the corporation prior to the fiscal year in which his death occurred, making payment of an amount equal to that compensation for two years, but payable over such reasonable period of time as may be determined by the Board of Directors of this corporation in their discretion.

"AND BE IT FURTHER RESOLVED BY THE BOARD OF DIRECTORS OF BOYLAN-PEARCE, INC.,

"That the Treasurer of this corporation is hereby authorized and directed, and this corporation obligates itself, to pay to Mrs. Virginia B. Holoman, widow of Dallas Holoman, deceased, as recognition in part of the great contribution made by Dallas Holoman to the success of the business of Boylan-Pearce, Inc., and by reason of the death of Dallas Holoman, deceased, and as additional compensation for services rendered to the corporation by Dallas Holoman during his lifetime, the total sum of $36,000 (being a continuation of his last year's compensation for a period of two years), payable as follows: the sum of $15,000 payable immediately during the current fiscal year of the corporation, and the sum of $21,000 payable during the month of February 1960."

Judgment was entered in which, "upon a consideration of the agreed statement of facts, including the exhibits attached to the said Stipulation, and after hearing arguments of counsel for the respective parties," the court determined "that the payments by the plaintiff Boylan-Pearce, Inc. to the widow of Dallas Holoman, the deceased former president of the plaintiff corporation, in the aggregate amount of $36,000, made as stipulated pursuant to the corporate resolution (Exhibit A, attached to the Stipulation), were not gifts by the plaintiff corporation to the said widow within the meaning of the Income Tax

and Gift Tax provisions of the Revenue Act of North Carolina, but, to the contrary, said payments were intended to be, and were, payments to the widow of Dallas Holoman, the plaintiff's deceased officer-employee, made by the said employer by reason of the death of said officer-employee, as salary or compensation of the said deceased officer-employee, paid for a period of not more than twenty-four months after the officer-employee's death (the equivalent of his annual compensation for two years), and made in recognition of services rendered by the said Dallas Holoman prior to his death; and that the said payments to the said widow were reasonable in amount (counsel for the defendant Commissioner of Revenue having stated in open Court during the arguments that the defendant was making no issue or contention that the amounts paid to the widow were not reasonable)."

Thereupon, the court concluded the said gift tax assessments and additional income tax assessments were erroneous and invalid and adjudged that plaitniff recover from defendant the amounts set forth in said stipulation.

Defendant excepted and appealed.

Lassiter, Leager & Walker for plaintiff appellee.

Attorney General Bruton and Assistant Attorneys General Abbott and Pullen for defendant appellant.

BOBBITT, J. Based solely on a general exception "(t)o the signing of the foregoing judgment," appellant assigns as error "the action of the trial court in finding that the payments made to the widow of Dallas Holoman did not constitute gifts and subject to gift tax but were ordinary and necessary business expenses deductible by plaintiff corporation for corporate income tax purposes, and in signing the judgment as appears of record."

Plaintiff's allegation that the payments to Virginia B. Holoman "were made by reason of the death of the said Dallas Holoman and in recognition of services rendered by the said officer and employee, Dallas Holoman, prior to his death, and the said payments are reasonable in amount," was categorically denied by defendant. Defendant alleged said payments were gifts.

"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." *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 159, 123 S.E. 2d 582.

The court, from the stipulated facts, determined, *inter alia,* "that the payments by the plaintiff Boylan-Pearce, Inc. to the widow of Dallas Holoman, the deceased former president of the plaintiff corporation, in the aggregate amount of $36,000, made as stipulated pursuant to the

corporate resolution . . . *were intended to be, and were,* payments to the widow of Dallas Holoman, the plaintiff's deceased officer-employee, made by the said employer *by reason of the death of said officer-employee,* as salary or compensation of the said deceased officer-employee, paid for a period of not more than twenty-four months after the officer-employee's death (the equivalent of his annual compensation for two years), *and made in recognition of services rendered by the said Dallas Holoman prior to his death;* and that the said payments to the said widow *were reasonable in amount* (counsel for the defendant Commissioner of Revenue having stated in open Court during the arguments that the defendant was making no issue or contention that the amounts paid to the widow were not reasonable)." (Our italics)

If different inferences can be drawn from the stipulated facts, the court, as indicated, has resolved the crucial factual issue raised by the pleadings in favor of plaintiff.

Appellant, in his brief, states the question presented on this appeal in these words: "Are payments made to a widow of a corporate officer upon resolution of the remaining officers and directors of a family corporation, adopted some thirteen months after the death of the deceased officer, properly regarded as a gift to the widow and not deductible from the gross income of the corporation as an ordinary and necessary business expense for income tax purposes where there has been no previous contract, resolution of the board of directors, or custom of the corporation in making such payments?"

In addition to the matters referred to in defendant's said statement, defendant stresses these undisputed facts: (1) Plaintiff was not legally obligated to Dallas Holoman for the $36,000.00 or any part thereof, and (2) plaintiff was not indebted to Virginia B. Holoman on account of services rendered or otherwise.

For the reasons indicated, defendant contends the stipulated facts establish, as a matter of law, that the payments to Virginia B. Holoman were gifts and therefore taxable under G.S. § 105-188 and were not allowable as deductions under G.S. § 105-147 in computing plaintiff's net income.

Unquestionably, under the statutory provisions in effect prior to July 1, 1957, defendant's position would be correct. Indeed, this fact is of significance in determining the legislative intent when the General Assembly, by the enactment of Chapter 1340, Session Laws of 1957, amended the Revenue Act in respects set forth below. The Tax Study Commission, appointed pursuant to joint resolution adopted by the General Assembly in 1955, included in its comprehensive report to the General Assembly of 1957, the following:

"6. IT IS RECOMMENDED *that provision be made to permit the deduction by employers of payments made to the estate or to the beneficiaries of a deceased employee, paid by reason of the death of the employee, if the amount of the payment is reasonable and is related to the service of the employee and that Federal regulations and Tax Court decisions be used by the Commissioner of Revenue in determining the amounts which are reasonable in each case.*

IT IS FURTHER RECOMMENDED *that such income in the hands of the person receiving the payment be considered as income and be taxable as such, except that an aggregate amount of $5,000 of such income paid in respect to the death of any one employee be excludable from gross income. The provisions to be patterned after the Federal Code.*

"Present Provision. The present law contains no reference to 'employee death benefits.' The amounts paid to the beneficiaries of an employee by reason of the death of the employee are considered to be gifts and as such are not deductible by the employer nor are such amounts includible in the gross income of the beneficiary. (Citation: G.S. 105-141 (2) (c); G.S. 105-147 (1))

"Explanation. It is considered to be desirable to encourage such payments. Such encouragement is best accomplished by a tax deduction to the employer. It is not believed to be desirable, however, to allow unlimited deductions of this type.

"The Federal government permits the deduction of reasonable amounts paid as continuation of the salary of the employee for a limited period. There is no fixed limit. There is a limit of $5,000, however, upon the exclusion by the beneficiaries of the payment.

"In order to follow the policy of conformity to the Federal Code wherever practicable, and in order to prevent the use of 'employee death benefits' as an instrument of tax evasion while encouraging such payments by corporations, it is the thinking of this Commission that the Federal Code should be followed and the payments defined as gross income to the recipient rather than as gifts, with an exclusion of up (to) $5,000 permitted.

"Effect upon Revenue. The effect upon revenue of the enactment of this proposal is believed to be negligible."

In said 1957 Act (Section 4, Subsection (au)), the General Assembly amended G.S. § 105-147 (now codified as G.S. § 105-147(23)) by providing that, in computing net income, the following item shall be allowed as a deduction:

"As to employers, the amount of the salary or other compensation of an employee which is paid for a period of not more than twenty-four months after the employee's death to his estate, widow, or heirs provided such payment is made in recognition of services rendered by the employer prior to his death and is reasonable in amount."

In said 1957 Act (Section 4, Subsection (q)), the General Assembly amended G.S. § 105-141, which defines "gross income," the provision now codified as the last paragraph of G.S. § 105-141(a), to wit:

"The words 'gross income' include any payments received by the estate, widow or heirs of an employee if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee. Provided, that such payments may be excluded from gross income to the extent of five thousand dollars ($5,000.00) with respect to the death of any one employee regardless of the number of employers making such payments, except that such exclusion shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living (other than total distributions payable to a distributee by a qualified stock bonus, pension, or profit-sharing trust or under an annuity contract within one taxable year of the distributee by reason of the employee's death)."

As indicated, defendant's counsel, at the hearing below, stated defendant "was making no issue or contention that the amounts paid to the widow were not reasonable."

Undoubtedly, as defendant contends, plaintiff has undertaken to bring itself within the provisions of G.S. § 105-147, as amended, with reference to the payments it made to Virginia B. Holoman. Indeed, the Tax Study Commission based its recommendation that such amendment be adopted on the ground it was "considered to be desirable to encourage such payments" and "(s)uch encouragement is best accomplished by a tax deduction to the employer." Moreover, it may be inferred that, absent the 1957 amendment, plaintiff would not have authorized such payments.

Defendant's contention that payments by an employer are allowable as deductions only when a legal obligation to make such payments exists would seem to render meaningless the 1957 amendment. Prior to the 1957 amendment, payments by an employer in discharge of its legal obligations to compensate its employees were deductible under G.S. § 105-147.

The 1957 amendment makes no reference to a previous or pre-existing "contract, resolution of the board of directors, or custom," of the corporation with respect to such payments. Ordinarily, payments made in accordance with a pre-existing contract, plan or policy would be payments for which the employer would be legally obligated.

We attach no legal significance to the fact there was no pre-existing plan or policy, or to the fact the resolution authorizing the payments was not adopted until June 26, 1959, or to the fact plaintiff is a so-called "family corporation." At most, these facts are of evidentiary significance in determining the nature of the employer's payments.

In our opinion, and we so decide, the stipulated facts, and inferences that may be reasonably drawn therefrom, support the court's determination of the crucial factual issue raised by the pleadings. Hence, the conclusion reached is that, based on the court's said determinations, plaintiff's payments to Virginia B. Holoman were authorized and allowable as deductions under G.S. § 105-147, as amended by the 1957 Act, in computing its net income, and were not taxable as gifts under G.S. § 105-188.

Our attention is directed to the following portion of Section 101(b) of the Internal Revenue Code (26 U.S.C.A. § 101(b)), *viz.*:

> "(b) Employees' death benefits.—
>
> (1) General rule.—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.
>
> (2) Special rules for paragraph (1).—
>
> (A) $5,000 limitation.—The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed $5,000."

Federal decisions cited by defendant relate to whether, under the quoted portion of Section 101(b) of the Internal Revenue Code, the payments involved in these cases constituted "gross income" of the recipient. While these decisions have been considered, they do not control decision here for the reason, among others, the Internal Revenue Code contains no provision analogous to G.S. § 105-147(23).

In Federal Income, Gift and Estate Taxation, § 14.13 (5), by Rabkin and Johnson, this statement appears: "There is no statutory correlation between the employer's deduction and the taxability or exemption to the employee's estate or beneficiary." In this connection, see 36 N.C.L.R., pp. 163-165.

Whether Virginia B. Holoman was entitled to deduct said payments as gifts in her 1959 and 1960 State income tax returns is not presently before us. Suffice to say, in our Revenue Act, there appears to be a statutory correlation between G.S. § 105-147(23) and the last paragraph of G.S. § 105-141(a).

For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

IN THE MATTER OF FLORA ELIZABETH WILSON.

(Filed 10 July 1962.)

1. Insane Persons § 1—

An order committing a person to a mental hospital for observation and treatment does not create a presumption of mental incapacity. G.S. 122-46.

2. Same; Constitutional Law § 23—

An order committing a person to a mental hospital permanently or indefinitely deprives him of his liberty within the purview of constitutional safeguards, and a person may not be so deprived of his liberty except by judgment rendered in accordance with due process of law, which implies an opportunity to be heard and to prepare for the hearing. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Federal Constitution.

3. Same—

Where a person has been committed to a mental hospital for observation and treatment, G.S. 122-46, the clerk may not thereafter upon the report of the hospital superintendent order the commitment of such person for an indefinite time without giving such person notice and an opportunity to be heard. If G.S. 122-46.1 does not contemplate notice and a hearing, it is unconstitutional, however under the 1957 amendment a hearing may be had under G.S. 35-3, 35-4 and 35-4.1. Under this procedure a guardian *ad litem* should be appointed so that the person committed will be bound by the judgment if the issue is found adverse to him.

BOBBITT, J., dissenting in part.

On *certiorari* to review an order entered by *Copeland, S.J.*, in a *habeas corpus* proceeding heard at the August 1961 Term, WAKE Superior Court.

The record discloses that Flora Elizabeth Wilson is confined in the State Hospital at Butner under an order of indeterminate duration entered by the Clerk Superior Court of Durham County. The commitment proceeding was initiated on March 21, 1959, by an affidavit of

Alfred R. Wilson, Jr., stating, "That Mrs. Flora P. Wilson is (a mentally disordered) person in my opinion and in need of treatment in a proper hospital; . . . that she will not of her own free will permit an examination by physicians." On the day the affidavit was filed the clerk issued process to the sheriff: "Upon the foregoing affidavit, you are hereby ordered to arrest the above named alleged (mentally disordered) person and her safely keep until proper adjudication can be had." On April 11, 1959, the clerk issued a notice to Mrs. Wilson that a hearing would be held on April 13, 1959. The clerk caused Mrs. Wilson to be examined by R. A. Horton and Hans Lowenbach, physicians, each of whom made affidavit that Mrs. Wilson is suffering from mental disease, epilepsy or inebriety and is a fit subject for admission to a hospital. The record does not contain an order of commitment, but the record recites that Mrs. Wilson was committed to the State Hospital at Butner on April 21, 1959.

On June 24, 1959, the Superintendent of State Hospital at Butner notified the Clerk: "It is my opinion she is mentally disordered and in need of further observation and treatment." The clerk ordered "an observation for four months in addition to the sixty days heretofore ordered." On October 13, 1959, the Superintendent reported: "Her condition has been essentially the same. I recommend permanent commitment." The clerk entered an order on October 14, 1959, that Mrs. Wilson "Be retained in the State Hospital at Butner for care and treatment as prescribed by law."

From time to time since the order of permanent commitment Mrs. Wilson has been released on parole for short periods, usually in the custody of her son. Nothing of note is reported to have occurred during the parole periods.

On June 26, 1961, Mrs. Wilson's daughter filed affidavit that her mother was not a mentally disordered person, not a fit subject for care and treatment in a mental hospital, and that her commitment and detention were unlawful. Upon this affidavit Judge Bickett issued a writ of *habeas corpus*, returnable at Raleigh, North Carolina, on July 14, 1961. Judge Copeland conducted a hearing on the writ at which two physicians, specialists in psychiatry, testified that in their opinion Mrs. Wilson is not psychotic and not dangerous to herself or others. Lay testimony to the same effect was offered. The respondent, Superintendent of the State Hospital at Butner, identified and presented to Judge Copeland the entire clinical file kept at the hospital, including the results of many staff conferences and findings indicating that Mrs. Wilson was in need of confinement and treatment.

Judge Copeland made the following findings and order:

"1. That the petitioner, Flora Elizabeth Wilson, at the time of her commitment, was a mentally disordered person and a fit subject for care and treatment at a mental hospital.

"2. That on the date of this hearing, the petitioner, Flora Elizabeth Wilson, is a mentally disordered person and a fit subject for care and treatment at a mental hospital and her being at large could be dangerous to herself and others when out of the control and custody of the hospital.

"3. That the petitioner, Flora Elizabeth Wilson, was committed and detained in accordance with all the statutory requirements.

"4. That all the orders issued by the Clerk of Superior Court of Durham County are found to be lawful in every respect, and not in violation of the Constitution of North Carolina or the Constitution of the United States.

"5. The Court determines that the North Carolina Statutes under which the petitioner was committed are lawful in every respect and not in violation of the Constitution of the State of North Carolina:

"IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the petition for a writ of *Habeas Corpus* filed in this case be, and the same is hereby dismissed and the petitioner is remanded to the John Umstead Hospital, Butner, North Carolina, for further care and treatment, as provided by law."

Counsel for Mrs. Wilson filed detailed exceptions to the findings of fact, conclusions, and the order remanding her to the hospital, etc. *Certiorari* was granted to review the order in the light of the errors assigned.

T. W. Bruton, Attorney General, Richard T. Sanders, Staff Attorney, for the State.

Louis Rabil, Douglas A. Clark, Washington, D. C., Michael Rabil, Malcolm B. Seawell, Raleigh North Carolina for petitioner appellant.

HIGGINS, J. Mrs. Wilson, by *habeas corpus,* challenges the legality of her restraint upon the ground the clerk's order committing her to the State Hospital at Butner violated her rights under Article I, Section 17, Constitution of North Carolina, and under the Due Process Clause of the 14th Amendment to the Constitution of the United States. The original order of commitment for 60 days observation and treatment and the follow-up order for additional observation and treatment for four months have terminated. However, the permanent order entered on October 14, 1959, is the basis of her present restraint.

The clerk and the hospital authorities have been proceeding under G.S. 122-46. In determining the validity of the final order the previous orders for observation and treatment do not create any presumption of mental incapacity. "Neither the institution of a proceeding to have an alleged mentally disordered person committed for observation as provided in this section, nor the order of commitment by the clerk as provided in this section, shall have the effect of creating any presumption that such person is legally incompetent for any purpose. Provided, however, that if a guardian or trustee has been appointed . . . under G.S. 35-2 or 35-3, the procedure for restoration to sanity shall be as is now provided in G.S. 35-4 and 35-4.1."

The foregoing quotation was by amendment to G.S. 122-46, enacted by the General Assembly at the 1957 Session, effective June 10th of that year. The method of showing restoration under G.S. 35-4 is by petition of any friend or relative alleging sanity, filed before the clerk of the superior court. "Whereupon the clerk shall issue an order, . . . to summon a jury of six freeholders to inquire into the sanity of the alleged sane person . . . The petitioner may appeal from the finding of said jury to the next term of the superior court . . . when the matter . . . shall be regularly tried *de novo* before a jury."

The amendment of 1957 now provides that one committed under G.S. 122-46 may be restored to sanity under G.S. 35-3, 35-4 and 35-4.1. Failure of any such previous tie-in is reflected in a number of decisions of this Court. *In re Harris,* 241 N.C. 179, 84 S.E. 2d 808; *In re Cook,* 218 N.C. 384, 11 S.E. 2d 142; *In re Sylivant,* 212 N.C. 343, 193 S.E. 422; *In re Chase,* 193 N.C. 450, 137 S.E. 305. The amendment removes from G.S. 122-46 the objection that a traditional trial by jury is not provided as a means of determining the issue of sanity. Apparently the requirement that a guardian be appointed and made a party is to give binding effect to an adverse verdict by the jury.

The record indicates that Mrs. Wilson was not present before the clerk at the time the final order of commitment was entered. The record indicates she was neither given notice nor an opportunity to be heard. There is nothing to indicate that she was advised of the medical reports, nor was she given opportunity to challenge the findings which the clerk appears to have used as the only basis for his commitment order. True, G.S. 122-46.1 provided: "Upon the basis of this report the clerk . . . is authorized to order said person discharged or to order him to remain in the hospital as a patient *as the facts may warrant.*" (emphasis added)

Does the term "as the facts may warrant," confine the scope of the clerk's inquiry to the report, or does it contemplate notice and a hearing? If notice and hearing, the requirement was not met. If it does

not contemplate a hearing, Mrs. Wilson is restrained of her liberty without due process of law. Article I, Section 17, Constitution of North Carolina; 14th Amendment to the Constitution of the United States. "Due process of law implies the right and opportunity to be heard and to prepare for hearing." *State v. Wheeler,* 249 N.C. 187, 105 S.E. 2d 615; *In re Gupton,* 238 N.C. 303, 77 S.E. 2d 716; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Mooney v. Holohan,* 294 U.S. 103; *Simon v. Craft,* 182 U.S. 427; *Holden v. Hardy,* 169 U.S. 366, 16 C.J.S. 578. "An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle of English jurisprudence that before any judgment can be pronounced against a person there must have been a trial of the issue upon which the judgment is given." *In re Boyett,* 136 N.C. 415, 48 S.E. 789. The guarantees imbedded in the Constitution are not subject to modification or repeal by the legislature. *State v. Mitchell,* 202 N.C. 439, 163 S.E. 581.

By reason of the lack of notice to Mrs. Wilson and an opportunity for her to be heard on the question of her sanity, the order of commitment under which she is now restrained violated her constitutional rights. Of course, detention of an alleged insane person for a short period of time pending observation is permitted. However, the judgment that Mrs. Wilson is lawfully detained and that she is now insane exceeds the scope of the *habeas corpus* hearing.

While motion may be made in the commitment proceeding to vacate the order now in effect, the result would probably be another hearing after notice. As a more practical approach, however, a guardian may be appointed upon the basis of the superintendent's certificate as provided in G.S. 35-3. A petition, on the application of some relative or friend, may be filed invoking the procedure under G.S. 34-4 and have a jury pass upon Mrs. Wilson's sanity. The guardian should be a party to the end the finding of the jury, if adverse, may have finality until a material change in condition occurs.

The order under review is

Reversed.

BOBBITT, J., dissenting in part. The factual question or issue is whether plaintiff is now a mentally disordered person in need of hospital custody and care. In my view, she is entitled to have this factual question or issue passed upon by a jury in accordance with the procedure prescribed in G.S. § 35-4 upon her own motion or upon motion of a relative or friend.

The controversy relates solely to the continued confinement of petitioner. No guardian or trustee has been appointed under G.S. § 35-2

and § 35-2.1 or under G.S. § 35-3. Thus, the termination of an existing guardianship or trusteeship is in no way involved.

In my opinion, it would be inappropriate to appoint a guardian on the ground of her alleged mental disorder to act for petitioner in a proceeding in which she asserts her competency. Hence, I dissent from the suggestion in the opinion that the appointment of such guardian for petitioner would be appropriate.

IN THE MATTER OF THE WILL OF MATTHEW LONDON LONG.

(Filed 10 July 1962.)

1. Wills § 3—

It is not required that witnesses to an attested will should affix their signatures in the presence of each other, but only that they do so in the presence of testator. G.S. 31-3(d).

2. Wills § 22; Appeal and Error § 42—

Upon appeal from judgment based upon the negative finding of the jury to the issue of the due execution of the paper writing propounded, an instruction to the effect that the subscribing witnesses must have affixed their signatures in the presence of each other, must be held for prejudicial error notwithstanding that all of the evidence tends to show that the witnesses did sign the instrument in the presence of each other, since the negative answer to the issue may have been influenced by the requirement that the jury believe the evidence in regard to this unnecessary element.

APPEAL by propounder from *Hobgood, J.*, at the September 1961 Civil Term of COLUMBUS.

This action was tried upon the issue of *devisavit vel non* raised by a caveat.

At the age of eighty-two years Matthew London Long died on May 3, 1961 at the home of his niece, Mrs. Daisy Hinojosa, in Fort Bragg, North Carolina. A paper writing bearing the same date was probated in common form on May 5, 1961 as his last will by Mrs. Hinojosa, its sole beneficiary. The caveat was filed by Bertha Long McKeithen on May 15, 1961. She alleged that she was the daughter of Matthew London Long; that the execution of the purported will was obtained by the propounder, Mrs. Hinojosa, through undue influence on Matthew London Long; and that on May 3, 1961 he lacked testamentary capacity.

Upon the trial the four issues usually raised by a caveat were submitted to the jury. *In re Will of Etheridge*, 229 N.C. 280, 49 S.E. 2d 480. The first issue was submitted and answered as follows:

"1. Was the paper writing dated May 3, 1961, and offered for probate as the last will and testament of Matthew London Long, executed according to law?

"ANSWER: No."

The other three issues were not answered.

All the evidence relating to the formal execution of the will tended to establish the following facts:

About 9:30 A. M. on May 3, 1961, Dr. Lewis S. Gaines, pastor of the First Baptist Church in Fayetteville, made a pastoral call on Mr. Long in the home of Mrs. Hinojosa. Mr. Long told the minister that he wanted "to place all his affairs and all of his holdings in the hands of Daisy." He said he had no will and requested the minister to call an attorney. Dr. Gaines called Mr. D. P. Russ, Jr. and told him what Mr. Long had said. Mr. Russ then prepared the paper writing propounded which purported to devise all of Mr. Long's property to Mrs. Hinojosa and to appoint her executrix. About noon Dr. Gaines and Mr. Russ carried the instrument to the Hinojosa home where it was read to Mr. Long and then handed to him for inspection. Mr. Russ "told him that it would be necessary for him to sign the will and to have the witnesses sign it and that it would have to be witnessed at his request." The attorney asked Mr. Long if he wanted him, Dr. Gaines, and Mrs. Alice Leona McLain, the sister of Mrs. Hinojosa, who were in the room, to witness his will. Mr. Long said that he did. He was then propped up on pillows and given a fountain pen, but he was too weak and shaky to sign his name. Russ inquired of Mr. Long if he wanted to make an "X" mark for his signature and let Russ sign his name for him. He said that he did. Russ wrote Mr. Long's name and then steadied his hand while he made his mark. Russ then asked him if that was what he meant for his signature, and Mr. Long said it was. At that time Dr. Gaines, Mr. Russ, and Mrs. McLain were in the room with Mr. Long. The three then signed in his presence and in the presence of each other.

With reference to the first issue the trial judge charged the jury as follows:

"Members of the jury, if you, the jury, are satisfied from the evidence and by its greater weight, that Matthew London Long signed said paper writing offered by the propounder as his last will and testament; or if you find by the greater weight of the evidence that it was signed by D. P. Russ, Jr., at the request of Matthew London Long, and that he made his "X" mark on said signature, acknowledging it as his own signature and at his direction; if you further find from the evidence and by its greater

weight that D. P. Russ, Jr., Lewis S. Gaines and Alice Leona McLain (it is not necessary to have but two of them, under the law, as witnesses, not three) subscribe their names as witnesses to said paper writing and that their signatures were subscribed thereto at the request of Matthew London Long, and in his presence and in the presence of each other, then you will answer Issue #1 which the Court has read to you, 'Was the paper writing dated May 3, 1961, and offered for probate as the last will and testament of Matthew London Long, executed according to law?' — if you find those facts, from the evidence and by its greater weight, then you will answer the first issue YES; if you are not satisfied of said aforementioned facts and by the greater weight of the evidence, then you will answer the first issue NO."

From judgment entered upon the verdict decreeing that the paper writing dated May 3, 1961 and offered for probate was not the last will and testament of Mr. Matthew London Long, the propounder appealed. She assigned as error that portion of the charge quoted above.

D. F. McGougan, Jr. and Powell, Lee and Lee for propounder appellant.

Herring, Walton and Parker for caveator appellee.

SHARP, J. The battleground of this case in the trial below was not the first issue; it was the second and third issues. All the evidence tended to show that the paper writing was executed in conformity with the legal requirements for the execution of a valid will. We must assume, therefore, that the jury's negative answer to the first issue indicated either confusion as to the law or disbelief of some of the uncontradicted evidence.

With reference to the signature of Mr. Matthew London Long, one of the alternative hypotheses upon which the jury was instructed to answer the first issue "Yes" was a finding "that Matthew London Long signed the paper writing offered by the propounder as a last will and testament." Since there was no evidence that Mr. Long actually wrote his own name, it is possible that this instruction, without more, confused the jury. Further explanation of the right of a testator to adopt as his own a signature written by another at his request and in his presence, would have been in order.

However, be that as it may, the judge told the jury that if the signatures of the witnesses "were subscribed thereto at the request of Matthew Long, and in his presence *and in the presence of each other*" (Emphasis added) they would answer the first issue "Yes";

otherwise, "No." This was error. Witnesses are not required to sign in the presence of each other; only in the presence of the testator. G.S. 31-3.3(d).

Upon the authority of *In re Will of Etheridge, supra,* a new trial is required even though all the evidence tended to show that the witnesses did sign in the presence of each other. The *Etheridge* case presented a situation strikingly similar to the instant case. There, as here, all the evidence tended to show the formal execution of the instrument in strict conformity with legal requirements for a valid will. The judge instructed the jury that if they believed the evidence and found the facts to be as all the evidence tended to show that they would answer the first issue "Yes". The jury answered it "No." However, the judge also instructed the jury that the law required the testator to sign the will in the presence of the witnesses. *Justice Seawell,* speaking for the Court said:

> "While the judge directed the jury to answer the issue as to the execution of the will 'yes,' — predicated on their belief of the evidence,—this did not withdraw from the jury the erroneous statement of the legal requirements under G.S. 31-3. And it may have entered into their consideration as the basis of their disbelief. As to this we cannot, of course, say; but the evidence should have been submitted to the jury with an exact statement of the law relating to the subject, particularly since the formal execution of the will was a matter in issue."

The propounder is entitled to a trial *de novo,* and it is so ordered.

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1962

MARVIN WILSON SEYMOUR v. W. S. BOYD SALES COMPANY, INCORPORATED.

(Filed 19 September 1962.)

1. Sales § 14c; Trover and Conversion § 2—

Allegations to the effect that the chattel sold by defendant was subject to a prior lien in violation of warranty against encumbrances, and that defendant granted plaintiff an extension of time for the payment of the balance of the purchase price, but repossessed the chattel without notice and sold it under the chattel mortgage, *held* to state a cause of action for breach of warranty and a cause of action for wrongful conversion.

2. Automobiles § 4—

By provision of statute in North Carolina every seller of a motor vehicle is required to expressly warrant title and expressly list all liens and encumbrances, and the effect of failure to list a lien is a warranty that it does not exist. G.S. 20-72(b), G.S. 20-75.

3. Same; Sales § 5; Chattel Mortgages and Conditional Sales § 1—

Where a conditional sale contract for the sale of a motor vehicle provides that if any part of the agreement should be invalid under the laws of the State such part should be deemed amended in conformity with such laws, such contract includes warranty of title and warranty against encumbrances in accordance with State law, irrespective of whether the agreement otherwise contains such warranties and notwithstanding any waiver of implied warranties by provision that no representation or warranties should be binding unless expressly contained in the agreement.

4. Sales § 13—

Breach of warranty against encumbrances entitles the purchaser to rescind the contract of sale, but if, upon discovery of such breach, the purchaser keeps the chattel and relies on the seller's agreement to discharge the prior lien, he waives his right to rescind.

5. Sales § 14g—

Breach of warranty against encumbrances does not entitle the purchaser to anything more than nominal damages until he has paid the amount of the outstanding lien or has been deprived of possession by reason of the lien in question.

6. Same; Damages § 5—

A purchaser who has been deprived of possession or use of the chattel as a result of breach of warranty against encumbrances may not recover the profits he would have realized from the use of the chattel unless he alleges and proves that such special damages were within the contemplation of the parties at the time of the execution of the contract.

7. Chattel Mortgages and Conditional Sales § 15—

Where a conditional seller grants an extension of time for the payment of the money due or to become due under the contract, he waives default in the payment of the purchase price and may not repossess during the term of the extension. If the extension of time is not for a definite period it will be construed to be for a reasonable period under the circumstances, and reasonable notice of forfeiture must be given.

8. Same; Trover and Conversion § 1—

Where the purchaser of a motor vehicle, upon discovery of the existence of a prior lien in another state constituting a breach of warranty against encumbrances, advises the seller that the lien precluded his use of the vehicle in such state, and therefore precluded him from earning profits to pay the purchase price, and thereupon the seller agrees to discharge the lien and that no further payment need be made on the purchase price until the matter had been straightened out, the extension of time is supported by consideration and is valid, and the act of the seller in thereafter repossessing the vehicle without notice and selling it under the conditional sale contract constitutes a wrongful conversion.

9. Trover and Conversion § 2—

Where the conditional seller wrongfully repossesses and sells the vehicle prior to default or during the time of an extension of time for payment, the measure of damages is the fair market value of the chattel less the indebtedness secured by the conditional sale contract.

10. Pleadings § 34—

The court wrongfully strikes allegations of fact constituting a statement of a good cause of action, but the striking of allegations which are merely repetitious of matter appearing in an exhibit attached to the complaint will not be held for error.

11. Same; Damages § 11—

Allegations in regard to the loss of prospective profits are properly

striken on motion when the complaint does not lay the predicate for the recovery of special damages by allegation that such damages were within the contemplation of the parties at the time the contract was executed.

APPEAL by plaintiff from *Copeland, J.*, January 1962 Civil Term of CURRITUCK.

The allegations of the amended complaint, summarized in part and copied verbatim in part, are as follows:

1. Plaintiff is a resident of Currituck County, and defendant is a North Carolina corporation having its principal office in Raleigh.

2. Plaintiff is in the business of transporting goods by truck for hire in several eastern States, including New York.

3. On 24 October 1960 plaintiff purchased of defendant a diesel tractor for use in his business, and the written sales agreement is made a part of the complaint. "That as shown by said sales agreement, the plaintiff contracted to buy said vehicle and pay the amount of $10,792.32 after the payment in cash of $500.00 and delivery to defendant of his 1956 Chevrolet tractor, for which he was allowed $1,000 on the purchase price. That the defendant company financed the amount owing it by the plaintiff with Universal C.I.T. Credit Corporation upon plaintiff executing to said defendant corporation a conditional sales contract on said tractor, which plaintiff bought from the defendant. The total cost to the plaintiff after financing and paying for the insurance that he was required to take out to enable him to operate throughout the territory, being in the amount of $12,692.32."

4. Defendant represented to plaintiff that it owned the diesel tractor and "that there were no liens or claims against it and that they were empowered to convey to him title absolute to same."

5. Plaintiff applied for a license in New York to operate the tractor in that State and about 7 November 1960 was advised that New York held a fuel tax lien in excess of $348 against the tractor and no license would be issued until the lien was discharged. Plaintiff immediately notified defendant, and defendant promised to promptly "lift" the lien but failed to do so, and on 5 December 1960 when plaintiiff made inquiry he was told by Mr. Wood, an employee of defendant, that the matter would be "straightened out" within a few days.

6. When plaintiff was advised by defendant that it had been unable to lift the lien "they precluded him from following his business in New York State where most of his profits were derived, he stated to it that until this lien was lifted in order that he could use the truck for the purpose for which he bought it, he would be unable to pay the installment payments under his contract; that Mr. Wood, on or about

December 5, 1960, stated to him that until they had the matter straightened out, he would not be required to make any further payments."

7. "That approximately three weeks later, on or about December 26, 1960, the plaintiff called the defendant company again and talked with the credit manager and told him that he could not make payments because he was unable to use his truck for any profitable operation; further stating to him that he had received a request from the C.I.T. Credit Corporation for payment on the conditional sales contract, whereupon the credit manager of the defendant corporation stated to him that he would contact C.I.T. Credit Corporation and have them hold the matter in abeyance until the lien was lifted."

8. "That two or three weeks following the conversation had with the credit manager of the defendant corporation, on or about February 1, 1961, and while his truck was at the Forehand Garage at Hickory, Virginia for the purpose of changing two tires thereon, the defendant company, without notice to this plaintiff, went to the premises of the Forehand's Garage and took the truck from the possession of this plaintiff."

9. "That because of the plaintiff being unable to use the tractor for the purpose for which it was bought, being precluded from operating in the State of New York where the greater amount of the profits from his operation were derived, he was unable to make any of the payments and when final demand was made upon him for the purpose of bringing the account current, he was helpless to do anything about it; that being notified that the truck had been taken and was being offered for sale, he was unable to raise the amount of money necessary to put it back in good financial status and had to suffer the loss of it."

10. "That by reason of the wrongful taking of said tractor from him, because the defendant corporation failed to live up to their agreement and to release the truck to him lien-free in order that he could successfully operate it in and through New York State, he was caused to lose the value of his Chevrolet tractor, which was placed at $1,000 and the $500 cash payment made by him at the time of the purchase; that for a period of three months he was unable to operate said tractor, which resulted in a loss to him of approximately $250.00 per week, which amount he had enjoyed in other operations of like character over a period of many years. That the loss in the operation of the truck freely, as he was entitled to do had the defendant corporation relieved the truck of the lien placed upon it so that it would have been free for the use for which it was purchased, he would have enjoyed a profit of the amount of $3,000 or some other large amount. That the defendant corporation by failure of it to live up to its contract has

caused plaintiff to suffer loss in the amount of $4,500 or some other large sum."

Defendant moved to strike from the amended complaint all of paragraphs 3, 7, 8, 9 and 10 and those portions of paragraphs 4 and 6 which are quoted verbatim above.

The court sustained the motion as made, except that all of paragraph 6 was stricken and that portion of paragraph 3 which is quoted verbatim above.

Plaintiff appeals.

J. W. Jennette for plaintiff appellant.
Bailey and Dixon for defendant appellee.

MOORE, J. In Supreme Court defendant demurred *ore tenus* on the ground that the amended complaint does not state facts sufficient to constitute a cause of action. *Hall v. Coach Co.*, 224 N.C. 781, 32 S.E. 2d 325. Construing the pleading liberally in favor of pleader, as we are required to do (*Glover v. Brotherhood*, 250 N.C. 35, 108 S.E. 2d 78), we find that it alleges facts sufficient for causes of action, (1) for breach of warranty of title and against encumbrances, and (2) for wrongful conversion. The demurrer is overruled.

There remains for decision the question: Did the court below err in striking the challenged allegations from the amended complaint?

Plaintiff has not been put to an election as to which of the causes of action he will prosecute. Hence a brief discussion of the pleading and applicable legal principles is appropriate as a basis for determining whether or not the allegations should have been stricken.

As to breach of warranty, the amended complaint alleges in substance: On 24 October 1960 defendant sold and delivered to plaintiff a second-hand diesel tractor. Plaintiff made a down payment consisting of $1500 cash (according to conditional sale contract) and a truck valued at $1000, and the parties entered into a conditional sale contract providing for the payment of the balance of the purchase price in installments, the first installment to be due 10 December 1960. About 7 November 1960 plaintiff discovered that there was a fuel tax lien against the tractor in the State of New York and that he could not obtain a permit to operate the truck in that State until the lien was removed. He promptly advised defendant of the lien and defendant promised to have it discharged immediately. Plaintiff waited until 5 December 1960 and then stated to defendant that he could not operate the tractor profitably unless he could use it in New York and could not make the payments unless he could make profitable use of the vehicle. Defendant again promised to remove the lien. Defend-

ant failed to discharge the lien and instead repossessed and sold the tractor. Plaintiff has suffered loss of profits, his cash payment and the trade-in truck.

"It is elementary that in the sales of personal property there is an implied warranty of a good title upon the part of the vendor, and this warranty extends to and protects against liens, charges and encumbrances by which the title is rendered imperfect and the value depreciated thereby." *Martin v. McDonald,* 168 N.C. 232, 233, 84 S.E. 258; *Hodges v. Wilkinson,* 111 N.C. 56, 15 S.E. 941. Accord: Uniform Sales Act, s. 13; Uniform Commercial Code, s. 2-312(3): 1 Williston: Sales (Rev. Ed. 1948), s. 218. This rule also applies to sales made pursuant to conditional sale contracts. *Old Pueblo Motors, Inc. v. Abarca,* 288 P. 666 (Ariz. 1930); *McDonnell Motor Hauling Co. v. Morgan Constr. Co.,* 235 S.W. 998 (Ark. 1921); *Bowen v. Dawley,* 101 N.Y.S. 878 (1906). At common law an action for breach of warranty upon a conditional sale contract would not lie until the conditions had been fulfilled and title had passed, but the Uniform Sales Act has changed the common law in this respect. *Groenland v. Phoenix Sprinkler & Heating Co.,* 216 N.W. 431 (Mich. 1926). While North Carolina has not adopted the Uniform Sales Act, its decisions are in substantial accord with the Act in this regard, *Case Co. v. Cox,* 207 N.C. 759, 178 S.E. 585; *Huyett & Smith Mfg. Co. v. Gray,* 124 N.C. 322, 32 S.E. 718. The conditional sale contract in the case at bar provides that "Title to the car (sic) is retained by seller until . . . time balance is fully paid . . ., when title shall pass to the customer." Such provision has been held to be an express warranty of title and against encumbrances. *Yattaw v. Onorato,* 17 A. 2d 430, 132 A.L.R. 334 (R.I. 1941); *Rundle v. Capitol Chevrolet,* 129 S.W. 2d 217 (Tenn. 1939); *MacDonald v. Mack Motor Truck Co.,* 142 A. 68 (Me. 1928); *Pierce v. Banton,* 57 A. 889 (Me. 1904). Or, at the very least, an implied warranty of title. *Smith v. Mfg. Co.,* 166 S.E. 607 (S.C. 1932); *McDonnell Motor Hauling Co. v. Morgan Constr. Co., supra; Bowen v. Dawley, supra.* The contract in the instant case also states that "No agreement, representation or warranty shall be binding . . . unless expressly contained herein." Defendant contends that this constitutes a disclaimer and waiver of any and all implied warranties. The trend of decisions in this jurisdiction is to give effect to such disclaimer clauses in contracts. *Petroleum Co. v. Allen,* 219 N.C. 461, 14 S.E. 2d 402; *Woodridge v. Brown,* 149 N.C. 299, 62 S.E. 1076. See also 39 N.C. Law Rev. 299 (1961). However, none of the North Carolina cases deal with warranties of title. And on this record it is unnecessary to deal with the effect of the disclaimer clause or to decide whether the retention of title provision constitutes an express warranty. The

contract further declares: "If any part hereof is invalid under the applicable laws or regulations of the State . . . such part shall be deemed amended to conform thereto." Under the laws of North Carolina the seller of a motor vehicle is required to endorse, and deliver to or for the buyer, an assignment and warranty of title and a statement of all liens and encumbrances, even where a conditional sale is involved G.S. 20-72(b); G.S. 20-75. Strict compliance with these requirements is necessary in every sale of motor vehicles. Every such seller is therefore required to expressly warrant title and expressly list all liens and encumbrances. The effect as to unlisted liens is a warranty that they do not exist. By the terms of the contract on this record these warranties are included in and are a part of the contract.

The complaint alleges facts sufficient to constitute a cause of action for breach of warranty. Upon discovery of the New York fuel tax lien one of two courses was open to plaintiff. First, he could have rescinded the contract, returned or offered to return the tractor to the seller, demanded refund of his cash payment and return of the truck or its value, and upon refusal of defendant to accede, he could have maintained an action for the down payment and the truck. *Hajoca Corp. v. Brooks,* 249 N.C. 10, 105 S.E. 2d 123; *Close v. Crossland,* 50 N.W. 694 (Minn. 1891). Plaintiff elected not to rescind. He did not return or offer to return the tractor; he did not demand the return of his down payment and truck; he kept the tractor and relied on defendant to perfect the title. Thereby, plaintiff waived his right to rescind. He chose the other course, an action for damages for breach of warranty against encumbrances. In such action, a buyer cannot recover anything more than nominal damages until he has paid the amount of the outstanding lien or has been deprived of possession by reason of the lien in question, except where he alleges and proves some special damages which were within the contemplation of the parties at the time the contract of sale was made. *Close v. Crossland, supra; Paul Hellman, Inc. v. Reed,* 366 P. 2d 391 (Okla. 1961). See also 77 C.J.S., Sales, s. 385, p. 1341. North Carolina has applied this rule in real estate transactions. *Fishel v. Browning,* 145 N.C. 71, 58 S.E. 759; *Lane v. Richardson,* 104 N.C. 642, 10 S.E. 189. The loss of anticipated profits may not be recovered in the absence of allegation and proof that they were within the contemplation of the parties at the time of the execution of the contract of sale. *Wentworth & Irwin, Inc. v. Seals,* 56 P. 2d 324 (Ore. 1936). See also *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592.

As to the cause of action for wrongful conversion, the complaint alleges, in substance, the following facts, in addition to those sum-

marized above: On 5 December 1960 when plaintiff told defendant he would be unable to make installment payments until the lien was discharged and the vehicle could be operated in New York, defendant stated "that until they had the matter straightened out, he would not be required to make any further payments," and thereafter defendant stated that it "would contact C.I.T. Credit Corporation and have them hold the matter in abeyance until the lien was lifted." About three weeks later defendant, without notice to plaintiff, seized the truck and thereafter sold it. Plaintiff was without means to redeem it. The lien was not discharged before the seizure.

Where a conditional seller grants an extension of time for the payment of money due or to become due under the contract, the general rule is that he waives default in payment and the right to forfeit the contract for that default until the expiration of the extension period. *Carmichel v. Guenette*, 6 S.E. 2d 365 (Ga. 1939); *Valicenti v. Central Motors, Inc.*, 174 A. 799 (Pa. 1934); *Sackler v. Slade*, 114 S. 396 (Miss. 1927). The extension of time may be for an indefinite period, in which case time is extended for a reasonable period under the circumstances and reasonable notice of forfeiture must be given. *Calhoun v. Universal Credit Co.*, 146 P. 2d 284 (Utah 1944); *Central Ins. Co. of Baltimore v. Ehr.*, 139 P. 2d 701 (Wash. 1943). It has been held that no new consideration is necessary to support an extension of time, but this seems to be the minority view. *Carmichel v. Guenette, supra.* In any event, from the facts alleged, there was sufficient consideration in the case at bar to support the promise to extend the time for payment.

Where the conditional seller wrongfully deprives the buyer of possession or wrongfully withholds possession from him, he is guilty of conversion, and the buyer may maintain an action for damages caused by the conversion. *Calhoun v. Universal Credit Co., supra; Schenectady Discout Corp v. Dziedzic*, 31 N.Y.S. 2d 636 (1941); *Southern Arizona Bank & Trust Co. v. Stigens*, 53 P. 2d 422 (Ariz. 1936); *Valicenti v. Central Motors, Inc., supra.* Where the conditional vendor takes the property sold from the possession of the vendee and assigns as the reason therefor the default of the vendee in making payments, it has been held that the taking is a wrongful conversion when there has been in fact no default, or when the period of extension of the time for making payment has not ended. *Schenectady Discount Corp. v. Dziedzic, supra; Calhoun v. Universal Credit Co., supra.* Also see *Binder v. General Motors Acceptance Corporation*, 222 N.C. 512, 23 S.E. 2d 894. In the instant case, by virtue of the alleged agreement of the seller to extend the time for payment of installments, the seizure of the tractor was wrongful and amounted to a conversion of the

property. The measure of damages in an action for conversion is the fair market value of the property taken, less the secured indebtedness, if any, of the plaintiff thereon. 78 C.J.S., Sales, s. 630, p. 437; *C.I.T. Corp. v. Watkins,* 208 N.C. 448, 181 S.E. 270; *Elmore v. Ritter Implement Co.,* 87 S.W. 2d 1008 (Tenn. 1935); *Hardin v. Marshall,* 5 S.W. 2d 325 (Ark. 1928).

In the light of the foregoing discussions, we are of the opinion, and so hold, that the court below erred in striking paragraphs 6, 7, 8 and 9 of the amended complaint, and also erred in striking the indicated portion of paragraph 4. Paragraph 10 was properly stricken. The indicated portion of paragraph 3 is merely a repetition of some of the facts set out in the conditional sale contract, which is a part of the amended complaint, and it was not error to strike this repetitious matter.

The allegations of paragraphs 4, 6, 7, 8 and 9 are not sufficiently evidentiary in nature to prejudice defendant, and will not be stricken on this ground.

The judgment below will be modified to conform with this opinion.

Plaintiff may desire to ask leave to amend his pleadings so as to draw the pertinent issues into clearer focus.

Modified and affirmed.

FRANCES G. HAMILTON, ADMINISTRATRIX OF MICHAEL EUGENE HAMILTON, DECEASED v. ROBERT NEIL McCASH AND WIFE, RUTH CRIPPEN McCASH.

(Filed 19 September 1962.)

1. Automobiles § 14—

It is negligence *per se* for a motorist to follow another vehicle more closely than is reasonable and prudent with regard to the safety of others, the speed of the vehicles, and the traffic and conditions of the highway. G. S. 20-152 (a).

2. Automobiles § 7—

A motorist is under duty to keep a proper lookout in the direction of travel, and will be held to the duty of seeing what he ought to have seen in the discharge of such duty.

3. Automobiles § 25—

The rule of a reasonably prudent man requires that a motorist not operate his vehicle at a speed greater than that which is reasonable and

prudent under the existing circumstances and that he not operate it carelessly and unlawfully without due regard to the safety of others.

4. Automobiles § 34—

A motorist is under duty to exercise due care to avoid injury to children whom he sees, or by the exercise of due care should see, on or near the highway.

5. Automobiles § 41m— Evidence of negligence of defendant proximately causing injury to child on highway held for jury.

Evidence tending to show that defendant motorist was traveling at a speed of some 50 miles per hour, about a car's length behind a preceding vehicle, in approaching an intersection duly marked by a sign and by yellow, no-passing lines painted on the center of the highway, that a nine-year old boy was riding a bicycle on the right shoulder approaching the intersection, that defendant's view of the boy was obstructed by the preceding vehicle which she was following too closely, that the driver of the preceding vehicle, upon apprehending that the boy was losing control of his bicycle, sounded his horn and decreased speed, and, in order to avoid striking the child, ran off the road on the left, and that defendant motorist did not see and could not have avoided striking the child after the child suddenly turned left onto the highway, *is held* sufficient to be submitted to the jury on the issue of defendant motorist's negligence as a proximate cause of the injury.

6. Negligence §§ 16, 26—

Since a nine-year old boy is rebuttably presumed incapable of contributory negligence, nonsuit may not be entered on the ground of such child's contributory negligence.

7. Automobiles § 65f—

Where the evidence of negligence on the part of defendant driver is sufficient to be submitted to the jury and there is evidence that the vehicle was registered in the name of the other defendant, plaintiff is entitled to go to the jury against such other defendant by virtue of G.S. 20-71.1(b).

APPEAL by plaintiff from *Mintz, J.*, April 1962 Term of MARTIN.

Civil action to recover damages for the wrongful death of a nine-year-old boy, allegedly caused by the actionable negligence of the defendants, Robert Neil McCash, and wife, Ruth Crippen McCash, in striking and running over him with an automobile driven by the *feme* defendant and owned by the male defendant, her husband.

The defendants in their answer deny any negligence on their part, and plead as a further answer and defense that if it should be found at the trial they were negligent in the operation of the automobile, then plaintiff's intestate was guilty of contributory negligence. And the defendants for further answer and by way of defense aver that if it should be shown at the trial they were guilty of actionable negli-

gence, then the McLean Trucking Company was also guilty of actionable negligence in the operation of its truck in causing the death of plaintiff's intestate, and they pray that McLean Trucking Company be made a party defendant by virtue of G.S. 1-240 as a joint tort-feasor for the purpose of contribution. An order was entered by the court making McLean Trucking Company an additional defendant.

McLean Trucking Company filed an answer to plaintiff's complaint substantially admitting its allegations, and an answer to the original defendants' further answer and defense denying any negligence on its part in the operation of its truck, and alleging that if plaintiff's intestate was killed by reason of negligence it was caused by the negligence of the original defendants.

From a judgment of involuntary nonsuit entered, on motion of the original defendants, by the court at the close of plaintiff's evidence, plaintiff appeals.

R. L. Coburn for plaintiff appellant.

James and Speight, by W. W. Speight and William C. Brewer, Jr., for Original Defendants, Robert Neil McCash and Ruth Crippen McCash, appellees.

PARKER, J. Plaintiff's evidence tends to show the following facts:

U. S. Highway #64 is a paved road, with dirt shoulders, running eastwardly from the town of Williamston, through or by the town of Jamesville, toward the town of Plymouth. About one-half mile east of the town of Jamesville this highway is intersected on its south side by rural paved road #1552, which enters it in a T-formation, but does not cross it. U. S. Highway #64 on both sides of this intersecting road has pavement 24 feet wide and shoulders 8 feet wide. U. S. Highway #64 west of this intersection is level and straight for about one-half mile, and the same way east for two or three miles. Immediately west of this intersection are two yellow lines on U. S. Highway #64, with a white line between, indicating no passing. On the right shoulder of U. S. Highway #64 traveling east there is a sign 300 feet west of the intersection indicating an intersecting road to the right. Approaching this intersection from the west traveling east there are no obstructions on the shoulders to impair a clear view.

About 11:25 a.m. on 1 August 1961 plaintiff's intestate, Michael Eugene Hamilton, a very smart, healthy, and normal boy nine years old, was riding a bicycle in an eastwardly direction on the right shoulder of U. S. Highway #64, about a foot from the pavement, and approaching the intersection of roads above described. The shoulder the boy was riding on had little ruts or little bumps near the intersection.

Approaching this intersection at the same time with Michael Hamilton was a Ford van truck owned by McLean Trucking Company, and driven by its employee, Willie Bruce Pearce, which was going east on U. S. Highway #64 toward the town of Plymouth. Following closely behind McLean's truck was a Ford station wagon registered in the name of Robert Neil McCash, and driven by his wife, Ruth Crippen McCash. Robert Neil McCash was a passenger in the station wagon. Willie Bruce Pearce called by plaintiff as a witness testified: "I saw Mrs. McCash was on my tail gate, about a car length. She had been driving behind me like that some two or three hundred yards because the yellow line was in our lane of traffic going east." He also testified: "The McCash car had been following me some two to five miles." The maximum speed on U. S. Highway #64 for trucks is 50 miles per hour, 60 miles per hour for passenger cars, and the minimum speed for passenger cars is 45 miles per hour.

Pearce saw Michael Hamilton riding on a bicycle on the right shoulder of the highway going east about 200 yards from the intersection. He reduced his speed from 45 miles per hour to about 35 miles per hour, according to his guess, and blew his horn. When Michael was close to the intersection, Pearce saw his bicycle bumping along on the little ruts or little bumps on the right shoulder near the intersection. He had something under his right arm, and his left hand was on the left handle bar of the bicycle. At that time he was off the seat, between the seat and handle bars, with apparently one foot on the rural paved intersecting road, and looked like he had lost control of the bicycle. When Pearce was within 10 to 25 feet from Michael, Michael and the bicycle cut to the left in front of Pearce, who pulled his truck off the highway to his left into a ditch, missed striking Michael, ran down the ditch 50 or 75 yards, came back on the highway, and stopped. Pearce did not turn on his signal to indicate a left turn, when he cut left into the ditch. Pearce testified on cross-examination by McLean's counsel: "When I first saw the child having difficulty with his bicycle I reduced my speed and blew my horn." Pearce went back to where he "crossed the road," and found Michael between the two front wheels of the McCash station wagon, his head pointed south, feet north, and lying on his left side. Mr. McCash said to Pearce, "you have run over the little boy." Pearce denied it. Pearce testified: "Before I turned off the highway I saw the McCash Ford station wagon tail-gating my truck, about one car length from the tail gate." There was no other traffic on the highway near the scene at this time.

R. C. Sexton arrived at the scene five or ten minutes after the collision. The McCash station wagon was on the left or north lane of

U. S. Highway #64 opposite the intersecting rural paved road, and headed toward Plymouth. He crawled under the McCash station wagon. Michael was back of the front wheel with his head toward the middle of the highway. The wheel was on the bicycle, under the fender. The skid marks led to the McCash automobile. They came from the south side of the highway to where the child was lying.

When other people arrived at the scene, "the tension or spring mechanism" of the McCash automobile was lifted high enough for Darrell Clayton, Jr., and another to go under the automobile and to get Michael out from under the automobile. His shirt was partially torn. The back wheel of the bicycle was under the right front wheel of the automobile. Clayton carried Michael to a hospital in Plymouth. About 4:00 o'clock p. m. the same day Clayton attended a coroner's inquest. At that time he climbed under the McCash automobile, and found up under the chassis some dry blood and a small piece of hair.

Berry W. Parker, a State Highway Patrolman, arrived at the scene about 12:10 o'clock p. m. The defendants McCash told him the station wagon had been moved back two feet from where it came to a stop. Parker found 42 feet of skid marks directly behind the station wagon and two feet ahead of it, which were in the northbound lane of traffic. The last 12 feet of wheel marks were not the same width: the right wheel marks had about a two inch wider marking than the left wheel marks. Parker testified on cross-examination by McLean's counsel:

> "The commencement of the station wagon skid marks are seven feet east of where the truck, the dual wheels, went off. The skid marks on the pavement were solid skid marks up to the last 30 feet, then the last 12 feet it was scuffs on the right wheel. At the point where the scuffs began I found some abrasions in the highway where the pavement — metal, scratchings, I call it scratchings and little groovings cut out in the highway and little marks in the highway, grooves. I found small bits of clothing, what I call T-shirt in this area for the last 12 feet this station wagon was traveling."

Parker testified he talked to Mr. and Mrs. McCash and Pearce. Mrs. McCash said she was driving the station wagon at the time: Pearce said he was driving McLean's truck. Mr. McCash's registration certificate showed he was the owner of the station wagon his wife was driving. Parker testified as to the following conversation between Mrs. McCash and himself.

> "Mrs. McCash said she was traveling approximately 50 miles per hour and gained up on the truck, going to overtake it, and

I asked her the distance she was traveling, she said 'closely' but she did not give any feet or anything, said, closely behind the truck to overtake it, and said she was headed east and she saw this truck suddenly swerve so she swerved behind it and then she said when she came to a stop she realized there was a child in front of her car and she said that she did not see no child and she had not run over no child, and not run over nobody, she had not run over anything and so I showed her where this blood was, showed her where the body was, the body had been moved. There was a puddle of blood in front of her car and we found hair, some blood stains and some hair up under the front part of her car, under the axle, on the axle, about the oil pan. I examined that hair and it appeared to be that of the child's head. I saw the child's head, it was torn up right bad.

"Mrs. McCash said she first saw the child while it was laying down on the pavement and she applied brakes and slid up to it. Mrs. McCash did not explain why she was driving close behind the truck. She just said she was coming up on it to overtake it is the words she told me."

Parker testified Pearce told him:

"* * * he was headed east, traveling approximately 45 miles per hour. Mr. and Mrs. McCash were present. And he saw a child on a bicycle headed east on the shoulder of the road. As he approached near this bicycle he saw it hit a rough place in the shoulder and started swerving to its left into the right lane of traffic and he said he immediately swerved his truck to the left to avoid the child and said he went across the road and into the left ditch and down this left ditch. Tire marks that he showed me where he made and the marks in the ditch he told me he made that led up to the back of the vehicle he told me he was driving — part of the path to where his vehicle stopped. He told me they were his marks, 80 yards in the left ditch and then back across the highway and 35 more yards and he stopped on the right shoulder."

Dr. E. W. Ferguson saw Michael Hamilton in his hospital in Plymouth about 45 minutes after he was injured. Michael was in dire shock, his respiration was extremely shallow, he had multiple fractures of the skull, with a hole in the top of his skull through which brain tissue was extruding, and his neck was broken. Michael died about 30 minutes after he was admitted in the hospital. In Dr. Ferguson's

opinion the causes of his death were his fractured skull, extensive brain damage, severe concussions, and a broken neck.

This suit was instituted against the original defendants on 30 August 1961.

G.S. 20-152(a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway." A violation of G.S. 20-152(a), which is a safety statute, is negligence *per se*, and if injury or death proximately results therefrom, it is actionable. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184; *Crotts v. Transportation Co.,* 246 N.C. 420, 98 S.E. 2d 502; *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881. Among its other allegations of negligence against Mrs. McCash, the complaint avers that she operated the station wagon in violation of G.S. 20-152(a), and that such negligence on her part was a proximate cause of Michael Hamilton's injuries and death.

The complaint also alleges that Mrs. McCash was negligent in operating the station wagon without keeping a proper lookout, and that such negligence on her part was a proximate cause of Michael Hamilton's injuries and death. "It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

The complaint further alleges that Mrs. Cash was negligent in operating the station wagon at a greater rate of speed than was reasonable and prudent under the circumstances and conditions then existing, and that she operated it carelessly and unlawfully without due regard to the safety of others, and that such negligence on her part was a proximate cause of Michael Hamilton's injuries and death. The rule requires a motorist to act as a reasonably prudent man. *Crotts v. Transportation Co., supra.*

It has been repeatedly declared by this Court that a legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706, and cases therein cited.

A motorist must recognize that young children have less judgment and capacity to appreciate and avoid danger than adults, and that such children are entitled to a care in proportion to their incapacity to foresee, to appreciate and to avoid peril. *Pavone v. Merion,* 242 N.C. 594, 89 S.E. 2d 108, and cases therein cited.

Applying these principles of law to the evidence, it is our opinion that plaintiff's evidence, considered in the light most favorable to her, would permit, but not compel, a jury to find the following facts and draw these reasonable inferences therefrom: Mrs. McCash in the daytime was driving the station wagon on U. S. Highway #64 at a speed of about 50 miles per hour about a car length behind the McLean van truck traveling ahead of her, and had been so driving some two or three hundred yards, before the McLean truck cut sharply to its left off the highway into a ditch to avoid striking Michael Hamilton and his bicycle, who had been riding his bicycle on the south shoulder of U. S. Highway #64 and who when he approached the intersection of U. S. Highway #64 with rural paved road #1552 lost control of his bicycle due to the little ruts or little bumps on the shoulder near the intersection and cut to his left on the highway in front of the McLean truck. That such driving of the station wagon by Mrs. McCash, who was sitting under the steering wheel on the left, obstructed her view ahead and of the shoulder on the highway on her right, and prevented her from seeing Michael Hamilton, a nine-year-old boy, riding his bicycle on such shoulder and losing control of it near the intersection ahead, even if she had been trying to keep a lookout ahead, until the McLean truck cut to its left into the ditch. That Mrs. McCash told the State Highway Patrolman "she did not see no child." That Mrs. McCash was so driving the station wagon at 50 miles per hour, though she had passed by a sign 300 feet west of the intersection indicating an intersecting road to the right ahead, which she saw, or in the exercise of due care should have seen, and was so driving on a highway with two yellow lines on it, with a white line between, indicating no passing, which she saw, or in the exercise of due care should have seen. That such driving of the station wagon by Mrs. McCash was in clear violation of the safety provisions of G.S. 20-152 (a) and was negligence on her part, that by such driving Mrs. McCash could not keep a proper lookout ahead in the direction of her travel, and see persons or vehicles on or near the highway or shoulder ahead, especially children on or near the highway, that she was operating the station wagon at a speed and in a manner that was not reasonable and prudent under the conditions and circumstances then and there existing. That when the McLean truck cut off the highway into a ditch on its left to avoid striking Michael Hamilton, Mrs. McCash was so close to the boy that she could not, by reason of her negligence, stop or turn aside to avoid striking him with her station wagon, even if she had seen him, which she says she did not, and that she ran over him and dragged him under the station wagon some 12 feet. That by reason of her negligent operation of the station wagon as above set forth Mrs. McCash, in the

exercise of the reasonable care of an ordinarily prudent person, should have foreseen that some injury would result from her negligence, or that consequences of a generally injurious nature should have been expected, and that such negligent operation of the station wagon by Mrs. McCash as above set forth was the proximate cause of Michael Hamilton's injuries and death. In brief, plaintiff's evidence, considered in the light most favorable to her, shows a direct causal connection between the negligence of Mrs. McCash in the operation of the station wagon, and the injuries and death of Michael Hamilton.

The cases relied on by appellees are factually distinguishable. For instance, in *Dixon v. Lilly*, 257 N.C. 228, 125 S.E. 2d 426, there was no evidence of excessive speed on defendant's part, or of any other negligence alleged in the complaint.

A compulsory nonsuit on the ground that Michael Hamilton, a nine-year-old boy, was guilty of legal contributory negligence is not permissible. Whether he was capable of contributory negligence presents an issue for a jury, because there is a rebuttable presumption that he was incapable. *Wilson v. Bright*, 255 N.C. 329, 121 S.E. 2d 601.

The judgment of compulsory nonsuit of plaintiff's action against Mrs. McCash was improvidently entered. Consequently, the trial court erred in entering a judgment of compulsory nonsuit of plaintiff's action against Mr. McCash, for the reason that the station wagon was registered in his name, and therefore plaintiff is entitled to go to the jury against him by virtue of the provisions of G.S. 20-71.1 (b). *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E. 2d 644.

Reversed.

PORTIA EVON SALTER, BY HER NEXT FRIEND, HARVEY W. MARCUS v. GERALD JOSEPH LOVICK AND ELIZABETH HINNANT DUKE.

(Filed 19 September 1962.)

1. Automobiles § 10—

Notwithstanding that a motorist is not required to anticipate the presence of an unlighted vehicle parked or standing on the highway in his lane of travel, and is entitled to assume and act upon the assumption, in the absence of anything which gives or should give him notice to the contrary, that another motorist will not expose him to danger by the violation of law or legal duty, a motorist remains under duty to keep a proper lookout and to operate his vehicle as a reasonably prudent person would under the circumstances.

2. Automobiles § 41f— Evidence of negligence in hitting rear of unlighted vehicle held for jury.

Evidence tending to show that a motorist traveling at a speed of 55 to 60 miles per hour saw on his left side of the highway a vehicle parked partly on the hard surface with its bright lights facing him, and that he did not decrease speed until he was about 50 feet from a truck parked without lights partly on the hard surface opposite the lighted vehicle, and that he then applied his brakes but was unable to avoid striking the rear of the parked truck, *is held* sufficient to be submitted to the jury on the question of such motorist's negligence in failing to keep a reasonably careful lookout and in traveling at excessive speed under the circumstances, since a man of reasonable prudence, upon seeing the lighted vehicle facing him on the highway, would not have assumed that the road ahead was clear, but would have slowed down and brought his vehicle under control.

3. Automobiles § 7—

The failure of a motorist to maintain a reasonably careful lookout is negligence.

4. Automobiles § 19—

The doctrine of sudden emergency is not available to a party whose own negligence causes or contributes to the creation of the emergency.

5. Automobiles § 48; Negligence § 7—

There can be more than one proximate cause of an injury, and when the injury is caused by the negligence of two persons the injured party may maintain an action for damages against either one or both of the tort-feasors.

6. Automobiles § 65f—

Where the evidence of negligence on the part of defendant driver is sufficient to be submitted to the jury and there is evidence that the vehicle was registered in the name of the other defendant, plaintiff is entitled to go to the jury against such other defendant by virtue of G.S. 20-71.1(b).

7. Automobiles § 41f—

Where a motorist is traveling within the maximum speed limit prescribed by law, his inability to stop within the radius of his lights is not negligence *per se* but may be considered with other facts upon the issue of negligence, and a charge which instructs the jury in effect that the inability of a motorist, traveling at a lawful speed, to stop within the radius of his lights would constitute negligence *per se* must be held for prejudicial error.

APPEAL by defendants, Gerald Joseph Lovick and Elizabeth Hinnant Duke, from *Parker (J.W.), J.*, 30 April 1962 Civil Term of CARTERET.

Civil action to recover damages for personal injuries, which plaintiff alleges she sustained through the negligence of the defendant Lovick in driving a Rambler automobile, owned and registered in

the name of the defendant Duke, into the rear end of a truck owned by the United States, assigned to the Marine Corps, and parked at night partially on paved Highway #24, while she was riding as a guest passenger in the automobile.

Defendants filed a joint answer denying any negligence on their part, averring that the sole proximate cause of the collision was the negligence of the driver of the parked truck, and alleged conditionally a cross-action for contribution against Donald C. Rowland, alleged driver of the parked truck, pursuant to the provisions of G.S. 1-240. If Rowland was made a party defendant, it does not appear in the record before us.

By consent of the parties an order was entered transferring the case for trial to Carteret County on the ground that the convenience of witnesses and the ends of justice would be promoted by such change of venue. G.S. 1-83 (2).

The jury found by its verdict that plaintiff was injured by the negligence of the defendant Lovick, as alleged in her complaint; that defendant Lovick was operating the automobile as the agent of the defendant Duke and acting within the scope of his agency; and awarded her damages in the amount of $5,000.00.

From a judgment entered upon the verdict, defendants appeal.

C. R. Wheatly, Jr., and Whitaker & Jeffress for defendant appellants.

Lamar Jones for plaintiff appellee.

PARKER, J. Each defendant assigns as error the denial of his or her separate motion for judgment of compulsory nonsuit made at the close of all the evidence offered by plaintiff and defendants. G.S. 1-183.

Plaintiff's evidence, and the evidence of defendants favorable to her, (*Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1), when considered in the light most favorable to her, tends to show:

Defendant Duke on 10 February 1960 owned a Rambler passenger automobile, which was registered in her name, and which she maintained for the pleasure and convenience of her family. On the evening of this day defendant Lovick was operating this automobile with the consent and approval of the defendant Duke to carry her daughter, Nancy, and David Ballou and plaintiff to a ball game in Morehead City: all of these were minors. They had supper at plaintiff's home, drove to the ball game, and a few minutes before the game was finished left to go back to plaintiff's home. Lovick was driving, Nancy was seated beside him, and Ballou and plaintiff were on the back seat.

About 10:30 o'clock p.m. that night in transit to plaintiff's home Lovick was driving west on Highway #24 about six miles west of

Morehead City at a speed of 55 to 60 miles an hour. The maximum speed limit there for passenger automobiles was 60 miles an hour. The lights of the automobile were in good condition. The road, with pavement 20-22 feet wide and with sandy shoulders 8 feet wide, was level and flat. The moon was not shining; wind was blowing "right hard"; "right much salt and sand" in the air; and visibility was not the best.

Lovick and some of the passengers in the automobile, if not all, saw in front of them a motor vehicle on their left side of the highway with bright lights on shining toward them. This vehicle was a big Low-Boy, the kind that carries bulldozers, and was parked partially on the paved highway facing east with its left wheels on the pavement. It was parked a short distance east of a regular Army truck that hauls men with canvas on it, which was partially parked, and apparently disabled, on the right side of the highway going west with its left rear wheel five feet on the pavement from its edge. It had no lights burning on its rear, but it had reflectors on the rear, which reflected the light from the automobile Lovick was driving. Lovick testified he saw no reflectors on the rear of the truck.

W. J. Smith, a State highway patrolman, who investigated the collision, testified Lovick told him, in the absence of the defendant Duke:

> "He was headed west on N. C. Highway #24 at 55 to 60 miles per hour. That he didn't see any obstruction in the road until he was right on top of the truck * * * He said when he was approximately 50 feet of it he saw the truck and applied his brakes and skidded into the rear."

Skid marks led back from the Rambler automobile about 35 feet. The right front of the Rambler automobile hit the left rear of the Army truck.

Plaintiff testified:

> "I stated that I saw a reflector on the back of the Marine vehicle. When I first saw the reflector, didn't do anything (sic). I don't know whether he saw it or not. I don't know how long after I saw the reflector before Lovick did anything. However, he pulled the car to the left and applied his brakes. I had seen the reflector before he turned to the left."

In the collision plaintiff sustained personal injuries.

It is true that Lovick was not bound to anticipate or to foresee that an unlighted truck would be left standing on the traveled portion of the highway ahead of him without flares or other signs of danger, and in the absence of anything which gives or should give notice to the contrary, he was entitled to assume and to 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 only from the violation of duty or law by some other person, but this did not relieve him of the necessity of keeping a proper lookout and proceeding as a reasonably prudent person would under the circumstances. *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19.

Plaintiff's evidence permits these reasonable inferences: When Lovick at a speed of 55 to 60 miles an hour approached the vehicle with bright lights facing him he was not keeping a reasonably careful lookout, for if he had been doing so, he would have seen in the exercise of ordinary care that the vehicle with bright lights facing him was standing still partially parked on the paved portion of the highway on his left, though there was a sandy shoulder beside the pavement 8 feet wide. That under such circumstances a reasonably prudent man keeping a proper lookout would not have assumed, and acted upon the assumption, that the road ahead of him was clear, but would have slowed down and gotten his automobile under control. That if he had done so, he would have seen the parked truck ahead of him, and in the exercise of ordinary care could and would have avoided striking it. That instead he did not decrease his speed of 55 to 60 miles an hour under those circumstances until he was about 50 feet from the truck, and then it was impossible for him to avoid colliding with its rear. In brief, plaintiff's evidence permits reasonable inferences of a failure to keep a reasonably careful lookout, of excessive speed under the circumstances and conditions then and there existing, and of a failure to proceed as a reasonably prudent man would have under the circumstances and conditions then and there existing.

A failure to maintain a reasonably careful lookout by a motorist is negligence. *Clark v. Emerson,* 245 N.C. 387, 95 S.E. 2d 880; *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332. Excessive speed is negligence. *Clark v. Emerson, supra; Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345.

The jury could reasonably find from plaintiff's evidence that by reason of his negligent operation of the automobile Lovick, in the exercise of the reasonable care of an ordinarily prudent person, should have foreseen that some injury would result from his negligence, or that consequences of a generally injurious nature should have been expected, and that such negligent operation of the automobile by Lovick was a proximate cause of plaintiff's injuries.

Defendants contend that Lovick was faced with a sudden emergency, and that he made such choice of action as a person of ordinary care

and prudence, similarly situated, would have made, and therefore he is blameless. Plaintiff's evidence, and defendants' evidence favorable to her, when considered in the light most favorable to her, does not show as a matter of law that Lovick passed the test required of a person who is required to act in a sudden emergency as stated in *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562, and other decisions of this Court.

It is well-settled law in North Carolina that there can be more than one proximate cause of injury. *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847. Where an injury to a third person is proximately caused by the negligence of two persons, the injured person may maintain an action for damages against either one or both. *Darroch v. Johnson and Colville v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589; *White v. Carolina Realty Co.,* 182 N.C. 536, 109 S.E. 564; Strong's N. C. Index, Vol. I, Automobiles, § 48.

The trial court properly overruled defendant Lovick's motion for judgment of compulsory nonsuit entered at the close of all the evidence.

The court properly overruled defendant Duke's similar motion by virtue of the provisions of G.S. 20-71.1 (b). *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767; *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644.

Defendants assign as errors the following parts of the charge in parentheses, which parts follow each other consecutively in the record:

> "The court further instructs you that the driver of a car is not required to anticipate that vehicles will be stopped or parked on the highway at night without lights or the warning signals required by statutes (but this does not relieve him of the duty to keep a proper lookout and not exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmosphere, atmospheric conditions and the duty to anticipate the presence of others and hazards of the road such as disabled vehicles).
>
> "(A motorist must take into consideration hills and curves in observing the rule that he must be able to stop within the range of his lights).
>
> "(However, the rule that a driver must not exceed a speed at which he can stop within the radius of his lights is not a rule of thumb but requires an obligation that he exercise that degree of care for his own safety and those with him that reasonably prudent men would exercise for their own safety), however, each case must be determined upon the particular facts."

Defendants further assign as error the following part of the charge enclosed in parentheses, when the court was instructing the jury as to the application of the law to the facts in respect to the first issue as to whether plaintiff was injured by the negligence of the defendant Lovick, as alleged in the complaint:

> "The Court instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant, Gerald Joseph Lovick operated his automobile at the time and place in question at a speed greater than was reasonable or prudent under the conditions then existing or if the plaintiff has satisfied you that the defendant Gerald W., Gerald Joseph Lovick operated this automobile at the time and place in question without keeping a proper lookout or (if the plaintiff has satisfied you from the evidence and by the greater weight that the defendant operated his automobile at such a speed as to not be able to stop within the range of his lights and you further find from the evidence and by its greater weight that either one or more of these acts constituted negligence on the part of the defendant, Gerald Joseph Lovick and was one of the proximate causes of the injury and damage by plaintiff it would be your duty to answer this issue yes)."

From a study of all the challenged parts of the charge set forth above, the meaning seems to be clear and unmistakable, and the jury must have so understood it, that the court instructed the jury on the first issue to the effect that a failure or inability of Lovick, who was driving the automobile within the maximum speed limit on the highway there, to stop the automobile within the radius of the lights thereof, would constitute a breach of legal duty, and would be negligence *per se*. In so charging the court committed prejudicial error.

The General Assembly of 1953 enacted ch. 1145, Session Laws 1953, now incorporated in G.S. 20-141 (e), wherein it is expressly prescribed "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, but the facts relating thereto may be considered with other facts in such action in determining the negligence * * * of such operator." *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232; *Brooks v. Honeycutt*, 250 N.C. 179, 108 S.E. 2d 457; *Scarborough v. Ingram*, 256 N.C. 87, 122 S.E. 2d 798.

For error in the charge defendants are entitled to a new trial, and it is so ordered.

New trial.

DR. JOHN C. TAYLOE, DR. A. R. PETERS, JR., JOSEPH P. TUNSTALL, DR. SAM. H. WILLIAMS, JR., DR. W. C. PIVER, JR., DR. CLARK RODMAN, DR. DAVID T. TAYLOE, DR. R. G. SILVERTHORNE, AND DR. C. T. PARTRICK, PARTNERS, TRADING AND DOING BUSINESS AS TAYLOE DRUG COMPANY v. HARTFORD ACCIDENT & INDEMNITY COMPANY.

(Filed 19 September 1962.)

1. Landlord and Tenant § 7—

Under the terms of a lease obligating lessees of a store to keep the premises in repair, "unavoidable accidents excepted," lessees are liable for the cost of repairing the doors to the store damaged in a burglary, since such damages results from the intentional act of the burglar or burglars, and therefore is not the result of an unavoidable accident.

2. Insurance § 93—

Under a policy of insurance in favor of lessees of a store building, covering loss from burglary and damage to the premises owned by lessees or for which they are liable, insurer is liable for the cost of repairing doors to the store damaged in a burglary when lessees are liable under the terms of the lease for the repair of the premises except damage resulting from "unavoidable accidents."

APPEAL by defendant from *Mintz, J.*, June Term 1962 of BEAUFORT.

David T. Tayloe and Fred V. Tayloe own a store building located on West Main Street in Washington, North Carolina. By lease dated 29 August 1953 the store building was leased to the plaintiff partnership for use as a drug store. The lease period was from 1 January 1954 to 1 January 1964. The lease contained the following paragraph:

"The lessors agree that the lessees shall enjoy said premises during said term free and clear from the adverse claims of any person. And the lessees agree to make no unlawful use of said premises, to keep the premises in good repair, and deliver up the same at the end of the term in good order and condition, reasonable wear and tear and unavoidable accidents excepted."

On 29 April 1960 the defendant issued a Storekeepers' Burglary and Robbery Policy to the plaintiff partnership. The policy contained the following paragraph:

"VII. Damage. To pay for damage to the premises and to money, securities, merchandise, furniture, fixtures and equipment within the premises, by such robbery, kidnapping, burglary, safe burglary, robbery of a watchman, or attempt thereat, provided with respect to damage to the premises the insured is the owner thereof or is liable for such damage."

On or about 18 June 1960, during the night or early morning, and while the store was closed for business, one or more persons entered

the store. Entrance was gained by smashing the glass, locks and frame of the two front doors, and by springing the hinges on which the doors swung. The party or parties entered the drug store and illegally removed therefrom merchandise and cash of the alleged value of $449.15. The doors of the store were damaged allegedly to the extent of $655.00.

Trial by jury was waived by all parties and it was agreed that the trial judge might hear the evidence, find the facts and enter judgment. Judgment was entered in favor of plaintiff partnership and against the defendant insurer in the sum of $979.62. Of this amount, $442.55 was awarded for merchandise and cash stolen from the drug store and is not contested or involved in this appeal. The defendant appeals from the remainder of the judgment in the amount of $537.07, which is the actual amount, according to the evidence, expended by plaintiff partnership for the repair or replacement of the aforesaid two front doors including metal frames, and assigns error.

Carter & Ross for appellees.
James & Speight, William C. Brewer, Jr., for appellant.

DENNY, C.J. This appeal turns on whether or not the damage to the premises involved in this action resulted from an unavoidable accident within the terms of the plaintiff partnership's lease.

"Accident" is defined as "an unforeseen event, occuring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." Black's Law Dictionary, Third Edition. This definition of an accident was cited with approval in *Thomas v. Lawrence,* 189 N.C. 521, 127 S.E. 585 and *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726.

In 1 C.J.S., Accident, page 443, an "unavoidable accident" is defined "as meaning an accident which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case, which is not occasioned by any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise, or which occurs without fault attributable to any one; * * *."

Webster's Third New International Dictionary (Unabridged) defines "unavoidable casualty or unavoidable accident" as "an unintentional occurrence that cannot be avoided by the degree of care required of a person under all the circumstances. A casualty or accident happening without fault of any person involved."

In the case of *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68, *Bobbitt, J.,* speaking for the Court, said: "An unavoidable accident,

as understood in the law of torts, can occur only in the absence of causal negligence."

There is a divergence of opinion among the authorities as to whether or not an intentional act of a third party or parties constitutes an "unavoidable accident." Some hold, however, that damage to leased premises by the act of a stranger is included in the term "unavoidable casualties." *Kirby v. Davis*, 210 Ala. 192, 97 So. 655.

In the case of *Leominster Fuel Co. v. Scanlon*, 243 Mass. 126, 137 N.E. 271, 24 A.L.R. 1459, the plaintiff had leased the premises from the defendant for a period of years. There was a plate-glass window in the leased premises next to the sidewalk, the window formed a part of the wall of plaintiff's office. The window was broken by a third person who ran into it from the street. The plaintiff brought an action against the lessor to recover for the expense of replacing the plate-glass window.

In the lease the lessee had covenanted, "To keep the premises in tenantable repair, damage by fire, unavoidable casualty, and unusual wear and tear alone excepted."

The Supreme Court of Massachusetts held: "The breaking of the window through accident or negligence by an outsider, for whose conduct neither the landlord nor the tenant were responsible, was not an 'unavoidable casualty' within the meaning of those words in the lease exonerating the tenant from keeping the premises in tenantable repair. *Welles v. Castles*, 3 Gray, 323; *French v. Pirnie*, 240 Mass. 489, 134 N.E. 353, 20 A.L.R. 1098.

"It follows that the defendant is under no liability to plaintiff for replacing the window. * * *" See Anno — Lease — Unavoidable Casualty, 20 A.L.R. 1101, *et seq.*

It appears from the evidence on this record that the plaintiff partnership remodeled the leased premises at a cost of approximately $16,000; building a completely new front, installing new doors and new windows. The glass double doors were of the double-action type with metal frames. The insurance policy involved contains this provision with respect to the property interest covered: "Ownership of Property; Interests Covered. The insured property may be owned by the insured, or held by the insured in any capacity whether or not the insured is liable for the loss thereof, or may be property as respects which the insured is legally liable; provided, the insurance applies only to the interest of the insured in such property, including the insured's liability to others, and does not apply to the interest of any other person or organization in any of said property unless included in the insured's proof of loss."

There is no controversy about the proof of loss. Proof of loss was waived by stipulation of counsel.

There is no contention that the lessors have any liability for repairs to the premises involved during the leased period. According to the evidence, all the property damage inflicted by the burglar or burglars was to property bought and installed by the partnership lessee and repaired or replaced by it after the robbery.

This Court has been inclined to the view that where injury or death has resulted from the intentional or wrongful conduct of a third party, the death or injury was not the result of accidental means. *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438; *Goldberg v. Insurance Co.*, 248 N.C. 86, 102 S.E. 2d 521.

In the case of *Slaughter v. Insurance Co., supra,* the action was brought by the plaintiff, beneficiary, to recover on an accident policy issued by the defendant in which it contracted to pay $2,500 for the loss of life by the insured, William B. Slaughter, "resulting directly and independently of all other causes from bodily injury sustained by the insured solely through external, violent, and accidental means." The policy contained an exclusion clause, in material part as follows: "The insurance under this policy shall not cover death * * * caused directly or indirectly, wholly or partly, (1) by the intentional act of the Insured or any other person, whether sane or insane * * *." The insured operated a taxi-cab in Selma. An unidentified man requested Slaughter to take him to Smithfield. Later, Slaughter's body was found near the city dump about three miles from Smithfield. His money, his pistol, and the taxicab were gone. This Court said: "All the evidence points to an intentional killing with robbery as the motive. This evidence, viewed in the light of reason and common sense, leaves no basis for a finding of death as the result of accident as the term 'accident' is generally understood. The evidence, circumstantial, of course, offered nothing which even remotely tended to suggest, much less support a finding, that death resulted through accidental means."

The appellant concedes that the burglar or burglars intended to smash the doors of the drug store owned by the plaintiff partnership in order to gain entrance thereto so they might take and carry away cash and merchandise stored therein.

In our opinion, the damage to the premises was not the result of an unavoidable accident within the meaning of the terms of the lease. Consequently, plaintiff partnership was required to make the necessary repairs to the premises if it desired to continue its business. We hold, therefore, that under the terms of the lease and the policy of insurance issued by the defendant to plaintiff partnership, the judgment of the court below should be sustained.

The judgment entered below is

Affirmed.

CARSON D. SPIVEY, SR., ADMINISTRATOR OF EDITH RACHEL SPIVEY, DECEASED, v. GERTRUDE SMALL BOYCE AND EPHRIAM J. BOYCE, SR., ORIGINAL DEFENDANTS; AND ALLEN JEANETTE WILLIAMS AND WILLIAM H. WILLIAMS, ADDITIONAL DEFENDANTS.

(Filed 19 September 1962.)

1. Appeal and Error § 29—

The failure of the original defendant to serve case on appeal within the time prescribed with respect to an additional defendant's cross action against him results in absence of case on appeal in regard to the cross action, and the case on appeal in regard to the action between the plaintiff and the original defendant cannot supply the deficiency.

2. Appeal and Error § 28—

The absence of a case on appeal precludes consideration of exceptions occurring during the progress of the trial, including asserted error in allowing motion to nonsuit and refusal to submit a certain issue, but the absence of case on appeal does not preclude consideration of errors appearing on the face of the record proper, such as the denial of motion to strike allegations from a pleading.

3. Appeal and Error § 47; Pleading § 34—

The refusal to strike an allegation setting up an estoppel by settlement as a defense to the original defendant's cross action against one of the additional defendants will not be held for error when the original defendant takes a voluntary nonsuit as to such additional defendant prior to trial and such additional defendant is not a party at the time of trial, since the mere reading of the allegations and the original defendant's denial thereof could not have resulted in prejudice.

APPEAL by defendants Boyce from *Morris, J.*, January Term 1962 of PERQUIMANS.

Civil action growing out of a collision that occurred in Bertie County on the afternoon of Sunday, December 4, 1960, between an automobile owned by defendant Ephriam J. Boyce and operated by his wife, defendant Gertrude Small Boyce, and an automobile owned by (additional) defendant William H. Williams and operated by his daughter (additional) defendant Allen Jeanette Williams.

Admissions establish that, in each instance, the owner of the automobile, under the family purpose doctrine, is liable for the negligence if any, of the driver thereof.

The collision occurred within the right-angle intersection of two paved highways, U. S. Highway #17, the dominant highway, and N. C. Highway #45, the servient highway. The Williams car was proceeding south on #17 and the Boyce car was proceeding east on #45. Standard highway signs warned motorists on #45 to stop before entering upon #17. Each driver was undertaking to pass straight through the inter-

section. They entered the intersection at approximately the same time. The principal impact was between the left front of the Boyce car and the right front of the Williams car. Plaintiff's intestate, a guest passenger in the Williams car, was seated beside the right front door thereof. This door was knocked open by the impact. Plaintiff's intestate was thrown onto the highway and sustained fatal injuries.

Plaintiff instituted this action against defendants Boyce, alleging the death of his intestate (daughter) was proximately caused by their negligence. Answering, defendants Boyce denied negligence, pleaded negligence of defendants Williams was the sole proximate cause of the death of plaintiff's intestate; and, conditionally, alleged a cross action for contribution against defendants Williams. Defendants Williams were made parties on motion of defendants Boyce and became defendants only in respect of said cross action for contribution.

Defendants Williams filed a joint answer in which they denied negligence, pleaded negligence of defendants Boyce was the sole proximate cause of the death of plaintiff's intestate; and Allen Jeanette Williams pleaded a cross action against defendants Boyce in which she alleged she sustained personal injuries on account of their negligence and was entitled to recover damages therefor. In addition, defendants Williams pleaded a settlement alleged to have been made by defendants Boyce with defendant William H. Williams for the damage to his car and pleaded "said settlement and payment . . . as estoppel by settlement in bar of the right of the original defendants to recover against these additional defendants by contribution or otherwise by cross action herein."

Defendants Boyce, under date of June 23, 1961, filed a motion to strike the allegations of defendants Williams relating to their alleged settlement with William H. Williams for the damage to his car. In support of their motion, defendants Boyce set forth in an affidavit that if such settlement had been made by their liability insurance carrier it was made without their knowledge, consent or approval. Facts as to hearings and rulings on said motion to strike will be set forth in the opinion.

In a reply, defendants Boyce pleaded the contributory negligence of Allen Jeanette Williams in bar of her right to recover on her cross action.

At a pretrial conference, a voluntary nonsuit was taken by defendants Boyce in respect of the cross action they had alleged against defendant William H. Williams for contribution. Thus, William H. Williams was not a party at the time of the trial.

The record shows that the court submitted and the jury answered these issues:

"1. Did the plaintiff's intestate, Edith Rachel Spivey, come to her death as a result of the negligence of the defendants Boyce, as alleged in the Complaint? ANSWER: Yes.

"2. What amount of damages, if any, is the plaintiff entitled to recover of the defendants Boyce as a result of the death of the said intestate? ANSWER: $20,000.

"3. Was the additional defendant Allen Jeannette *(sic)* Williams injured as a result of the negligence of the defendants Boyce, as alleged in the Answer and Further Defense of the additional defendants Williams? ANSWER: Yes.

"4. In what amount, if any, is the additional defendant Allen Jeannette *(sic)* Williams entitled to recover of the defendants Boyce because of injuries sustained? ANSWER: $2,000."

The record shows the court entered judgment in accordance with the verdict; that defendants Boyce gave notice of appeal; that they were allowed sixty days (from February 2, 1962) to serve case on appeal.

By agreement between plaintiff and defendants Boyce, the time for serving case on appeal was extended to June 1, 1962; defendants Boyce served their statement of case on appeal on plaintiff on May 31, 1962; and on June 26, 1962, the case on appeal in the transcript now before us was agreed to by counsel for plaintiff and counsel for defendants Boyce.

Allen Jeanette Williams did not agree to any extension of time for service of case on appeal by defendants Boyce. No statement of case on appeal was served on her or her counsel until June 1, 1962.

Silas M. Whedbee and John H. Hall for plaintiff appellee.
LeRoy, Wells & Shaw for defendants Boyce, appellants.
Aydlett & White for Allen Jeanette Williams, appellee.

BOBBITT, J. There was plenary evidence to support the jury's finding that plaintiff's intestate came to her death "as a result of the negligence of defendants Boyce, as alleged in the Complaint." Too, there was plenary evidence to support the jury's finding that plaintiff is entitled to recover damages from defendants Boyce in the sum of $20,000.00.

Careful consideration of assignments of error based on exceptions brought forward in the case on appeal served in apt time on plaintiff, relating to plaintiff's action against defendants Boyce, have been considered. Suffice to say, none discloses prejudicial error or requires discussion.

On account of the failure of defendants Boyce to serve a case on appeal on Allen Jeanette Williams within the time provided therefor, there is no case on appeal as between defendants Boyce and Allen Jeanette Williams. *Little v. Sheets*, 239 N.C. 430, 80 S.E. 2d 44, and cases cited. The *(Boyce-plaintiff)* case on appeal appearing in the transcript before us cannot be considered in determining the rights of defendants Boyce and Allen Jeanette Williams *inter se*.

Absent exceptions duly taken and set forth in a case on appeal served in apt time, there is no basis for consideration of certain assignments of error stressed by defendants Boyce, namely, (1) asserted error in the court's allowance of the motion of defendant Allen Jeanette Williams for judgment of nonsuit as to the alleged cross action of defendants Boyce against her for contribution, (2) asserted error in the court's denial of the motion of defendants Boyce for judgment of nonsuit as to the cross action of Allen Jeanette Williams against them, and (3) asserted error in the court's refusal, upon trial of said cross action, to submit an issue as to Allen Jeanette Williams' contributory negligence.

Obviously, determination of such assignments of error would require a critical consideration of the evidence offered at the trial; and, absent a case on appeal, the evidence offered at the trial is not before us for consideration. Indeed, absent a case on appeal, whether such motions and rulings were made does not appear.

"Exceptions which point out errors occurring during the progress of a trial in which oral testimony is offered or challenge the sufficiency of the evidence to support the facts found can be presented only through a 'case on appeal' or 'case agreed.' This is the sole statutory method of vesting this Court with jurisdiction to hear the appeal. Unless so presented, they are mere surplusage without force or effect and must be treated as a nullity." *Hall v. Hall*, 235 N.C. 711, 714, 71 S.E. 2d 471; *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22; *Cressler v. Asheville*, 138 N.C. 482, 51 S.E. 53.

Even so, defendants Boyce contend the court erred in denying their motion to strike the fifth paragraph of the answer of defendants Williams and that error in this respect appears on the face of the record proper.

The written motion of defendants Boyce to strike the portion (fifth paragraph) of said joint answer of defendants Williams in which they alleged defendants Boyce had settled with William H. Williams for the damage to his car, was first overruled by a formal order of November 8, 1961. The court then noted and signed exception taken by defendants Boyce to said order. At the pretrial conference, held at the trial term, the court again, by a formal order, overruled said writ-

ten motion. Thereupon, defendants Boyce took a voluntary nonsuit as to (additional) defendant William H. Williams and again moved to strike the said fifth paragraph of the pleading filed jointly by defendants Williams. The court overruled this motion. The court then noted and signed exceptions by defendants Boyce to said rulings.

Prior to the adoption of our Rule 4(a), Rules of Practice in the Supreme Court, 254 N.C. 783, 785, defendants Boyce could have appealed as a matter of right from the denial of their said motion. Under the present practice, they are entitled to bring forward from an adverse final judgment their exception (then noted and signed by the court) to the order(s) denying their said motion.

It is noted that defendants Boyce, in their reply, categorically denied the allegations set forth in the said fifth paragraph of the joint answer of defendants Williams. Prejudice, if any, to defendants Boyce results solely from the reading of said fifth paragraph in the presence of the jury and of the reading of the denial thereof by defendants Boyce. Nothing appears to indicate evidence was offered in the presence of the jury bearing in any way on the subject of said allegations.

Uncontradicted evidence, including her own testimony, is to the effect that Mrs. Boyce failed to stop in obedience to the stop sign; and, upon the uncontradicted testimony, the only reasonable conclusion that may be drawn is that the negligence of defendants Boyce was a proximate cause of the collision. The jury so found in their answers to the first and third issues.

We pass, without decision or discussion, whether the court erred in refusing to strike said fifth paragraph. Suffice to say, we do not think it may be reasonably asserted that the jury, in answering the issues submitted, was in any way influenced or affected by the mere reading of said allegations and the denial thereof. Hence, we are of opinion, and so decide, that error, if any, in the denial of said motion to strike was not prejudicial.

No error.

STATE v. FLOYD RICHARD PLEDGER.

(Filed 19 September 1962.)

1. Attorney and Client § 1—

The preparation of legal documents and contracts by which legal rights are secured constitutes practicing law. G.S. 84-2.1.

2. Same—

G.S. 84-4 proscribes the preparation of legal documents by a lay person for another person, firm, or corporation, but does not prohibit a lay person from preparing legal documents so long as he has a primary interest in the transaction, and therefore prepares such documents not for another but for himself.

3. Same—

A corporation can act only through its officers, agents, and employees, and therefore a lay person who is an officer, agent, or employee of a corporation may prepare legal documents for the corporation when the corporation has a primary interest in the transaction for which the documents are prepared, since his act in so doing is the act of the corporation in furtherance of its own business.

4. Same—

Where the evidence permits the inference that a lay person prepared legal documents for a corporation and that such lay person was not an agent or employee of the corporation, nonsuit is properly overruled in a prosecution of such lay person for the unauthorized practice of law.

5. Criminal Law §§ 135, 141—

Prayer for judgment may be continued from term to term without defendant's consent if no conditions are imposed, and when prayer for judgment is continued there is no judgment and no appeal will lie.

6. Criminal Law § 87—

Where indictments are consolidated for trial, the counts in the separate bills of indictment will be treated as separate counts in one bill.

7. Criminal Law § 141—

Where several indictments are consolidated for trial and final judgment is imposed upon conviction on some of the counts and judgment is continued as to other counts, the appeal from the judgment is permissible, and all counts are before the Supreme Court, but as to counts upon which prayer for judgment was continued the cause must be remanded, and as to them the cause remains in the trial court for appropriate action upon motion of the solicitor, with right of defendant to appeal from any final judgment adverse to him entered thereon.

APPEAL by defendant from *Parker, J.*, June 1962 Criminal Term of CRAVEN.

Defendant is charged in eight criminal cases, docket nos. 5773 to 5780, inclusive, with unauthorized practice of law in violation of G.S. 84-4.

The indictments allege that defendant prepared directly "and through others" eight deeds of trust for other persons and corporations, he not being a member of the North Carolina Bar and not being licensed to practice as an attorney at law. The beneficiary in the deeds of trust referred to in the indictments in cases 5773, 5774 and 5775

is Designed for Living, Inc. The beneficiary in the deeds of trust referred to in the indictments in cases 5776, 5777, 5778, 5779 and 5780 is Century Home Builders, Inc.

The evidence tends to show: Century Home Builders, Inc., is engaged in the sale and construction of "shell" homes. Its principal office is in Lumberton, North Carolina, and it has a branch office in New Bern. At the times mentioned in the indictment defendant was its employee and was in charge of the New Bern office. He solicited sales, and when time sales were made deeds of trust were prepared by him or under his direction for his corporate employer. Printed forms were used and preparation consisted in inserting in blank spaces the names of the parties to the instrument, the description of the land, and the terms of the instruments. Defendant also saw to the execution, acknowledgment and recordation of the deeds of trust. The eight deeds of trust referred to in the indictment were prepared by defendant or under his supervision by his secretary. He is not a member of the North Carolina Bar and is not a licensed attorney at law. Designed for Living, Inc., has its principal office in Atlanta, Georgia.

The cases were consolidated for trial. Defendant pleaded not guilty in each case. The jury returned a verdict of "Guilty as charged."

The court entered judgments as follows: In case 5776, two years. In case 5777, two years, to begin at the expiration of the sentence in 5776. In case 5779, two years, to begin at the expiration of the sentence in 5777. In cases 5773, 5774, 5775, 5778 and 5780 "Prayer for Judgment continued." The prison sentences were suspended upon certain conditions.

Defendant appeals.

Attorney General Bruton and Staff Attorneys Richard T. Sanders and Ralph M. Potter for the State.

Charles L. Abernethy, Jr., for defendant.

MOORE, J. It is charged that defendant engaged in unauthorized practice of law. The bills of indictment are grounded on G.S. 84-4 which, in pertinent part, provides: ". . .(I)t shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to . . . prepare for another person, firm or corporation, any . . . legal document."

A deed of trust is a legal document. Practice of law embraces the preparation of legal documents and contracts by which legal rights are secured. G.S. 84-2.1; *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 25, 28, 86 S.E. 2d 893; *Seawell, Attorney-General v. Motor Club*, 209 N.C. 624, 631, 184 S.E. 540; *Re: S. E. Matthews*, 62 P. 2d 578, 111

A.L.R. 13 (Idaho 1936). See also 111 A.L.R., Anno — What amounts to Practice of Law, p 19.

The evidence for the State tends to show that the deeds of trust in question were prepared by defendant directly or under his supervision, and that he is not a member of the North Carolina Bar and is not a licensed attorney at law. The crucial question on this appeal is: Did he prepare the documents "for another person, firm or corporation" within the intent and meaning of the statute?

It was not the purpose and intent of the statute to make unlawful all activities of lay persons which come within the general definition of practicing law. G.S. 84-2.1. Any adult person desiring to do so may prepare his own will. A person involved in litigation, though not a lawyer, may represent himself and either defend or prosecute the action or proceeding in a tribunal or court, even in Supreme Court, and may prepare and file pleadings and other papers in connection with the litigation. A person, firm or corporation having a primary interest, not merely an incidental interest, in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating G.S. 84-4. The statute was not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare. *Seawell, Attorney-General v. Motor Club, supra; People ex rel. Chicago Bar Asso. v. Goodman,* 8 N.E. 2d 941, 111 A.L.R. 1 (Ill. 1937); *In re Cohen,* 159 N.E. 495 (Mass. 1928). Automobile, furniture, and appliance dealers prepare conditional sale contracts. Banks prepare promissory notes, drafts and letters of credit. Many lending institutions prepare deeds of trust and chattel mortgages. Owner-vendors and purchasers of land prepare deeds. *Copeland v. Dabbs,* 129 S. 88 (Ala. 1930). Almost all business concerns prepare contracts in one form or another. All such activities are legal and do not violate the statute so long as the actor has a primary interest in the transaction. *Cain v. Merchants National Bank & Trust Co.,* 268 N.W. 719 (N.D. 1936); *In re Kelsey,* 173 N.Y.S. 860 (1919); 9 N.C. Law Rev. 291, 293. For example, the grantor or the beneficiary in a deed of trust may prepare the instrument with impunity if the latter is extending credit to the former; the named trustee may not do so, for his interest is only incidental. A corporation can act only through its officers, agents and employees. A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the

statute, for his act in so doing is the act of the corporation in the furtherance of its own business.

Century Home Builders, Inc., is in the business of selling houses. In this connection its extends credit to purchasers and takes deeds of trust as security. Defendant at the times in question was its employee and manager of its New Bern office, and was charged with the prosecution of its business. His acts in preparing deeds of trust, to secure the indebtedness of buyers incurred in the purchase of houses from Century, were not violative of G.S. 84-4. As to the defendant, Century was not "another . . . corporation." In cases 5776, 5777, 5778, 5779 and 5780, the court below erred in denying defendant's motion for nonsuit.

Designed for Living, Inc., is a foreign corporation with its principal office in Atlanta, Georgia. In his argument in Supreme Court defendant's counsel stated that this corporation is a finance company. The evidence in the record, considered as a whole, permits the inference that defendant was not such agent or employee of Designed for Living, Inc., as to allow him to prepare deeds of trust on its behalf without being liable to the penalty of the statute. As to the defendant, this corporation was "another . . . corporation" within the meaning of the statute, so far as the present record discloses. In cases 5773, 5774 and 5775 the motion for nonsuit was properly overruled.

A defendant is entitled to appeal only from a final judgment. *State v. Cox*, 215 N.C. 458, 2 S.E. 2d 370. There were final judgments in cases 5776, 5777 and 5779. As already indicated, nonsuit should have been allowed in these cases, and the judgments will be reversed. In cases 5773, 5774, 5775, 5778 and 5780 prayer for judgment was continued, unconditionally. Prayer for judgment may be continued from term to term without defendant's consent if no conditions are imposed. *State v. Griffin*, 246 N.C. 680, 100 S.E. 2d 49; *State v. Graham*, 224 N.C. 347, 30 S.E. 2d 151; *State v. Graham*, 225 N.C. 217, 34 S.E. 2d 146. Where prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor. *State v. Griffin, supra; Barbour v. Scheidt*, 246 N.C. 169, 97 S.E. 2d 855.

The eight indictments (cases) involved on this appeal were consolidated for trial. Therefore, the counts in the separate bills of indictment are treated as separate counts in one bill. *State v. Austin*, 241 N.C. 548, 85 S.E. 2d 924. Since there were final judgments on three of the counts (cases 5776, 5777 and 5779) and appeal therefrom was permissible and proper, all counts are before us for disposition. Since there were no final judgments on five of the counts (cases 5773,

5774, 5775, 5778 and 5780), the cause will be remanded to Superior Court as to these.

If the State should elect to move for judgments in cases 5778 and 5780, it will be the duty of the court to adjudge therein that defendant is not guilty and to discharge him. This, because defendant's motion for nonsuit should have been granted on these counts, as explained above.

If the State should elect to move for judgments in cases (counts) 5773, 5774 and 5775, and the court should enter final judgments therein, defendant may, if so advised, appeal therefrom, and may again assert any or all exceptions appearing in the present record on appeal relating to these cases.

As to cases (counts) 5773, 5774, 5775, 5778 and 5780, the cause is Remanded.

In cases (counts) 5776, 5777 and 5779 the judgments below are Reversed.

WILLIAM D. REA, JR. v. UNIVERSAL C. I. T. CREDIT CORPORATION.

(Filed 19 September 1962.)

1. Chattel Mortgages and Conditional Sales § 15—

After default the mortgagee is entitled to possession of the mortgaged chattel and may seize and take possession of the chattel without legal process provided he may do so without provoking a breach of the peace.

2. Actions § 4—

The exercise of a legal right in a lawful manner cannot support an action either for punitive or compensatory damages.

3. Chattel Mortgages and Conditional Sales §§ 15, 17—

Where, after default, the mortgagee repossesses the chattel and sells it without advertisement as required by law, the mortgagor may recover the amount by which the value of the chattel at the time of its seizure exceeds the balance owing and secured by the conditional sale contract.

4. Same—

Where goods of the mortgagor are in the chattel at the time of its repossession by the mortgagee, the mortgagor is entitled to recover the value of such goods, and provision of the conditional sale contract that the mortgagor should give notice within 24 hours of claim for any articles taken which were not covered by the mortgage can have no application when the chattel is repossessed without knowledge of the mortgagor, since the mortgagor cannot be held to the duty of giving notice of a fact of which he had no knowledge.

APPEAL by defendant from *Copeland, S.J.,* March 1962 Regular Term of PERQUIMANS.

Plaintiff, on 5 March 1960, purchased from Portsmouth Motor Co. a 1955 Buick automobile. The sale was made in Virginia, where plaintiff was working. Part of the purchase price was paid in cash. The balance, payable in monthly installments beginning 5 April 1960, was secured by a "Virginia Conditional Sale Contract." This contract and the debt thereby secured were assigned to defendant.

Plaintiff paid his monthly installments through December 1960 but did not make subsequent payments. The contract specified notices should be given mortgagor by mail addressed to him at 4800 Old Deep Creek Boulevard, Portsmouth, Va., and further provided defendant "may, without notice or demand for performance or legal process, enter any premises where the car may be found, peaceably take possession of it and custody of anything found in it . . ."

Sometime in June plaintiff carried the automobile to his home at Belvedere, Perquimans County. He left it parked, with the doors locked, on his front lawn some sixty feet from the highway. Plaintiff returned to work in Virginia. Late in June or early in July plaintiff's wife and children went to Plymouth to visit relatives.

On the afternoon of 3 July 1961 an agent of defendant went to Belvedere to take possession of the Buick. He saw the car parked on plaintiff's front lawn. Failing to find anyone at home, he inquired of a neighbor as to the whereabouts of plaintiff's family. He was informed they were away. He thereupon, by use of a coat hanger, managed to unlock the car door and had the car carried away by a wrecker he had employed for that purpose.

Prior to July defendant had demanded payment of installments then due. Plaintiff, at that time, in response to defendant's statement that it would take possession of the car, said: "When you come after my automobile, be sure and bring legal papers showing it is legal for you to take my car." This conversation occurred in Virginia.

Plaintiff alleged the seizure of the automobile was wrongful because of the manner of taking, that defendant had converted the automobile and some tools and other personal property in the car to its use. He alleged damages on account of the conversion of the tools in the sum of $650, actual damages on account of the conversion of the car in the sum of $2500, and punitive damages for the conversion of the car in the sum of $2500.

Defendant admitted taking the car, asserting its right to do so under the mortgage. It denied that it took any tools or property not covered by the sales contract. It did not and does not contend that in selling the car it complied with the North Carolina statutes with

respect to advertisement and sale. It pleaded the unpaid balance owing it as a counterclaim.

The jury found defendant wrongfully seized the automobile; it was worth $500 in September when defendant converted it; plaintiff was entitled to $650 as compensatory damages and $1000 as punitive damages for the wrongful seizure. It found the balance owing on the purchase price to be $466.20.

The jury was instructed that the sum awarded as compensatory damages would include the value of any tools converted and inconvenience occasioned by the loss of use of the automobile.

The court rendered judgment for plaintiff for the sums fixed by the jury less the balance of the purchase price. Defendant excepted and appealed.

Walter G. Edwards and John H. Hall for plaintiff appellee.
Blanchard and Farmer for defendant appellant.

RODMAN, J. Does the evidence suffice to warrant a finding that defendant wrongfully took possession of the automobile? If not, the court erred in submitting the first issue to the jury.

Until modified by statute, G.S. 45-3.1, a mortgagee of chattels or his assignee was, in the absence of an agreement to the contrary, entitled to possession of the mortgaged property even prior to a default. *Grier v. Weldon,* 205 N.C. 575, 172 S.E. 200.

After default a mortgagee is entitled to possession of the mortgaged property and he may exercise that right without process of law provided he does so peacefully. *Freeman v. Acceptance Corp.,* 205 N.C. 257, 171 S.E. 63. Where, as here, the mortgage contains an express provision authorizing mortgagee to peacefully enter the premises of mortgagor and take possession, such entry and taking is not wrongful. The law is, we think, well stated in *Willis v. Whittle,* 82 S.C. 500, 64 S.E. 410. *Hydrick, J.,* there said: "It is well settled that, after condition broken, the legal title to mortgaged chattels vests in the mortgagee. The right of the mortgagee to seize mortgaged chattels after condition broken is a license coupled with an interest, which cannot be revoked by the mortgagor. It is part of the consideration of the mortgage, and to allow the mortgagor to revoke it would be a fraud on the rights of the mortgagee, and would very much impair the value of chattel mortgages as securities. The right to seize carries with it by necessary implication the right to do whatever is reasonably necessary to make the seizure, including the right to peaceably enter upon the premises of the mortgagor. There is one restriction, however, which the law imposes upon this right. It must be exercised without provok-

ing a breach of the peace; and, if the mortgagee finds that he cannot get possession without committing a breach of the peace, he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it." The right of a chattel mortgagee to take possession of property without legal process is the subject of an annotation appearing 57 A.L.R. 26. Here the evidence fails to disclose any conduct on the part of defendant or its agents when it went on plaintiff's property to take the automobile which would tend to constitute a breach of the peace.

The exercise of a legal right in a lawful manner cannot support a claim for either punitive or compensatory damages. The court erred in permitting plaintiff to recover either compensatory or punitive damages resulting from the repossession of the automobile; but since the foreclosure sale was not advertised as required by law, plaintiff was, as the court held, entitled to have the jury fix the fair market value of the car when sold, and to recover the amount by which such value exceeds the balance owing and secured by the conditional sale contract.

Plaintiff alleged that he had in his automobile at the time it was taken certain tools which had a value of $650. These tools had not been returned to him. Defendant denied there was any such tools in the car at the time it took possession. It tendered an issue to determine its liability for such tools as might have been in the car at the time of seizure. Defendant argues here that it cannot be held liable for tools in the car when defendant took possession. This contention is based on a provision of the conditional sale contract obligating mortgagor "to send notice by registered mail to holder within 24 hours after repossession if Customer claims that any articles not included herein were contained in the car at the time of repossession, failure to do so being a waiver of and bar to any subsequent claim therefor." Manifestly the quoted provision can have no application to the facts of this case. The car was taken without the knowledge of plaintiff. It was taken on 3 July 1961. Plaintiff testified: "I next went back to my home in Belvedere about the third week in July. My car was not where I had left it. It was gone. I have never seen it since." Certainly it was never contemplated that the mortgagor should notify defendant of a fact unknown to plaintiff.

The issues submitted were not directed to and determinative of the question: Did defendant, when it took the automobile, also take and convert chattels not included in the mortgage? Plaintiff is entitled to have that question determined, and, if the jury answer in the affirmative, he is entitled to compensation based on the market value of such property.

New trial.

LEWIS E. FERRELL, EXECUTOR OF THE LAST WILL AND TESTAMANT OF DELLA BASNIGHT BELL v. OSCOE BASNIGHT, MELVIN BASNIGHT, ST. CLAIRE BASNIGHT, MILROE ETHERIDGE, MYRTLE B. PECK, ENID B. FORD, ELLEN ALEXANDER, AND FLOSSIE BASNIGHT.

(Filed 19 September 1962.)

Appeal and Error § 4; Wills § 71—

The executor is not a "party aggrieved" by judgment adjudicating the rights of the beneficiaries under the will and, none of the beneficiaries affected by the judgment having appealed, the appeal will be dismissed.

APPEAL by plaintiff from *Parker, J.,* May 1962 Term of CRAVEN.

Della Basnight Bell died testate on 1 February 1961. Her will dated 27 April 1954 was probated in Craven, the county of her residence. Plaintiff was named in and has qualified as the executor of the will. He brings this action for a declaratory judgment to determine "(1) Whether Winslow Basnight shall take any part of the estate of the said Della Basnight Bell under either Item THREE or Item THIRTY-FIVE thereof; (2) Whether the defendant Milroe Etheridge shall take any part of the residue of said estate under Item THIRTY-FIVE of said Will, or whether Ellen Alexander will take any part, or whether either will take any part thereunder."

There is attached to the complaint a copy of the will. It is divided into thirty-six parts or items. Thirty-two of these give money or specific chattels to designated relatives or friends. The complaint directs attention to Items THREE, FIVE, and THIRTY-FIVE. These items, so far as here pertinent, read:

"THREE: I hereby will and devise to my brother Winslow Basnight the sum of One Thousand ($1,000.00) Dollars; to my brother St. Claire Basnight One Thousand ($1,000.00) Dollars; to my brother Oscoe Basnight One Thousand ($1,000.00) Dollars; and to my brother Melvin Basnight One Thousand ($1,000.00) Dollars."

"FIVE: I do hereby will and bequeath to my sister Milroe Etheridge the sum of Five Hundred ($500.00) Dollars and all of my silver knives, forks and spoons and all of the Haviland China."

"THIRTY-FIVE: . . . it is my will and desire that any residue and property, real or personal, not specifically disposed of herein, after the payment of all sums for which my estate may be liable, be equally divided between my full brother, my half brothers and my half sister, share and share alike."

Plaintiff alleges these facts to justify his prayer for interpretation: (1) The will was executed 27 April 1954. (2) Winslow Basnight (Mrs. Bell's brother) died 29 January 1953, leaving a widow, defendant Flossie Basnight, and two daughters, defendants Peck and Ford, as his

heirs at law and distributees. (3) Defendants St. Claire Basnight, Oscoe Basnight, and Melvin Basnight were half brothers of Mrs. Bell. Defendants Milroe Etheridge and Ellen Alexander were half sisters of Mrs. Bell. (4) The will makes no specific reference to Mrs. Ellen Alexander.

Plaintiff alleges: "(W)hen testatrix designated her half sister in such will, she meant her half sister Milroe Etheridge, theretofore mentioned, and not her half sister Ellen Alexander."

Ellen Alexander, although personally served with process, did not answer. The other defendants filed an answer verified by the defendant Oscoe Basnight. Their answer admits the factual allegations of the complaint. It alleges the defendants Peck, Ford, and Flossie Basnight were, as a matter of law, entitled to receive the $1,000 given their father and husband, Winslow Basnight, by Item THREE. The answer denies that the rights of the parties are to be determined solely by a construction of the will, alleging all defendants have settled any potential controversy by a written agreement dated 4 March 1961, copy of which they annexed to the complaint. This agreement provides in part: "And whereas all of said parties desire to stipulate and agree that it was the intent of the said Della Basnight Bell in said Item THIRTY-FIVE of her will, constituting its residuary clause, to provide that her half sister Milroe Etheridge should participate in the property passing thereunder, and to exclude her half sister Ellen Alexander, and the said Ellen Alexander does not wish any controversy over the construction of said item of said will by reason of said testator mentioning 'my half sister' when in fact she had two half sisters . . ."

Judge Parker, being of the opinion the pleadings raised no issues of fact and the defendant Ellen Alexander having waived any right to a jury trial by her failure to plead or to appear (G.S. 1-184), found the facts as stated in the pleadings, including a finding that the agreement of 4 March 1961 was executed by Ellen Alexander and the remaining defendants.

Based on his findings, he concluded: (1) Item THREE bequeathing $1000 to Winslow Basnight was void by reason of his death prior to the execution of the will. (2) By virtue of the agreement of 4 March 1961 defendants Ford and Peck were entitled to this sum. (3) That portion of Item THIRTY-FIVE giving one-fifth of the residuary estate to Winslow Basnight was void because of his death prior to the execution of the will "but by reason of the aforementioned agreement between Ellen Alexander and the others therein mentioned, dated March 4, 1961, and recorded in Book 627 at page 123, the said Myrtle B. Peck and Enid B. Ford are entitled to receive a one-fifth part of all the residuary estate." (4) "That Milroe Etheridge is entitled to

receive a one-fifth part of all property devised in Item THIRTY-FIVE of the said last will and testament of Della Basnight Bell which was devised to 'my half sister.' "

Plaintiff excepted to the judgment and appealed.

Barden, Stith & McCotter by L. A. Stith for plaintiff appellant.
R. E. Sumrell for defendant appellees.

RODMAN, J. Plaintiff, appellant, does not contend his rights are in any wise prejudiced by the judgment. Admittedly the court has answered the questions which plaintiff wanted answered and which are determinative of the rights of the parties. Mrs. Alexander did not deny the allegation in the complaint that Mrs. Bell, when she referred to her half sister, meant Mrs. Etheridge and not Mrs. Alexander. In fact Mrs. Alexander not only did not deny the allegation but executed the written instrument acknowledging that fact. She has not appealed from the judgment determinative of her rights.

The remaining defendants have not appealed from the judgment declaring Winslow Basnight's children entitled to the $1000 given by the will to their father, nor have they appealed from that part of the judgment holding that they are jointly entitled to one-fifth of the residuary estate. In fact all the defendants who answered and who have entered an appearance in this Court conclude their brief with this language: "We contend that for the reasons above stated, Myrtle B. Peck and Enid B. Ford are entitled to the One Thousand Dollar bequest made to their father, Winslow Basnight, under Item Three of the Will involved in this case; that they are entitled to One-Fifth (1/5) of the residuary estate; and that Milroe Etheridge is the half-sister referred to in Item Thirty-Five of the will and is therefore entitled to One-Fifth (1/5) of the residuary estate." It thus appears that the parties who might be adversely affected by the judgment approve the result but suggest that the court gave the wrong reason for the conclusion reached.

Because plaintiff is not an aggrieved party, his appeal must be dismissed unless we are to depart from an unbroken line of decisions by this Court. *Cline v. Olson*, 257 N.C. 110; *Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632; *Gregg v. Williamson*, 246 N.C. 356, 98 S.E. 2d 481; *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519; *Gold v. Insurance Co.*, 255 N.C. 145, 120 S.E. 2d 452; *Buick Co. v. General Motors Corp.*, 251 N.C. 201, 110 S.E. 2d 870; *In re Estate of Cogdill*, 246 N.C. 602, 99 S.E. 2d 785.

Our holdings are in accord with decisions elsewhere. *Holland v. King*, 107 S.E. 2d 805; *Bryant v. Thompson*, 13 L.R.A. 745, with an-

notations; Annotation, 117 A.L.R. 99, on the question "Right of executor or administrator to appeal from order of distribution." See particularly the list of cases cited pp. 100-101. "An executor or administrator, as such, is not, however, aggrieved or prejudiced by a decree or judgment as to the rights of the beneficiaries, and therefore, cannot appeal from a decree affecting their interests. In accordance with this rule, it is held that an administrator is not entitled to appeal from a decree of distribution." 2 Am. Jur. 960-961; 4 C.J.S. 585-586.

Appeal dismissed.

WILLIAM JARVIS LEGGETT AND WIFE, LOSSIE BELL LEGGETT v. SMITH-DOUGLASS COMPANY, INC., IVAN BISSETTE AND ROBERT D. WHEELER, TRUSTEE, AND FRANK HART.

(Filed 19 September 1962.)

1. Appeal and Error § 12—

While the Superior Court may dismiss an appeal for failure to serve statement of case on appeal within the time limited, it may not dismiss an appeal after it has been docketed in the Supreme Court. Nevertheless, where appellant thereafter takes a voluntary nonsuit in the trial court such act is tantamount to an abandonment or withdrawal of the appeal and the Superior Court has jurisdiction to hear another action thereafter brought pursuant to G. S. 1-25.

2. Judgments § 34—

A consent judgment that the deed of trust in question is valid and which fixes the balance of the note secured thereby precludes the mortgagor from thereafter attacking the validity of the deed of trust or the amount then due so long as the consent judgment remains in full force and effect.

3. Mortgages and Deeds of Trust § 39—

In an action to set aside the foreclosure of a deed of trust on the ground of irregularities in the advertisement and sale, demurrer is properly entered sustained when there are no facts alleged supporting the legal conclusions of the pleader.

4. Pleadings § 19—

Where the complaint contains a defective statement of a good cause of action in failing to allege the facts necessary to support the legal conclusions, the action should not be dismissed prior to the expiration of time for amending the pleading. Nor may the action be dismissed upon demurrer on the ground of the pendency of a prior action between the parties until sufficient matter is made to appear to determine the identity of the actions.

LEGGETT *v.* SMITH-DOUGLASS CO.

APPEAL by plaintiffs from *Bundy, J.*, in Chambers at the Courthouse in Greenville, North Carolina, 3 March 1962, at 10:00 a.m. From PITT.

The plaintiffs executed to Robert D. Wheeler, trustee, under date of 29 December 1958, a deed of trust which is recorded in Book S-30, at page 263, in the office of the Register of Deeds of Pitt County. Said instrument was given to secure a note in the sum of $3,000.00 payable to Smith-Douglass Company, Inc.

The first action brought by the plaintiffs in connection with said deed of trust was instituted to restrain a sale pursuant to the terms of the instrument, the plaintiffs at the time being in default. On 28 January 1961 a judgment was signed by Judge Bundy which was consented to by C. L. Abernethy, Jr., attorney for the plaintiffs, and by H. Frank Owens, the then attorney for the defendants.

The judgment, among other things, set out that the deed of trust "is a good and valid deed of trust and the same shall remain in full force and effect.

"It is further ordered that the amount of the indebtedness due on the note secured by said deed of trust is the sum of $1886.00 plus interest at the rate of 6% from November 1, 1960, until paid."

The consent judgment further provided that the terms of payment of the secured note were modified as follows:

"At least the sum of $35.00 due and payable on or before the 1st day of February, 1961, and a like amount due and payable on or before the 1st day of each and every calendar month thereafter until both principal and interest are fully paid; * * *

"It is further ordered that if the said William Jarvis Leggett and wife, Lossie Bell Leggett, should fail or neglect to pay any installment of principal or interest as the same shall become due, then the holder of the note may at his option declare the entire balance due thereon immediately due and payable, and upon request the Trustee may proceed to foreclose said deed of trust according to its terms which except as herein modified remains in full force and effect."

The second action was instituted by the plaintiffs on 2 November 1961 against the original defendants and Frank Hart. According to the oral argument of appellees, the plaintiffs defaulted in their payments as fixed by the consent judgment. The premises involved were foreclosed under the deed of trust and Frank Hart became the last and highest bidder therefor. His bid was confirmed, and the Clerk of the Superior Court of Pitt County ordered the trustee to execute a deed of trust to Frank Hart upon compliance with the terms of his bid. Frank Hart now holds the trustee's deed to said premises.

The defendants demurred to the complaint filed in the second action

and a hearing was had before Judge Bundy, Resident Judge of the Third Judicial District, on 4 January 1962, at which hearing the demurrer was sustained and the action dismissed.

The plaintiffs gave notice of appeal to the Supreme Court and were given fifteen days from 4 January 1962 to make up and serve copy of case on appeal upon the defendants. The appeal was never perfected. On 8 February 1962 the plaintiffs purportedly took a nonsuit before the Clerk of the Superior Court of Pitt County and on the same date instituted a third action in which they seek the identical relief sought in the second action.

The defendants demurred to the complaint filed in the third action and interposed a plea in abatement on the ground that a prior action by the identical plaintiffs in this action against the identical defendants is now pending in the Supreme Court and, as appears therefrom, the relief sought in the prior action is the identical relief sought in the present action.

The hearing on the demurrer and plea in abatement was likewise held before Judge Bundy, Resident Judge, at 10:00 a.m. on 3 March 1962 at the Courthouse in Greenville, North Carolina. The demurrer and the plea in abatement were sustained and the action dismissed.

The plaintiffs appeal, assigning error.

Charles L. Abernethy, Jr., for appellants.
Robert D. Wheeler, Albion Dunn for appellees.

DENNY, C.J. Chapter 743 of the Session Laws of 1959, codified as G.S. 1-287.1, authorizes the superior court to dismiss an appeal to the Supreme Court when the statement of the case on appeal has not been served on the appellee or his counsel within the time allowed. This statute does not apply when the case on appeal has been docketed in the Supreme Court. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118. In such instances, the appeal may not be withdrawn without the approval of this Court. However, we are inclined to the view that when a demurrer to the complaint filed in an action has been sustained and the plaintiff gives notice of appeal to the Supreme Court, but instead of perfecting the appeal he elects to take a voluntary nonsuit and brings another action pursuant to the provisions of G.S. 1-25, the taking of a voluntary nonsuit before the clerk of the superior court is tantamount to an abandonment or withdrawal of the appeal.

The record in this appeal contains the complaints and the respective amendments to the complaints filed by the plaintiffs in the second and third actions. Neither complaint, including the amendments thereto, states a cause of action upon which a judgment could be predicated

for the relief sought. The pleadings and the amendments thereto are almost interminable and allege evidentiary matters and conclusions rather than facts. The plaintiffs' pleadings do not conform with the requirements of good pleadings within the meaning of G.S. 1-122. *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. For example, the plaintiffs seek to set aside the foreclosure proceeding and to have the sale declared illegal. The only ground alleged, however, for the relief sought is that "there has not been a legal and valid advertisement by which a valid foreclosure could be effectuated." Wherein the advertisement was defective is nowhere alleged. In both actions the plaintiffs undertook to attack the validity of the deed of trust which was executed by the plaintiffs on 29 December 1958 and at the same time alleged that the consent judgment entered on 28 January 1961 was entered in good faith. That judgment recites that the deed of trust "is a good and valid deed of trust and the same shall remain in full force and effect," fixed the balance due on the note secured by the deed of trust and set out a new schedule of payments; otherwise the deed of trust was to remain in full force and effect and to be foreclosed in accordance with its terms if the plaintiffs defaulted in the payment of the amounts set out in the consent judgment. There are no allegations to the effect that the consent judgment was obtained by fraud or mutual mistake. The plaintiffs do not attack the validity of the consent judgment, nor do they attempt to have it set aside upon the ground of fraud or for any other reason. Therefore, they are bound by its terms.

The plaintiffs are in no position to attack the validity of the deed of trust or the amount due thereunder so long as the consent judgment remains in full force and effect.

As we construe the pleadings, the only cause of action upon which the plaintiffs might obtain relief with respect to the foreclosure proceeding would be an action based on irregularities, if any, which would be sufficient to upset the foreclosure proceeding. No such allegations appear in the present pleadings. These plaintiffs should state their cause of action, if any, by a plain and concise statement of facts constituting such cause of action, but if they are unable or unwilling to do so, then they should be restrained from further annoying these defendants by vexatious litigation in connection with the transactions involved. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107.

Therefore, we hold that the demurrer filed in the second cause of action was properly sustained for failure of plaintiffs to state a cause of action, and, for the same reason, the demurrer to the complaint filed in the third or present action will be sustained. *Gillikin v. Sprin-*

gle, 254 N.C. 240, 118 S.E. 2d 611; *Skinner v. Transformadora, S.A.,* 252 N.C. 320, 113 S.E. 2d 717.

Under our decisions, we hold that it was error to dismiss the action. *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123; *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Batson v. City Laundry Co.,* 206 N.C. 371, 174 S.E. 90; *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266.

Where, in the trial of a new action, "upon its merits, * * * 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 judicata,* and thus end that particular litigation." *Hampton v. Spinning Co., supra.*

Unfortunately, the plaintiffs herein, neither in the second or third action, have stated a cause of action that will entitle them to come to bat on the purported merits of the controversy.

Except as modified herein, the judgment entered below will be upheld.

Modified and affirmed.

GWENDELLYN BRINN GIBBS v. SHELDON ALVIN GAIMEL.

(Filed 19 September 1962.)

1. Automobiles §§ 21, 41r—

Evidence permitting the inference that the accelerator of defendant's car was defective so that it occasionally permitted gasoline to continue to flow to the engine after the release of pressure from the accelerator pedal, that defendant, with knowledge of the condition, loaned the vehicle to plaintiff without disclosing the defect, with further evidence that plaintiff was injured in an accident resulting from the sticking of the accelerator, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Negligence § 24c—

Negligence may be proved by circumstantial evidence from which the conclusion of negligence may be inferred.

3. Automobiles § 19; Negligence § 14—

Where the driver of a car is confronted with a sudden emergency arising from the jamming of the accelerator pedal, such driver cannot be held guilty of contributory negligence as a matter of law in failing to pursue the wisest choice of conduct, the driver not having contributed to the creation of the emergency.

GIBBS *v.* GAIMEL.

APPEAL by defendant from *Copeland, S.J.*, January, 1962 Term, CURRITUCK Superior Court.

In this civil action the plaintiff alleged, and at the trial offered evidence tending to show, that on September 30, 1960, she requested and was given permission to drive defendant's automobile on a short errand in connection with her father's business. Unknown to the plaintiff, the automobile had a defective accelerator which occasionally jammed, causing the engine to race after pressure on the foot pedal was released. The defendant, knowing of the defect, failed to notify or warn the plaintiff. While she was in the act of returning to her father's place of business, the accelerator stuck. She lost control, crashed into a house, sustaining painful and permanent injuries. Although plaintiff and other members of her family had on several occasions driven the vehicle, the plaintiff did not know of the defective accelerator.

The defendant, by answer, denied "any tendency on the part of the accelerator . . . to become jammed or stuck to any appreciable extent, or to operate in any manner . . . likely to endanger any competent driver." The defendant averred the plaintiff's injuries were caused entirely by her own carelessness and negligent operation of the vehicle.

The plaintiff introduced in evidence, as the admission of the defendant, the following:

> "Sheldon Alvin Gaimel, being duly sworn, says: That on the 30th day of September, 1960, I loaned my automobile to Mrs. Gwendellyn Gibbs to go to a store so she would make some purchases and learned a short time thereafter that Mrs. Gwendellyn Gibbs was in an accident as a result of and the proximate cause being that the accelerator on my car stuck or jammed causing said car to get out of control. I truthfully say that the accelerator, prior to this occasion, had jammed with me at several times and that I had thought of carrying the car to a mechanic to repair same but this had been put off. I failed to advise or explain the condition of the accelerator to Mrs. Gwendellyn Gibbs at the time I loaned my car to her.
>
> "Witness my hand and seal this 6th day of October, 1960.
>
> "/s/ Sheldon Alvin Gaimel."

The defendant testified that a driver could restore the accelerator to its normal function by "patting" the accelerator pedal with the foot.

The jury answered issues of negligence, contributory negligence, and damages in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

Robt. B. Lowry, John H. Hall for plaintiff appellee.
LeRoy, Wells & Shaw, by Dewey W. Wells for defendant appellant.

HIGGINS, J. The evidence permits these inferences: The defendant's vehicle was defective. He knew of the defect, but permitted the plaintiff to use it without disclosing the defect, of which she had no knowledge. The defective condition of the accelerator occasionally permitted the gasoline to continue to flow into the engine after the release of pressure on the accelerator pedal. The defendant had found out the danger of a racing engine could be overcome by "patting" the pedal. But he neither informed the plaintiff of the defect nor explained the manner by which the danger could be avoided. Thus, when the accelerator jammed, the plaintiff was unprepared for what confronted her. The result was a damaged house, a demolished automobile, and a permanently injured driver.

The evidence was sufficient to support a finding the owner had breached his duty to give the plaintiff notice of the defective condition of the automobile he was permitting her to use. "He who puts a thing in charge of another which he knows, or in the exercise of prudence he should have known, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury, owes a duty to such person to give reasonable warning or notice of such danger." *Austin v. Austin,* 252 N.C. 283, 113 S.E. 2d 553; *Honeycutt v. Bryan,* 240 N.C. 238, 81 S.E. 2d 653; *Sears v. Interurban Transp. Co.,* 125 So. 748, 752 (La.); *Cronin v. Swett,* 157 Neb. 662, 61 N.W. 2d 219.

In order to make out a case, "Direct evidence of negligence is not required, but the same may be inferred from acts and . . . circumstances . . ." *Frazier v. Gas Co.,* 247 N.C. 256, 100 S.E. 2d 501; *Shepard v. Mfg. Co.,* 251 N.C. 751, 112 S.E. 2d 380; *Young v. Koger,* 94 Ga. App. 524, 95 S.E. 2d 385.

The evidence was insufficient to show the plaintiff's contributory negligence as a matter of law. *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33. The jammed accelerator confronted her with a sudden emergency which she did not create. Hence she cannot be held for failure to pursue the wisest choice of conduct. *Bundy v. Belue,* 253 N.C. 31, 116 S.E. 2d 200; *Hennig v. Booth and Naugle v. Booth,* 4 N.J. Misc. 150, 132 A. 294.

We have carefully examined and found without merit all assignments of error which comply with Rule 19(3). *Pratt v. Bishop,* 257 N.C. 486; *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294; Rules

of Practice in the Supreme Court 19(3), 254 N.C. 797. The cause presented issues of fact for the jury. *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297. The record discloses

No error.

STATE v. DAVID LEE DIXON.

(Filed 19 September 1962.)

1. Bastards § 6—

Nonsuit should be allowed in a prosecution for wilful refusal to support an illegitimate child when there is no evidence of notice to defendant or request for support, it being incumbent upon the State to show that the refusal or neglect to provide support was wilful.

2. Bastards § 7—

Instructions in a prosecution for wilful refusal to support an illegitimate child that if the jury should find that defendant was the father of the child and that demand had been made upon him for support, to answer the issue of the wilful refusal to support the child in the affirmative, must be held for prejudicial error, since the State has the burden of showing beyond a reasonable doubt that the failure to provide support was wilful.

3. Bastards § 2—

A prosecution of a defendant for wilful failure to support his illegitimate child may not be instituted and heard in a court of a justice of the peace. G.S. 49-7.

4. Same—

Prosecution of a male defendant for wilful refusal to support his illegitimate child must be instituted by the child's mother or, in the event the child is likely to become a public charge, by the Director of Public Welfare.

APPEAL by defendant from *Parker, J.,* April, 1962 Mixed Term, PITT Superior Court.

This criminal prosecution was instituted before C. A. Lilley, Justice of the Peace, on the affidavit of Lizzie Vines. The affidavit recited that on or about the 15th day of October, 1960, David Lee Dixon did unlawfully, wilfully and feloniously beget upon the body of Annie Doris Vines an illegitimate child, now the age of three weeks and has wilfully failed and refused to provide adequate support for said child and to pay doctor bills for the delivery of said child. The justice of the peace issued an order of arrest, returnable before himself immedi-

ately. After hearing, the justice concluded the defendant was guilty and required him to execute a bond to appear for trial "at the *County Court of Pitt County.*"

The *Pitt County Recorder's Court* tried the defendant upon the original warrant, found him guilty, and imposed judgment from which he appealed to the superior court. The superior court, still proceeding on the justice's warrant, submitted three issues to the jury:

> "1. Is the defendant, David Lee Dixon, the father of the illegitimate child, Bennie Louis Vines, begotten upon the body of Annie Doris Vines?
>
> "2. If so, has demand been made upon the defendant, David Lee Dixon, in accordance with the provisions of law for the support of said illegitimate child, Bennie Louis Vines?
>
> "3. If so, has the defendant, David Lee Dixon, wilfully failed and refused to support his illegitimate child, Bennie Louis Vines, begotten upon the body of Annie Doris Vines?"

"The jury retired and returned to the courtroom after having answered all three issues Yes. Judgment was entered on the verdict as follows: 2 years in jail, assigned to . . . the roads . . . suspended on the condition the defendant pay costs of court and $30.00 per month . . . for the use and benefit of Bennie Louis Vines." The defendant appealed.

T. W. Bruton, Attorney General, James F. Bullock, Asst. Attorney General, for the State.

Roberts & Stocks, by Eugene A. Smith for defendant appellant.

HIGGINS, J. The defendant assigns as error the refusal of the court to grant his motion for nonsuit renewed at the close of all the evidence. The motion to dismiss should have been allowed. The evidence fails to show any notice to the defendant or request for support. "In order to convict the defendant under the statute the burden was on the State to show not only that he was the father of the child, and that he had refused or neglected to support and maintain it, but further that his refusal or neglect was wilful, that is, intentionally done, 'without just cause, excuse or justification,' after notice and request for support." *State v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333, citing authorities.

The defendant also assigns as error this instruction to the jury: "Now, the Court instructs you that if you answer the first issue yes and the second issue yes and upon a consideration of the third issue if you find the facts to be as all the evidence tends to show it would

be your duty to answer the third issue yes also; if you fail to so find you would answer it no."

The Attorney General concedes the above charge is erroneous and in conflict with *State v. Jones,* 254 N.C. 351, 118 S.E. 2d 908; *State v. Gibson,* 245 N.C. 71, 95 S.E. 2d 125; *State v. Hayden, supra; State v. Cook,* 207 N.C. 261, 176 S.E. 757. "It is as much the duty of the State to establish wilful failure to support by evidence showing that fact beyond reasonable doubt as it is to so establish paternity." *State v. Jones, supra.*

The Attorney General calls attention to certain deviations from statutory requirements as shown by the record: The affidavit initiating the prosecution may be made by the mother or the Director of Public Welfare, G.S. 49-5; *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126. Neither the mother nor the Director of Public Welfare signed the affidavit. Sound reason appears why only the mother or her personal representative, or (under certain conditions) the Director of Public Welfare may initiate the prosecution. The mother as well as the father is liable for the support of the illegitimate child. In all likelihood the mother will continue to be its custodian. She may neither need nor desire any assistance or support from the father. The statute is so worded that she may decide whether to call upon the father for assistance. In the event she elects not to make the demand, her election will be respected unless the child is likely to become a public charge; then the Director of Public Welfare may proceed.

G.S. 49-7 provides that the proceeding may be instituted in the superior court or in any inferior court except courts of justices of the peace. This proceeding was instituted in and made returnable to the court of a justice of the peace. *State v. Robinson, supra.*

Finally, the record before us shows: "Verdict: Guilty of the charge of bastardy." "The only prosecution contemplated under this statute is that grounded on the willful neglect or refusal of a parent to support his or her illegitimate child." *State v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857. The verdict will not support a judgment.

So defective is this record that the whole proceeding must be declared a nullity. However, the mother of the child or the Director of Public Welfare if the child is likely to become a public charge, may institute a proceeding before a proper court under G.S. 49-2 charging the defendant with the misdemeanor there defined. The Superior Court of Pitt County will enter an order arresting the judgment and dismissing the proceeding.

Remanded with direction to dismiss.

CARL HENRY ROBERTS v. COCA-COLA BOTTLING COMPANY OF ASHEVILLE, INC.

(Filed 19 September 1962.)

1. Limitations of Actions § 18—

When the facts are admitted, the applicability of the statute of limitations becomes a question of law.

2. Limitations of Actions § 12—

Where an amendment is filed which introduces a new cause of action, the statute of limitations continues to run until the time of the filing of the amendment.

3. Same—

Where plaintiff obtains an extension of time to file complaint for a cause of action based on negligence, but instead files a complaint stating a cause of action for breach of warranty, the action for breach of warranty is instituted as of the time of filing the complaint and does not relate back to the time of entry of order extending the time for pleading.

APPEAL by defendant from *Martin, S.J.*, March, 1962 Special Term, BUNCOMBE Superior Court.

This civil action for damages was here on a former appeal reported in 256 N.C. 434. After the cause was remanded the superior court entered the following order:

> "This cause coming on to be heard before the undersigned Judge Presiding over the Special March 1962 Civil Term of the Superior Court of Buncombe County, North Carolina, upon the plea in bar and motion to dismiss thereon contained in the Answer of the defendant, and the plaintiff having formally admitted in open Court that all of the facts and circumstances relating to the questions raised in the plea in bar are accurately set forth in the pleadings and record and no other grounds for tolling the statute of limitations in this case exists and the matter is solely a matter of law for the Court; and
>
> "It thereupon appearing to the Court the questions now before the Court are: 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 a new action as of the filing date; (3) or whether the action implied warranty could be related back to the Summons and escape the plea of the statute of limitations?; and
>
> "The Court being of the opinion and concluding as a matter of law (1) that the plaintiff's complaint was not different in nature

from that authorized in the application and order; (2) that the complaint actually filed did not constitute the beginning of a new action as of its filing date, but in fact (3) the action upon implied warranty related back to the Summons and thereby escaped the defendant's plea of the statute of limitations and that, therefore, the defendant's plea in bar and motion to dismiss based thereon should be overruled and denied.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant's plea in bar based upon the statute of limitations and the motion to dismiss arising therefrom be and the same are hereby overruled and denied.

"This 22nd day of March 1962."

Defendant duly excepted and appealed.

Williams, Williams and Morris, by Robert R. Williams, Jr., for defendant appellant.

Willson and Riddle, by Robert B. Willson for plaintiff appellee.

HIGGINS, J. When the summons and order extending the time for filing the complaint were served, the defendant entered a special appearance and moved to quash the service and dismiss the action, contending the plaintiff's application and order failed to state the nature and purpose of the suit as required by G.S. 1-121. Before the hearing on the first motion, however, the defendant filed (conditionally) "Answer, including motion," denying the court had acquired jurisdiction over the defendant. However, the answer alleged the plaintiff's injury occurred August 8, 1958, and the plaintiff's cause of action based on breach of warranty was instituted on August 24, 1961, by filing the complaint; and that the lapse of more than three years barred recovery.

After this Court on the former appeal affirmed the order denying the motion to dismiss, a further hearing was held upon the complaint, answer, and admissions. The court overruled the plea of the statute of limitations and held as a matter of law (1) the plaintiff's complaint was not different in nature from that authorized in the application and order; (2) that the complaint actually filed did not constitute the beginning of a new action as of its filing date; (3) the action upon implied warranty related back to the summons and thereby escaped the defendant's plea of the statute of limitations.

The facts being admitted, the applicability of the statute of limitations became a question of law. The application and order extending the time to plead were, as previously decided, barely sufficient to enable the plaintiff to file a complaint stating a cause of action for

damages based on negligence. Such a complaint would relate back to the date of the summons. However, when the plaintiff failed to file a complaint based on negligence but elected to allege a cause based on breach of warranty, the new cause must be deemed to have been instituted on the date the complaint was actually filed. "In the absence of statute otherwise providing, the general rule is that an amendment introducing a new cause of action does not relate back to the commencement of the action, with respect to limitations, but is the equivalent of a new suit, so that the statute of limitations continues to run until the time of the filing of the amendment." . . . "In each instance the ultimate determinative question is whether the amendment states a new cause of action." *Stamey v. Membership Corp.*, 249 N.C. 90, 105 S.E. 2d 282; *George v. R.R.*, 210 N.C. 58, 185 S.E. 431; *Kinston v. R.R.*, 183 N.C. 14, 110 S.E. 645

No reason suggests itself why the rule should be different when a plaintiff obtains leave to file an action in tort, does not do so, but instead files one in contract. The action in contract is instituted when the complaint is filed. "The recovery must be based on the cause of action alleged. It cannot rest on a different legal right." *Wynne v. Allen.* 245 N.C. 421, 96 S.E. 2d 422.

For the reasons assigned, we hold the trial court should have entered judgment sustaining the plea of the statute of limitations and dismissing the action. The cause is remanded to the Superior Court of Buncombe County for the entry of such an order.

Reversed.

W. E. SCOTT; M. M. SCOTT, J. E. SCOTT, G. L. SCOTT, MARY S. DAVIS, KATHERINE S. McPHERSON, GERTIE S. BRICKHOUSE, ELSIE S. COPELAND, JULIUS TWIDDY, ROBERT TWIDDY AND WESLEY S. TWIDDY v. CORA JACKSON, RAYMOND DAVIS, COURTNEY SIKES, EDWARD DAVIS, MELVIN DAVIS, ELIZABETH D. HANBACK, LUTHER DAVIS, JR., CHARLES DAVIS, NELLIE D. PAISLEY, PHILIP DAVIS, GEORGE RANDOLPH, JR., VIVIAN B. BRAY, MARY R. BOWDEN, ETHEL R. BOONE, GASTON WILLIAMS, LENA W. FOREHAND, WILEY WILLIAMS, HYACINTH S. HOLTON, LUCILLE S. EDWARDS, ANNIE MAE G. ETHERIDGE, DORIS W. BURGESS, BETHEL W. SAWYER AND MARGARET W. FEREBEE.

(Filed 19 September 1962.)

1. Wills § 42—

G.S. 41-6 applies only when a devise is to the heirs of a living person,

and cannot have any application to a devise of a contingent limitation over to the heirs of testator upon the termination of a defeasible fee.

2. Same—

A devise of a contingent limitation over to the heirs of the childless testator takes the remainder to the heirs of testator upon the termination of the defeasible fee, and the word "heirs" will not be construed to mean "children" so as to take the estate to the heirs of the devisee for want of an ultimate taker, since such construction would not only be strained but would also be at variance with the intent of testator as expressed in the instrument.

3. Wills § 35—

A devise to a person and her heirs, with provision that if such person should die without issue the estate should go to testator's heirs, creates a defeasible fee, and upon the death of the devisee without issue the estate devolves to the heirs of testator.

APPEAL by defendants from *Stevens, J.*, March 1962 Term of PASQUOTANK.

This action was instituted to determine ownership of two pieces of land in Pasquotank County conveyed to William Randolph in 1902 by deed recorded in Book 25, p. 290. The court adjudged plaintiffs the owners. Defendants excepted and appealed.

John H. Hall for plaintiff appellees.
E. Ray Etheridge for defendant appellants.

RODMAN, J. William Randolph died in 1931. His will dated 19 March 1927 was probated in Pasquotank County.

Ethel Mae Stafford died intestate in 1961. She never had a child. Plaintiffs are her heirs at law.

William Randolph never had a child. Defendants are his heirs at law.

Polly S. Randolph, widow of William, died in 1946.

The rights of the parties are determined by the interpretation given to Items Two and Three of the will of William Randolph. They read as follows:

"ITEM TWO. I give, devise and bequeath unto my beloved wife for and during the term of her natural life, all of my property of whatever kind and wherever situated, consisting of real, personal and mixed property and choses in action. The personal property to be used by her for her support and maintenance and if necessary, to sell any part of the said personal property to pay off any indebtedness that I may owe at my death.

"ITEM THREE. I give and devise unto Ethel Mae Stafford, who is my wife's niece and who has been reared and maintained by us since

she was six years of age, after the death of my wife, all of my real estate, and such of my personal property as my wife shall not have disposed of or used during her life time to her and her heirs in fee simple, and in the event that the said Ethel Mae Stafford should die without leaving any issue or the issue of such then I devise such of my real estate to go to my heirs."

Plaintiffs, to support their assertion of title, say the word "children" should be substituted for the word "heirs" at the end of the third item so that the clause of defeasance would read: "in the event that the said Ethel Mae Stafford should die without leaving any issue or the issue of such then I devise such of my real estate to go to my children."

If the will should be so read, plaintiffs are the owners of the land, because, testator never having had children, there was never anyone who could qualify as the ultimate devisee. Hence the condition over would necessarily fail. *Elmore v. Austin,* 232 N.C. 13(22), 59 S.E. 2d 205; *Lide v. Mears,* 231 N.C. 111(120), 56 S.E. 2d 404.

To support their contention that the word "children" must be substituted for the word "heirs" at the end of Item Three of the will, plaintiffs rely on G.S. 41-6.

It is, we think, apparent this statutory provision can have no application to the facts of this case. This is true for two reasons: First, the statute applies only when the conveyance is to the heirs of a living person. Here the contingent and ultimate beneficiaries could not be the heirs of a living person because nothing was given prior to the death of William Randolph, the devisor. The instant Ethel Mae Stafford acquired an interest in the lands the heirs of William Randolph were readily ascertainable. *Perrett v. Bird,* 152 N.C. 220, 67 S.E. 507. This is not a case of *nemo est haeres viventis.* The converse of the picture here presented resulting in a different conclusion was presented to this Court in *Thompson v. Batts,* 168 N.C. 333, 84 S.E. 347.

Second, testator had no children when his will was executed. The devise to Ethel Mae Stafford would have been defeated by the subsequent birth of issue to devisor. G.S. 31-5.5. To hold that a word deliberately chosen by a devisor should not be given its customary and accepted meaning, but a word of limited meaning should be substituted, thereby invalidating the will solemnly executed, would not give effect to testator's intention, but would do violence thereto.

Ethel Mae Stafford was given a fee defeasible. When she died never having borne a child her estate terminated. Title then vested in defendants, the then heirs at law of William Randolph. *Ziegler v. Love,* 185 N.C. 40, 115 S.E. 887; *Kirkman v. Smith,* 174 N.C. 603, 94 S.E. 423, 175 N.C. 579, 96 S.E. 51; *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863; *Elkins v. Seigler,* 154 N.C. 374, 70 S.E. 636.

Reversed.

STATE v. JOHN HARDISON.

(Filed 19 September 1962.)

1. Criminal Law § 161—

An error in charging that the burden was on the State to prove an element of the offense "by the greater weight" of the evidence, rather than "beyond a reasonable doubt," must be held prejudicial.

2. Criminal Law § 151—

The record imports verity and the Supreme Court is bound thereby.

3. Criminal Law § 164—

Where separate prosecutions are consolidated for trial and but a single judgment is pronounced upon conviction of both offenses, upon granting a new trial on one of the charges the cause must also be remanded for judgment on the other charge, since the judgment may have been augmented by reason of the conviction on both charges.

APPEAL by defendant from *Parker (J. W.), J.*, June 1962 Term of CRAVEN.

Criminal prosecution upon two informations signed by the solicitor for the State, each information charging a noncapital felony case, and wherein there appears on the face of each information a written waiver of the finding and return into court of a bill of indictment signed by the defendant and his counsel, Charles L. Abernethy, Jr., in conformity with the regulations prescribed by the General Assembly, and contained in G.S. 15-140.1. Without objection the two informations were consolidated by the court for trial.

Information #5820 charges the defendant with fraudulently uttering and publishing a forged cheque, dated 20 March 1959, drawn on the First-Citizens Bank and Trust Company of New Bern for $50.23, payable to the order of Leeroy Tripp, and signed Nello L. Teer, Jr., Auditor, under the printed name Nello L. Teer Company, and endorsed Leeroy Tripp and N. F. Godwin. Information #5821 charges the defendant with fraudulently uttering and publishing a forged cheque, dated 20 March 1959, drawn on the First-Citizens Bank and Trust Company of New Bern for $57.24, payable to the order of Leeroy Tripp, and signed Nello L. Teer, Jr., Auditor, under the printed name Nello L. Teer Company, and endorsed Leeroy Tripp and N. F. Godwin.

Plea: Not Guilty. Verdict: Guilty in both cases.

From a single judgment of imprisonment for not less than five years nor more than eight years in the State Prison, defendant appeals.

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

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

PER CURIAM. Defendant assigns as error the overruling of his motion for judgment of compulsory nonsuit as to both informations made at the close of the State's evidence—the defendant offered no evidence. A careful study of the evidence presented by the State shows that it is sufficient to carry the case to the jury on both informations under the decisions of this Court. *S. v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742; *S. v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353; *S. v. Ridge,* 125 N.C. 655, 34 S.E. 439; 37 C.J.S., Forgery, sec. 34. Defendant's motion for judgment of compulsory nonsuit on both informations was properly overruled by the trial court.

Defendant's assignments of error to the admission of evidence over his objection and exception have been examined, and are overruled.

The court in the crucial part of its charge to the jury in respect to the applicable law on information #5820 charging the defendant with fraudulently uttering and publishing a forged cheque in the sum of $50.23 instructed the jury, *inter alia,* "and that you further find from the evidence and by the greater weight that at the time he passes this cheque that the same was counterfeit, was forged, and he knew the same to have been false, forged or counterfeited at the time, then it would be your duty to return a verdict of guilty as to that indictment (sic)." Defendant assigns this part of the charge as error. This assignment of error is good, and on this information he is entitled to a new trial, and it is so ordered. *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463. Most probably, the manifest error as to the degree of proof in the words "from the evidence and by the greater weight" was a *lapsus linguae* or an error in transcribing, but it is in the record, and we are bound by it.

Defendant's assignments of error as to the court's charge to the jury in respect to information #5821 charging the defendant with fraudulently uttering and publishing the $57.24 cheque are without merit, and are overruled. The trial in respect to that information is without error.

The jury returned a verdict of guilty in each of the two informations against the defendant. After the verdict the court rendered a single judgment of imprisonment upon the verdict. A new trial being awarded for error in the trial of one of the informations, it would seem that justice requires that the single judgment be set aside and the cause remanded for a proper judgment upon the verdict rendered in the other information in which no error is made to appear in the trial.

The Court speaking by *Bobbitt, J.*, in *S. v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734, said:

> "Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. 'Pesumably this (the single judgment) was based upon consideration of guilt on both charges.' *Devin, J.*, later *C.J.*, in *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; also, see *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895. But the rule is otherwise when, as here, separate judgments, each complete within itself, are pronounced on separate indictments or counts. In such case, a valid judgment pronounced on a plea of guilty to a valid count in a bill of indictment will be upheld. *S. v. Thorne, supra; S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9."

The result of the decision is this: The judgment entered below will be set aside and the case remanded for judgment on the verdict upon information #5821; and for a new trial upon information #5820.

In Information #5820 — New trial.

Information #5821 — Remanded for judgment.

LILLIAN RUTH MILLS v. CHARLIE WILLIAM MILLS.

(Filed 19 September 1962.)

1. Divorce and Alimony § 18—

The failure of the court to make a specific finding that the husband was able to pay the alimony *pendente lite* awarded to the wife is not fatal, the order itself indicating that the court considered the allowance to be reasonable and there being plenary evidence to support such finding.

2. Same—

The husband's allegations that during the pendency of the action the wife had engaged "in amorous conduct" is insufficient to raise the question of adultery for the determination of the court before ordering alimony *pendente lite.*

APPEAL by defendant from *Parker, J.*, June Term 1962 of PITT.

Civil action instituted October 16, 1961, under G.S. § 50-16 for

alimony without divorce.

After the filing of complaint and answer, Judge Bone, on November 9, 1961, entered an order that defendant, *pendente lite,* pay $150.00 per month for the support of plaintiff and $150.00 as a fee for plaintiff's counsel. Defendant made the payments required by Judge Bone's said order until there was a resumption of marital relations between plaintiff and defendant.

On June 14, 1962, plaintiff served notice on defendant that, at a time and place specified, she would move before Judge Parker for leave to file an amended complaint, as per copy attached to notice, and also move for an order providing, *pendente lite,* for her support and for an allowance of fee to her counsel.

The cause came on for hearing before Judge Parker upon plaintiff's complaint and amended complaint and defendant's answers thereto and upon affidavits offered by plaintiff and defendant. On June 28, 1962, Judge Parker entered an order in which he made these findings of fact, *viz:*

> "FIRST: That the original complaint was filed in the Office of the Clerk of the Superior Court of Pitt County on October 16, 1961, and that Answer thereto was duly filed in said Clerk's office on October 31, 1961.
>
> "SECOND: That the matter came on to be heard before the Honorable Walter J. Bone on the 9th day of November, 1961, and thereafter an Order was duly entered as appears of record in the proceedings allowing the petitioner Lillian Ruth Mills the sum of One Hundred and Fifty Dollars ($150.00) per month commencing November 15, 1961, and the attorneys for petitioner, Messrs. James & Hite, the sum of One Hundred and Fifty Dollars ($150.00) as Counsel fees.
>
> "THIRD: That after a period of a few weeks the petitioner and the respondent resumed their marital relationship that existed prior to the filing of the original Complaint herein on condition that the respondent refrain from the acts and conduct set out in the original Complaint, in the Amended Complaint, and particularly on condition that he should break off his relationship with one, Mamie Hindershoot (sic), by whom he had allegedly fathered a child and such status continued until on or about February 1, 1962, when the parties separated again.
>
> "FOURTH: That thereafter, the petitioner filed an Amended Complaint in the Office of the Clerk of the Superior Court of Pitt County on June 28, 1962, and set out therein allegations of misconduct on the part of the respondent in addition to those prev-

iously alleged in the original Complaint and thereafter, to wit, on June 28, 1962, the respondent duly filed Answer thereto.

"FIFTH: The Court finds as a fact that petitioner and respondent own as tenants by entirety a home in Greenville, Pitt County, North Carolina, which is now occupied by respondent and under his control, and also a home in Rocky Mount, North Carolina, which is now occupied by the petitioner.

"SIXTH: The Court further finds as a fact from a full and complete perusal of the petition and affidavits supporting the same both for the petitioner and the respondent, that the respondent has failed and refused to abide by the conditions agreed to between him and petitioner at the time they resumed their marital relationship subsequent to November 9, 1961, and prior to the second separation on or about February 1, 1962, and that the conduct of the respondent has made the condition of the petitioner intolerable and burdensome to such an extent that the petitioner is justified in withdrawing from the said marital relationship formerly existing between the parties."

Judge Parker concluded that plaintiff was not entitled to an order "reviving and reinstating" the said order of Judge Bone. However, based upon the foregoing findings of fact, Judge Parker ordered that defendant, *pendente lite,* pay $150.00 per month, commencing July 1, 1962, for the support of plaintiff, and also $100.00 as partial compensation for services rendered by plaintiff's counsel, and that plaintiff, *pendente lite,* occupy the home in Rocky Mount owned by the parties as tenants by entirety.

Defendant excepted to designated findings of fact and conclusions of law and to the judgment and appealed.

James & Hite for plaintiff appellee.
Albion Dunn for defendant appellant.

PER CURIAM. The facts alleged in the complaint and in the amended complaint are sufficient to constitute a cause of action under G.S. § 50-16. Moreover, there was plenary evidence to support each of the court's findings of fact.

True, as contended by defendant, the court made no specific finding of fact as to defendant's ability to pay. Even so, defendant admits he is an able-bodied man; and evidence offered in his behalf is to the effect defendant is hard working, industrious, and attentive to his business. While not set forth as a specific finding of fact, the order itself indicates the court considered the allowances reasonable and

there is plenary evidence to this effect. In these circumstances, the failure of the court to make a specific finding of fact as to defendant's ability to pay is not deemed a sufficient ground for disturbing the court's order.

As to defendant's contention that he had pleaded the adultery of his wife in bar of her right to alimony, and that plaintiff had not denied such plea, and that the court made no finding with reference thereto, it is noted: Defendant, in his answer to the original complaint, alleged plaintiff had committed adultery with a named person back in 1950 and that defendant had condoned her said unfaithful conduct. (Note: The first separation of plaintiff and defendant was in September, 1961.) Defendant, in his answer to the amended complaint, alleged plaintiff and a (different) named person, during the pendency of this action, had engaged "in amorous conduct." In our view, these allegations do not constitute a sufficient plea of adultery on the part of the wife to bar her right to alimony or to require a denial by the wife or to present an issue for determination by the court on plaintiff's motion for alimony and counsel fees *pendente lite.* No evidence was offered by defendant to support his said allegations.

As to plaintiff's procedure by filing amended complaint herein, see *Hester v. Hester,* 239 N.C. 97, 100, 79 S.E. 2d 248.

Defendant having failed to show any sufficient ground to disturb it, Judge Parker's interlocutory order of June 28, 1962, is affirmed.

Affirmed.

OLIN MATHIESON CHEMICAL CORPORATION v. W. A. JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 19 September 1962.)

1. Taxation § 23—

A party asserting that he comes within the exceptions of a taxing statute has the burden of proof, since exceptions or exemptions from taxes must be construed in favor of the taxing power.

2. Taxation § 29—

A herbicide does not come within the provisions of the sales tax statute excluding insecticides from sales tax, notwithstanding that the herbicide, when used on tobacco, inhibits the growth of suckers and thus decreases the food supply available to insects. G.S. 105-164. 13(2).

APPEAL by plaintiff from *Mintz, J.,* January 1962 Term of MARTIN.

Plaintiff, a corporation manufacturing and selling commercial fer-

tilizers, insecticides, and herbicides, instituted this action against the Commissioner of Revenue under G.S. 105-267 to recover $13,855.66, sales tax assessment paid under protest on maleic hydrazide which is generally known as MH-30. Plaintiff alleged that MH-30 is a plant growth inhibitor, herbicide, and insecticide and that it could have been properly registered as a commercial fertilizer. G.S. 105-164.13(2) provides, *inter alia,* that the sale at retail of insecticides for agriculture is excluded from the sales tax. Plaintiff contends that MH-30 is exempt from the sales tax as an insecticide.

Plaintiff's evidence tended to establish the following facts:

MH-30 is used as a herbicide on quack grass, wild onions and garlic, plantain, dandelion, crabgrass, and wild beans. It is commonly used in Eastern North Carolina for tobacco sucker control. When it is sprayed on the blooming plants it prevents further growth of suckers. Eggs which form tobacco worms are laid in suckers; if suckers are eliminated eggs are not laid and worms are reduced. Furthermore, when suckers are eliminated, the nutrients which normally go into sucker growth increase the weight of the salable leaf. However, control tests have shown that there is very little difference, if any, between excellent hand suckering and the use of MH-30 in the weight that is produced.

On the argument plaintiff conceded that MH-30 is not a commercial fertilizer. A botanist for the U. S. Rubber Company which discovered MH-30 testified for plaintiff. He said, "No, my company does not recommend MH-30 as an insecticide to destroy insects."

At the close of plaintiff's evidence the defendant's motion for nonsuit was allowed. Plaintiff excepted and appealed.

Attorney General Bruton, Assistant Attorney General Pullen for the State.

R. L. Coburn for plaintiff appellant.

PER CURIAM. A taxpayer who challenges a sales tax coverage by virtue of an exemption or exclusion has the burden of showing that he comes within the exemption upon which he relies. *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754. Exemptions from taxes must be strictly construed in favor of the taxing power. *McCanless Motor Co. v. Maxwell, Comr. of Revenue,* 210 N.C. 725, 188 S.E. 389. The law imposing the sales and use tax does not define insecticides; so the term must be given its ordinary meaning. Webster's New International Dictionary, Second Edition, Unabridged, defines *insecticide* as "An agent or preparation for destroying insects, as an insect powder." It is apparent from the plaintiff's evidence that

MH-30 is an agent for destroying weeds and plants — a herbicide. MH-30 is no more an insecticide than would be a forest fire which destroyed the balsam firs upon which the woolly aphids feed. The judgment of the court below is

Affirmed.

JUSTIN ROBINSON v. FREDERICK TAYLOR
AND
LILLIAN E. ROBINSON v. FREDERICK TAYLOR.

(Filed 19 September 1962)

1. Appeal and Error § 20—

Appellant may not complain of error in regard to an issue answered in his favor.

2. Trial § 52—

A motion to set aside the verdict for inadequacy of the award is addressed to the sound discretion of the trial court, and the court's ruling thereon is not reviewable when no abuse of discretion is shown.

APPEAL by plaintiffs from *Parker, J.*, March 1962 Term of CARTERET.

These two civil actions grew out of a collision between the automobile operated by defendant and the automobile owned and operated by the male plaintiff in which his wife, the *feme* plaintiff, was a passenger. Plaintiffs alleged that the collision occurred when the defendant lost control of his vehicle because of excessive speed and intoxication and drove his vehicle to his left of the center of the highway. Each seeks to recover his damages sustained in the collision. Mrs. Robinson alleged personal injuries in the amount of $15,000.00; Mr. Robinson, personal injuries of $3,000.00 and property damage in the amount of $1,950.00.

The defendant's answer was a general denial; there was no plea of contributory negligence and no counterclaim. The two cases were consolidated for trial. Each plaintiff testified as to his injuries and offered in evidence the subpoena issued by the defendant for the doctor who had treated plaintiffs. The defendant offered no evidence.

The jury answered the issues of negligence in favor of the plaintiffs. Mrs. Robinson was awarded $1,000.00 for her personal injuries; Mr. Robinson recovered $50.00 for personal injuries and $1,050.00 for damages to his automobile. Both plaintiffs appealed. *Inter alia,* they assign as errors the failure of the trial judge to give a peremptory instruc-

tion on the issues of negligence and to set the verdict aside for inadequacy.

Hamilton, Hamilton & Phillips for plaintiffs.
Claude R. Wheatly, Jr., and Thomas S. Bennett for defendant.

PER CURIAM. This case involved settled, uncomplicated rules of law. The answer raised issues of fact which the jury resolved in favor of the plaintiffs who, nevertheless, were disappointed in the amount of damages awarded them. If there were any errors in the rulings on evidence or in the charge with reference to the first issues they were rendered harmless when the jury answered them in favor of the plaintiffs. *Lyon v. R. R.*, 165 N.C. 143, 81 S.E. 1. The assignments of error which relate to the issue of damages disclose no prejudicial error. The trial judge who heard the evidence and observed the parties declined to set the verdict aside. This was a matter within his discertion. *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202. No abuse appears.

No error.

STATE v. RALPH BARTLETT.

(Filed 19 September 1962.)

1. Homicide § 20—

The State's evidence to the effect that defendant threw deceased to the floor and stomped him in the stomach six or more times, with expert testimony that deceased died as a result of peritonitis from the perforation of the upper intestinal tract and that such perforation might have resulted from the assault, is sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter, notwithstanding the expert's testimony on cross-examination that such perforation might have resulted from the constant and excessive use of alcoholic beverages by deceased.

APPEAL by defendant from *Huskins, J.*, April 16, 1962 Criminal Term of BUNCOMBE.

Defendant was charged with murder of Kenneth Suttle. The solicitor announced he would not ask for a verdict of murder in the first degree but of second degree or manslaughter as the evidence might warrant. The jury found defendant guilty of manslaughter. The court imposed a prison sentence and defendant appealed.

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

W. M. Styles for defendant appellant.

PER CURIAM. The only assignment of error is to the refusal of the court to allow defendant's motion to nonsuit because the State's evidence, defendant offered none, is not sufficient to support the verdict.

The evidence was to this effect: On the evening of 1 November 1961 deceased and defendant were in the home of Edith Anderton and husband. All were drinking. Defendant and deceased got into an argument. Defendant said to deceased: "If you don't shut your mouth I am going to stomp the Hell out of you." Thereupon defendant threw deceased to the floor and stomped him in the stomach six or more times. Defendant was at that time wearing high-top boots. Deceased "passed completely out." Sometime during the night deceased got to his bed. For about a week after that deceased would get up from bed and eat, "but he couldn't hold it on his stomach. What he would eat he would vomit it right on up." After that he spent about ten days without getting out of bed.

Deceased was taken to Memorial Hospital in Asheville on 13 November. He was then acutely ill. Dr. Anderson operated on him that day and found "a generalized inflammation of all the contents of his abdomen, with multiple areas of accumulation of pus from infection of several days standing." Pneumonia developed on 14 December. Death occurred on 15 December. Dr. Anderson expressed the opinion that death was caused "by a perforation of his upper intestinal tract resulting in peritonitis, which was subsequently followed by pneumonia." Dr. Anderson expressed the opinion "in the absence of any disease within the upper intestinal tract that the condition which produced his death could have been caused by a blow such as might have been inflicted by being stomped in the abdomen with boots. I did not find any evidence of any other disease. It is my opinion that at the time I first saw him in the hospital the condition which I found had existed for ten days or two weeks . . ."

Deceased habitually consumed alcoholic beverages, frequently in excessive quantities. He frequently drank Solox, a paint thinner. On cross-examination Dr. Anderson testified that such use would provide "a reasonable hypothesis that the perforation in his upper intestinal tract was caused entirely from internal reasons and not from any blow from the outside at all."

What caused the perforation of the intestine was a question of fact. The evidence was sufficient to support a finding it was caused by the assault. It was sufficient to support a finding it was caused by constant

and excessive use of alcoholic beverages. What in fact caused the death was a question for the jury. *S. v. Parrish,* 251 N.C. 274, 111 S.E. 2d 314; *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

No error.

PALMER S. MIDGETT v. MARTIN KELLOGG, JR., AND F. T. HORNER, EXECUTORS OF THE ESTATE OF CORNELIUS P. MIDGETT, DECEASED.

(Filed 19 September 1962.)

APPEAL by defendants from *Morris, J.,* January 1962 Term of DARE.

Civil action to recover from the executors of the estate of Cornelius P. Midgett, deceased, upon three causes of action: First, upon the following written instrument executed and delivered by Cornelius P. Midgett to plaintiff: "16 October 1958. I, C. P. Midgett, certify that I owe Palmer S. Midgett the sum of Five Hundred Ninety-eight Dollars, Sixty-two Cents ($598.62), for money spent in the operation of the hotel during the summer of 1958. C. P. MIDGETT C. P. Midgett"; Second, for various items of personal property allegedly purchased and paid for by plaintiff for and in behalf of Cornelius P. Midgett during the year 1959 in the amount of $1,016.15; and Third, for alleged services rendered by plaintiff during the years 1957, 1958, and 1959 to Cornelius P. Midgett in connection with the operation of his (Cornelius P. Midgett's) hotel, known as the First Colony Inn at Nags Head, North Carolina, under an alleged agreement by Cornelius P. Midgett that he would pay plaintiff for his services by devising him an interest in his hotel aforesaid, that Cornelius P. Midgett breached his agreement to devise by devising in his last will and testament his hotel to other persons, and that his services during this period were reasonably worth $8,000.00.

The following issues were submitted to the jury, and answered as appears:

"1. In what amount, if any, are defendant executors indebted to plaintiff by reason of his first cause of action, alleged in the complaint?

"Answer: Full amount, $598.62.

"2. In what amount, if any, are defendant executors indebted to plaintiff by reason of his second cause of action, alleged in the complaint?

"Answer: $800 including interest.

"3. What amount, if any, is plaintiff entitled to recover of the defendant executors, upon a quantum meruit for services rendered by plaintiff to C. P. Midgett during the years 1957, 1958 and 1959?

"Answer: $3,000 including interest."

From a judgment entered in accordance with the verdict, defendants appeal.

John H. Hall for defendant appellants.
LeRoy, Wells and Shaw by J. H. LeRoy for plaintiff appellee.

PER CURIAM. The jury, under application of settled principles of law, resolved the issues of fact against the defendants. While the defendants' well-prepared brief, and the argument of their counsel, present their contentions forcibly, a careful examination of their assignments of error discloses no new question or feature requiring extended discussion. The case was tried in substantial accord with established principles of law in this jurisdiction, and neither reversible nor prejudicial error has been made to appear sufficient to justify disturbing the trial below. The verdict and judgment are upheld.

No error.

LUCILLE H. CHAPPEL, ADMINISTRATRIX OF CHARLIE E. CHAPPEL, DECEASED v. JOHN HARRIS OVERMAN.

(Filed 19 September 1962.)

APPEAL by plaintiff from *Copeland, Special Judge,* March Term 1962 of PERQUIMANS.

The defendant was the owner of a motor truck and trailer which he was using in his logging business. On 11 June 1960 the defendant transported on his motor truck and trailer a load of pilings to Pendleton's Mill (a sawmill) in Pasquotank County. The load consisted of about nine to eleven pilings which averaged from 60 to 65 feet in length. The pilings were to be cut into logs in lengths from twelve to sixteen feet before the mill would purchase them.

Plaintiff's intestate was engaged in cutting off the small end of the pilings which extended beyond the rear of the trailer. He was using his own portable power saw, and while engaged in sawing one of the

pilings, two or three of the pilings rolled off the truck striking plaintiff's intestate which resulted in his death.

Both plaintiff's intestate and the defendant had been in the piling and logging business for several years, and the evidence tends to show that they had been working together for two months prior to the accident which resulted in the intestate's death. The evidence further tends to show that plaintiff's administratrix received one half of the proceeds from the sale of these logs.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. Motion allowed. Plaintiff appeals, assigning error.

Charles E. Johnson and John H. Hall for appellant.
LeRoy, Wells & Shaw for appellee.

PER CURIAM. A careful review of the evidence adduced in the trial below leads us to the conclusion that the plaintiff failed to establish actionable negligence on the part of the defendant.

Affirmed.

STATE v. LONNIE GRAHAM.

(Filed 19 September 1962.)

APPEAL by defendant from *Fountain, Special Judge,* March 12, 1962 Term of CRAVEN.

Criminal prosecution on warrant charging that defendant, on December 9, 1961, at #303 Norwood Street, New Bern, N. C., unlawfully and wilfully did have a quantity of taxpaid whiskey in his possession for the purpose of sale.

Upon trial *de novo* in the superior court (on appeal by defendant from conviction and judgment in the Recorder's Court of the City of New Bern), the jury returned a verdict of guilty as charged. Judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Assistant Attorney General Barham for the State.
Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. The State offered evidence tending to show defendant had in his possession, at the time and place alleged, 8 3/4 pints of

taxpaid whiskey, and evidence of circumstances tending to show defendant had possession thereof for the purpose of sale. Under the decisions of this Court, the evidence was clearly sufficient to warrant submission to the jury and to support the verdict. Defendant has failed to show prejudicial error. Hence, the verdict and judgment will not be disturbed.

No error.

STATE v. RAY BRYANT.

(Filed 19 September 1962.)

APPEAL by defendant from *Fountain, Special Judge,* March Term 1962 of CRAVEN.

This is a criminal action tried upon a bill of indictment charging the defendant with an assault with a deadly weapon with felonious intent to kill and murder Grover Lancaster, Jr., inflicting serious injuries not resulting in death.

The jury returned a verdict of guilty of assault with a deadly weapon. Judgment was pronounced on the verdict and the defendant appeals, assigning error.

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

Reginald L. Frazier, Samuel S. Mitchell for the defendant.

PER CURIAM. The evidence adduced by the State in the trial below was sufficient to carry the case to the jury, and the appellant has not shown error sufficiently prejudicial to justify upsetting the verdict of the twelve.

No error.

BETTY HENSLEY v. WILLIAM M. WALLEN, RUSSELL HENSLEY AND SHELBY LEE SILVERS.

(Filed 26 September 1962)

1. Automobiles §§ 25, 38—

Where there is no allegation or evidence that the scene of the accident was in a business or residential district or that any signs had been posted giving notice of any special speed restriction, it is error for the court to permit a witness to testify and to charge the jury on such testimony, that the speed at the scene of the accident was limited to a speed less than the general statutory maximum, even though the scene is within the boundaries of a municipality. G.S. 20-141(a), G.S. 20-141(b)(4).

2. Same—

Whether speed is limited at a particular locality to a speed less than the general statutory maximum is a mixed question of law and of fact, and while a witness may testify as to the posting of signs restricting the speed limit, and as to the frontage of residences and business establishments from which it may be determined whether the area is a business or residential district, a witness may not invade the province of the jury by testifying as to a particular speed limit less than the general statutory maximum.

APPEAL by defendant Wallen from *Huskins, J.*, May 1962 Regular Term of BUNCOMBE.

In this action plaintiff seeks to recover damages for personal injuries which she alleged were proximately caused by the negligence of defendant Wallen. Her evidence tends to show the following facts:

On June 28, 1960, about 6:30 P. M., she was a passenger in the Pontiac automobile being operated by her husband, Russell Hensley, the additional defendant, in the City of Asheville, on Patton Avenue. It was raining at the time and the pavement was wet. In the area involved, Patton Avenue is a straight four-lane highway. A median strip separates two eastbound traffic lanes and two westbound lanes. The Hensley car entered Patton Avenue from Hazel Mill Road on the north, crossed the north lane for westbound traffic and proceeded west in the south lane next to the median strip. At the time the Hensley car entered Patton Avenue the Wallen automobile was from 400 to 600 feet east of the intersection traveling west at a speed of about fifty miles per hour. Immediately upon entering Patton Avenue the plaintiff's husband gave a left-turn signal with his hand. After he had traveled about 200 feet west to the point where Hazel Mill Road intersects Patton Avenue from the south, he stopped in the median strip with about three feet of the Pontiac protruding into the south lane while he waited for traffic going east to pass so that he could proceed south on Hazel Mill Road. While thus stopped the Pontiac was

struck on the left rear by the front of defendant's Chevrolet. In the collision plaintiff sustained a muscle sprain to the neck. At the time of the accident title to the Pontiac in which plaintiff was riding was in the name of S. L. Silvers to whom plaintiff had sold it. After the accident, defendant Silvers transferred the title back to her. Plaintiff's husband testified that the automobile was his but he carried title to all of his automobiles in his wife's name.

The evidence of defendant Wallen tended to show that he was operating his Chevrolet automobile westerly on Patton Avenue in the inside lane at a speed of from thirty to thirty-five miles per hour; that when the Hensley car came into Patton Avenue from the Hazel Mill Road it proceeded west in the north or outside lane at a speed of from twenty to thirty-five miles per hour; that without giving any signal whatever, the driver of the Pontiac automobile made a ninety-degree turn across the south lane in which the defendant was traveling when he was from two to eight-car lengths away; that behind the two automobiles there were other cars traveling west in both lanes and if the Chevrolet had turned either way it would have had to have been onto the median strip, estimated to be from six to twelve feet wide with posts in the center; and that at the time the Chevrolet hit the left rear of the Pontiac, the Pontiac was "crossing in the cross-over" and was crossways the inside lane.

Plaintiff's husband, Russell Hensley, and Shelby Lee Silvers were made additional parties defendants. At the close of the evidence the original-defendant Wallen took a voluntary nonsuit as to the additional-defendant Silvers. The jury found the plaintiff had been injured by the negligence of Wallen; that the additional-defendant Hensley was not negligent; that plaintiff did not own the Pontiac; and that plaintiff was entitled to damages in the sum of $2,000.00. From judgment entered on the verdict the defendant appealed.

W. Harold Sams for plaintiff appellee.
Williams, Williams and Morris for defendant appellant.

SHARP, J. The defendant excepted to the admission in evidence of the plaintiff's statement that the speed limit at the time and place of the accident was thirty-five miles per hour and to those portions of the charge based upon that evidence. These exceptions are the bases of defendant's assignments of error Nos. 2, 3, 18, 19 and 20.

In her specifications of negligence plaintiff alleged that defendant Wallen was operating his automobile at a speed which was excessive under the existing conditions in violation of G.S. 20-141(a). She made no other allegation with reference to his speed. She did not allege that

the approach to the scene of the collision was either a business or a residential district or that the proper authorities had posted any signs giving notice of any determined speed limit for the area. Thus G.S. 20-141(a) and (b)4 were pertinent in judging the conduct of the defendant. *Bobbitt v. Haynes,* 231 N.C. 373, 57 S.E. 2d 361.

In answer to a question from her counsel as to whether there had been any changes in highway conditions at the scene of the collision since the accident, plaintiff said, "Yes, the speed limit has been changed. It was 35 at the time and now it is 45." The defendant's motion to strike this answer was denied.

It is noted that plaintiff did not say there was a *posted sign* in the area limiting speed to thirty-five miles per hour. She merely said the speed limit "was 35." This statement constituted the only evidence in the record from which the jury might have found that the law had fixed a maximum speed limit of less than fifty-five miles per hour on Patton Avenue. No inference of a lesser limit arises from the fact that the collision occurred in the city limits. The record is silent as to whether the area constituted a business or a residential district as defined by the statute.

In his recapitulation of the evidence the judge told the jury that plaintiff said thirty-five miles per hour was the posted speed limit on Patton Avenue at that point at that time and, in stating the contentions, he said that plaintiff contended that defendant was driving fifty miles per hour "when the posted maximum speed out there was 35 miles per hour." Thereafter he gave the following mandate:

> "The court instructs you that if the plaintiff has satisfied the jury from the evidence in this case, and by its greater weight, that the maximum lawful speed at the point of collision was 35 miles per hour, and that Wallen was driving at a speed in excess of the maximum lawful speed limit, or that regardless of the speed limit that Wallen was driving at a speed which was greater than was reasonable and prudent under the condition then existing, and has further satisfied you by the greater weight of the evidence that his driving in either of those respects was the proximate cause, or one of the proximate causes of the collision which ensued, and of the injuries which she sustained, then that would amount in law to actionable negligence on the part of William M. Wallen, and it would be your duty to answer the first issue YES."

In our opinion the admission of this evidence and the charge with reference to it constituted prejudicial error.

Over objection, a witness may not testify what the maximum speed

permitted by law is for a given area. What is the speed limit is a mixed question of fact and law, except where the State Highway Commission or local authorities, pursuant to the statute, have determined a reasonable and safe speed for a particular area and have declared it by erecting appropriate signs. The answer to the question, "What is the maximum speed permitted by law for a given area?" depends upon whether that area is a business or residential district as defined by G.S. 20-38(a) and (w)1, or "places other than those," G.S. 20-141(b)4. In the absence of a stipulation, it is necessary to prove the character of the district before the maximum speed permitted by law can be determined. Frequently the nature of a particular district cannot be satisfactorily proven without detailed measurements of the buildings fronting the highway for the required distance. To permit a witness to say what a speed limit was for a particular area at a given time is to allow him to give his inferences from facts which he has observed. Such testimony violates the opinion rule and invades the province of the jury. *Mason v. Gillikin*, 256 N.C. 527, 124 S.E. 2d 537; Stansbury, North Carolina Evidence, Secs. 122 and 123. Of course, if a highway sign declaring the speed limit to be thirty-five miles per hour had been posted in the area, it would have been competent for the witness to say so, describe the sign, and testify as to its location. When such a sign is present, nothing else appearing, there is a logical inference that it was erected by the proper authorities pursuant to G.S. 20-141. *Smith v. Buie*, 243 N.C. 209, 90 S.E. 2d 514.

There was neither allegation nor competent evidence upon which the jury might find that the maximum legal speed for Patton Avenue in the area in question was thirty-five miles per hour. There was no evidence that defendant was exceeding fifty-five miles per hour. Therefore, the prejudicial effect of that portion of the quoted charge is apparent. *Brady v. Beverage Co.*, 242 N.C. 32, 86 S.E. 2d 901.

The defendant makes several assignments of error to the charge with reference to the issue of plaintiff's ownership of the Hensley automobile. However, the jury's finding that the operator, the additional-defendant, was not negligent renders these assignments moot on this appeal. These and the other assignments of error relate to matters which may not reoccur upon another trial.

For the reasons stated the defendant is entitled to a new trial, it is so ordered.

New trial.

STATE v. JOHNNIE MORRISEY.

(Filed 26 September 1962.)

Arrest and Bail § 6—

In a prosecution for felonious assault upon a constable who was arresting defendant, the evidence disclosed that after the constable had hit defendant with a blackjack, defendant cut the constable with a knife several times, inflicting wounds requiring thirty-eight stitches to close. *Held:* The evidence was sufficient to be submitted to the jury notwithstanding defendant's contention that the arrest was unlawful, since even though the arrest were unlawful, whether defendant used more force than reasonably appeared to him to be necessary to prevent being taken into custody was for the determination of the jury.

APPEAL by defendant from *Bone, J.* April 1962 Criminal Term of DUPLIN.

The defendant was tried upon a bill of indictment which charged him with a felonious assault upon Earl Chesnutt. The State's evidence tended to show the following events:

On March 17, 1962, about 1:00 A. M., Earl Chesnutt, a constable of Magnolia Township and Chris Baysden, a uniformed policeman of Warsaw, were patrolling the streets of the town in a patrol car. The constable wore a badge and a gun but was not in uniform. The two officers observed an automobile in a gutter and stopped to investigate.

The defendant and two others got out of the car. The defendant appeared to the officers to be "under the influence of something." The constable told defendant he was under arrest for public drunkenness and took hold of his arm. The defendant broke away and, with the constable in pursuit, ran twenty-five yards and fell. After the constable helped him up, he and Officer Baysden brought defendant back to the patrol car and told him to get in. The defendant, using foul language, refused. Constable Chesnutt hit him with a blackjack. Defendant then produced a knife with a blade about four inches long and cut the constable in the head and in three places on the lower stomach. Thirty-eight stitches were required to close the wounds. A bystander took the knife from defendant, and he and another helped the police officer put defendant into the car. At the jail, a deputy sheriff who helped put him on the bed smelled whiskey on defendant's breath.

The defendant's evidence tended to show that he had drunk no intoxicants that evening but that the constable himself was drunk; that he knew Officer Baysden but did not know Chesnutt and had no idea he was an officer; that nobody told him he was under arrest for public drunkenness; that Chestnutt asked him if he were drunk and he replied that if he were there was a policeman present who could ar-

rest him; that Baysden was still in the patrol car when he ran; that when he fell Chesnutt kicked him and beat him with a blackjack; that he got his knife open and when Chesnutt jerked him up he "jabbed him a couple of times" after which he was put into the patrol car and carried to jail.

The jury returned a verdict of assault with a deadly weapon inflicting serious bodily injury. From the sentence imposed the defendant appealed.

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

W. G. Pearson, II, and C. C. Malone, Jr., for defendant appellant.

PER CURIAM. The defendant's brief is devoted to the contention that his attempted arrest by Constable Chesnutt was unlawful and for that reason the trial judge erred in overruling his motion for nonsuit.

If Constable Chestnutt's attempt to arrest defendant was lawful, defendant was clearly guilty of an assault upon him. If the attempted arrest was unlawful, the defendant was permitted to use only such force as reasonably appeared to him to be necessary to prevent being taken into custody. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100.

According to the State's evidence, which we accept as true on the motion for nonsuit, after the constable hit defendant with a blackjack, defendant cut him once in the head and three times in the stomach. Thirty-eight stitches were required to close the wounds. A uniformed policeman was on the scene but defendant asked for no protection.

This evidence would require the submission of the case to the jury on the question of whether the defendant used excessive force even should it be conceded that Constable Chesnutt was unlawfully attempting to arrest him. The issue of his guilt was submitted to the jury under a charge which gave the defendant the benefit of every contention and inference arising from the evidence in his behalf. He took no exception to any of it. The record discloses that defendant has had a fair trial and that the jury decided against him.

No error.

CAPTAIN WILLIAM C. ROYALS, JAMES MARION ROYALS, MOSES A. TART, ET AL v. WILLIAM ELI BAGGETT (INDIVIDUALLY) AND WIFE JEAN BAGGETT AND WILLIAM ELI BAGGETT AS ADMINISTRATOR OF JOHN C. WILLIAMS, DECEASED.

(Filed 26 September 1962.)

Executors and Administrators § 2—

Where, less than thirty days after the death of intestate, the clerk appoints as administrator the nominee of one of the next of kin without citation to the others of equal right, and two of such other persons apply for letters within six months of the death of intestate, the court, upon appeal from the refusal of the clerk to revoke the letters of administration, properly remands the matter to the clerk with direction that the clerk consider the qualifications of all three persons, but should not revoke the letters if the clerk should find that the person appointed is better qualified and more suitable to administer the estate. G.S. 28-6(b), G.S. 28-15.

APPEAL by petitioners from *Bone, J.*, June Civil Term 1962 of SAMPSON.

This is a petition for the removal of the defendant William Eli Baggett as administrator of the estate of John C. Williams, deceased.

John C. Williams of Sampson County, North Carolina, died intestate on 3 December 1961 leaving no widow and no descendants, but leaving surviving him as his next of kin ten nieces and nephews whose names are set out in the record. On 7 December 1961, Bernard J. Baggett, one of said nephews, renounced his right to administer on the estate of the said John C. Williams, deceased, and nominated in his stead his son William Eli Baggett, who was appointed administrator of said estate on 7 December 1961, and the said William Eli Baggett then entered upon the administration of said estate.

On 4 April 1962 the petitioners herein filed a petition requesting the removal of William Eli Baggett as administrator of the estate of John C. Williams, deceased, and for the appointment of James M. Royals and Moses A. Tart as administrators of said estate, these nephews having applied for letters of administration within six months of the death of the intestate.

This matter came on for hearing before the Clerk of the Superior Court of Sampson County on 11 May 1962, and no evidence having been offered tending to show that William Eli Baggett "is incompetent or incapable or an unfit person to administer said estate or that he is in any manner mishandling said estate," the Clerk found that William Eli Baggett is entitled under the law to act as administrator of the estate of the said John C. Williams, deceased, and declined to revoke the letters of administration theretofore issued to him.

The petitioners appealed to the Superior Court. When this cause came on for hearing in the Superior Court, and it appearing from the record that William Eli Baggett was appointed to administer on said estate by the Clerk without considering the comparative qualifications and suitability of the other nieces and nephews of said decedent for appointment as such administrator, and without any notice having been given to such other nieces and nephews, the court set aside the order of the Clerk of the Superior Court from which the appeal was taken, and remanded the matter to the Clerk and (1) directed him to reconsider the matter for the purpose of deciding in the exercise of his sound discretion who among those persons entitled thereto is most suitable and best qualified to administer on the estate of John C. Williams, deceased; and (2) that since none of the petitioners except James M. Royals and Moses A. Tart have applied for letters of administration on said estate, the Clerk be required to consider only the comparative qualifications and suitability of the said James M. Royals, Moses A. Tart and William Eli Baggett in deciding who is best qualified to administer upon said estate.

The order further provided that if the Clerk shall find William Eli Baggett is better qualified and more suitable to administer the estate, then, in that event, he shall not revoke the letters of administration heretofore issued to the said William Eli Baggett, but said letters shall remain in full force and effect; otherwise, to revoke said letters and appoint one or both of the other applicants.

The petitioners appeal, assigning error.

E. J. Wellons, E. R. Temple for appellants.
McLeod & McLeod for appellees.

PER CURIAM. G.S. 28-6 (b) provides: "Any person who renounces his right to qualify as administrator may at the same time nominate in writing some other qualified person to be named as administrator, and such designated person shall be entitled to the same priority of right to qualify as administrator as the person making the nomination. Provided, that the qualification of the appointee shall be within the discretion of the clerk of court."

This Court, in *Hill v. Alspaugh*, 72 N.C. 402, said: "We think the true intent and meaning of the statute is that the persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and that a party interested, wishing to quicken their diligence *within that time*, must do so by citation as prescribed by statute, or if a person, not preferred, applied for administration *within six months*, he must pro-

duce the written renunciation of the person or persons having prior right." G.S. 28-15; *Williams v. Neville,* 108 N.C. 559, 13 S.E. 240.

No citation having been issued as required by statute prior to the issuance of letters to William Eli Baggett, the judgment of the court below will be upheld.

Affirmed.

WILBURN MARLIN BURKE v. CAROLINA & NORTHWESTERN RAILWAY COMPANY.

(Filed 26 September 1962.)

Appeal and Error § 39—

Where the Justices of the Supreme Court are evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Sharp, S.J.,* January 15, 1962 Term, GASTON Superior Court.

In this civil action the plaintiff sought to recover damages for his personal injury sustained while he was attempting to hold in place boxes of freight in a partially loaded car during shifting operations. The plaintiff alleged: "The engineer of the defendant operated the defendant's engine wantonly and recklessly and without regard to . . . the safety of the plaintiff."

The defendant, by answer, denied negligence and pleaded (conditionally) the plaintiff's contributory negligence.

At the close of the plaintiff's evidence the court allowed defendant's motion for involuntary nonsuit. From judgment dismissing the action, the plaintiff appealed.

Frank Battley Rankin for plaintiff appellant.

W. T. Joyner, Geo. B. Mason, Mullen, Holland & Cooke, by James Mullen for defendant appellee.

PER CURIAM. *Justice Sharp,* having presided in the court below, did not participate in the decision here. The other Justices, being equally divided as to the propriety of the nonsuit, the judgment of the superior court is affirmed without the decision becoming a precedent.

Affirmed.

IN THE MATTER OF SCOTT DILLINGHAM,
REAL ESTATE BROKER'S LICENSE NO. 510.

(Filed 10 October 1962.)

1. Brokers and Factors § 8; Administrative Law § 4—

The statute regulating real estate brokers and salesmen provides that review of an order of the Board suspending or revoking a license shall be *de novo* in the Superior Court in all cases, regardless of whether the board has made a record of its proceedings, G.S. 93A-6(b), and therefore G.S. 143-307 does not apply.

2. Brokers and Factors § 8—

The North Carolina Real Estate Licensing Board has authority to revoke or suspend the license of a real estate broker or a real estate salesman solely for misconduct which is connected with the pursuit by the licensee of the business of broker or salesman, and evidence of a licensee's guilt of criminal offenses not related to the pursuit of his licensed privileges, even though they be of infamous, vile and depraved character, and evidence of his fraud or deceit in selling his own notes secured by deeds of trust, are irrelevant in determining whether his license should be revoked or suspended.

3. Statutes § 5—

A statute must be read contextually with reference to its subject matter and objectives to ascertain the legislative intent.

4. Same—

When a statute, in describing its application, enumerates specific classifications followed by words of general description, the general words will be limited to classifications of the same general nature or class as those particularly and specifically enumerated. This rule is especially applicable to penal and criminal statutes, which must be strictly construed.

APPEAL by the North Carolina Real Estate Licensing Board from *Huskins, J.*, Regular April-May 1962 Civil Term of BUNCOMBE.

On 5 July 1961 the North Carolina Real Estate Licensing Board, hereafter to be designated as The Board, pursuant to the provisions of G.S. 93A-6, upon its own motion, issued a written notice notifying Scott Dillingham, a licensed real estate broker, that probable grounds existed to revoke or suspend his real estate broker's license under the provisions of G.S. 93A-6, (a), (1), (2), (3), (8), and (10), as shown by judgments rendered in four cases against him — three civil and one criminal — which cases are set forth in the written notice with particularity, and further notifying him that the hearing would be held in Room 711, First-Citizens Bank and Trust Company Building, Raleigh, North Carolina, at 11:00 o'clock a.m. on 28 July 1961, where and when he could be present, offer evidence, and be heard in person or by counsel.

The written notice was sent to Scott Dillingham by registered mail, and he receipted for it on 7 July 1961.

On 21 July 1961 The Board received a written reply to its notice from Scott Dillingham.

The Board had the hearing at the place and time specified in the notice. Scott Dillingham did not appear either in person or by attorney. The Board made findings of fact in respect to the four cases specified in the notice, and that Scott Dillingham is guilty of violating the provisions of G.S. 93A-6, (a), (1), (2), (3), (7), (8), and (10). Whereupon, it ordered that the Real Estate Broker's License of Scott Dillingham be, and it hereby is, revoked, and that he surrender to The Board the original certificate of his license, and his certificate of renewal of his license. In apt time Scott Dillingham appealed to the superior court. Whereupon, The Board sent the record in the proceeding to the superior court of Buncombe County, the county of the residence of Scott Dillingham. G.S. 93A-6, (b).

In the superior court The Board and Scott Dillingham waived a jury trial. G.S. 1-184. Judge Huskins excluded all the evidence offered by The Board, and allowed Scott Dillingham's motion for judgment of compulsory nonsuit. The Board appeals to the Supreme Court.

Lee & Allen, by H. Kenneth Lee for the appellant.
W. M. Styles for the appellee.

PARKER, J. The Board assigns as error that Judge Huskins heard the proceeding on appeal *de novo* rather than on the record. This assignment of error is overruled.

The General Assembly at its Regular Session in 1957 enacted Ch. 744, Session Laws 1957, now codified as G.S. Ch. 93A, Real Estate Brokers and Salesmen, which is "An act to define, regulate and license real estate brokers and real estate salesmen in North Carolina and to create the North Carolina Real Estate Licensing Board and define its powers and duties, and to provide penalties for the violation of the provisions of the act." The Board was created by this Act, and is operating by virtue of its provisions. G.S. 93A-6, (b), of this Act as codified specifically prescribes that when The Board suspends or revokes a license, the licensee shall have the right to appeal within a fixed time to the superior court, "where he shall be entitled to a trial *de novo*." *S. v. Warren*, 252 N.C. 690, 692, 114 S.E. 2d 660, 663.

The Board contends that it made and preserved a record of the proceeding, and, therefore, the review by the superior court shall be on the record as provided in G.S. 143-314 and 143-315. That only when The Board enters an order without making a record shall the pro-

ceeding be heard *de novo*. That there is no sound reason why this Board was not placed under the provisions of G.S. Ch. 143, Article 33, Judicial Review of Decisions of Certain Administrative Agencies, and that the advantages of uniformity will be lost if each new licensing board is left to operate under its own statute.

G.S. 143-307, Right to Judicial Review, enacted in 1953, provides: "Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this article [Article 33], unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute."

Such an argument might have been convincing if it had been addressed to the General Assembly when it was considering the enactment of this statute. But, however that may be, the statute codified as 93A, Real Estate Brokers and Salesmen, states in G.S. 93A-6, (b), in clear and unmistakable language that on an appeal to the superior court from an adverse decision by The Board the accused licensee "shall be entitled to a trial *de novo*." The intent and meaning of the Legislature in using such words are manifest. It means a trial *de novo* without any qualification and in all such appeals. Adequate procedure for judicial review is provided by this statute. In this plain language the Legislature has spoken, and it is not for the Court to write into the statute that the accused licensee shall be entitled to a trial *de novo* only when The Board has entered an order and made no record, as contended by The Board.

The Board assigns as error the exclusion by the court, on defendant's objection, of the entire record in the superior court of Buncombe county of the case of *State ex rel. Robert S. Swain, solicitor of the 19th Judicial District v. Scott Dillingham, individually, et al.*, which was a suit instituted on 8 March 1959 to enjoin Scott Dillingham and one Hazel Rice from maintaining and operating in Buncombe County at that time a public nuisance, to-wit, a house of prostitution, and from keeping therein prostitutes for hire whose illegal earnings Scott Dillingham shared, and in which suit Scott Dillingham consented to the signing of a judgment against him *et al.* by a superior court judge padlocking the premises for one year on the grounds alleged in the complaint.

The Board also assigns as error the exclusion by the court, on defendant's objection, of a certified copy, which defendant admitted was a true and correct copy, of the Criminal Minute Docket of Buncombe County superior court of 14 April 1959 showing that Scott Dillingham on that day pleaded guilty to a charge of operating a disorderly house.

The conduct and criminal acts of Scott Dillingham in the year 1959, as disclosed by the above excluded records of the superior court of Buncombe County, are of an infamous, vile and depraved character. The basic question for decision presented by these assignments of error concerns the authority of The Board to revoke or suspend his license as a real estate broker for such conduct and criminal acts of which he is guilty, where that conduct and criminal acts are not connected with the pursuit in any way of his licensed privilege.

G.S. 93A-6, (a), authorizes The Board to hold a hearing and to revoke or suspend the license of a real estate broker or real estate salesman, heretofore issued by it under the provisions of Chapter 93A, Real Estate Brokers and Salesmen, General Statutes of North Carolina, if he is found guilty by it of "performing or attempting to perform *any of the acts mentioned herein*" (emphasis ours); then eleven acts are enumerated.

The Board made specific findings of fact, and concluded that Scott Dillingham was guilty of violating the provisions of G.S. 93A-6, (a), (1), (2), (3), (7), (8), and (10). The only one of these eleven acts specified in the statute which might be contended to have any bearing in respect to Scott Dillingham's guilt of maintaining and operating a house for the purpose of prostitution in violation of the criminal law of this State, G.S. 14-204, and of his guilt of operating a disorderly house in violation of the criminal law of this State, is eight, which reads: "(8) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public."

The question here presented is one of first impression in this State. However, it has been passed upon by the Supreme Courts of Iowa and California, by the Kansas City Court of Appeals of Missouri, and by the Superior Court of New Jersey, Appellate Division.

The Iowa case is that of *Blakeley v. Miller, Real Estate Commissioner,* 232 Iowa 980, 7 N.W. 2d 11. In that case Blakeley was the holder of a real estate broker's license issued under authority of Chapter 91.2 of the 1939 Code of Iowa. He was appointed by a district court of Jefferson County, Iowa, as a referee in a partition action involving real estate, with an express order of court to sell the land, and to divide the proceeds between the several owners. He so conducted himself as to cause the court to discharge him as referee without compensation. Thereupon, Miller, the real estate commissioner, gave notice and had a complaint served upon Blakeley of a hearing in reference to said matter. Blakeley appeared with counsel and evidence was heard. The real estate commissioner found that Blakeley was

guilty of acts in connection with his duties as referee, which were in violation of the provisions of section 1905.45 of the Code of Iowa, and entered an order revoking his license as a real estate broker. Blakeley sought a review in the district court, claiming the commissioner acted illegally and without jurisdiction. The district court entered a decree annulling the order of the commissioner, and he appealed to the Supreme Court.

The Supreme Court quotes section 1905.45 of the Code of Iowa which authorized the commissioner to suspend or to revoke the license of any real estate broker or real estate salesman issued under the provisions of this chapter, "where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of: 1. Making any substantial misrepresentation, or * * * 8. Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or * * * 10. Any other conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent, or dishonest dealing." (It is to be noted that the above grounds for the suspension or revocation of a license are identical with ours.)

After quoting the statute the Supreme Court said:

> "The language of the above section, 'acts mentioned herein,' must mean the acts of a real estate salesman or real estate broker for which a license is required in section 1905.20. And in the performance of those duties the statute holds the salesman or broker to strict accountability under pain of revocation of his license, but nowhere in the statute do we find that his conduct, outside of his actions in connection with his duties while so acting as a salesman or broker, after the license has been once issued and six months have elapsed, applies to the revocation of his license. One could think of many good reasons why it would be better to have the actions outside of his conduct in acting as a real estate agent apply to his right to hold a real estate license, but this is for the legislature to say and not for the court to write into the statute.
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> * * * * * * * *
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> "The acts complained of and upon which the real estate commissioner revoked the license were not connected in any way with the performance of appellee's duties as a salesman or real estate broker. The legislature of Iowa saw fit specifically to except one acting under order of court, and in the case at bar Blakeley was acting under order of court. In the construction of a statute such

> as confronts us in this case, the sole duty of the court is to ascertain from the statute as written the intent and purpose of the legislature, which is the sole law-making body."

With all of the Justices concurring, the district court's judgment annulling the commissioner's order was affirmed.

The California case is that of *Schomig v. Keiser, Real Estate Commissioner, et al.*, 189 Cal. 596, 209 P. 550. In that case plaintiff Schomig filed a petition for a writ of *certiorari* against Keiser, Real Estate Commissioner, to review the latter's order revoking petitioner's license as a real estate broker or real estate salesman under section 12 of the Act establishing a real estate commissioner and authorizing him to revoke licenses for certain causes. The Supreme Court issued the writ. The petition shows that Edward Rautenberg filed a verified complaint with the real estate commissioner against Schomig, showing that he was Rautenberg's agent in the collection of payments on a contract for the sale of real estate in Oakland; that the contract was made by Rautenberg with certain Negroes for the purchase of the land, and subsequently they sold the lots to Miss Wall who is making the payments to Rautenberg by means of the agency of Schomig through the Oakland Bank of Savings at the rate of $15.00 per month; that the bank was to transmit said money through Schomig to Rautenberg; that Rautenberg had received from Schomig all that had been received by him from Miss Wall excepting the sum of $114.00, which had been paid by Miss Wall in excess of the amount due; that Rautenberg then complained to the bank, and the bank then forced Schomig to account to him, and confess that he had received the sum of $114.00.

The Supreme Court of California quoted a portion of section 12 of the Act authorizing him to revoke the license of a real estate salesman or broker "at any time where the holder thereof in performing, or attempting to perform, any of the acts mentioned in section 2 hereof is guilty of * * * (5) Any other conduct, whether of the same or a different character than hereinabove specified, which constitutes dishonest dealing," a provision almost identical with section 93A-6, (a), (10) of our Act. The Supreme Court also quoted section 2 of their Act defining a real estate broker and a real estate salesman, which is almost identical with section 93A-2, (a), and (b), of our Act. After doing so, the Court said:

> "It will be seen that this does not authorize the commissioner to revoke any license of either a broker or salesman under the act, unless he is acting for a compensation, and also unless he does the acts complained of at a time when he is negotiating for

the sale or purchase of real estate, or is selling or buying the same or negotiating a loan thereon or offers to lease, or rent, or places for rent, or is collecting rents, from real estate, as a whole or partial vocation.

"Any employment by any person or another to collect payment on an agreement which has already been negotiated and is in all respects perfected and the terms agreed upon, does not make the party a real estate broker or real estate salesman, and any misconduct in performing such acts would not warrant the real estate commissioner in revoking the license of such person.

"The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms."

The opinion written by *Chief Justice Shaw* and concurred in by other Justices annulled the order of the real estate commissioner.

The Missouri case is that of *Robinson v. Missouri Real Estate Commission, Mo. App.,* 280 S.W. 2d 138, 56 A.L.R. 2d 566 (6 June 1955). This was an appeal from the judgment of a circuit court affirming the order and decision of the Real Estate Commission revoking the license of Don Robinson as a real estate broker. At the hearing the Commission found these facts: One McCown owned a house in Kansas City, having purchased it through appellant Robinson. Early in 1953, McCown, through another broker, sold this property, and took back from the purchaser two promissory notes secured by a deed of trust, one note for $3,310.62, the other for $1,000.00. McCown carried the notes and deed of trust to appellant, and asked him if he could sell them. Robinson said, "he would try to find a buyer." This occurred about 15 August 1953. Appellant sold the notes to one John and received in payment a certified check in the amout of $2,586.37, made jointly payable to Herbert and Juanita McCown and Don Mar Realty Company. On 31 August 1953, appellant told McCown that he could get $1,850.00 for the notes, and the McCowns, relying upon his statement, signed the paper authorizing the sale of the notes for that amount. The notes had been sold to John before the instrument authorizing their sale for $1,850.00 was signed. McCown was paid $1,850.00. Neither McCown nor his wife ever saw, or knew of, the check for $2,586.37 made by John payable to them and appellant jointly. Nor did either give authority to anyone to endorse their names thereon. The check was handed to one Turner, a salesman employed by the appellant. Appellant told Turner to endorse the names of McCown and

his wife on the check. Turner did so and returned the check to appellant. The Commission announced its finding on 30 June 1954, and concluded that the misrepresentation made by appellant to the McCowns as to the amount received in the sale of the two notes constitutes a substantial misrepresentation in the conduct of respondent's business in violation of section 339.100 (1), RS Mo. 1949, [VAMS], and constitutes untrustworthy, improper, fraudulent, dishonest dealings and conduct in violation of section 339.100 (7), RS Mo. 1949, [VAMS]. The Commission further concluded that the aforementioned forgery constitutes untrustworthy, improper, fraudulent, dishonest dealings and conduct within the meaning of and in violation of section 339.100 (7), RS Mo. 1949, [VAMS].

The Kansas City Court of Appeals quotes section 3 of the Missouri Real Estate Commission Act, which defines who is a real estate broker, and states the Commission is authorized to revoke a broker's license if he is found guilty of any of the eleven acts set out in section 10, Laws of 1941, pp. 428-429. It then stated, the undisputable fact is that McCown engaged appellant *to sell notes,* and that this employment had nothing to do with the sale or exchange of real estate, or with the leasing or renting of real estate, or with the loaning of money for others to be secured by a deed of trust or mortgage on real property. That reprehensible as appellant's conduct was, it was unconnected with his activities and duties as a real estate broker. The Court then stated the facts, and quoted extensively from the Iowa and California cases set forth above.

After this the Court said:

> "We are convinced that the California and Iowa courts have correctly construed these Real Estate Broker Acts. Extensive search reveals no decision to the contrary.
>
> "It is a generally accepted doctrine that, where a statute authorizes the revocation of a license for causes enumerated, such license cannot be revoked upon any ground other than one of the causes specified. 33 Am. Jur. p. 382; 53 CJS, Licenses, § 44, p. 651.
>
> "And it is also a familiar rule of statutory construction that 'where a law specifically designates several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things not specifically named, it must be so construed as to apply only to things or acts of the same general nature as those definitely set out.' *State ex rel. Spriggs v. Robinson,* 253 Mo. 271, 287, 161 S.W. 1169, 1170, and *State ex inf. McKittrick v. Wilson,* 350 Mo. 486, 166 S.W. 2d 499, 501, 143 A.L.R. 1465.

"Ten of the eleven grounds set out in Sect. 10 of the Act authorizing revocation of a license relate to the conduct of the real estate business. The general language, 'any other conduct which constitutes untrustworthy . . . dealings, or demonstrates bad faith or gross incompetence', appearing in clause (7) must be construed as applying to that business — not to some outside activity of a broker.

"Let us assume that appellant also had a license to sell intoxicating liquor, and that he kept his establishment open on Sundays, sold liquor to minors and, in general, ran a disorderly place. Could it be said that respondent Board would have been justified in revoking his real estate broker's license because he had violated the liquor laws? We think not, for the simple reason that those unlawful acts had nothing to do with the *sale, exchange, rental or negotiation of loans on real estate.* And the same is true of the acts on account of which the Board undertook to revoke appellant's broker's license.

"In our opinion, the following tends to support our present holding. Some of the States having real estate broker's license laws also require a broker to give bond that he will conduct himself in accordance with the provisions of the Acts. In several reported cases the broker and his surety had been sued because of admittedly gross fraud on the part of the broker. Those cases hold that the surety is not liable unless the broker's fraudulent acts arise out of some transaction falling within the statutory definition of the broker's business. In other words, the broker's trickery must occur in connection with the *sale, rental or negotiation of loans on real estate.* [Quoting extensive authority]

"The judgment of the Circuit Court is reversed, and the cause is remanded with directions to the Circuit Court to enter a new judgment reversing the finding and judgment of the Commission."

These three decisions show that the Supreme Courts of the State of Iowa and of the State of California, and a Kansas City Court of Appeals of the State of Missouri have construed the statutes of their respective States to confine the delegated authority of the licensing commissioner or commission to suspend or revoke the license exclusively to activities in which the licensee has actually engaged as a real estate broker.

The New Jersey case is that of *Division of New Jersey Real Estate Commission v. Ponsi,* 39 N.J. Super. 526, 121 A. 2d 555 (15 March 1956). In this case there was ample evidence that the appellant Ponsi, a licensed real estate broker, deliberately engaged in unfair and

unworthy dealing in the course of a real estate transaction concerning his own property. After a hearing the Real Estate Commission resolved that Ponsi had been guilty of conduct which demonstrates bad faith or unworthiness, under the New Jersey statute, and for that cause denied him a renewal of his real estate broker's license. N.J.R.S. 45:15-17 authorizes the commission to suspend or revoke a real estate broker's license "where the licensee, in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of"; and then follows an enumeration of seventeen acts. The New Jersey Court, after referring to the Iowa, California, and Missouri cases set forth above, and after setting forth that their statute obliges an applicant for a license to furnish to the commission "evidence of good moral character," and that it seems inconceivable that the Legislature intended to establish one standard for the issuance of a license and another for its renewal or revocation; and that the statute provides the commission may "in its discretion" refuse to grant any new license "upon sufficient cause being shown"; and that no license shall be issued to any person who has been convicted of certain specified criminal offenses, said:

> "Those provisions display the broad legislative object and purpose to limit the licensees to reputable, honorable and conscientious persons.
>
> "It is therefore in recognition of the indubitable intent of the Legislature that a significant meaning be ascribed to the specifications of Section 45:15-17, such as (e) '*Any* conduct which demonstrates unworthiness* * *bad faith* * *'; (h) 'Being convicted of a *crime* * *'; and (l) '*Any* other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.' (Italics supplied.)
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> * * * * * * * *
>
> "We therefore express the opinion that acts of a licensed broker comprehended by the statute in its specifications which are determined by the Commission to disqualify the real estate broker from the retention or renewal of his license are not necessarily restricted to those committed in the pursuit of the privileges accorded by the license."

The determination of the commission was affirmed. This case is cited with approval in *Maple Hill Farms, Inc. v. Division of New Jersey Real Estate Commission,* 67 N.J. Super. 223, 170 A. 2d 461 (25 April 1961).

Our statute, G.S. 93A-6 (a) empowers The Board to revoke or suspend the license of any real estate broker or real estate salesman

heretofore issued under the provisions of the Act at any time "where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of"; and then the statute enumerates eleven acts. The words "any of the acts mentioned herein" are not characterized by phrasal felicity or clarity, but they must mean, as the Iowa Court said in construing identical words in their Real Estate and Salesmen Act, the acts of a real estate broker or real estate salesman for which a license is required in G.S. 93A-1.

The eleven acts enumerated in the statute lack precision of statement, and this is particularly true of the eighth act enumerated. It is an accepted rule of statutory construction that in ascertaining the intent of the Legislature in case of ambiguity the language of the statute must be read contextually and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; 50 Am. Jur., Statutes, sec. 292. It is also a recognized rule of statutory construction that when particular and specific words or acts, the subject of a statute, are followed by general words, the general words will be construed as applicable only to persons or things of the same general nature or class as those particularly and specifically enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, the specific words or acts would have been omitted. This is especially applicable to penal or criminal statutes. *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211; *Morecock v. Hood,* 202 N.C. 321, 162 S.E. 730; *S. v. Craig,* 176 N.C. 740, 97 S.E. 400; 82 C.J.S., Statutes, section 332 b.

Applying these rules of statutory construction, it seems evident that of the eleven acts enumerated in G.S. 93A-6 (a) authorizing revocation or suspension of a license, acts one, two, three, four, five, six, seven, nine and ten relate solely to the conduct of real estate brokers and salesmen as they are defined in G.S. 93A-2. And further applying said rules, the general language of act eight "Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public" must be construed as applying exclusively to activities in which the licensee has actually engaged in the pursuit of his licensed privilege as a real estate broker or salesman and not to some outside activity not connected in any way with the pursuit of his licensed privilege. We do not mention act eleven set forth in G.S. 93A-6 (a) for the reason The Board did not find Scott Dillingham guilty of violating that act.

In our opinion the California, Iowa and Missouri Courts have cor-

rectly construed their Real Estate Acts, and our decision is in harmony with them. We are not convinced by the reasoning of the New Jersey Court.

The portion of our Act which empowers The Board to revoke the license of a real estate broker or salesman is penal in its nature and should not be construed to include anything as a ground for revocation which is not embraced within its terms. The evidence offered by The Board to the effect that Scott Dillingham on 14 April 1959 pleaded guilty to a charge of operating a disorderly house, and on 8 March 1959 consented to the signing of a judgment against him padlocking for one year premises maintained and operated by him as a house of prostitution shows acts of a vile and decadent character committed by Scott Dillingham, but such acts are not connected in any way with the pursuit of his licensed privilege as a real estate broker, and are not a ground for revocation of his license theretofore issued. Consequently such evidence was correctly excluded by Judge Huskins as irrelevant and immaterial.

The Board assigns as error the exclusion by the court of the record in the case of *Mrs. Rubye A. Lowry v. Scott Dillingham* in the superior court of Buncombe County. The verdict of the jury in that case was that in May 1955 Scott Dillingham was guilty of fraud in selling to plaintiff a note secured by a deed of trust owned by Scott Dillingham. Judgment was signed in accord with the verdict. The Board also assigns as error the exclusion by the court of the record in the case of *R. Alvin Jennings et ux. v. Scott Dillingham* in the district court of the United States for the western district of North Carolina, Asheville Division. The verdict of the jury in that case was that in May 1955 Scott Dillingham was guilty of fraud in selling to plaintiffs a note secured by a deed of trust owned by him.

G.S. 93A-2 (a) defines a real estate broker within the meaning of the Act as "any person,* * **who for a compensation or valuable consideration or promise thereof* sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others, as a whole or partial vocation." (Emphasis added.) Subsection (c) of this statute states "The provisions of this chapter shall not apply to and shall not include any person,* * *who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein."

If we assume the truth of the facts upon which the verdicts in the *Lowry* and *Jennings* cases were based, Scott Dillingham's selling of his own notes secured by deeds of trust to Mrs. Rubye A. Lowry and R. Jennings *et ux.* did not make him a real estate broker as a real estate broker is defined in G.S. 93A-2 (a), and any misconduct in performing such acts does not warrant The Board or the court on appeal to revoke his license on such ground. Therefore, the records in those cases were irrelevant and immaterial, and properly excluded by the court. Having arrived at that opinion it is not necessary for us to decide whether or not the record in the two civil cases set forth above can be introduced in evidence under the provisions of G.S. 93A-6 (a) to establish the truth of the facts on which the verdicts in those cases were rendered, and it is not necessary for us to decide whether the provisions of our Real Estate Brokers and Salesmen Act will or will not be construed to have retrospective operation.

The Board having offered no competent evidence, it necessarily follows that the entry of a judgment of compulsory nonsuit by the court was proper.

Affirmed.

JAUNELL PETIT PICKELSIMER, BY AND THROUGH HER NEXT FRIEND, ROBERT T. GASH, v. CHARLES W. PICKELSIMER, JR., AND JOSEPH PICKELSIMER, EXECUTORS OF THE ESTATE OF C. W. PICKELSIMER, DECEASED.

(Filed 10 October 1962.)

1. Trial § 29—

Where a judge intimates an opinion adverse to the plaintiff on the law upon which his case is based or excludes evidence material and necessary to prove his case, he may submit to a nonsuit and appeal.

2. Frauds, Statute of § 6b; Wills § 2—

An oral contract to devise realty, as well as an indivisible oral contract to devise both real and personal property, is void and may not be enforced if the statute of frauds is pleaded. G.S. 22-2.

3. Frauds, Statute of § 3—

The defense of the applicable statute of frauds may be raised by pleading the statute specifically, by denying the contract, or by alleging another and different contract.

4. Executors and Administrators § 24a—

A party rendering personal services in consideration of the recipient's

promise to devise real property may, upon breach of the contract, recover from the recipient's estate the value of such services upon *quantum meruit.*

5. Executors and Administrators § 24d—

In an action in *quantum meruit* to recover for breach of contract to devise realty in consideration of personal services, the measure of damages is the reasonable value of the services.

6. Contracts § 14—

The right of a third party to recover on an agreement made for his benefit must be predicated upon the existence of a valid and enforceable contract.

7. Same; Executors and Administrators § 24a; Frauds, Statute of § 4—

Plaintiff's mother, in consideration of the deceased's promise to devise property to plaintiff, forbore bringing bastardy proceedings against deceased and moved into deceased's home and performed personal services in looking after deceased and his legitimate children during their minority. *Held:* Plaintiff's mother may have a right of action to recover the value of the services rendered upon *quantum meruit,* but, upon the plea of the statute of frauds, plaintiff may not maintain an action as the third party beneficiary of the void contract, the doctrine of part performance not being recognized in this State. *Redmon v. Roberts,* 198 N.C. 161 overruled.

APPEAL by plaintiff from *Martin, S. J.,* April 1962 Civil Term of TRANSYLVANIA.

In this action against the executors of the estate of C. W. Pickelsimer, Sr., the minor plaintiff seeks to recover a sum equal to one-fifth of the value of his estate. Plaintiff alleges that she is the illegitimate daughter of C. W. Pickelsimer, Sr. and Blanche Petit, his housekeeper; that after the birth of plaintiff on April 1, 1945, Blanche Petit moved with plaintiff to another town; that thereafter Pickelsimer orally agreed with Blanche Petit as follows: if she would not bring any suit against him, return with plaintiff to his home in Brevard, keep house for him and care for his other three minor children until they were old enough to care for themselves, that he would marry her, recognize plaintiff as his child, support and maintain her and, at his death, devise and bequeath to plaintiff a one-fifth part of his estate; that, relying upon this promise, plaintiff's mother gave up her home and business in Cashiers, returned to his home and cared for his minor children until they grew up and left home; that she likewise cared for C. W. Pickelsimer, Sr. until shortly before his death on February 4, 1960; that although Blanche Petit fully performed her part of the contract, C. W. Pickelsimer, Sr. failed to marry her and failed to devise plaintiff a one-fifth part of his estate; and that instead, he bequeathed plaintiff only the sum of one thousand dollars, plus seventy-

five dollars a month until she reached the age of eighteen. The balance of his estate, consisting of both real and personal property, he gave to defendants. The prayer is for the sum of "$250,000.00 on account of damages sustained by the minor plaintiff, the sum representing a sum equal to approximately one-fifth of the estate of C. W. Pickelsimer, Sr., or the value of the services rendered by the said Blanche Petit to the said C. W. Pickelsimer, Sr. for and on behalf of the minor plaintiff."

Answering the complaint, the defendants denied both the alleged contract and the alleged paternity of the plaintiff. They admit that C. W. Pickelsimer, Sr. was the father of four children born prior to 1945.

After the jury was impaneled and the pleadings read, the attorneys for plaintiff announced that they were prepared to offer oral evidence tending to prove the allegations of the complaint. Whereupon, the court expressed the opinion that the oral contract alleged was void by reason of the statute of frauds and that plaintiff was entitled to no recovery based on it. To this intimation the plaintiff excepted, submitted to a voluntary nonsuit, and appealed.

Uzzell & Dumont and Hamlin, Potts, Ramsey & Hudson, attorneys for plaintiff.

Redden, Redden & Redden; J. Bruce Morton, and Daniel R. Dixon, attorneys for defendant.

SHARP, J. On this appeal the plaintiff has followed an approved practice. "Where a judge intimates an opinion adverse to the plaintiff on the law upon which his case is based or excludes evidence material and necessary to prove his case, he may submit to a nonsuit and appeal." *Rochlin v. Construction Co.*, 234 N.C. 443, 67 S.E. 2d 464; *Wimberly v. Parrish*, 253 N.C. 536, 117 S.E. 2d 472. In considering this appeal the allegations of the complaint must be accepted as true.

It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. 22-2). An indivisible oral contract to devise both real and personal property is also void. *Grady v. Faison*, 224 N.C. 567, 31 S.E. 2d 760; *Jamerson v. Logan*, 228 N.C. 540, 46 S.E. 2d 561; *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524; *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E. 2d 575. Upon a plea of the statute, it may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach. Our statute goes to the substance as well as the remedy. *Daughtry v. Daughtry*, 223 N.C. 528, 27 S.E. 2d 446; *Jordan v. Furnace Co.*, 126 N.C. 143, 35 S.E. 247; *Rochlin v.*

Construction Co., supra; Clapp v. Clapp, 241 N.C. 281, 85 S.E. 2d 153. However, such a contract may be enforced unless the party to be charged takes advantage of the statute of frauds by pleading it. This he may do by pleading the statute specifically, by denying the contract, or by alleging another and different contract. *Gulley v. Macy,* 81 N.C. 356; *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196.

The remedy of the promisee who has rendered personal services in consideration of an oral contract to devise real estate void under the statute of frauds is an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered. *Daughtry v. Daughtry, supra; Gales v. Smith,* 249 N.C. 263, 106 S.E. 2d 164. In such case, plaintiff's recovery is not the value of the lost land but the reasonable value of his services to the defendant. Where the promisor in an oral contract to convey or devise real property has received the purchase price in money or other valuable consideration and has failed to transfer title, the promisee may recover the consideration in an action of quasi-contract for money had and received or under the doctrine of unjust enrichment. *Rochlin v. Construction Co., supra*; *Wells v. Foreman,* 236 N.C. 351, 72 S.E. 2d 765; *Mauney v. Norvell,* 179 N.C. 628, 103 S.E. 372.

Plaintiff Pickelsimer, however, expressly relies upon the case of *Redmon v. Roberts,* 198 N.C. 161, 150 S.E. 881. That case undoubtedly supports her position, and unless *Redmon* is overruled the decision on this appeal must be for the plaintiff. The two cases cannot be distinguished on the ground that there was no objection to the oral evidence of the contract in *Redmon.* Where the pleadings raise the question of the statute of frauds, that defense is not waived by a failure to object to the parol evidence on the trial. *Jamerson v. Logan, supra.*

In *Redmon* the plaintiff alleged and offered oral evidence tending to show that she was the illegitimate daughter of J. F. Redmon; that when plaintiff was an infant, he had agreed with her mother that if she would not bring any suit against him and would deliver plaintiff to him, he would take her into his home as his child, give her his name, and leave her a share of his estate equal with that of his other children; that relying upon this promise, plaintiff's mother fully complied with her part of the agreement; that plaintiff was cared for in Redmon's home as one of his children; that after she became of age he died intestate survived by a wife and seven children in addition to the plaintiff. Plaintiff sought to recover "a sum of money equal to the value of a child's share in the estate, real and personal, of the deceased."

The defendants, the widow and legitimate children of Redmon,

denied the material allegations of the complaint and specifically plead the statute of frauds. The jury's verdict established that plaintiff was the illegitimate daughter of Redmon; that he had made and breached the contract alleged; and that, as damages, the plaintiff was entitled to recover $6,000.00 which, under the charge, was the net value of the property he had agreed to devise. There was no exception to the judge's charge on damages, and the court's approval of it was dicta. As the opinion expressly recognized, the Court in *Hager v. Whitener,* 204 N.C. 747, 169 S.E. 645 applied this *Redmon dicta* as the measure of damages which plaintiff was entitled to recover for services he had rendered in consideration of an oral contract to convey land. However, in *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331, the court said the *Redmon* dicta was "not in accord with the decisions of this court." See discussion of the *Redmon* dicta in 39 N.C.L.R. 98.

The opinion in *Redmon* states that plaintiff's case is based "upon the breach of contract to give the plaintiff an equal share of the intestate's property." In upholding the judgment for plaintiff, *Brogden, J.,* speaking for the Court said:

> "This Court and the Courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered. *Whetstine v. Wilson,* 104 N.C., 385, 10 S.E., 471; *Lipe v. Houck,* 128 N.C., 115, 38 S.E., 297; *Faircloth v. Kenlaw,* 165 N.C., 228, 81 S.E., 299; *McCurry v. Purgason,* 170 N.C. 463, 87 S.E., 224; *Deal v. Wilson,* 178 N.C., 600, 101 S.E., 205; *Brown v. Williams,* 196 N.C., 247, 145 S.E., 233; *Doty v. Doty,* 2 L.R.A. (N.S.), 713; *Broughton v. Broughton,* 262 S.W., 1089; *Bowling v. Bowling's Adm'r.,* 300 S.W. 876."

The North Carolina cases cited above in the *Redmon* opinion do not sustain the proposition for which they are cited. In none of them did the Court uphold and enforce an oral contract to devise or convey land in consideration of services rendered; the plaintiff, who was not a third-party beneficiary, was allowed to recover only the reasonable value of the services he had rendered.

In *Redmon,* plaintiff was the third-party beneficiary of a contract which had been fully performed by one of the parties, her mother, who had surrendered the custody of her illegitimate child to the second party, the father, and had forborne to institute any legal proceedings against him. In sustaining the plaintiff's verdict in *Redmon,* the Court relied upon the two Kentucky cases cited in the quoted portion of the opinion: *Doty's Adm'rs. v. Doty's Guardian,* 118 Ky 204, 80 S.W. 803, 2 L.R.A. (N.S.) 713, and *Bowling v. Bowling's Adm'r.,* 222 Ky. 396, 300 S.W. 876. These two cases, the facts of which are striking-

ly similar to *Redmon*, followed the earlier Kentucky case of *Benge v. Hiatt's Adm'r.*, 82 Ky. 666, 56 Am. Rep. 912.

In each of these three Kentucky cases, the father of an illegitimate child had agreed with the mother, in consideration of her surrender of custody or her forbearance to institute bastardy proceedings against him, that he would give money and land to the child or "make him an equal heir" with his other children. In each case the father, having received the consideration, died without conveying or devising the property to the child. The Kentucky Court refused to specifically enforce these contracts because, being oral, they were within the statute of frauds, and Kentucky did not recognize the equitable doctrine of part performance. However, it applied its unique "Waters rule" permitting each plaintiff, a third-party beneficiary, to recover the value of the property the father had orally contracted to give him because the mother's peformance could not be valued in money. This rule was first applied in *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209. The Court of Appeals in *Walker v. Dill's Adm'r.*, 186 Ky. 638, 643, 218 S.W. 247, 249, stated it as follows:

> "(I)n cases in which it is possible to determine from the evidence the reasonable value of the services performed this will be the measure of recovery, but where the thing done or services performed are of such nature as not to admit of a reduction to a monetary value, then the (oral) contract made between the parties will be received to fix the value; and in case where lands or other property is agreed to be devised, the value of such property or land will be considered as the measure of recovery, though the thing itself cannot be recovered nor the contract specifically enforced."

In none of these Kentucky cases did the court mention the fact that plaintiff, a third-party beneficiary of an unenforceable contract, was recovering in *quantum meruit*.

In an article in 50 Kentucky Law Journal, 220, 234, the associate editor expresses the opinion that the basis of the *Waters* rule was the Kentucky Court's reluctance to leave the four-state minority of North Carolina, Tennessee, Kentucky and Mississippi which did not recognize the part performance doctrine, and that it had adopted the *Waters* rule as the most equitable substitute for specific performance.

North Carolina has repudiated and consistently declined to follow the doctrine of part performance. Anno. 104 A.L.R. 923, 928, 944, 947; *Grantham v. Grantham, supra; Ebert v. Disher*, 216 N.C. 36, 3 S.E. 2d 301; *Duckett v. Harrison*, 235 N.C. 145, 69 S.E. 2d 176; 1 N.C.L.R.

48; 15 N.C.L.R. 203. Kentucky, however, in the recent case of *Miller v. Miller,* Ky., 1960, 335 S.W. 2d 884, without mentioning part performance, appears to have withdrawn from the four-state minority. In *Miller,* an illegitimate daughter brought suit against her father's estate for breach of his oral promise to devise real property to her in return for her mother's forbearance from instituting bastardy proceedings against him. This forbearance was treated as being impossible of monetary evaluation. The trial court, following precedent, applied the *Waters* rule, held the oral contract unenforceable, but allowed plaintiff to recover the value of the promised realty. However, evidence of its value was so conflicting that the court referred to the opinions as "permissive guesses." The Appellate Court reversed the ruling on damages and decreed the transfer of the specific property to the plaintiff as logically substituting the thing itself for the uncertain value of the land.

In advancing to this denouement, the Kentucky Court recognized that cases like *Benge, Doty and Bowling* left the statute of frauds "eviscerated and stripped of its essential vitality" and "neither dead nor alive." It also noted that had the plaintiff in *Miller* read the previous decisions of the Kentucky Court before testifying, "she could scarcely have displayed greater skill in bringing her case within their scope." The court commented that "(t)he sacrifice of the objectives underlying the statute of frauds in favor of a benevolent solicitude for those who would suffer irreparable hardship in the class of cases exemplified by the one before us may be of debatable wisdom. . . ." Nevertheless, the Kentucky Court declined to overturn these cases which had become so firmly entrenched as a part of its law. Instead, it took the final step and permitted the recovery of the property rather than its value. In doing so, the court said it substituted logic for "a hybrid rule calling for an artificial measure of recovery in lieu of the real thing. . . ."

The opinion in *Miller* suggests the reasons why the decision in *Redmon* was ill-advised. *Redmon v. Roberts, supra,* is not in accord with precedent in North Carolina. It cannot be supported by logic in a state which does not recognize the doctrine of part performance. It is hereby overruled.

When the instant case was before this Court at the Fall Term of 1961, the only question presented was whether the plaintiff's mother was a necessary party. It was held that she was not. At that time no answer had been filed. The question of the statute of frauds and the validity of the contract alleged by the plaintiff had not been raised, and it was not considered. *Pickelsimer v. Pickelsimer,* 255 N.C. 408, 121 S.E. 2d 586.

With *Redmon* no longer an authority for her position, this question arises: Is there any theory upon which this plaintiff, a third-party beneficiary, who herself performed no services, gave up no right, and furnished no consideration to the promisor, can recover either upon quasi-contract or upon implied *assumpsit?*

At the outset, it should be noted that ordinarily "(b)efore any question as to the rights of third-party beneficiaries can arise, it must be established that the agreement between the parties contains all the elements of an enforceable contract." 2 Williston on Contracts, Sec. 347. As stated by *Johnson, J. in Lammonds v. Manufacturing Co.,* 243 N.C. 749, 92 S.E. 2d 143, "The third party beneficiary doctrine is well established in our law. . . .(T)he rule is that a third person may sue to enforce a *binding contract* or promise made for his benefit, even though he is a stranger both to the contract and to the consideration." (Emphasis added) Obviously, we are not here dealing with a *binding contract.* The oral contract entered into between Pickelsimer and the mother of plaintiff for her benefit is void under the statute of frauds. It may not be specifically enforced even though the consideration received and retained by the promisor cannot be valued in money, and the breach of the contract itself cannot be the basis for the recovery of damages.

The theory of the doctrine permitting recovery by a third-party beneficiary is that it is just and practical to permit a person for whose benefit the contract is made to enforce it against one whose duty it is to pay. 12 Am. Jur., Contracts, Sec. 278. Necessarily this theory presupposes a valid, enforceable contract — not one void under the statute of frauds.

The plaintiff can have no cause of an action against the estate of her punative father in quasi-contract upon the theory that it had been unjustly enriched at her expense. Plaintiff herself parted with nothing and no assets came into the hands of Pickelsimer which in equity belonged to her. 12 Am. Jur., Contracts, Sec. 277. He supported her in his home where she and her mother lived together until shortly before his death. In supporting plaintiff, he relieved her mother of an obligation which she shared with him. There is no reason to suppose that the support he furnished plaintiff in his home amounted to any less than the support payments which the court would have ordered him to make in a bastardy case.

Neither can plaintiff recover on the theory that Pickelsimer received services or benefits for which the law would imply a promise on his part to pay her their reasonable value. It was her mother who performed the services — not the plaintiff. "When services are performed by one person for another under an agreement. . . that compensation

therefor is to be provided in the will of the person receiving the benefit of such services and the latter dies intestate or fails to make such provision, *a cause of action accrues in favor of the person rendering the services.*" (Emphasis added) *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764.

While the law will not permit one person to take the labor of another without compensation when it was performed and received in expectation of payment, it does not follow as a corollary that a third-party beneficiary under a void contract can recover for labor which another performed, even though such labor provided the consideration for the void contract.

Sometimes the measure of damages in a given situation assists us to a conclusion. Where recovery is allowed for services rendered under a contract void under the statute of frauds, it is always on the basis of the reasonable value of the services rendered by the one and accepted by the other, less any benefits received by the one. *Doub v. Hauser,* 256 N.C. 331, 123 S.E. 2d 821; *Gales v. Smith, supra.*

To permit plaintiff to recover the value of her mother's services as Pickelsimer's housekeeper in lieu of a one-fifth interest in his estate would create an anomalous situation. Logic forbids it and the result would be an invitation to a jury to place an artificial value on these services. The interest in the estate, which plaintiff would have received had the contract upon which she sued been in writing, cannot now be salvaged by any legal legerdemain.

However great the "benevolent solicitude" for the plaintiff, and the temptation engendered by it, we cannot escape the fact that the contract which was intended for plaintiff's benefit is void. She cannot recover on it because of the policy of the law of this State as expressed in the statute of frauds. If any action on implied *assumpsit* arises from the situation presented by this record, it belongs to plaintiff's mother who rendered the services. In such an action, evidence of the value of the estate would not bear upon the value of her services. *Doub v. Hauser, supra.*

For the reasons stated in this opinion, the judgment of nonsuit is

Affirmed.

VAN V. RICHARDSON, JR. v. GEORGIANNA REEVES RICHARDSON.

(Filed 10 October 1962.)

1. Divorce and Alimony § 13—

Where husband and wife execute a valid separation agreement and pursuant thereto live separate and apart physically for an uninterrupted period of two years with the intention of ceasing matrimonial co-habitation, such separation is ground for divorce under G.S. 50-6, and such cause for divorce is not affected by the fact that the husband fails to comply completely with the provisions of the agreement as to the amounts and time for payment of support for the children of the marriage, there being no contention that the execution of the separation agreement was procured by fraud or duress.

2. Same—

Where husband and wife voluntarily execute a valid separation agreement and thereafter live separate and apart for a period of two years, the wife is precluded from asserting as a defense to his action for divorce that the separation was due to his misconduct prior to the date of the separation, even though such conduct may have been sufficient to have justified the wife in separating herself from her husband, since the actual separation was by mutual consent.

APPEAL by plaintiff from *Patton, J.,* May Civil Term 1962 of LINCOLN.

Civil action under G.S. § 50-6 for absolute divorce on the ground plaintiff (husband) and defendant (wife) had lived separate and apart for two years.

Plaintiff alleged, and defendant in her answer admitted, that plaintiff had been a resident of North Carolina more than six months prior to the institution of the action; that plaintiff and defendant were married January 25, 1947, and thereafter lived together as husband and wife until February 29, 1960; that since February 29, 1960, plaintiff and defendant had lived continuously separate and apart from each other; and that three children, ages 14, 9½ and 8, were born of their marriage.

After answering as set forth above, defendant alleged, in bar of plaintiff's action, the following:

"1. That the plaintiff was at fault and caused the separation between the plaintiff and defendant, the defendent having been a dutiful wife and mother of the children born of this marriage.

"2. That while the plaintiff and defendant were married and living together, the plaintiff violated his marital obligations by dating one Frances Jahn, and the reason for his causing a separation between plaintiff and defendant was his desire to continue keeping company with the said Frances Jahn.

"3. That although the plaintiff and defendant executed Articles of Separation, the plaintiff has breached the obligations required of him in this agreement, and by reason of his breach of the separation agreement, he is not now entitled to any benefits thereunder."

Evidence was offered by plaintiff and by defendant. Evidence offered by defendant included testimony: (1) That plaintiff, while living with defendant, frequently associated with Mrs. Jahn, a neighbor, expressed his affection for her rather than for defendant, moved out of the bedroom plaintiff and defendant had previously shared, and stated that he wanted a divorce; (2) that plaintiff had breached the "Articles of Separation" by his failure to comply fully with his obligations in respect of the time and amounts of the payments he agreed to make to defendant for the support of their children.

The court submitted, and the jury answered, these issues:

"1. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the institution of this action? ANSWER: Yes.

"2. Were the plaintiff and defendant married as alleged in the complaint? ANSWER: Yes.

"3. Have the plaintiff and defendant continuously lived separate and apart from each other for more than two years next preceding the institution of this action, as alleged in the complaint? ANSWER: No.

"4. Was the separation brought about by the fault of the plaintiff as alleged in the answer? ANSWER: Yes."

Upon this verdict, the court adjudged "that the plaintiff's action for an absolute divorce from the defendant be and the same is hereby denied, and that the costs be taxed against the plaintiff." Plaintiff excepted to this judgment and appealed therefrom.

The court, when it signed said judgment, also entered an order relating to the custody and support of the three children. Nothing appears to indicate plaintiff excepted to said order or appealed therefrom. In substance, it awards "the general custody of the three minor children" to defendant, subject to plaintiff's prescribed visitation privileges, and provides that plaintiff pay to defendant $200.00 each month "for the use and benefit and support of the minor children" and "reasonable medical expenses for the three minor children."

W. H. Childs, Jr., for plaintiff appellant.
Charles T. Myers and Robert F. Rush for defendant appellee.

BOBBITT, J. The first, second and third issues were not raised by the pleadings but by the statute providing that the material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury. G.S. § 50-10; *Taylor v. Taylor*, 225 N.C. 80, 82, 33 S.E. 2d 492, and cases cited; *Moody v. Moody*, 225 N.C. 89, 33 S.E. 2d 491.

Defendant, in her answer, admitted plaintiff's allegations as to his residence and their marriage, and with reference to their separation averred: "and it is further admitted that they lived together thereafter as man and wife until the 29th day of February, 1960, and it is further admitted that they no longer lived together as man and wife after February 29, 1960."

All of the evidence tends to show plaintiff and defendant and their three children lived in the home at 5745 Murrayhill Road, Charlotte, N. C., until February 29, 1960; that on February 29, 1960, plaintiff and defendant entered into and executed a "Deed of Separation" in which they agreed *thereafter* to "live separate and apart from each other as fully and completely and in the same manner and to the same extent as though they (had) never been married"; and that contiuously from February 29, 1960, until the commencement of this action on March 16, 1962, plaintiff and defendant had lived separate and apart from each other.

The "Deed of Separation," referred to in defendant's alleged plea in bar as "Articles of Separation," is referred to hereafter as the separation agreement. It was offered in evidence by plaintiff. The separation agreement, drafted by counsel for defendant, is dated February 29, 1960, and was duly executed and acknowledged by plaintiff and defendant on that date; and, in accordance with G.S. § 52-12, the Assistant Clerk of the Superior Court of Mecklenburg County, after private examination of defendant, certified that it was not unreasonable or injurious to defendant but was "reasonable, just, and fair to her."

In their separation agreement, plaintiff and defendant agreed, *inter alia*, as follows: Each could acquire, own and dispose of property as if unmarried. Neither would molest the other or interfere in any way with the other's freedom of action. Plaintiff would not be responsible thereafter for the support of defendant. Defendant would have the custody of the three children of the marriage subject to plaintiff's prescribed rights of visitation. Plaintiff would pay specified amounts at specified times to defendant for the support of the children. Plaintiff would maintain and keep in force an $8,000.00 life insurance

policy "with the same beneficiary or beneficiaries as listed thereon *until such time as he may remarry,* at which time he agrees to change the beneficiaries to his children, share and share alike." (Our italics) Plaintiff would pay all medical, hospital, doctor bills, etc., of his children. Plaintiff would pay all bills he or any member of his family had incurred prior to February 29, 1960. Plaintiff would convey to defendant all of his right, title and interest in and to the home at 5745 Murrayhill Road theretofore owned by plaintiff and defendant as tenants by entirety. Plaintiff granted, conveyed and quit-claimed to defendant all his right, title and interest in and to all furniture, appliances, household effects and other personalty located in and about the home at 5745 Murrayhill Road.

The separation agreement recites that plaintiff and defendant "were married on January 25, 1947, and thereafter lived together as man and wife until the date of this agreement." Referring to said separation agreement, defendant testified: "Yes, it was agreed at that time that my husband and I would not live together as man and wife, and that I could go my way and he could go his."

Defendant does not allege or contend that plaintiff procured the separation agreement by fraud or duress. In this connection, see *Pearce v. Pearce,* 225 N.C. 571, 35 S.E. 2d 636. No question as to the mental capacity of either plaintiff or defendant is involved. In this connection, see *Moody v. Moody,* 253 N.C. 752, 117 S.E. 2d 724.

G.S. § 50-6 creates "an independent cause of divorce." *Byers v. Byers,* 222 N.C. 298, 303, 22 S.E. 2d 902, where the history of this statute is set forth; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466. Suffice to say, where the husband and wife separate by mutual consent and thereafter live separate and apart for two years or more, such separation constitutes a ground for absolute divorce under G.S. § 50-6. *Williams v. Williams,* 224 N.C. 91, 29 S.E. 2d 39; *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492.

Here, if the jury believed the evidence and all of it and found the facts to be as testified by the witnesses and shown by the documentary evidence, it was the jury's duty to answer the third issue, "Yes." Notwithstanding, the jury answered the third issue, "No."

Plaintiff assigns as error designated portions of the court's instructions to the jury, including the excerpts quoted below.

With reference to the third issue, the court instructed the jury, *inter alia,* as follows: ". . . if you find . . . the original separation was the fault of the plaintiff and that then the defendant signed this deed of separation under the idea that he would comply with it, that both parties would comply with it, and recited therein that they were living separate and apart and continued to live separate and apart, but that

after that he failed to comply with the promises that he made when he signed the deed of separation, and that that failure to comply was his fault, that is that he was able to do otherwise, that he could have complied with it and didn't, then if you find that he didn't comply with it just because he didn't want to, not because he is not able to, then that would have the effect when he breached the contract, of placing them back in the same status insofar as the separation is concerned, as they were prior to the time they were, prior to the time the separation agreement was signed."

The phrase, "if you find . . . the original separation was the fault of the plaintiff," suggests there had been a separation prior to February 29, 1960. However, all the evidence tends to show plaintiff and defendant and their three children had lived in the home at 5745 Murrayhill Road until their separation on February 29, 1960. "Where the statute defines the ground for divorce as a 'living separate and apart' for a certain period, the fact that while the parties have become estranged they continued to live under the same roof precludes a finding that they have lived separate and apart." 17 Am. Jur., Divorce and Separation § 185. It has been so held by this Court. *Dudley v. Dudley,* 225 N.C. 83, 33 S.E. 2d 489. There is no evidence plaintiff and defendant "lived separate and apart" within the meaning of G.S. § 50-6 prior to February 29, 1960.

Admittedly, plaintiff did not comply fully with the terms of the separation agreement with reference to the payments he agreed to make for the support of the children. The gist of the quoted instruction is that if the plaintiff could have but did not make all the payments he was obligated to make under the separation agreement, plaintiff's breach of contract in this respect nullified the separation of February 29, 1960, and on account thereof the relationship as between plaintiff and defendant was the same as if they had not separated on February 29, 1960. In our view, and we so hold, the quoted instruction was erroneous.

"A husband and wife live separate and apart for the prescribed period within the meaning of G.S. 50-6 when, and only when, these two conditions concur: (1) They live separate and apart physically for an uninterrupted period of two years; and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation." *Mallard v. Mallard,* 234 N.C. 654, 656, 68 S.E. 2d 247, and cases cited. All the evidence tends to show both plaintiff and defendant, when they separated on February 29, 1960, intended to cease their matrimonial cohabitation and thereafter live separate and apart and that they did so. This fact cannot be removed nor is its legal significance impaired by plaintiff's

partial failure to pay the amounts he had agreed to pay for the support of his children.

It is noted: Defendant did not seek, nor did the court make, any allowance for her support. (Defendant's evidence tends to show she is employed and, including overtime, has gross earnings of approximately $500.00 per month.) While defendant prayed that plaintiff's "request for a divorce be denied," the only affirmative relief she sought was an order granting her custody of the children and requiring plaintiff (1) to pay all past due amounts, and (2) to pay "a reasonable and adequate sum each month for the support and maintenance of the children in the future," and for an allowance of fees for her counsel.

The terms of the separation agreement do not limit the authority of the court to make and enforce such allowances for the support of the children as circumstances may require. In this connection, see *Thomas v. Thomas*, 248 N.C. 269, 271, 103 S.E. 2d 371, and cases cited.

With reference to the fourth issue, the court instructed the jury as follows: "Now, on issue #4, if the defendant . . . has satisfied you from this evidence and by its greater weight, that the separation between the plaintiff and the defendant was occasioned and brought about by the acts of misconduct of the plaintiff . . ., then if you find by the greater weight of the evidence, the burden being on the defendant, then you would answer issue #4 'yes.' If you are not so satisfied, you would answer it 'no,' or if, upon a fair and impartial consideration of all the evidence, the weight of the evidence on that issue is equally balanced between the parties or if it outweighs in favor of the plaintiff, then you would answer issue #4 'no,' because the burden is on the defendant to satisfy you by the greater weight of the evidence that the separation between the parties was brought about by the fault of the plaintiff. If the separation was brought about by the fault of the defendant, then the issue would be answered 'no.' If the separation was brought about by the fault of both of them, your answer to #4 would be 'no,' because the burden is upon Mrs. Richardson the defendant, to satisfy you by the greater weight of the evidence that the separation was brought about by the fault of Mr. Richardson, the plaintiff."

If it be conceded that defendant's pleading and evidence were sufficient to warrant submission of the fourth issue, the question would arise as to whether the quoted instruction is erroneous on account of the court's failure to instruct the jury as to what, in terms of defendant's pleadings and evidence, would constitute "fault of the plaintiff" within the meaning of the fourth issue.

Conceding, but not deciding, defendant's pleading was sufficient to raise the fourth issue, the burden of proof on this issue was on de-

fendant. In such case, the uncontradicted evidence would require that the court instruct the jury to answer the fourth issue, "No."

True, where the husband sues the wife under G.S. § 50-6 for an absolute divorce on the ground of two years' separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's wilful abandonment of his wife. *Johnson v. Johnson,* 237 N.C. 383, 75 S.E. 2d 109, and cases cited; *Pruett v. Pruett,* 247 N.C. 13, 25, 100 S.E. 2d 296, and cases cited. In such case, the burden of proof is on the defendant (wife) to establish her alleged affirmative defense. *Taylor v. Taylor, supra; McLean v. McLean,* 237 N.C. 122, 125, 74 S.E. 2d 320.

Here, there was no wilful abandonment of defendant by plaintiff. Their separation on February 29, 1960, was by mutual consent. Whether plaintiff, while living with defendant, was guilty of such conduct as would have justified defendant if she had separated herself from him is not presented. Suffice to say, she did not do so. Plaintiff and defendant having lived together until their separation on February 29, 1960, and having then separated by mutual consent, defendant cannot attack the legality of their separation from and after February 29, 1960, on account of alleged misconduct while they were living together. *Pearce v. Pearce, supra.*

According to our decisions, the effect of a divorce *a mensa et thoro,* obtained by the wife on the ground her husband abandoned her, is to legalize their separation from the date of such judgment; and in such case the husband, after two years from the date of such judgment, may proceed to an absolute divorce. *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444; *Pruett v. Pruett, supra; Sears v. Sears,* 253 N.C. 415, 117 S.E. 2d 7. Where an original separation is caused by the husband's abandonment of his wife, and subsequently the husband and wife enter into and execute a valid separation agreement, their separation agreement would seem to legalize their separation from and after the date thereof. However, that factual situation is not presented on this appeal. Here, there was no separation of plaintiff and defendant except the separation by mutual consent on February 29, 1960, pursuant to the terms of the separation agreement.

Defendant cites and relies upon *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471, and *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745. In Pharr, this Court upheld orders (1) denying the plaintiff's motion to strike a portion of the defendant's answer, and (2) permitting the defendant to file an amended further answer and defense. In Butler, this Court held the plaintiff was entitled to allowances for subsistence and counsel fees *pendente lite.* These decisions relate solely to pleadings and interlocutory orders. While not sharply drawn into focus, it ap-

pears the controversy, to the extent a separation agreement was involved, related to whether the wife was precluded thereby from obtaining a court order requiring the husband to make the payments for her support. Suffice to say, the *Pharr* and *Butler* cases do not control decision on the facts established by the uncontradicted evidence herein.

For error in the instructions relating to the third and fourth issues, the verdict and judgment are vacated; and the cause is remanded for a new trial in accordance with the law as stated herein.

New trial.

WILLIAM V. JOHNSON v. SOUTHERN RAILWAY COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 October 1962.)

1. Appeal and Error § 60—

Decision on a former appeal that there was sufficient evidence of negligence to be submitted to the jury and that the evidence did not disclose contributory negligence as a matter of law, constitutes the law of the case and precludes nonsuit upon substantially the same evidence, but is not conclusive if the evidence upon the second trial is materially different from that of the first. In the present case, the evidence at the two trials upon the issue of contributory negligence *is held* not sufficiently different in material aspects as to justify a different conclusion.

2. Railroads § 5— Evidence held insufficient to establish contributory negligence as a matter of law on part of motorist at railroad crossing.

Evidence tending to show that the automatic signal lights at a railroad crossing were not working at the time plaintiff approached the crossing in his truck, that plaintiff stopped his vehicle some 30 feet from the crossing and looked and listened without seeing or hearing an approaching train, but that his view of the track, except for a distance of 75 feet, was obstructed at that point by a box car on a spur track some 10 to 12 feet from the mainline track, that plaintiff proceeded slowly onto the crossing, that he did not rely entirely upon the absence of the automatic signal lights but continued to look for an approaching train, although his main attention was upon the highway, and that he was struck by a train which entered the crossing without warning signal by bell or whistle, *is held* not to show contributory negligence as a matter of law on the part of plaintiff.

3. Same—

The failure of automatic signal lights at a railroad crossing, in the absence of other timely warning, while not warranting a motorist in entering blindly upon the crossing, does constitute an implied permission to a motorist to proceed upon the crossing in those cases in which the motor-

ist has taken reasonable precaution and made reasonable observation under the circumstances, and therefore the absence of signal lights is properly considered upon the question of such motorist's contributory negligence.

APPEAL by plaintiff from *Stevens, J.*, May 1962 Term of GATES.

Action by plaintiff to recover damages suffered by him when the pickup truck he was driving was struck by a freight train at a grade crossing in Roduco, N. C., about 10:20 A.M. on 24 January 1960. The freight was a Southern Railway Company train and was being operated over the tracks of the Atlantic Coast Line Railroad Company by permission of the latter company.

From judgment of nonsuit plaintiff appeals.

Phil P. Godwin, John H. Hall and Thos. L. Woodard for plaintiff, appellant.

Joyner & Howison and Walton K. Joyner for defendant Southern Railway Company, appellee.

Rodman & Rodman and Godwin & Godwin for defendant Atlantic Coast Line Railroad Company, appellee.

MOORE, J. This is the second appeal we have heard in this cause. In the first trial of this case in the Superior Court of Gates County, at the March Term 1961, judgment of nonsuit was entered at the close of plaintiff's evidence. Plaintiff's appeal was heard at our Fall Term 1961, and we were of the opinion that the evidence made out a *prima facie* case of actionable negligence on the part of the defendants, and the issue of contributory negligence was for the jury. We reversed the judgment of nonsuit. *Johnson v. R.R.*, 255 N.C. 386, 121 S.E. 2d 580.

The case again came on for trial in Superior Court at the May Term 1962. Plaintiff and defendants offered evidence. At the close of all the evidence plaintiff was again nonsuited. Hence the present appeal.

When it has been determined on appeal that the evidence warrants the submission of the case to the jury, such determination of the Supreme Court is the law of the case and, in a subsequent hearing upon substantially the same evidence, the refusal of the trial court to submit the case to the jury is error. *Alexander v. Brown*, 239 N.C. 527, 80 S.E. 2d 241; *Maddox v. Brown*, 233 N.C. 519, 64 S.E. 2d 864. But where the evidence on the subsequent trial is materially different from that on the former trial, the decision of the Supreme Court on the former appeal as to the sufficiency of the evidence is not conclusive *Warren v. Insurance Co.*, 217 N.C. 705, 9 S.E. 2d 479; *George v. R.R.*, 217 N.C. 684, 9 S.E. 2d 373

Our inquiry on the present appeal is whether upon the retrial the evidence, considered in the light most favorable to plaintiff, is different in material aspects from that of the former trial so as to justify nonsuit.

The opinion on the former appeal, cited above, contains a summary of the pleadings and plaintiff's evidence at the first trial. For an understanding of the general facts and circumstances of the case reference should be had to our former opinion. We summarize herein only such of the evidence adduced at the trials as is necessary to a decision.

There was evidence at the second trial that the train failed to signal its approach, failed to give warning by whistle, gong or bell, and that the automatic signal light at the crossing was not working. Defendants concede that there is sufficient evidence of actionable negligence on their part to withstand the nonsuit motion, but they contend that the evidence on the present record discloses contributory negligence on the part of plaintiff as a matter of law.

The railroad runs north and south, the highway runs east and west. Plaintiff entered the highway about 60 feet east of the crossing and headed west. He stopped about 30 feet before reaching the mainline track and looked in both directions and listened. The railroad station is about 300 feet north of the crossing and is east of the track. A spur track runs between the station and the mainline track, parallels the latter, and ends near the highway but does not cross it. There was a housed box car standing on the spur track about 50 feet north of the highway. There was another box car on the spur track alongside the station. The railroad is straight and level for about two miles northwardly from the crossing. After leaving the point 30 feet from the crossing plaintiff, without stopping again, drove upon the track and was struck by the train.

Plaintiff's evidence at the first trial tends to show, among other things, the following additional facts: From his stopped position 30 feet from the crossing, plaintiff could see about 75 feet along the mainline south of the first box car, and had a view of the mainline as far as the station, about 300 feet. The only obstruction within the 300 feet was the first box car. There was a substantial opening between the first box car and the car standing alongside the depot. Upon seeing and hearing no train approaching, plaintiff moved forward in low gear, and as he did so the view between the box cars decreased and at length was obstructed altogether. The mainline and the spur track were only 6 feet apart. The box car was wider than the spur track. The truck seat was 5 to 6 feet from the front bumper of the pickup.

From this evidence we were of the opinion that plaintiff stopped his vehicle and looked and listened at the best vantage point available

to him before going upon the track, a point from which he could see the mainline track for 300 feet to the north, and that his view became more and more obscured as he approached the track. As to whether plaintiff in the exercise of due care should have stopped his pickup again and made observations at a closer but safe distance from the track, we considered it a matter for jury determination. The questions seemed debatable, (1) whether, in the absence of any active warning of the approach of the train, plaintiff in the exercise of reasonable care for his own safety should have stopped and made observations at a point nearer the crossing, (2) and if so, whether, considering the obstruction of his view, such conduct would have reasonably disclosed the peril, and (3) whether under the circumstances plaintiff could reasonably rely upon the failure of automatic signals and warnings. We therefore held that it was a case for the jury.

At the second trial plaintiff testified as follows (quoted verbatim, but not in the same sequence): "As I came from the point about 60 feet east of the track to the point about 30 feet from the track, I could see the track between the box cars. . . . I stopped at a point where the first box car and the second box car had sort of gotten in line so I couldn't see anything at that point. The way I was sitting, looking at an angle by the box car, I could see about 75 feet north up the mainline track. . . . (F)rom the time I let out the clutch and pulled on up to the track, I glanced in the direction of north and south, but I was centering my attention primarily on the road. I never saw the train that hit me. I reckon the distance between the east rail of the mainline and the west rail of the spur track is about 10 or 12 feet. (According to defendants' evidence it is by actual measurement 9 feet 11 inches.) It is about 5 or 6 feet from the seat in the truck to its front bumper. The box car had an overlap of about 2½ feet over the rails."

In our opinion the evidence at the second trial, considered in the light most favorable to plaintiff, is somewhat less favorable to him than the evidence at the first trial. The evidence at the first trial permits the inference that when plaintiff stopped 30 feet from the crossing he had a view of the mainline track for more than 300 feet north of the crossing, that he could see between the two box cars on the spur track, and as he approached the crossing the view was more and more obscured. He testified at the second trial that he could see the track between the box cars before he came to a stop, but from his stopped position his view to the north was totally obstructed except for a distance of 75 feet. The evidence at the first trial indicated that the distance between the mainline and spur tracks was 6 feet; at the second trial plaintiff testified that the distance was 10 to 12 feet. The box car had an "over-hang" of 2½ feet; the seat of the pickup was 5

to 6 feet from the front bumper. Accepting the measurement given at the second trial as true, plaintiff might have stopped just short of the mainline track and gained a clear view up the track to the north for a distance which would have permitted him to see the oncoming train in time to avoid collision.

From these differences in the evidence at the two trials the learned trial judge undoubtedly concluded that there was a material change and on motion to nonsuit the case was controlled by the decisions in *Parker v. R.R.*, 232 N.C. 472, 61 S.E. 2d 370, and *Boyd v. R.R.*, 232 N.C. 171, 59 S.E. 2d 785. We do not agree.

Mathematical possibilities and the results of exact measurements, showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law.

In our former opinion in this case (*Johnson v. R.R.*, 255 N.C. 386, 388-9) we stated the following principles of law and cited authorities: "The mere momentary failure of an automatic signaling device to operate upon the occasion of an accident is not evidence of negligence on the part of the railroad company. . . . But it is proper to consider such failure in measuring the care exercised by the traveler in negotiating the crossing, and it is therefore relevant on the question of contributory negligence. . . . A traveler on a highway has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. . . But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when from a safe position such looking and listening will suffice to warn him of danger. . . . Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury."

According to plaintiff's evidence, he stopped and made such observations as he could to determine whether he could cross in safety. The view to the north was obstructed. There were no audible or visible warnings of the approach of the train. He moved forward slowly centering his attention primarily on the road. The double blinker lights of the automatic warning device near the track were not blinking. The inscription on the blinker read: "Railroad Crossing. Stop on Red Signal."

We are of the opinion that the failure of automatic signal lights at a railroad crossing to work has the tendency to abate the ordinary caution of a traveler on the highway, and that he has the right to place some reliance on such failure. In the absence of other timely warning, it would seem that it is an implied permission to proceed in those cases

in which the traveler has taken reasonable precautions and made reasonable observations under the circumstances. In the case at bar plaintiff stated: "I did not rely on the signal light alone; I did not rely on it fully." But we do not interpret this to mean that he paid no attention to the light and did not rely on it at all. He stated that it was not working. It would appear that it was one of the several circumstances observed and relied on by him. Where the view of a traveler is obstructed, as in this case, and the automatic signal light is not working, and there is no other timely warning of the approach of a train, the question as to whether or not the traveler, in proceeding onto the crossing, exercises the care of an ordinarily prudent man is one for the jury.

The judgment below is

Reversed.

WEYERHAEUSER COMPANY v.
CAROLINA POWER & LIGHT COMPANY

(Filed 10 October 1962.)

1. Easements § 8; Contracts § 12—

A deed conveying an easement constitutes a contract to be construed according to the general rules governing the construction of contracts in ascertaining the intent of the parties as to the extent of the easement conveyed.

2. Same—

In construing the extent of an easement conveyed by deed, the primary purpose is to ascertain the intention of the parties at the time of the execution of the instrument as gathered from its language read contextually and not in detached portions, considered in the light of the purposes sought to be accomplished, the subject matter of the contract, and the situation of the parties.

3. Same—

Where the language of an easement deed is unambiguous, effect must be given to its terms taken in their plain, ordinary and popular sense, and the court may not, under the guise of construction, reject language inserted by the parties, or insert language which the parties elected to omit, or grant relief merely because the contract is a hard one.

4. Same— Deed held to convey right to cut such trees outside of easement which endangered transmission line.

The easement deed in question, in consideration of a stipulated sum, conveyed a one hundred foot right-of-way for a transmission line and

provided that the grantee should have the right to cut trees and undergrowth on the right-of-way and to cut trees outside the right-of-way which in falling might endanger the transmission line. *Held:* Under the terms of the instrument the grantee is entitled to cut trees outside the right-of-way which endanger the line without paying additional compensation therefor, and further, the grant of such right is a continuing one and cannot be construed as limited to those trees which endangered the transmission line at the time the instrument was executed.

5. Same—

While a contract against public policy, or a contract which involves a violation of statutory provisions in its performance, is void, the law favors the acquisition by public service companies of necessary rights-of-way by agreement rather than by condemnation, and therefore provision in an easement contract that the grantee should have the right to cut trees outside the right-of-way when such trees endanger the transmission line is valid, there being no public policy that the grantee in the continuing exercise of such easement should pay for trees endangering its line as such trees are cut. G.S. 40-8, G.S. 40-11.

6. Easements § 8; Contracts § 4—

Where an easement deed provides a legal consideration for the right-of-way acquired, which easement includes a continuing right to cut trees outside of the right-of-way which endanger the transmission line, the fact that the consideration may be inadequate to the continuing exercise of such right does not render the instrument void, since whether the consideration is adequate to the promise is generally immaterial in the absence of fraud.

APPEAL by plaintiff from *Mintz, J.*, April 1962 Term of PENDER.

This is a controversy without action (G.S. 1-250) for construction of a provision of a grant of easement.

From an adverse judgment, plaintiff appeals.

Norman, Rodman & Hutchins for plaintiff.

A. Y. Arledge and Charles F. Rouse for defendant.

MOORE, J. In 1941 Finley McMillan, for a recited consideration of $1,000, granted to the Tide Water Power Company "a right-of-way and easement, one hundred (100) feet in width, upon, over and across" a large tract of timber land situate in Pender County, "for the purpose of constructing, operating and maintaining one electric transmission line . . . the said right-of-way to extend fifty (50) feet on each side of the center line thereof . . . ." The grant further provides: "The party of the second part shall have the right to make such changes, alterations and substitutions in said line of structure, from time to time, as to it may seem advisable or expedient. And the right is further granted to the party of the second part, its successors and

assigns, to keep said right-of-way and easement clear of all structures and undergrowth for the full width thereof and to cut away and keep clear of said line and wires all trees or other obstructions that might in any way endanger the proper operation of the same, including all trees off the right-of-way which in falling might endanger the line."

Plaintiff is presently the owner of the land burdened with the easement. Defendant has succeeded to the rights granted to Tide Water Power Company. Defendant has been and now is engaged in cutting from the timber land in question trees standing outside the 100-foot right-of-way "which in falling might endanger the line."

Plaintiff "concedes that the defendant is authorized by the terms of said easement deed to cut" such trees, but "plaintiff contends that it is entitled to receive payment for the value of the trees so cut and to be cut and has made demand upon the defendant therefor." Defendant has refused the demand.

It is stipulated by the parties that the only question for decision is: "In the exercise of its right to cut trees outside of the 100-foot right-of-way, pursuant to the easement deed . . . , is the defendant liable to the plaintiff for the value of such trees as and when cut?"

The cause came on to be heard before Judge Mintz who answered the stipulated question in the negative and adjudged that plaintiff recover nothing. Plaintiff excepted and appealed.

An easement is an interest in land, and is generally created by deed. *Borders v. Yarbrough,* 237 N.C. 540, 542, 75 S.E. 2d 541. An easement deed, such as the one in the case at bar, is, of course, a contract. The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties. *DeBruhl v. Highway Commission,* 245 N.C. 139, 145, 95 S.E. 2d 553. The intention of the parties is to be gathered from the entire instrument and not from detached portions. *Electric Supply Co. v. Burgess,* 223 N.C. 97, 100, 25 S.E. 2d 390. An excerpt from a contract must be interpreted in context with the rest of the agreement. *R.R. v. R.R.,* 236 N.C. 247, 251, 72 S.E. 2d 604. When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. *Indemnity Co. v. Hood,* 226 N.C. 706, 710, 40 S.E. 2d 198. It is the province of the courts to construe and not to make contracts for the parties. *Williamson v. Miller,* 231 N.C. 722, 727, 58 S.E. 2d 743; *Green v. Insurance Co.,* 233 N.C. 321, 327, 64 S.E. 2d 162. The terms of an unambiguous contract are to be taken and understood in their

plain, ordinary and popular sense. *Bailey v. Insurance Co.*, 222 N.C. 716, 722, 24 S.E. 2d 614. A court cannot grant relief from a contract merely because it is a hard one. *Durant v. Powell*, 215 N.C. 628, 633, 2 S.E. 2d 884. Applying these principles in the construction of the contract in the instant case, we conclude that the court below placed the proper interpretation upon its terms and the judgment below should be affirmed.

Plaintiff contends that the contract is divisible, the "danger tree" clause is only incidental to the primary grant of the right-of-way, and that the parties did not intend that the recited consideration should compensate for cutting trees outside the right-of-way. Plaintiff points out that the main granting clause, following the recital of consideration, deals only with the grant of a 100-foot right-of-way, and that the later clause granting the right to cut "danger trees" does not use such language as "in further consideration. . . ." It is argued that the parties contemplated the payment of damages for cutting trees outside the right-of-way when the cutting is done. We do not agree with plaintiff's interpretation of the contract. Plaintiff stipulates that by virtue of the easement deed defendant "is authorized to cut the trees standing outside of the . . . right-of-way 'which in falling might endanger the line.' " There is no contention that the recited consideration is not sufficient to support this right. There is no suggestion that defendant has done or proposes to do anything more than to exercise the right. The easement deed does not vest in defendant title to the felled trees, and there is no contention that it does. The trees are the property of plaintiff and are subject to its disposal. Indeed, plaintiff may anticipate cutting by defendant and fell, remove and dispose of the trees at a time and in a manner which will best serve plaintiff's advantage. In the absence of an express agreement that defendant must pay the value of such trees when cut, we cannot insert such provision in the deed and thereby contract for the parties. Considering the deed as a whole, it appears that the parties intended that there should be no trees, structures or obstructions along the transmission line which would endanger it. Plaintiff does not contend that defendant should compensate separately for the cutting of trees and undergrowth *on* the right-of-way. Yet the authority to cut these is contained in the same clause which permits cutting of "danger trees" outside the right-of-way. If one part of the clause is within the primary objective of the grant and supported by the recited consideration, so is the remainder of the clause. The contract is entire and indivisible. It contemplates and provides for no further payment of consideration for the rights granted. The mere right-of-way for an electric transmission line

would be of little value without the right to maintain and protect the line. The parties so understood, and contracted accordingly.

Plaintiff further contends that, at most, the parties intended and contracted that the recited consideration should cover only the cutting outside the right-of-way of the "danger trees" which were in existence at the time the contract was made, and not such trees as might endanger the line in the future. By way of analogy, plaintiff cites and discusses *Whitfield v. Lumber Co.*, 152 N.C. 211, 67 S.E. 512. That case involves a timber deed whereby plaintiff conveyed to defendant pine trees (on certain lands) which measured "from 12 inches square at the stump upwards." A period of fifteen years was granted for cutting and removing the trees. In the fifteenth year defendant cut and removed all trees which *then* conformed to the specified measurement. The Court, in construing the timber deed, held that the measurement referred to the date of the deed and not the date of cutting, and that the parties were contracting with respect to the trees which were of the specified measurement at the time the contract was made. However, *Whitfield* is no authority for plaintiff's position here. The language of the easement deed settles the contention. Defendant is granted the right "to cut and *keep clear* of said line" the danger trees. The expression "keep clear," when taken in its natural and ordinary sense, imports a continuing future right.

Plaintiff also contends that the portion of the easement deed which provides for the cutting of "danger trees" outside the right-of-way, without providing for separate, additional and continuing compensation therefor, is against public policy and void. It relies on G.S. 40-8 and *Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267. G.S. 40-8 provides that a corporation "entitled to exercise eminent domain may, at any time, enter on . . . any lands (adjacent to its property or right-of-way), and cut, dig, and take therefrom any wood . . ." for the purpose of constructing, operating, repairing, enlarging or altering its works. In the *Wissler* case the Power Company undertook by condemnation to acquire the right to cut "danger trees" outside its right-of-way. The Power Company had theretofore acquired its right-of-way by condemnation. The Court held that by virtue of Revisal, s. 2576 (now G.S. 40-8) the power of condemnation was not confined to a right-of-way, delimited by surface boundaries, and that the Power Company "should be allowed to condemn the right to cut these trees, paying for this right and privilege, as in other cases, *the value of the trees cut and the damage done to the land* . . ." Plaintiff asserts that the quoted excerpt from the opinion declares a public policy which requires payment of the value of "danger trees," *when cut.* It is true that agreements, the performance of which violates statutory pro-

visions relating to the subject, are against public policy, and agreements against public policy are void. *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77. But the *Wissler* case decides and declares only that the right to cut the trees, not having been acquired when the right-of-way was condemned, and not having been paid for in the first proceeding, could not in the subsequent proceeding be taken without compensation. Plaintiff construes the language, as to compensation, to mean that payment shall be made when cutting is done and damage is inflicted. While not necessary to decision here, the better construction is that compensation is to be presently made in a lump sum under the established rule for measuring damages in condemnation proceedings. In the *Wissler* case the right-of-way and the right to cut trees could have been condemned in one proceeding. Had the parties been willing to contract with respect thereto, these rights could have been acquired by easement deed upon such consideration as was agreeable. The agreement in the instant case violates no public policy, statutory or otherwise. It is only when the parties cannot agree that condemnation proceedings may be instituted. G.S. 40-11, *Proctor v. Highway Commission,* 230 N.C. 687, 691, 55 S.E. 2d 479. The law favors the settlement of these matters by contract rather than through litigation. In the instant case McMillan agreed to burden his land for a consideration agreeable to him. Plaintiff acquired the land with full notice of the burden, and it is to be supposed that this burden was taken into consideration in determining the price to be paid by plaintiff for the land.

Plaintiff's final contention seems to be that the consideration was inadequate, that there will be almost continuous cutting of trees along an extensive segment of the right-of-way, and defendant is authorized to alter its "line of structure" and may thereby increase the burden. But as we stated above, when parties have dealt at arms length and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one. Whether or not the consideration is adequate to the promise, is generally immaterial in the absence of fraud. *Young v. Highway Commission,* 190 N.C. 52, 57, 128 S.E. 401. Furthermore, plaintiff is in no position to question the adequacy of consideration.

The judgment below is

Affirmed.

ROBERT J. HINES v. MALCOLM S. FRINK, ADMINISTATOR OF THE ESTATE OF THOMAS RAY GORE, DECEASED

AND

MALCOLM S. FRINK, ADMINISTRATOR OF THE ESTATE OF THOMAS RAY GORE, DECEASED v. ROBERT J. HINES AND DONALD RAY EAGLE.

(Filed 10 October 1962.)

1. Appeal and Error § 41—

A new trial will not be awarded for the admission of incompetent hearsay evidence when such evidence is wholly irrelevant and could not have affected the answer to the issue, since a new trial will not be awarded for mere technical error in the absence of a showing of prejudice by appellant.

2. Death § 6—

Where plaintiff in an action for wrongful death produces no evidence tending to show any pecuniary loss resulting to the estate of his decedent, nonsuit will not be disturbed, since neither punitive nor nominal damages are recoverable in such action and, in the absence of evidence of damage, the court would be required to instruct the jury to answer nothing to the issue of damages.

3. Automobiles § 42g—

Evidence tending to show that the automobile in which the owner was riding as a passenger approached an intersection with its headlights burning, within the maximum speed, that the driver decreased speed when he passed a sign warning him of his approach to the intersection, and that as he proceeded into the intersection an unlighted truck entered the intersection from his left from a servient road into the path of the automobile, *is held* not to disclose contributory negligence as a matter of law on the part of the driver and owner of the automobile.

4. Appeal and Error § 19—

An assignment of error which attempts to raise several separate questions of law based upon separate exceptions is ineffectual as a broadside assignment.

5. Automobiles § 35; Negligence § 20—

A defendant in an action for negligence does not raise the issue of contributory negligence when his only allegations of negligence on the part of plaintiff are contained in his counterclaim, with allegation that the acts of negligence referred to in the counterclaim were proximate causes which contributed to plaintiff's injury, since contributory negligence may not be pleaded by reference to the counterclaim. G.S. 1-138.

6. Same—

Where plaintiff alleges cause of action in negligence against a defendant and such defendant files a cross-action, plaintiff is entitled to have the issue of contributory negligence submitted to the jury on the counterclaim even though plaintiff's action is nonsuited, since plaintiff is not required to repeat the same allegations in a reply in order to raise the issue of contributory negligence.

7. Appeal and Error § 25— An assignment of error must be based on objection and exception duly taken.

Appellant was administrator of the driver of a truck involved in collision with an automobile driven by one party and owned by another party who was a passenger therein. Appellant's pleadings were sufficient predicate for the issue of contributory negligence in the action by the owner of the car but were insufficient in the cross-action of the driver of the car. *Held:* The two actions must stand or fall together and the failure of appellant to eliminate inconsistencies by motion to amend, failure to object to the issues, or to tender an issue of contributory negligence, precludes him from raising for the first time on appeal, by exception to the charge, asserted error of the court in failing to submit the issue of contributory negligence.

8. Appeal and Error § 24—

An assignment of error grouping a number of exceptions to separate portions of the charge, presenting numerous questions of law, is ineffectual, since such grouping of the exceptions does not comply with Rule of Practice in the Supreme Court No. 19(3).

PARKER, J., concurs in result.

APPEAL in two cases by Malcolm S. Frink, administrator of the estate of Thomas Ray Gore, from *Cowper, J.*, April 1962 Term of NEW HANOVER.

These two actions, involving claims and counterclaims for personal injuries, property damage, and wrongful death, result from a collision which occurred on July 3, 1960, about 9:20 P.M. at the intersection of U.S. Highway No. 74 and Rural Paved Road No. 1409, known as the Military Cut-off. A stop sign on No. 1409 made No. 74 the dominant highway. The vehicles involved were a Dodge pickup truck which was being driven in a southerly direction on No. 1409 by the deceased, Thomas Ray Gore, and a 1955 Buick automobile being driven in an easterly direction by Donald Ray Eagle on No. 74. The Buick was owned by Robert J. Hines who was in the automobile at the time. In the collision the Hines automobile was damaged, and he and Eagle sustained personal injuries. Thomas Ray Gore was killed instantly.

On February 23, 1961, in New Hanover County, Robert J. Hines instituted an action against Malcolm S. Frink, administrator of the estate of Thomas Ray Gore, to recover for personal injuries and property damages. Thereafter, on April 4, 1961, Frink, administrator, instituted an action in Brunswick County against Donald Ray Eagle and Robert J. Hines to recover damages for the wrongful death of his intestate. Robert J. Hines was never served with summons in the second action which subsequently was removed to New Hanover County and consolidated for trial with the *Hines* action.

Plaintiff Hines alleged, *inter alia,* in his complaint that Gore was operating his truck in the nighttime without lights, without keeping a proper lookout and at an excessive rate of speed; that he failed to stop at the intersection in obedience to the stop sign facing him and failed to yield the right of way to the plaintiff's automobile approaching on the dominant highway; and that he drove his truck into the intersection directly across the path of plaintiff's vehicle thereby proximately causing the collision. In his answer, defendant denied negligence on the part of his intestate, Gore. For a further defense, cross action and counterclaim against plaintiff he alleged that Hine's agent, Eagle, was negligent in that he approached the intersection at an excessive and unlawful speed, outrunning his headlights and without keeping a proper lookout; that Gore had entered the intersection first, but upon seeing that the Hines car was apparently not going to stop or slow down, he had stopped his truck leaving space in which the Hines car could have passed in safety; that notwithstanding, Eagle drove the Hines automobile with undiminished speed into the Gore truck causing Gore to be thrown out of the truck and killed instantly. He alleged that the estate of Gore had been damaged in the sum of $25,000.00

Immediately after his allegation of damage in the counterclaim appears the following paragraph:

> "F. The defendant alleges that the acts of negligence above referred to, on the part of his plaintiff and his agent, were proximate causes which contributed to any and all injury and damage to the plaintiff, if any."

Plaintiff Hines replied to the counterclaim, specifically plead the acts which he alleged constituted contributory negligence on the part of Gore in bar of the counterclaim, and renewed the prayer in his complaint.

The complaint of Frink, administrator, against Eagle, in effect, repeats the allegations of his counterclaim in the *Hines* action. By answer, Eagle denied negligence on his part and, in a first further answer and counterclaim, set up a cause of action against defendant for personal injuries. His allegations of negligence against Gore were substantially those alleged by Hines in his complaint. In a second further answer and defense, Eagle specifically alleged contributory negligence on the part of Gore in bar of any recovery by his administrator. Frink, administrator, filed a reply to the Eagle answer in which he repeated the allegations of his complaint as a plea that Eagle had the last clear chance to avoid the collision.

Upon the trial Hines and Eagle offered evidence. Frink, administrator, offered none. The evidence tended to show the following facts:

U.S. Highway No. 74 runs approximately east and west, and is twenty-four feet wide with twelve-foot shoulders. Rural Paved Road No. 1409 runs approximately north and south and is twenty-one feet wide. Highway No. 74 is straight for at least three-fourths of a mile west of its intersection with No. 1409. At the intersection, the southern line of No. 74 flares out. There is an intersection warning sign on Highway No. 74, about one hundred feet west of the intersection, for traffic going east.

Eagle testified (but not in sequence): "As I got to the intersection, all of a sudden a red flash came in front of me. . . . When I first saw the Gore vehicle I was within three or four feet of it. . . The red truck was moving and the first time I saw it it was already in my lane. . .I did not see any lights, any automobile or anything other than my lights. . . (I)t happened so fast it got me helpless with surprise." Horace Blanton, a passenger in the Hines car had been talking to Hines who was in the back seat. He turned just in time to get a glimpse of the truck before the impact. He testified that he was unable to say whether the truck was moving or not; that from the glimpse he got it appeared at that moment to be sitting still in front of Mr. Eagle. The Gore truck was struck on the right-hand side by the front of the Hines vehicle. It was knocked seventy-two feet from the debris which was in the eastbound lane of No. 74 about the middle of the intersection. It came to rest headed in a northwesterly direction "up to the north on 74 and the southern edge of the Military Road." Gore's body was on the edge of the road on the north side of his truck. The Hines car was damaged on the left front after the collision. It was ninety feet along Highway No. 74 from the debris and eighteen feet from the truck. There were no skid marks either north or west of the debris. Plaintiff Hines offered in evidence the allegation in the reply of Frink, administrator, to the Eagle counterclaim "that Thomas Ray Gore stopped at said stop sign."

At the close of plaintiff's evidence, Frink, administrator, moved for judgment of nonsuit in the *Hines* case and the *Eagle* cross action. Both motions were denied. At the close of all the evidence, Frink, administrator, having offered none, Hines and Eagle each moved to nonsuit the case of *Frink,* administrator, against him. Each motion was allowed.

Frink, administrator, tendered no issues. Without objection, the following issues were submitted to the jury and answered as indicated:

> "I. Was the plaintiff Robert J. Hines injured and damaged by the negligence of the defendant's intestate, Thomas Ray Gore, as alleged?
> ANSWER: Yes.

"II. Was the defendant Donald Ray Eagle injured and damaged by the negligence of the defendant's intestate, Thomas Ray Gore, as alleged.?
ANSWER: Yes.

"III. What amount, if any, is Robert J. Hines entitled to recover for his personal injuries and property damage?
A. Personal injury: 51.00
B. Property damage: 549.00

"IV. What amount, if any, is Donald Ray Eagle entitled to recover for his personal injuries?
ANSWER: 1,000.00"

From the two judgments entered on the verdict, Frink, administrator, appealed.

S. Bunn Frink and Isaac C. Wright for appellant.

L. Gleason Allen, Napoleon B. Barefoot and Dupree, Weaver, Horton and Cockman for appellees.

SHARP, J., Appellant's first assignment of error relates to the testimony of the investigating officers that the license plate on Gore's Dodge truck had been issued for an International truck which he found out later had been junked. This hearsay was, of course, incompetent and totally irrelevant. However, it is inconceivable that it could have affected the verdict. Jurors are presumed to be persons of "sufficient intelligence". *Murphy v. Power Company*, 196 N.C. 484, 146 S.E. 204. Technical error will not authorize a new trial unless it appears that the objecting party was prejudiced thereby, and the burden is on him to show prejudice. *Ray v. Membership Corp.*, 252 N.C. 380, 113 S.E. 2d 806. The first assignment of error is overruled.

Appellant's second assignment of error embraces his exceptions to the overruling of his motion to nonsuit the actions of Hines and Eagle against him, and to the order of the court nonsuiting his action for the wrongful death of Gore. Each of these rulings was correct.

No discussion of negligence or proximate cause is necessary to sustain the motions of Hines and Eagle to nonsuit the action of Frink, administrator, for the wrongful death of his intestate. He offered no evidence and the record is devoid of any evidence as to the age, health, habits, or earning capacity of Gore. This Court, speaking through *Rodman, J.*, has expressly said that G.S. 28-173, 174, which creates the right of action for wrongful death, "does not provide for assessment of punitive damages nor the allowance of nominal damages in the absence of pecuniary loss." *Armentrout v. Hughes*, 247 N.C. 631,

101 S.E. 2d 793. Even had Frink, administrator, been entitled to have the jury consider whether the negligence of Hines and Eagle proximately caused the death of his intestate, the Judge would have been required to instruct the jury that Frink, administrator, had offered no evidence tending to show any pecuniary loss resulting to the estate of Gore from his death, and that it should answer the issue of damages, on which he had the burden of proof, NOTHING. Hence, the judgment of nonsuit was proper. *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234.

The motions to nonsuit the actions of Hines and Eagle were made on the theory that the evidence established their contributory negligence as a matter of law. Conceding, for the purpose of these motions only, that Frink has properly pleaded contributory negligence in both actions, contributory negligence does not appear as a matter of law. The evidence of Hines and Eagle permits the legitimate inference that the Buick being driven by Eagle and the truck operated by Gore approached the intersection at approximately the same time; that the headlights of the Buick were burning and visible for three-fourths of a mile before it reached the intersection; that Eagle was driving within the maximum speed permitted by law; that as he passed the intersection warning sign he slowed down; that everything was clear as far as he could see when he proceeded into the intersection; that all of a sudden Gore drove his unlighted truck from the servient road into the path of the Buick, and a collision occurred in its lane of travel. Eagle was not required to anticipate such conduct on the part of another motorist. *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. It cannot be said that the sole inference to be drawn from this evidence is that either excessive speed, lack of control and a failure to apply brakes, or a failure on the part of Eagle to keep a proper lookout was a proximate cause of the collision. Indeed, the more logical inference is that the unexpected appearance of the unlighted truck from a servient road was the sole proximate cause of the collision. *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381.

In his second assignment of error appellant not only included his exceptions to the rulings on the motions for nonsuit but also exception No. 7 taken to that portion of the charge in which the Judge told the jury that it would be necessary to answer the first and second issues alike. Within this exception to the charge, appellant attempted to include for the first time an objection and exception both to the issues submitted and to the failure of the court to submit an issue of contributory negligence as to Hines and Eagle — which issue he had not tendered.

Assignment of error No. 2 does not comply with the rules of this Court. "An assignment of error must present a single question of law for consideration by the court." An assignment which attempts to raise several different questions is broadside. *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *Weavil v. Trading Post*, 245 N.C. 106, 95 S.E. 2d 533. However, it is noted that the defendant's pleadings in the case of *Hines v. Frink*, Administrator, do not raise the question of contributory negligence of Hines. Defendant could not, as he attempted to do, plead contributory negligence by reference to his counterclaim. G.S. 1-138. In appellant's case against Eagle he did not plead contributory negligence *eo nomine* to Eagle's counterclaim; he did purport to plead the doctrine of last clear chance. However, a plaintiff who has alleged actionable negligence in his complaint is not required to repeat the same allegations in a reply to be entitled to an issue of contributory negligence after nonsuit of his cause of action upon the trial of defendant's counterclaim. *Williamson v. Varner*, 252 N.C. 446, 114 S.E. 2d 92; *Jones v. Mathis*, 254 N.C. 421, 119 S.E. 2d 200. To have submitted an issue of contributory negligence in the *Eagle* case and not in the *Hines* case would have created an anomalous situation because, as the Judge correctly charged the jury when he instructed it to answer the first and second issues alike, these two parties stood or fell together. If Frink, administrator, had desired to eliminate the inconsistencies of his position he should have tendered the issue of contributory negligence and moved to amend. He did neither. Furthermore, he made no objection to the issues tendered. On this record, he cannot raise the question of issues for the first time in this Court by an isolated assignment of error to one of those portions of the charge containing the issues. "An assignment of error alone will not suffice. Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for this Court to decide." *Worsley v. Rendering Company*, 239 N.C. 547, 80 S.E. 2d 467.

Under his third assignment of error appellant groups exceptions 8 through 20 to thirteen portions of the charge. These have been set out and separately identified as Exhibits A through M. Under Exhibits B, C, G, J, and K, in addition to the portion of the charge to which appellant takes exception, he includes an exception to ommissions of evidence and contentions which he now says should have been included. For instance, after that portion of the charge labeled Exhibit J in which the Judge charged on the duty of Gore to keep his truck under proper control, we find: "And further excepts for that his Honor omitted to charge that according to Hines' evidence Gore had stopped his truck and had it under control." This method of grouping ex-

ceptions does not comply with Rule 19(3). Nevertheless, we have considered each of the "Exhibits" and find each without merit. Exceptions 8 through 12 relate to portions of the charge in which the Judge reviewed the evidence; exceptions 13 and 15, to his statement of allegations in the pleadings. No misstatements appear and none were called to the attention of the Judge at the time. Appellant made no request for a fuller statement of the evidence or elaboration of contentions. The other "Exhibits" relate to portions of the charge in which the Judge applied the law to the evidence. In each instance he did it correctly or stated it favorably to the appellant.

We find no error in the trial below which requires a new trial.

No error.

PARKER J., concurs in the result.

D. J. BLACK, T/A D. J. BLACK MOTOR EXPRESS v. GURLEY MILLING CO., INC., AND J. T. MEDLIN.

(Filed 10 October 1962)

1. Automobiles §§ 35, 42c—

Where defendants fail to allege that plaintiff's truck driver was following a preceding truck at a distance of less than 300 feet, defendants may not rely upon a violation by plaintiff's driver of G.S. 20-152(b) as the basis for contributory negligence, nevertheless, defendants having alleged that plaintiff's driver was not exercising due care and was operating his vehicle at a speed greater than reasonable and prudent under the circumstances then existing, the question of plaintiff's driver's negligence in exceeding a speed greater than was reasonable and prudent in following the preceding truck so closely, having regard to the exigencies of traffic, is presented.

2. Automobiles § 7—

A motorist is required, irrespective of statute, to exercise that degree of care in the operation of his vehicle which a reasonably prudent person would exercise under similar conditions, and in the discharge of such duty it is incumbent upon him to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid collision with persons and vehicles upon the highway.

3. Automobiles § 25—

It is negligence *per se* for a motorist to operate his vehicle on a highway at a speed greater than that which is reasonable and prudent under the conditions then existing. G.S. 20-141 (a).

4. Automobiles § 42e— Evidence held to show contributory negligence as a matter of law on part of truck driver in following another truck at a speed greater than prudent under circumstances.

Plaintiff's evidence tended to show that the driver of plaintiff's gasoline tank truck was following another gasoline tank truck about 35 miles per hour at a distance of some 75 feet, that the blinker lights of the preceding truck were turned on as the driver thereof swung to his left to pass defendant's truck, which was standing disabled in his lane of travel, that the driver of the preceding truck, upon seeing oncoming traffic, then pulled sharply back to the right, applied his brakes and stopped three feet behind the stationary truck, that when the preceding truck was pulled back to its right plaintiff's driver was about 50 feet behind it, saw its brake lights go on, but was not able to stop his heavily loaded vehicle and, to avoid collision, drove off the highway to the right and hit a telephone pole, resulting in the damages in suit. *Held:* Plaintiff's own evidence discloses contributory negligence as a matter of law on the part of his driver and nonsuit was correctly entered.

5. Automobiles § 52—

The negligence of the employee of the owner of a vehicle while driving the vehicle within the scope of his employment is imputed to the owner.

APPEAL by plaintiff from *Cowper, J.*, June 1962 Civil Term of NEW HANOVER.

Civil action to recover for damage to a tractor and oil tanker, for loss of use for two weeks of the tractor and oil tanker, for loss of gasoline from the oil tanker, and for damage to a power pole, allegedly caused by the negligence of the defendants.

Defendants in their joint answer denied any negligence on their part, and pleaded contributory negligence of William Sentelle Bullard, the plaintiff's employee and driver of his tractor and oil tanker, as a bar to recovery by plaintiff .

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

John J. Burney, Jr., and Isaac C. Wright for plaintiff appellant.
Henry & Henry for defendant appellees.

PARKER, J. Plaintiff's evidence shows these facts:

About 2:30 p.m. on 12 January 1959, during fair weather and "broad-open daylight," a truck owned by Gurley Milling Co., Inc., and driven by its employee J. T. Medlin, was standing still in the middle of U.S. Highway 74-76 fronting west near the Leland School, and 200 feet or further west of a railroad crossing in or near the town of Leland. It had no flares or lights behind it. Medlin was sitting in the cab with the hood of the tractor up.

About the same time, H. E. Raynor was driving a 52-foot-long tractor and oil tanker filled with 6800 gallons of gasoline for Concord Transfer Company westerly on the same highway at a speed of approximately 35 miles an hour and approaching the railroad crossing. Plaintiff's tractor and oil tanker filled with 5700 gallons of gasoline and driven by his employee William S. Bullard was following Raynor at a distance behind of 150 to 200 feet. At the railroad crossing there was a coal car on the west side of the highway which obstructed Raynor's view. After crossing the railroad there is nothing to prevent one from seeing west on the highway for several miles. When Raynor passed over the railroad crossing he saw the Gurley truck standing still in the middle of the highway 200 feet or further ahead. Raynor turned on his blinker lights to pass to the left of the Gurley truck, but could not do so because of oncoming traffic. Whereupon, he turned off his blinker lights, applied his brakes causing his lights to come on, and stopped on the highway three feet behind the Gurley truck. Raynor testified on cross-examination: "I did not need any flares. I saw his truck had stopped. I was paying attention and had no wreck — I didn't need any flares — it was daytime. I saw the truck and stopped." Medlin told Raynor "his truck knocked off in the highway," and he had been sitting there 30 minutes.

William S. Bullard, plaintiff's employee and driver, testified in substance, except when quoted: He was driving about 35 miles an hour, 75 to 100 feet behind the Raynor tractor and tanker, and keeping a lookout. He could see the distance between him and the Raynor tractor and tanker — that was as far as he could see up the highway. He saw Raynor's left hand signal come on, and Raynor swung to the left, and then pulled back sharp to the right. He didn't know exactly what was going on, and when he found out it was too late. He testified: "I was going around him to the left, and there was traffic coming, and I could not cut in unless I ran head on, and I pulled to the right I locked all my wheels. When he signalled the left turn, I slowed up and took my foot off the accelerator. When he pulled back in I knew what he was going to do. He had got on his brakes; I hit all my brakes. I brought my truck to a stop by the side of the Gurley Milling truck, off to the right of the highway." He asked Medlin what was wrong, why he didn't have out some lights or something. Medlin said "He had trouble with it every time he had left with it." After a patrolman arrived Medlin cranked up, and drove off. When Bullard drove off the highway, he struck a power pole, which damaged the tractor and tanker.

Bullard testified on cross-examination: "When I got to the railroad crossing the Concord truck was kind of on the left hand side of

the road with his signal light on; he was 75 or 100 feet in front of me. The tank had my view blocked, it was right in front of me.* * *When I crossed the railroad I could see west up the highway a mile. I knew the tanker was there, but I did not know there was a truck broke down in the middle of the road.* * *The first time I saw that truck was when I went in the ditch. I drove off the road to keep from hitting cars coming.* * *I tried to stop because I saw the tanker lights go on. I was close behind him. You can't see through an oil tanker. I tried to go around him on the right when he stopped, and I saw him pull back in the road, and I just did miss him, and I was trying to miss all of them. There were some children in the school yard playing, and I went on that side. That was the only way to keep two oil tankers from blowing up in front of the school house. I ran about 50 feet before I stopped. I was following him about 75 feet when I saw his blinker lights go on. I was about 50 feet behind him when I saw his brake lights go on. I don't know how far I was before I stopped — about 100 feet."

Plaintiff's evidence further shows the extent of damage to his tractor and tanker, the loss of 200 gallons of gasoline, the loss of profits for two weeks while the tractor and tanker were being repaired, and that he paid $26.00 for damage to the power pole.

Plaintiff alleges in his complaint that the Gurley truck stopped suddenly on the highway creating a sudden emergency and forcing plaintiff's driver to attempt to pass on the right and forcing him on a soft shoulder and into the ditch. His evidence shows that the Gurley truck had been sitting on the highway 30 minutes before Raynor stopped behind him. In spite of this variance between plaintiff's allegation and proof, but conceding that plaintiff has other allegations and proof of negligence on the part of the driver of the Gurley truck, this question is presented for decision: Does the evidence, viewed in the light most favorable to plaintiff, show that a proximate cause of his damages to his tractor and oil tanker was the negligence of the driver of his motor vehicle?

Defendants have pleaded contributory negligence on the part of the driver of plaintiff's tractor and oil tanker in driving it on a highway without exercising that degree of prudence and caution required by law, and at a rate of speed that was not reasonable and prudent under the circumstances then and there existing, and without exercising any care for his own safety. Defendants have not pleaded as an act of contributory negligence on the part of the driver of plaintiff's tractor and tanker that he was operating it in violation of the provisions of G.S. 20-152 (b), which provides "the driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within three hundred feet, but

this shall not be construed to prevent one motor truck overtaking and passing another." Therefore, defendants cannot avail themselves of the benefit of this section of the statute. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326.

This Court said in *Crotts v. Transportation Co.,* 246 N.C. 420, 98 S.E. 2d 502: "G.S. 20-152 is a statutory declaration of the common law that 'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.' " The quotation refers to G.S. 20-152 (a).

It is a general rule of law, irrespective of any statutory requirement, that the operator of a motor vehicle upon a highway must exercise that degree of care which a reasonably prudent person would exercise under similar conditions. *Crotts v. Transportation Co., supra; Smith v. Kinston,* 249 N. C. 160, 105 S.E. 2d 648; *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184. "And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway." *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357. G.S. 20-141 (a) provides that "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." A violation of this section of the statute, which is a safety statute, is negligence *per se. Crotts v. Transportation Co., supra; Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628.

Plaintiff's employee Bullard was driving his tractor and oil tanker filled with 5700 gallons of gasoline at a speed of about 35 miles an hour in the daytime on U.S. Highway 74-76 about 75 to 100 feet behind, according to Bullard's testimony, and 150 to 200 feet behind, according to Raynor's testimony, a tractor and oil tanker 52 feet long driven by Raynor. Bullard could see the distance between him and the oil tanker in front, but that was as far as he could see up the highway. Bullard knew, or in the exercise of ordinary care should have known, that the tanker ahead might be forced by other traffic on the highway to slow down or to stop, or that the driver of the long tractor and tanker ahead might attempt to turn to the left and pass a vehicle ahead, and might have to pull back on his side of the highway and slow down or stop because of oncoming traffic. Bullard traveling behind Raynor saw Raynor's left hand signal come on, and Raynor swing to the left, and then pull back sharply to the right. Bullard testified on cross-examination: "I was following him about 75 feet when I saw his blinker lights go on." When Raynor pulled back to

the right he applied his brakes, and stopped on the highway three feet behind the Gurley truck standing still on the highway. Bullard testified on cross-examination: "I was about 50 feet behind him when I saw his brake lights go on." At that time Bullard's speed was such that he knew he could not stop his heavily-loaded vehicle on the highway before colliding with the oil tanker ahead, and in order to avoid a rear-end collision with the oil tanker ahead and a blowing up of the oil tankers, he pulled off the highway to his right, struck a power pole, and brought his motor vehicle to a stop off the highway by the side of the Gurley truck.

The inference and conclusion are inescapable that Bullard was following the oil tanker ahead too closely at the speed he was driving, and that in the light of the attending circumstances an ordinarily prudent person ought reasonably to have foreseen that consequences of a generally injurious nature might probably occur as a result of such driving. Bullard in so driving a tractor and oil tanker filled with 5700 gallons of gasoline was not exercising that degree of care which a reasonably prudent man would exercise under similar conditions. If Bullard was faced with a sudden emergency or imminent danger, as plaintiff contends, but which we do not concede, by Raynor bringing his motor vehicle ahead to a stop, it is manifest that Bullard by his own want of ordinary care placed himself in a place of danger by following Raynor too closely at the speed he, Bullard, was driving, and consequently Bullard being a party to the creation of the emergency, if one existed, plaintiff cannot invoke the sudden emergency doctrine in exculpation of the negligent conduct of his driver. The negligence of his employee and driver acting within the scope of his employment is imputed to him. *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Rouse v. Jones, supra; Cockman v. Powers,* 248 N.C. 403, 103 S.E. 2d 710; *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514; 38 Am. Jur., Negligence, sec. 194 at page 876; 38 Am. Jur., Negligence, section 236. There can be no reasonable doubt that this negligent operation of plaintiff's motor vehicle by plaintiff's driver Bullard was one of the proximate causes of plaintiff's damage to his tractor and tanker. As a result plaintiff is barred from recovery from defendants by reason of the contributory negligence of his driver and employee acting within the scope of his employment. *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; 38 Am. Jur., Negligence, sec. 236. This decision is in accord with our decisions in somewhat similar factual situations. *Crotts v. Transportation Co., supra; Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783; *Fawley v. Bobo,* 231 N.C. 203, 56 S.E. 2d 419; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887.

The case of *Smith v. Nunn,* 257 N.C. 108, 125 S.E. 2d 351, is factually distinguishable, *inter alia,* in that plaintiff in that case was driving a passenger automobile, and not as here a tractor and oil tanker filled with 5700 gallons of gasoline, which in the event of a collision would probably blow up with disastrous consequences to the driver and others nearby.

The judgment of involuntary nonsuit below is

Affirmed.

RICHARD L. BEATTY, AN INFANT, BY HIS NEXT FRIEND, LEONARD I. BEATTY v. EDWIN WELLS BOWDEN.

(Filed 10 October 1962.)

1. Automobiles § 17—

The fact that a motorist is faced with a green traffic control signal at an intersection does not warrant such motorist in entering the intersection blindly in reliance upon the signal, but he remains under duty to maintain a lookout and to exercise reasonable care under the circumstances, since the green signal is not a command to go but a qualified privilege to proceed with the care of a reasonably prudent man under the circumstances.

2. Automobiles § 41g—

Evidence tending to show that when plaintiff's vehicle entered the well-lighted intersection defendant's vehicle was approximately 900 feet from the intersection, and that when plaintiff turned his vehicle to the left and entered defendant's lane of travel, defendant's car was still some 400 feet from the intersection, that the highway had two lanes of travel in the direction in which the vehicles were proceeding, and that defendant did not slacken speed until it was too late to avoid collision, *is held* to preclude nonsuit.

3. Appeal and Error § 42—

Repeated instructions to the effect that if the jury should find that defendant was guilty of acts of negligence which were a proximate cause of the accident to answer the issue of contributory negligence in the negative, rather than in the affirmative, must be held for prejudicial error.

APPEAL by plaintiff from *Parker, J.,* February Term 1962 of CRAVEN.

This is an action instituted by the plaintiff to recover for personal injuries, allegedly resulting from the negligence of the defendant, when the defendant's 1958 Chevrolet automobile collided with the Volkswagen automobile driven by the plaintiff.

The collision occurred about 10:40 p.m. on 1 June 1961 at the intersection of U.S. Highway No. 70 with N. C. Highway No. 101 within the Town of Havelock, North Carolina.

U.S. Highway No. 70 runs generally eastwardly and westwardly through the Town of Havelock and has two traffic lanes on each side of the center line or median thereof and an inside turning lane for left turning at each corner next to the median strip or island. The island is about six and one half feet wide. These left turning lanes at the intersection have been provided for by taking part of the median area between the east and westbound lanes. N.C. Highway No. 101 runs in a southwesterly and northeasterly direction and runs diagonally across U.S. Highway No. 70.

The plaintiff introduced evidence tending to show the following facts. The plaintiff was driving the Volkswagen automobile westwardly on U.S. Highway No. 70. He stopped at the intersection in the left-hand turning lane in obedience to a traffic light which was red. When the light turned green the plaintiff proceeded into the intersection and turned left to enter N.C. Highway No. 101; the turn necessitated crossing the two eastbound traffic lanes of U.S. Highway No. 70. At the time plaintiff started his car after the light had turned green, the defendant's car was about 900 feet west of the intersection. The plaintiff proceeded at a speed of ten to fifteen miles an hour and as he was about to cross the southernmost eastbound traffic lane of U.S. Highway No. 70, the defendant's automobile struck the plaintiff's Volkswagen and knocked it about two car lengths, seriously injuring the plaintiff. The collision occurred near the southwestern intersection of the two highways.

The evidence further tends to show that the area was well lighted from business establishments nearby and by street lights. At least two blocks west of this particular intersection there is a service or access street on each side of U.S. Highway No. 70 and these service or access streets have no access to the highway except at street intersections. The speed limit on U.S. Highway No. 70 through the Town of Havelock, according to the testimony of Ray Boyd, a deputy sheriff, is and was 35 miles per hour.

Walter Lynn Hadley, a Marine stationed at Cherry Point, North Carolina, testified that he and Calvin Luther Threat were following the Volkswagen on U.S. Highway No. 70 and pulled behind the plaintiff's car while it was stopped for the red light. The witness testified that they were going to the Jet Drive-In which is located on N.C. Highway No. 101 near the intersection. "This Volkswagen was also making a left-turn and * * * when the light turned green, the Volkswagen pulled on out into the intersection on up past the center line

and started to make his left-turn and our car proceeded forward also and just after the Volkswagen started his left-turn, I observed this 1958 Chevrolet bearing down towards us at a fast rate of speed. * * * (W)e stopped our car and at that time the Chevrolet hit the Volkswagen, swung it around and knocked it between 30 to 50 feet back towards us over to the side. * * * When I first saw the oncoming Chevrolet it was approximately 400 feet westwardly of the west side of the intersection of those highways. * * * I observed the oncoming car all the time from the point where I first saw it * * * and I could see it was traveling at a fast rate of speed. In my opinion the oncoming 1958 Chevrolet was traveling between 50 and 60 miles an hour. * * * The * * * Chevrolet had on dim lights. The oncoming car did not slacken its pace or put on brakes at any time prior to the accident * * *. After the Volkswagen had started to make its left-turn through the southern traffic lane of U.S. 70 it was about 10 feet from the * * * corner of the intersection when it was struck."

The defendant testified: "I noticed a car in the left-hand turn lane of Highway No. 70 west and I pulled up and I kept on going. I had the green light. I was in the right-hand lane of traffic. I passed through this intersection three or four times a day. I thought he would pull up and stop. I kept on going and when I got closer to him, I saw he wasn't going to stop but it was too late then for me to stop."

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit and the motion was allowed and the case was tried on the defendant's counterclaim. The plaintiff appeals from the judgement of nonsuit and also assigns error in the trial on the counterclaim.

Barden, Stith & McCotter, James R. Sugg for appellant.
Dunn & Dunn for appellee.

DENNY, C.J. A careful examination of the evidence introduced in the trial below leads us to the conclusion that the plaintiff's evidence was sufficient to require its submission to the jury, and we so hold.

The evidence adduced in the trial below tends to show that when the plaintiff first entered the intersection traveling in a westerly direction, the defendant's car was traveling east on U.S. Highway No. 70 at a point approximately 900 feet west of the intersection, and when the plaintiff turned the Volkswagen automobile to the left, within the intersection, the defendant's car was still about 400 feet west of the intersection. The defendant testified that he saw the plaintiff's car while it was "in the left-hand turn lane"; that he thought the plaintiff would pull up and stop; that he kept on going; that he had the green light and when he saw the plaintiff was not going to stop it was too late for him to stop.

When the driver of a motor vehicle, upon approaching a street intersection, is faced with a duly maintained electrically controlled traffic signal showing green, he is warranted in moving into the intersection unless the circumstances are such as to indicate the necessity for caution to one of reasonable prudence. However, even though a driver is faced with a green light, the duty rests upon him to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25.

In the case of *Hyder v. Battery Co.,* 242 N.C. 553, 89 S.E. 2d 124, this Court said: "The duty of a driver at a street intersection to maintain a lookout and to exercise reasonable care under the circumstances is not relieved by the presence of electrically controlled traffic signals, which are intended to facilitate traffic and to render crossing less dangerous. He cannot go forward blindly even in reliance on traffic signals. 4 Blashfield, p. 244. The rule is well stated in 60 C.J.S., 855 as follows:

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

" 'The fact that the operator of a motor vehicle may have a green light facing him as he approaches and enters an intersection where the traffic is regulated by automatic traffic control signals, does not relieve him of the legal duty to maintain a proper lookout, to keep his vehicle under reasonable control. * * *' *Cox v. Freight Lines, supra* (236 N.C. 72, 72 S.E. 2d 25)." *Bass v. Lee,* 255 N.C. 73, 120 S.E. 2d 570; *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543; *Williams v. Funeral Home,* 248 N.C. 524, 103 S.E. 2d 714; *Funeral Service v. Coach Lines,* 248 N.C. 146, 102 S.E. 2d 816.

Plaintiff's assignment of error No. 20, challenging the correctness of the court's ruling in sustaining the defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence, is sustained.

Even if the court had been warranted in sustaining the defendant's motion for judgment as of nonsuit, the plaintiff would be entitled to a new trial on the defendant's cross action or counterclaim. For example,

plaintiff's assignment of error No. 28 is to the instruction of the court on the second issue with respect to the defendant's contributory negligence. On this issue the court charged the jury as follows: "Again the court instructs you (this was the third time the court gave the equivalent of this instruction) that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant was operating his car at a speed greater than that allowed by law, greater than 35 miles per hour, then the court instructs you that the defendant would be negligent and if you further find that such operation, such speed was one of the proximate causes of the collision it would be your duty to answer the second issue no." This instruction was erroneous; consequently, assignment of error No. 28 is likewise sustained.

Therefore, the judgment as of nonsuit on the plaintiff's cause of action in the court below is reversed, and the verdict and judgment on the defendant's cross action or counterclaim are set aside and a new trial is ordered.

New trial.

SAM JOHNSON v. J. R. TAYLOR, SR. AND WIFE, ALMA L. TAYLOR, JULIA BOGGS MILLS, ALTON MILLS AND MR. AND MRS. J. C. METTS.

(Filed 10 October 1962.)

1. Boundaries § 7

Where respondents in a processioning proceeding admit plaintiff's title to land and claim title to contiguous land by adverse possession, and dispute the boundaries asserted by petitioner between the two tracts of land, no issue of title is raised and the clerk has jurisdiction to enter judgment declaring the boundaries. G.S. 38-3.

2. Courts § 7; Appeal and Error § 16—

Certiorari may not be used as a substitute for appeal, and where respondents fail to except to judgment of the clerk in processioning proceedings fixing the boundary line between the contiguous tracts, and fail to take an appeal from such judgment within the time allowed by statute, G.S. 38-3(2), without any showing of excusable neglect, petition for *certiorari* to review the judgment of the clerk is properly denied.

APPEAL by original respondents Taylor from *Bone, J.*, January Term 1962 of ONSLOW.

This was a processioning proceeding instituted by the petitioner on 21 May 1959 for the purpose of having the court locate the true dividing line between the lands of the respective parties.

A description of the tract of land owned by the petitioner was set out by metes and bounds in the amended petition. Respondents Taylor admitted they were "the owners of certain lands lying east of and adjoining the lands owned by the petitioner"; however, they denied the correctness of the boundary line between the lands of the parties as claimed by the petitioner.

Respondents further alleged that neither the petitioner nor the respondents had title to certain land claimed by the petitioner, and alleged that said land was owned by J. C. Metts and Julia Ward Boggs Mills and prayed that they be made parties to the proceeding. These respondents further alleged that they claimed certain of the lands involved by adverse possession against all other persons for more than twenty years and prayed that the proceeding be transferred by the Clerk to the Civil Issue Docket of the Superior Court of Onslow County.

The Clerk entered an order on 18 March 1960, making J. C. Metts and wife and Julia Ward Boggs Mills and her husband parties to the proceeding. A copy of the summons and petition were served on these additional respondents on 22 March 1960.

This cause came on for hearing before the Honorable W. F. Justice, Clerk of the Superior Court of Onslow County, pursuant to the provisions of G.S. 38-3. The petitioner and the original respondents were present at this hearing or were represented by counsel. Prior to this hearing, the parties had agreed that Sam J. Morris, Jr., Registered Engineer of Jacksonville, North Carolina, should prepare a map showing the property of the petitioner and disputed by the respondents. This map, together with the petition, the orders, the amended petition, the answer, and other evidence with respect to the true location of the dividing line of the lands involved, were considered. The Clerk, upon all the evidence, determined the location of the dividing line between the lands of the respective parties and set out his findings in detail in his judgment.

No exception was entered to the signing of the judgment, nor was an appeal taken therefrom within the time allowed by statute, G.S. 38-3, subsection 2.

A motion signed personally by the original respondents was filed before the Clerk of the Superior Court of Onslow County on 24 June 1960, requesting the Clerk to set aside the judgment entered by him on 9 June 1960. This motion was denied on 18 July 1960. The respondents excepted to the order denying their motion and gave notice of appeal to the Superior Court.

The appeal came on for hearing before the Honorable Malcolm C. Paul, duly assigned to hold the November Term 1960 of the Superior

Court of Onslow County. Judge Paul found that all parties were present or represented and further found as a fact that the paper writing filed on 24 June 1960 in this cause, signed by J. R. Taylor and wife, Alma L. Taylor, purporting to be an action or appeal in this cause, was never served on the petitioner or his attorney, and that said paper writing was filed more than ten days after 9 June 1960, the date on which the judgment was entered in this cause by the Honorable W. F. Justice, Clerk of the Superior Court of Onslow County. Judge Paul dismissed said motion or appeal signed by the originial respondents.

At the March Term 1961 of the Onslow County Superior Court, J. R. Taylor, one of the original respondents, filed a motion before the Honorable Chester Morris, who was holding said term of court, to set aside the Clerk's judgment dated 9 June 1960. Judge Morris entered an order denying the motion on the ground that another Judge of the Superior Court, to wit, the Honorable Malcolm C. Paul, had heard and adjudicated the matter. The respondent excepted to the denial of his motion and gave notice of appeal to the Supreme Court, which appeal was never perfected.

The original respondents filed a petition before the Honorable Henry L. Stevens, Jr., Resident Judge of the Fourth Judicial District, for a writ of *certiorari* to be directed to the Clerk of the Superior Court of Onslow County, commanding and directing him to forthwith transfer all papers in this cause to the Superior Court and to place same on the docket and calendar it for a hearing *de novo* on the merits at the very next civil term of said court. Judge Stevens granted the writ on 25 May 1961.

Prior to the filing of the petition for the writ of *certiorari,* original counsel for the respondents had withdrawn from the case; and after this writ had been allowed, counsel for the petitioner also withdrew from the case with the approval of the court.

This cause came on to be heard before his Honor, Judge Bone, holding the January Term 1962 of the Superior Court of Onslow County. Judge Bone, after reviewing the entire record in the cause and finding the facts, held (1) that the respondents are not entitled to have this cause heard *de novo* in the Superior Court at term before a judge and jury upon writ of *certiorari* as a substitute for an appeal from the judgment of the Clerk; (2) that the respondents' motion to set aside the judgment of the Clerk is *res judicata;* (3) that respondents' petition for writ of *certiorari* as a substitute for an appeal be denied; and (4) that the costs of this proceeding be taxed against the respondents.

Judgment accordingly was signed on 18 January 1962. The respondents appeal, assigning error.

Charles L. Abernathy, Jr., for respondents Taylor.
No counsel contra.

DENNY, C.J. A careful examination of the pleadings in this proceeding, leads us to the conclusion that title to land was not involved and the Clerk of the Superior Court of Onslow County had jurisdiction to enter the judgment signed by him on 9 June 1960. The respondents did not except to this judgment, neither did they give any notice of appeal therefrom to the Superior Court.

In the case of *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501, this Court said: "(A) perusal of the answers shows that respondents admit that petitioners own land adjoining the land they, the respondents, expressly aver they own, and of which they have had adverse possession for more than seven years under color of title, — yea, more than twenty years under known and visible lines and boundaries.

"Thus no issue of title is raised, — either as to the lands of petitioners, or as to the lands of respondents. So, after all the underbrush is cleared away, the pleadings raise only the issue as to 'What is the true dividing line between the lands of petitioners and the lands of respondents?' See *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; *Cornelison v. Hammond,* 225 N. C. 535, 35 S.E. 2d 633."

Insofar as the record discloses, the additional respondents never filed answers or participated in any of the hearings in this cause. Moreover, there is no finding or other indication that the dividing line between the lands of petitioner and the original respondents, as determined by the Clerk of the Superior Court of Onslow County, affected the rights of the additional respondents in any way whatsoever.

Certiorari may not be used as a substitute for an appeal expressly provided for by law, unless the right of appeal has been lost through no fault of the petitioner. An appeal in a processioning proceeding from the judgment entered therein by a clerk of the superior court in determining the location of a boundary line, is expressly provided for in G.S. 38-3, subsection 2, which reads as follows: "Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard *de novo.*" See *McDowell v. Kure Beach,* 251 N.C. 818, 112 S.E. 2d 390; *Sanford v. Oil Co.,* 244 N.C. 388, 93 S.E. 2d 560; *Russ v. Bd. of Education,* 232 N.C. 128, 59 S.E. 2d 589; *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66; *Belk's Dept. Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897.

In this proceeding, Judge Bone found as a fact that the respondents "have lost their right of appeal from the judgment of the Clerk, not by reason of excusable neglect, but by their own folly in attempting to handle their own case, in some instances without assistance of counsel, and, in other instances, contrary to advice of counsel." There is ample evidence on this record to support this finding.

Consequently, we concur in the ruling of the court below that the respondents are not entitled to have this cause heard *de novo* in the superior court upon writ of *certiorari* as a substitute for an appeal from the judgment entered by the Clerk of the Superior Court of Onslow County on 9 June 1960.

The judgment of the court below is

Affirmed.

REVEREND JAMES R. WALKER, JR., ASSISTANT PASTOR AND MEMBER OF THE FIRST BAPTIST CHURCH OF ROANOKE RAPIDS, AND AS THE DULY APPOINTED AND ACTING MODERATOR AND PRESIDING OFFICER OF OFFICIAL CHURCH BUSINESS CONFERENCES, PLAINTIFF v. REVEREND McKINLEY NICHOLSON, DEFENDANT.

(Filed 10 October 1962.)

1. Pleadings § 19—

If the complaint states a defective cause of action the action should be dismissed upon demurrer, but if the complaint merely fails to allege some of the facts essential to a statement of a good cause of action, the action should not be dismissed but plaintiff should be given opportunity to amend. G.S. 1-131.

2. Religious Societies § 2—

A person becomes a pastor of a church pursuant to contract made with the person or body having authority to employ.

3. Same; Contracts § 14—

Where a third party interferes with the performance of a contract, either party to the contract may maintain an action against him, but each party's action must be based upon damages accruing to himself by reason of such wrongful interference and he may not predicate his action upon damages accruing to the other party to the contract.

4. Injunctions § 2—

Injunction lies to prevent a threatened or imminent injury and it is not appropriate to redress a completed tortious act.

5. Injunctions § 3—

Mere averment that defendant will continue his wrongful acts unless

enjoined is but a conclusion of the pleader, and is insufficient to support injunctive relief, it being required that plaintiff allege facts supporting the conclusion of defendant's intention to continue the commission of the wrongful acts and that such acts will result in injury not compensable in money.

6. Same; Religious Societies § 2—

Plaintiff alleged that he is the duly appointed assistant pastor of a named church and that defendant, without any authority, was interferring with plaintiff in the performance of his duties as pastor. Plaintiff alleged facts supporting the conclusion of imminent, irreparable injury to the congregation but not to plaintiff himself, and failed to allege facts supporting the conclusion that defendant intended to continue the wrongful interference with plaintiff's contractual rights. *Held:* The complaint fails to state a cause of action for injunctive relief in favor of plaintiff, but plaintiff should be given opportunity to amend his complaint to allege the essential facts omitted.

7. Judgments § 13—

Judgment by default cannot be rendered upon a complaint which fails to state a cause of action.

8. Pleadings § 6—

Even when the complaint states a cause of action, the court, in the exercise of its discretion, may refuse to enter judgment by default for want of an answer and may extend the time for filing an answer, and *a fortiori* may do so when the complaint contains a defective statement of a good cause of action. G.S. 1-152.

APPEAL by plaintiff from *Copeland, S.J.*, January 29, 1962 Term of HALIFAX.

A verified complaint was filed 25 October 1961. Thereupon summons issued. The summons, with copy of the complaint, was served on defendant on 30 October 1961. At the December 1961 Term of Halifax plaintiff moved for judgment by default for want of an answer or other pleading. Defendant requested an extension of time to answer. The court, in the exercise of its discretion, refused plaintiff's motion for judgment by default and allowed defendant's motion for an extension of time to plead. Plaintiff excepted.

Thereafter defendant demurred to the complaint for that it failed to state a cause of action. The demurrer was sustained. Judgment was entered dismissing the action. Plaintiff excepted and appealed.

Robert L. Harrell, Sr., Samuel S. Mitchell, and James R. Walker, Jr., for plaintiff appellant.

Crew & House for defendant appellee.

RODMAN, J. Determination of the appeal depends on the answers to these questions: Do the allegations establish a defective cause of

action? If so, the court was correct in dismissing the action. *Parrish v. Brantley,* 256 N.C. 541, 124 S.E. 2d 533. Is the complaint defective because of the failure to allege some essential fact? If so, the action should not be dismissed but an opportunity should be given to amend the pleading by alleging the additional essential fact. G.S. 1-131; *Parrish v. Brantley, supra.*

Plaintiff has not complied with G.S. 1-122(2). The complaint is not a "plain and concise statement of the facts constituting a cause of action." It is a mixture of asserted facts and conclusions.

Summarized, the complaint alleges these facts: Plaintiff is assistant pastor of the First Baptist Church of Roanoke Rapids. It is his duty, in the absence of the pastor, to preside at business meetings of that church. He was presiding at such a meeting on Friday, 20 October 1961. Defendant is a resident of Weldon and is pastor of several churches in Northampton and Halifax Counties, but has no connection with the First Baptist Church of Roanoke Rapids. On the night of 20 October 1961 defendant came to the First Baptist Church of Roanoke Rapids, interfered with plaintiff in the performance of his duties as presiding officer and "attempted to preside at said business meeting. . . (and) attempted to 'SILENCE' the plaintiff. . ."

Secs. 5 and 6 of the complaint read as follows:

"5. That the said ministerial interference with the assigned duties of the plaintiff and in the internal affairs of the First Baptist Church by the defendant, destroys the Gospel Order and purposes of the Church and makes it impossible for the Church to discipline rebellious members and also makes it impossible to protect and preserve the law and order of the Church; that said interference by the defendant, if continued, would split the membership of the Church and weaken the influence of the Church in performing its function in the community; that said conditions cause irreparable harm to the Church and will be continued by the defendant unless restrained and enjoyed by this Court.

"6. That the plaintiff seeks an injunction and a restraining order against the defendant, restraining and enjoining the defendant from assuming pastoral authority at the First Baptist Church of Roanoke Rapids, N. C. or the moderatorship or presiding officer at the Church's business meetings or interfering with the rights, duties and privileges of the plaintiff as a member of the Church and as presiding officer of the business meetings of the Church, so long as the defendant is not Pastor of said Church or a member of said Church."

The prayer of the complaint is for injunctive relief restraining "defendant from assuming pastoral authority at the First Baptist Church of Roanoke Rapids, N. C. or the moderatorship or presiding officer at

the Church's business meetings or interfering with the rights, duties and privileges of the plaintiff as a member of the Church and as Presiding Officer of the business meetings of the Church, so long as the defendant is not Pastor of said Church or a member of said Church."

One becomes pastor of a church pursuant to a contract made with the person or body having the authority to employ. *First Presbyterian Church v. Myers,* 5 Okla. 809, 50 Pac. 70, 38 L.R.A. 687; 76 C.J.S. 794; 45 Am. Jur. 740. When a stranger interferes and prevents performance of a contract, either party to the contract may maintain an action against the stranger for the damages sustained by him or it. *Fowler v. Insurance Co.,* 256 N.C. 555, 124 S.E. 2d 520; *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176; *Elvington v. Shingle Co.,* 191 N.C. 515, 132 S.E. 274; Anno. 26 A.L.R. 2d 1240. The right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to the contract. G.S. 1-57; *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411; *Taylor v. R.R.,* 145 N.C. 400.

It is, we think, apparent from the quoted allegations that plaintiff seeks to redress the asserted wrong done the church. To redress that wrong the church must bring the action. *Collins v. Simms,* 254 N.C. 148, 118 S.E. 2d 402; G.S. 1-69.1.

The complaint, when liberally construed, also alleges a wrongful interference with plaintiff in the performance of his contractual obligation. Plaintiff would be entitled to recover such damages as resulted from such interference, but plaintiff here neither alleges nor seeks damages. He seeks only equitable relief — a restraining order.

The only wrongful act alleged relates to a past occurrence. Injunctive relief is not appropriate to redress a completed tortious act. *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455.

The concluding clause of sec. 5 of the complaint that the wrongful conduct of the defendant "will be continued by defendant unless restrained and enjoined" is a mere conclusion of the pleader and not a statement of fact. *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662; *Thomas & Howard Co. v. Insurance Co.,* 241 N.C. 109, 84 S.E. 2d 337. Ordinarily money compensation is sufficient to redress wrongs tortiously inflicted. Equity steps in only when irreparable injury is both real and immediate. *Membership Corp v. Light Co.,* 256 N.C. 56, 122 S.E. 2d 761.

The failure to allege facts evidencing an intent on the part of defendant to continue to interfere with plaintiff's performance of his contract and facts showing that such interference will result in injury not compensable by an award of damages does not warrant a dismissal of his action. He should be given an opportunity to amend his com-

plaint to allege these essential facts. G.S. 1-131; *Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278; *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809.

A judgment by default cannot be rendered on a complaint which fails to state a cause of action. Even when the complaint states a cause of action, the court, in the exercise of its discretion, may extend defendant's time to plead. G.S. 1-152; *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919. The court did not err when it refused to render judgment by default.

The judgment will be modified to conform with this opinion, and as thus modified it is affirmed.

Modified and affirmed.

R. A. BENTHALL, D/B/A BENTHALL STOCKYARD v. WASHINGTON HOG MARKET, INCORPORATED, AND THE BANK OF WASHINGTON.

(Filed 10 October 1962.)

Banks and Banking § 9— Evidence held not to show negligence or damages in action against bank failing to return promptly unpaid draft.

In a trial by the court under agreement of the parties, evidence and stipulations to the effect that the drawee's bank held a draft for some six business days before returning the draft unpaid, that the draft was deposited for collection, that the bank could not honor the draft without specific authority from the drawee, that the bank requested such authority and the drawee declined to give it, and that the drawer had accepted the proceeds of a number of other drafts which had been held by the bank for like periods of time before the drawee had authorized payment, without evidence that the drawer would have been able to collect the amount from the drawee had the draft been returned promptly, *held* to support judgment dismissing the action, plaintiff having failed to show either negligence or damages, both of which are essential to support recovery.

RODMAN, J., took no part in the hearing and disposition of this case.

APPEAL by plaintiff from *Morris, J.,* April 1962 Term, NORTHAMPTON Superior Court.

The plaintiff, a resident of Northampton County, instituted this civil action to recover $3,346.43 for hogs sold and delivered to the Washington Hog Market, Inc. "For several years the plaintiff has regularly sold hogs to the defendant Washington Hog Market, Inc., . . . the manner of payment agreed upon . . . was for the plaintiff to

draw a sight draft on the Washington Hog Market, Inc., directed to The Bank of Washington, Washington, North Carolina." On January 18, 1960, the plaintiff at Rich Square, North Carolina, made a sale of hogs to the Washington Hog Market and in accordance with the prior custom and understanding drew and deposited in the Bank of Rich Square the following sight draft:

"$3,346.43 18 Jan. 1960
On sight . . . pay to the order of The Bank of Rich Square . . . $3,346.43 — — — DOLLARS
Value received and charge the same to account of Washington Hog Market, Inc.
To Bank of Washington, Washington, N. C.
No. (signed) R. A. Benthall."

The Bank of Rich Square credited the plaintiff's account with the amount of the draft and forwarded it through its customary channels to the Bank of Washington which received it on January 20, 1960. The Bank of Washington notified the Hog Market in accordance with the custom but did not receive authority to pay the draft. On January 27, 1960, pursuant to a tracer request, the defendant returned the draft through channels to the Bank of Rich Square which charged it back to the plaintiff's account. During the six business days the defendant Bank held the draft the defendant Hog Market had on deposit a daily balance between $10,000 and $30,000. However, during this same period the Bank held for collection other customers' drafts in amounts between $99,000 and $129,000. Actually, during the time here involved the Washington Hog Market, Inc., was insolvent and subsequently was adjudged a bankrupt. The defendant Bank did not have knowledge of this insolvency.

The plaintiff obtained judgment by default final against the Hog Market. He seeks to obtain judgment against the defendant Bank upon the ground it was negligent in retaining the draft for an unreasonable length of time but should have returned it promptly.

The Bank defended upon the ground the draft was forwarded to it for collection and it proceeded according to the course of dealing long established between it and the plaintiff. The Bank specifically alleged, and the court found, that between August 6, 1959, and January 20, 1960, the appellant drew 15 similar drafts on the Washington Hog Market. One was collected after 4 days, 3 after 5, one after 6, 5 after 7, 2 after 8, one after 11, and 2 after 13 days. The plaintiff acquiesced in the method the appellee adopted to collect these drafts and accepted without objection or question the successful handling of these drafts. In fact, one of plaintiff's drafts for $2,299.49 was received on January

14, 1960, payment was authorized on January 27, 1960, the very day the draft in suit was returned.

The parties waived jury trial. The court found as a fact (1) the appellee was not negligent; (2) the plaintiff was not damaged; (3) the plaintiff "by . . . the custom of dealing with Washington Hog Market and manner of handling drafts . . . is now estopped to assert negligence." The court concluded the defendant Bank was not indebted to the plaintiff. From the judgment dismissing the action, the plaintiff appealed.

Martin & Flythe, by Joseph J. Flythe, for plaintiff, appellant.

Gay, Midyette & Turner; Rodman & Rodman, for defendant appellee.

HIGGINS, J. In *Trust Co. v. Bank,* 255 N.C. 205, 120 S.E. 2d 830, this Court reviewed a series of transactions involving drafts of other parties directed to the Bank of Washington to be charged to the account of the Washington Hog Market, Inc. The dates of the drafts and the manner of drawing and handling them were essentially the same as in this case. However, in *Trust Company* the rights and liabilities of forwarding banks were involved. The many pertinent cases with respect thereto are cited and discussed in the Court's opinion and in the dissent.

In the instant case, however, only the rights of the plaintiff (the drawer of the draft) and the Bank of Washington, to which it was sent for collection, are involved. The plaintiff alleged and the parties stipulated the draft was for collection. It is conceded the defendant Bank could not honor the draft without specific authority from the Hog Market. The Bank requested such authority. The Hog Market declined to give it.

The court determined the evidence failed to show either negligence on the part of the Bank or damages to the plaintiff. The court did find the evidence showed plaintiff had acquiesced in and benefited by the Bank's method of collecting its drafts on 15 prior occasions without complaint or objection. Upon these bases the court entered judgment dismissing the action.

The burden was on the plaintiff to show both negligence and damages. *Wilson v. Geigy,* 236 N.C. 566, 73 S.E. 2d 487. Failure to show either is fatal. There is neither finding nor evidence the plaintiff's chances for collection were jeopardized during the six business days the bank held the draft. As between the plaintiff and the Hog Market, the draft was nothing more than a creditor's claim. "The draft procedure was adopted as a method of collecting the debt." *Trust Co. v.*

Bank, supra. The differences of opinion in *Trust Co.* arose over the question whether forwarding banks, as among themselves, treated the drafts as "cash" or "collection" items. Here the plaintiff alleged and the parties stipulated the draft was for collection.

We have examined and found without error all exceptive assignments which are presented in accordance with appellate procedure. Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 797; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294. The evidence was ample to support the findings of fact which in turn fully sustain the judgment. In the trial, we find no error and the judgment is

Affirmed.

RODMAN, J., took no part in the hearing and disposition of this case.

RONNIE RAY JOHNS, BY HIS NEXT FRIEND, RALPH E. EARNEY v. RANSOM J. DAY.

(Filed 10 October 1962.)

1. Negligence § 21—

Negligence is not presumed from the mere fact that there has been an accident and an injury.

2. Automobiles § 41m—

Evidence tending to show that defendant was driving some five miles per hour between cars parked on either side of the street and that a six year old child ran from behind one of the parked cars into the path of defendant's car, that because of the obstruction of the parked car defendant did not see the child, but that the car did not cover more than six or seven feet after the child ran into its path and that defendant stopped the car within a foot after running over the child's legs, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence.

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

APPEAL by plaintiff from *Sharp, Special Judge,* January Civil Term 1962 of GASTON.

This is a civil action to recover for personal injuries sustained by plaintiff when the defendant allegedly ran over him with his automobile.

On 20 October 1960, about 4:00 o'clock in the afternoon, the de-

fendant was traveling in a westerly direction on Burton Street at a speed of about five miles per hour when the plaintiff ran in front of his mother's car, which was parked on the north side of the street near the curb in front of plaintiff' home, into the street and into the pathway of defendant's car.

The plaintiff's evidence tends to show that Burton Street is about 24 feet wide and runs in a generally east-west direction in the Linford Mills Village in North Belmont. The evidence further tends to show that the car of Bobby Hamilton was parked in front of Mrs. Brittian's home which is located across the street from the home in which plaintiff lives. The Hamilton car was headed east. The plaintiff was hit at a point about one foot to the rear of the Hamilton car as the defendant was driving between the Johns and Hamilton cars.

Bobby Hamilton testified for the plaintiff as follows: "I was present when this accident happened in which Ronnie Johns was hurt. At the time I was on my mother-in-law's front porch, Mrs. Brittian's. * * * I had not seen Ronnie Johns just prior to this accident. * * * When I walked out on the front porch, I looked around and saw him coming from in front of his mother's car heading across the street towards mine and that's when I saw Mr. Day hit him. The first time I saw him he was coming out from his mother and them's (sic) driveway. When I first saw him he was in the driveway running towards the opposite side of the road. At that time Mr. Day was coming down the road; he was just coming between the two cars. He was already in between them, coming on down through there. At the time I first saw Ronnie Johns and I first saw Mr. Day in my opinion he was about five or six feet from Ronnie Johns. It was about five or six feet from Mr. Day's car to the little Johns boy. I did not observe Ronnie Johns run all the way across the street. I saw him when he started out in front of the — out across the street; he was running; and I saw him go down. I don't know whether he fell or whether the car hit him and it knocked him down but after it hit I saw the wheel go over his legs. All I saw was the wheel struck him. * * * The left front wheel hit him. That was right at the back of my car. * * *"

Mr. Day was likewise put on the stand by the plaintiff and testified that he did not see the boy at all until after he hit him, and he hit his brakes as soon as he felt the bump. The Day car was stopped within approximately one foot of where it ran over the legs of the plaintiff.

The evidence also tends to show that the defendant's view was blocked by the car parked along the curb in front of the plaintiff's home and that the defendant was driving very slowly between the two parked cars at the time plaintiff was hit.

There was evidence that many children lived and played in the area involved. However, there was no evidence that children were playing in the area at the time plaintiff was injured. The defendant was familiar with the neighborhood and lived on the same street, approximately three or four hundred feet east of where the accident occurred.

The medical testimony is to the effect that the boy has rather extensive scarring on his leg, above the knee, but that he has "no permanent disability to the leg in the functioning or the motion of the leg." No bones were broken.

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

Childers & Fowler for appellant.
Hollowell & Stott for appellee.

DENNY, C.J. The sole question presented for decision on this appeal is whether or not the trial judge committed error in sustaining the defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence.

The evidence tends to show that while the defendant did not see the plaintiff before the left front wheel of his car had passed over the legs of plaintiff, the evidence further tends to show the plaintiff, a child six years of age at the time of the accident, ran out into the street in front of the car parked in front of his home and into the pathway of defendant's car. The evidence further supports the view that the defendant at the time of the accident was traveling about five miles per hour, going in between the cars parked on the north and south sides of the street. The undisputed evidence is to the effect that the defendant stopped his car within one foot of the point where the left front wheel of his car passed over the legs of the plaintiff. Moreover, the evidence tends to show that the defendant's car did not travel more than six or seven feet after the plaintiff ran into the pathway of defendant's car.

"No presumption of negligence arises from the mere fact there has been an accident and an injury." *Grant v. Royal*, 250 N.C. 366, 108 S.E. 2d 627; *Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821; *Merrell v. Kindley*, 244 N.C. 118, 92 S.E. 2d 671; *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661.

In the case of *Brinson v. Mabry*, 251 N.C. 435, 111 S.E. 2d 540, this Court said: "True, the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of

his vehicle and to keep a vigilant lookout to avoid injury (citing numerous authorities).

"Nevertheless, when a child, without warning, darts from behind another vehicle into the path of a motorist who is observing the rules of the road with respect to speed, control and traffic lanes, and who is maintaining a proper lookout, the resulting injury is not actionable. * * *"

Ordinarily, when a child suddenly runs into the street from behind a parked vehicle or other obstruction, thereby preventing the child from being seen in time to have avoided the accident, and the driver was not traveling at an excessive rate of speed, nonsuit is proper. *Kennedy v. Lookadoo,* 203 N.C. 650, 166 S.E. 752; *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43; *Bass v. Hocutt,* 221 N.C. 218, 19 S.E. 2d 871.

Likewise, in *Rountree v. Fountain,* 203 N.C. 381, 166 S.E. 329, the evidence was to the effect that the defendant backed his truck into an alley and ran over a four-year-old child. This Court held that the absence of a showing of the length of time that the child was in the alley, or that the defendant could or should have seen him in time to avoid the injury, led only to conjecture as to whether the child was there long enough to be seen or whether he dashed suddenly into the path of the truck. The evidence presenting such conjecture was held insufficient to be submitted to the jury. The judgment of nonsuit entered below was upheld. See also *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406.

The judgment below is

Affirmed.

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

JAMES WILLIAMS v. HARVEY B. HUNTER, T/A HARVEY B. HUNTER DAIRIES AND DONALD ALEXANDER FERGUSON.

(Filed 10 October 1962.)

1. Courts § 9; Pleadings § 34; Appeal and Error § 3—

Where a motion to strike an entire portion of a pleading is interposed for the purpose of testing the sufficiency of the pleading to state a cause of action or a defense, the motion is in effect a demurrer, and a judge of the Superior Court has jurisdiction to hear the motion notwithstanding that the motion to strike related to matters incorporated by amendment made pursuant to order of another Superior Court judge, and an appeal

will lie from the order allowing the motion to strike, Rule of Practice in the Supreme Court No. 4(a) (2) not being applicable.

2. Automobiles § 35; Judgments § 29— Prior judgment in action between drivers bars subsequent cross action for contribution by the one against the other.

In an action by a passenger in an automobile against the driver of a truck involved in a collision with the car and against an individual alleged to be the employer of the truck driver, the driver of the car was joined as an additional defendant for contribution. The additional defendant plead a prior judgment in his favor in his action against the driver of the truck and the alleged corporate employer of the truck driver. *Held:* The negligence of the respective drivers was necessarily at issue in the prior action and precludes the cross action asserted by the truck driver, and upon joint demurrer, also precludes the employer even though the employer was demoninated an individual in the one action and a corporation in the other.

3. Pleadings § 18—

Where two parties file a joint demurrer, the demurrer must be overruled if the pleading states a cause of action against either one of them.

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

APPEAL by Daniel Lester Barnes, a defendant for contribution, from *McConnell, S.J.*, May 1962 Civil Term of GASTON.

Plaintiff instituted this action to recover damages from defendants Hunter and Ferguson. As a cause of action he alleged these facts: He was a guest in an automobile owned and operated by Daniel Lester Barnes (hereafter merely Barnes). A truck owned by Hunter driven by his agent, defendant Ferguson, collided with the Barnes car. As a result of the collision, plaintiff sustained injuries. The collision was due to the negligent operation of the Hunter truck. The negligent acts of Ferguson are particularized in the complaint.

Defendants filed a joint answer. They alleged Ferguson, not Hunter, was the owner of the truck which collided with the Barnes car. They denied the asserted relationship of master and servant between Hunter and Ferguson. They denied the collision was in any way caused by the negligence of Ferguson. They specifically pleaded the negligence of Barnes as the sole cause of plaintiff's injuries.

After the answer was filed, defendants, as permitted by G.S. 1-240, made Barnes a defendant for contribution. Their complaint in the cross action against Barnes particularizing his negligence entitles them to contribution.

Barnes filed an answer to the cross action asserted by Hunter and Ferguson. He denied the allegations that he was negligent. He specifically pleaded the collision was caused solely by the negligence of

Ferguson, the agent of Hunter acting in the course and scope of his employment. Thereafter Barnes filed with the clerk a motion seeking permission to amend his answer to plead facts occurring susequent to the filing of his answer. The motion stated the amendment would be a plea of estoppel by judgment rendered in an action brought by Barnes against Hunter and Ferguson, which judgment was rendered at the December 1961 Term of Gaston. There was attached to the motion a certified copy of the judgment roll in a civil action entitled *"Daniel L. Barnes v. Harvey B. Hunter Dairies, Inc. and Donald Alexander Ferguson,"* consisting of summons, complaint, joint answer by defendants, and judgment in favor of plaintiff against Ferguson for $838 for personal injuries and property damages. The complaint in that action asserts Barnes' right to recover damages resulting from the collision caused by Ferguson's negligence as agent of corporate defendant.

At the January 1962 Term of Gaston *Judge Sharp* allowed Barnes' motion to amend. On 18 January 1962 Barnes filed his amended answer as permitted by the order of *Judge Sharp.* On 14 February 1962 Hunter and Ferguson filed a "MOTION TO STRIKE" asking the court to strike the entire amendment filed by Barnes on 18 January 1962, asserting "that neither the parties nor the issues in said action are the same, and that said former action and the judgment therein set up in said Amendment to Answer could not and does not constitute estoppel by judgment." Judge McConnell allowed the motion to strike. Barnes appealed.

Mullen, Holland & Cooke by Philip V. Harrell for additional defendant appellant.

Ernest R. Warren, Julius T. Sanders, and Carl J. Stewart, Jr., for original defendant, appellees.

RODMAN, J. Appellant challenges the right of Judge McConnell to act on the motion to strike because, as he contends, the allowance of the motion would constitute a reversal of *Judge Sharp's* order. This position would be sound if the defendants assigned some reason for removing the pleading from the file other than a failure to state a defense. This is not what they seek to accomplish. It is apparent the "Motion to Strike" is intended to test the legal sufficiency of the pleading. The way to raise that question is by demurrer. *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211; *Rhodes v. Asheville,* 229 N.C. 355, 49 S.E. 2d 638. The fragrance of the rose is not destroyed by calling it a weed. Nor may what is in fact a demurrer gain strength or lose vitality by designating it as a motion to strike. Where a "Motion to Strike" challenges the legal efficacy of a pleading, it is

and will be treated as a demurrer. *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554; *Etheridge v. Light Co.,* 249 N.C. 367, 106 S.E. 2d. 560.

If this were in fact an appeal from an order merely striking portions of a pleading, it would, under Rule 4(a) (2), 242 N.C. 766, be necessary to dismiss the appeal.

The admendment alleges a prior adjudication of the rights of Barnes and Ferguson in a court having jurisdiction of the parties and the cause of action. If the plea be established, it defeats Ferguson's right to relitigate any question then in controversy. The negligence of each driver, the parties to that action, was necessarily in issue. The adjudication then made is binding on the parties. *Hill v. Edwards,* 255 N.C. 615, 122 S.E. 2d 383; *Bullard v. Oil Co.,* 254 N.C. 756, 119 S.E. 2d 910; *Crain & Denbo, Inc. v. Construction Co.,* 252 N.C. 836, 114 S.E. 2d 809; *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545.

The action set up by Barnes as a defense to the claim for contribution is entitled *"Daniel L. Barnes v. Harvey B. Hunter Dairies, Inc. and Donald Alexander Ferguson."* The certified copy of the record in that action pleaded as an estoppel does not disclose how, if at all, it has terminated as to defendant Harvey B. Hunter Dairies, Inc. Nor does it appear that Harvey B. Hunter individually was a party to or in any way participated in that action. Barnes does not allege facts against Harvey B. Hunter trading as Harvey B. Hunter Dairies which would bring him in the class bound by the judgment under the doctrine applied in *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492. The facts pleaded in the amendment are not sufficient to estop Harvey B. Hunter from claiming contribution. Nonetheless, he has elected to act jointly with a party who is estopped. Since he has deliberately placed himself in the sea with Ferguson, they must, as Avery, J., said in *Conant v. Barnard,* 103 N.C. 315, "sink or swim together."

Since the demurrer is bad as to Ferguson, it is bad as to both. Some of the subsequent cases applying the rule announced in the *Conant* case are collected in *Paul v. Dixon,* 249 N.C. 621, 107 S.E. 2d 141.

Reversed.

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

FRED J. KNIGHT v. ASSOCIATED TRANSPORT, INCORPORATED.

(Filed 10 October 1962.)

1. Appeal and Error § 60—

Decision on a former appeal constitutes the law of the case and is controlling in subsequent proceedings.

2. Automobiles § 54f—

Evidence tending to show that the insignia of defendant was painted on the side of the truck involved in the collision establishes a *prima facie* case of the ownership of the vehicle and that it was being driven by an employee of defendant in the course of his employment, and takes the issue of *respondeat superior* to the jury, even though defendant introduces evidence that it was not operating a vehicle at the time and place of the accident, but such *prima facie* case does not alter the burden of proof and permits but does not compel the jury to find the issue in the affirmative.

3. Evidence § 8—

Where a *prima facie* case arises upon a particular set of facts the burden is upon plaintiff to establish the predicate facts by the greater weight of the evidence, in which event the jury may but is not compelled to find the issue in the affirmative, and defendant is under no burden to offer evidence but merely risks an adverse verdict if he fails to do so.

Appeal by defendant from *McConnell, S.J.*, April 1962 Civil Term of GASTON.

This cause was here at the Fall Term 1961 on appeal from a judgment rendered at May Term 1961. See *Knight v. Associated Transport,* 225 N.C. 462, 122 S.E. 2d 64. Plaintiff's version of the facts is there stated. Repetition is not necessary. A new trial was then awarded for error in the charge. When the case was tried the second time the jury again found, on evidence for plaintiff, substantially as stated in the prior appeal, that the truck colliding with Akers vehicle in which plaintiff was riding was owned by and operated for defendant. It found the collision was caused by the negligent manner in which defendant's truck was operated. It fixed the amount of compensation to which plaintiff was entitled. Defendant appeals from the judgment rendered on the verdict.

Mullen, Holland & Cooke by Frank P. Cooke and Childer & Fowler by Henry L. Fowler, Jr. for plaintiff appellee.

Whitener & Mitchem for defendant appellant.

RODMAN, J. The law as declared on the first appeal was the law of the case and controlling in subsequent trials. *Collins v. Simms,* 257 N.C. 1; *Pulley v. Pulley,* 256 N.C. 600, 124 S.E. 2d 571; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482.

The law applicable to the facts which plaintiff's evidence tended to establish is clearly and succinctly stated in the following quotations from the opinion written by the present Chief Justice. He said: "[W]e have come to the conclusion that where common carriers of freight are operating tractor-trailer units, on public highways, and such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence that the name of the defendant was painted or inscribed on the motor vehicle which inflicted the injury constitutes *prima facie* evidence that the defendant whose name or identifying insignia appears thereon was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the defendant."

At the first trial defendant offered no evidence. At the second trial defendant offered evidence tending to show that it was not operating a vehicle at the time when and place where plaintiff was injured. The evidence did not change the legal principle declared on the first appeal. The court correctly declined to allow the motion to nonsuit.

Defendant challenged the court's charge in the first trial because the court told the jury that the burden rested on the defendant to repel the inferences which the law drew from plaintiff's testimony. In concluding the opinion *Justice Denny* said: "However, since the court below used the Virginia presumptive rule in charging the jury, and we are now adopting the *prima facie* rather than the presumptive rule, we think the defendant is entitled to a new trial, and it is so ordered."

Defendant now assigns as error these portions of the charge: "Therefore, if you believe the testimony that was — and if the plaintiff has satisfied you from testimony by its greater weight, bearing in mind that our Courts have held that the having of the insignia on the truck is — makes out a *prima facie* case, and if the plaintiff has satisfied you, bearing that in mind, by the greater weight of the evidence on the first two issues, it would be your duty to answer those two issues YES."

"In other words, the *prima facie* evidence of insignia carries with it the — or is evidence of the fact that the truck was owned by Associated Transport and that it was operated by one of its agents in the course of his employment, still the burden is upon the plaintiff and does not shift on it to satisfy you, but bear in mind that our Courts have held that the insignia upon the truck, if it — *if you believe the testimony of the witnesses and the plaintiff has satisfied you by the greater weight as to the testimony, it will be your duty to answer those two issues YES.*" (Emphasis supplied.)

The first two issues read:

"1. Was the defendant, Associated Transport, Inc., the owner of a tractor-trailer unit on May 19, 1959, while it was being operated on Highway 360 in the State of Virginia, as alleged in the Complaint?"

"2. If so, was said tractor-trailer unit being operated at said time and place by an agent, servant and employee of Associated Transport, Inc., in the course and scope of his employment and about his master's business, as alleged in the Complaint?"

Plaintiff must prove by the greater weight of the evidence or beyond a reasonable doubt, depending on whether the case be civil or criminal facts which call for an application of the *prima facie* rule. When these facts have been so established, the jury may but is not compelled to find the ultimate fact in issue in accordance with plaintiff's contention. Defendant is under no burden to offer evidence. If he does not, he merely risks an adverse verdict. *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137; *Woodruff v. Holbrook,* 255 N.C. 740, 122 S.E. 2d 709; *Taylor v. Parks,* 254 N.C. 266, 118 S.E. 2d 779; *Howard v. Sasso,* 253 N.C. 185, 116 S.E. 2d 341; *S. v. Bryant,* 245 N.C. 645, 97 S.E. 2d 264; *Ferrell v. R.R.,* 190 N.C. 126. 129 S.E. 155; *McDowell v. R.R.,* 186 N.C. 571, 120 S.E. 205.

The exceptions are well taken. They are in effect peremptory instructions to answer the issues in favor of plaintiff if the jury should find from the greater weight of the evidence that the vehicle which collided with the vehicle in which plaintiff was riding bore the insignia of defendant.

The charge does not conform to the opinion on the prior appeal. It places a heavier burden on defendant than the charge which was held erroneous on the prior appeal.

We deem discussion of other asserted errors unnecessary.

New trial.

ENNIS WEST v. ADDIE WEST AND WIFE, WILLIE JONES WEST; MAMIE WEST JOHNSON AND HUSBAND, H. P. JOHNSON; BEULAH WEST WILSON AND HUSBAND, O. T. WILSON; ALTON WEST AND WIFE, WILMA WEST; DOLLIE MAE LEE AND HUSBAND, B. F. LEE; FRANK WEST AND WIFE, ...; ISKEY WEST HARGROVE, E. A. WEST AND G. A. WEST, WIDOW OF A. B. WEST, DECEASED.

(Filed 10 October 1962.)

1. Partition § 7—

Whether the division of land by the commissioners in an actual partition is fair and equitable is a question of fact to be determined by the court upon appeal from a judgment of the clerk affirming the report of the commissioners, and the court's findings are conclusive and binding if supported by any evidence, even though the evidence be conflicting.

2. Trial § 6—

A stipulation of the parties is a judicial admission precluding any of them from thereafter controverting the truth of the matters stipulated, and therefore where the parties stipulate that the issues raised by the pleadings were properly disposed of by a judgment (which judgment was by consent) a party may not thereafter contend that the judgment was void as to him for lack of his consent.

APPEAL by petitioner and four respondents from *Bone J.*, at the April 1962 Term of SAMPSON.

This proceeding was instituted on September 17, 1942 to partition lands of A. B. West, deceased, among his nine children. Thereafter E. A. West, one of the appellants, alleged title in himself to two of the five tracts described in the partition and a claim for improvements on a third tract. The widow petitioned for dower, and certain other respondents asked for an accounting of the rents and profits by E. A. West.

At the April-May 1946 Term of the Superior Court, a jury verdict established E. A. West's title to the two tracts he claimed. On December 21, 1950, the allotment of the widow's dower was confirmed, and at the March 1952 Term of the Superior Court all other matters in controversy between the parties were compromised in a consent judgment signed by the presiding judge on March 26, 1952. In the judgment the court named three commissioners to partition the first three tracts of land described in the petition by allotting to each tenant in common "a one-ninth (1/9) share thereof in severalty". It further provided that "if equal shares cannot be made by dividing the lands, then the said commissioners are to charge the more valuable dividend with such sum or sums of money as they shall deem necessary to be paid to the dividend or dividends of inferior value in order to make an equitable partition. . . ."

Pursuant to this judgment, the commissioners made an actual partition of the land and filed their report on June 7, 1952. On June 17, 1952, petitioners and five of the respondents filed exceptions to the report. These exceptions were not heard by the clerk until September 25, 1961. On that date he heard the evidence offered by both petitioner and respondents. The clerk overruled the exceptions and affirmed the report of the commissioners. His order was appealed to the Judge of the Superior Court. At the April Term 1962, his Honor, Judge Walter J. Bone, heard the conflicting testimony of the witnesses for appellants and appellees, including the testimony of the one surviving commissioner and of the surveyor who ran and marked the division lines in May 1952. After hearing the evidence, the Judge found that the partition made by the commissioners and reported to the court on June

7, 1952 was just and fair. He confirmed the order of the clerk sustaining the report of the commissioners. E. A. West, Alton West, Addie West, Ennis West, and Frank West appealed to the Supreme Court.

By stipulation, entered of record on July 6, 1962, the parties agreed that all issues raised by the pleadings, which have been lost, were properly disposed of by the judgment of March 26, 1952, and that the only remaining question was "the actual partition of the lands." The appellants made two assignments of error: (1) To his Honor's findings of fact that the partition made by the commissioners was just and fair, and (2) To his judgment affirming the order of the clerk which confirmed the report of the commissioners.

David J. Turlington, Jr. for plaintiff and defendants E. A. West, Alton West, Addie West and Frank West, appellants.

Woodrow H. Peterson for defendants other than E. A. West, Alton West, Addie West and Frank West, appellees.

SHARP, J. The question involved on this appeal is stated identically in the brief of both the appellants and the appellees: "Did his Honor err in concluding and adjudging that the partition which had been made among the various tenants in common was just and fair and subsequently ruling and adjudging that the Report of Commissioners be confirmed?"

Where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the Judge of the Superior Court upon an appeal from a judgment of the clerk affirming the report of commissioners. *Byrd v. Thompson,* 243 N.C. 271, 90 S. E. 2d 394. The findings of the judge are conclusive and binding if there is any evidence in the record to support them. *McMillan v. McMillan,* 123 N.C. 577, 31 S.E. 729. The evidence before Judge Bone, while conflicting, was sufficient to sustain his findings.

In their brief the appellants contend that the consent judgment of March 26, 1952 was void as to Alton West for lack of consent. This question is not raised by any assignment of error and is precluded by the stipulation of July 6, 1962. "A stipulation is a judicial admission. As such, 'It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of presenting evidence to establish the admitted fact'." *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460.

For the reasons assigned the judgment of the court below is

Affirmed.

MRS. MARY E. BLACK, PLAINTIFF v. SUE WRIGHT WILLIAMSON, ORIGINAL DEFENDANT AND CHARLES L. BLACK ADDITIONAL DEFENDANT.

(Filed 10 October 1962.)

1. Appeal and Error § 3—

An order for the examination of an adverse party pursuant to G.S. 1-568.11 is an interlocutory order which does not affect any substantial right and from which no appeal lies. G.S. 1-277.

2. Bill of Discovery § 3—

Where the examination of an adverse party pursuant to informal consent of the parties has broken down upon disagreement as to the propriety of one of the questions asked on examination, a subsequent order for the examination of the party pursuant to G.S. 1-568.11 will not be held erroneous as subjecting the adverse party to an examination *de novo* when movant disclaims any intention to again subject the party to an examination with respect to the matter concerning which she has already testified.

APPEAL by original defendant from *Walker, Special Judge,* March 26, 1962, "B" Term of MECKLENBURG.

On February 18, 1960, at a street intersection in Charlotte, N. C., there was a collision between an automobile, in which plaintiff was a passenger, operated by Charles L. Black (plaintiff's husband) and an automobile operated by Sue Wright Williamson. On August 3, 1961, plaintiff instituted this action against Mrs. Williamson, alleging the collision and plaintiff's injuries were proximately caused by the negligence of Mrs. Williamson. Answering, Mrs. Williamson denied negligence and alleged the collision and plaintiff's injuries were proximately caused by the negligence of Mr. Black. Mr. Black was joined as a defendant in respect of the cross action for contribution alleged by Mrs. Williamson. Answering, Mr. Black denied the essential allegations of Mrs. Williamson's cross complaint for contribution.

After the pleadings were filed, plaintiff's counsel proceeded to examine Mrs. Williamson adversely before Mrs. Rose M. Senn, a Notary Public, on January 19, 1962, in accordance with informal consent arrangements for such examination. Plaintiff had not obtained or applied for an order of the "judge or clerk" appointing a commissioner to hold such examination in accordance with G.S. § 1-568.11. Plaintiff's counsel examined Mrs. Williamson as to what occurred on the occasion of the collision. The examination proceeded without incident until certain questions asked by plaintiff's counsel were challenged by Mrs. Williamson's counsel as relating to law rather than fact, *e.g.*, this question: "And do you say that Mr. Black failed to yield the right of way to you?" When Mrs. Williamson, on advice of counsel, refused to answer the questions challenged as improper by her counsel,

plaintiff's counsel stated that he withdrew his "stipulation" and the informal adverse examination ended.

On January 25, 1962, on plaintiff's application, Rachel B. Ingle, Assistant Clerk of the Superior Court of Mecklenburg County, signed an order for the adverse examination of Mrs. Williamson by plaintiff, appointed Mrs. Senn as Commissioner with full statutory powers, and designated the time (February 6, 1962) and place for such adverse examination. On January 30, 1962, Mrs. Williamson, through her counsel, moved to vacate said order of January 25, 1962, asserting, *inter alia,* her health would be placed in jeopardy by further examination, and praying, *inter alia,* "if the court determines that the plaintiff is entitled to further examination, the same be ordered upon written interrogatories." Thereupon, the said Assistant Clerk, by order of February 1, 1962, set aside so much of her order of January 25, 1962, as required Mrs. Williamson to appear for adverse examination on February 6, 1962, and set February 8, 1962, as the time for a hearing on Mrs. Williamson's said motion.

After hearing, J. Edward Stukes, Clerk of the Superior Court of Mecklenburg County, in his discretion, by order dated February 28, 1962, denied Mrs. Williamson's said motion, "reinstated in full force and effect" the said order of January 25, 1962, and set April 20, 1962, as the date for the adverse examination of Mrs. Williamson. Mrs. Williamson excepted to said order of February 28, 1962, and appealed therefrom to a judge of the superior court.

After hearing in the superior court, Judge Walker, in his discretion, by order dated March 29, 1962, affirmed the clerk's said order of February 28, 1962, and Mrs. Williamson gave notice of appeal to the Supreme Court.

On April 26, 1962, the said clerk, allowing Mrs. Williamson's motion therefor, changed the date for the adverse examination of Mrs. Williamson from April 20, 1962, to May 21, 1962, "in order that she may have opportunity to docket her appeal and seek further stay in the Supreme Court of North Carolina until a final determination of the Appeal." A petition filed by Mrs. Williamson in this Court for a stay of the clerk's order providing for her adverse examination was denied May 18, 1962.

It appears from exhibits attached to the motion to dismiss appeal filed in this Court by appellees (but not from the record filed by appellant herein) that the clerk, subsequent to his order of April 26, 1962, ordered that the adverse examination of Mrs. Williamson be deferred until disposition by this Court of appellant's purported appeal.

Warren C. Stack and James L. Cole for plaintiff appellee.

Carpenter, Webb & Golding for defendant Williamson, appellant.

Kennedy, Covington, Lobdell & Hickman and Edgar Love, III, for additional defendant Black, appellee.

PER CURIAM. The purported appeal is from an interlocutory order of a superior court judge, affirming an order of the clerk entered in accordance with G.S. § 1-568.11. It does not deprive appellant of a substantial right and no appeal lies therefrom. G.S. § 1-277; *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669.

It is also noted that no exception or assignment or error appears in the record. The closest approximation is appellant's notice of appeal from Judge Walker's order. No error appears upon the face of the record.

Appellant asserts the order for her adverse examination provides for an examination *de novo*, thus subjecting her to a second examination concerning matters covered by her testimony on January 19, 1962. Appellees, in their brief, assert "(t)here is nothing in the order appealed from which purports to subject the defendant to re-examination 'with respect to those matters concerning which she has already testified at length,'" and that they have no disposition to re-examine appellant concerning matters covered by her previous testimony. If, upon further adverse examination, appellant should refuse to answer any question propounded, whether she would be required to answer is determinable in accordance with G.S. § 1-568.18 and G.S. § 1-568.19. See *Berry Brothers Corp. v. Adams-Millis Corp.*, 257 N.C. 263, 125 S.E. 2d 577.

Appeal dismissed.

ROBERT S. BENSON v. WALTER F. SAWYER.

(Filed 10 October 1962.)

Automobiles § 41k—

Evidence tending to show that plaintiff had opened the door to a parked vehicle to speak to his estranged wife's sister, who was sitting on the front seat as a passenger, that defendant got into the driver's seat, backed the car suddenly and rapidly so that plaintiff did not have time to step aside, and was struck by the open door and drug to his injury, and that defendant then drove forward and left the scene, *is held* sufficient to be submitted to the jury on the issue of negligence and not to show contributory negligence as a matter of law, there being no evidence of any menace by plaintiff by word or demeanor.

BENSON *v.* SAWYER.

APPEAL by plaintiff from *Cowper, J.*, March 1962 Civil Term of NEW HANOVER.

Action to recover for personal injuries suffered by plaintiff by reason of the alleged negligence of defendant.

From judgment of involuntary nonsuit, plaintiff appeals.

Solomon B. Sternberger and Addison Hewlitt, Jr., for plaintiff.
Poisson, Marshall, Barnhill & Williams for defendant.

PER CURIAM. The case was nonsuited at the close of plaintiff's evidence. His evidence, considered in the light most favorable to him, tends to show:

Shortly after midnight on 17 October 1960 plaintiff parked his truck in the parking area in front of the Oleander Fruit stand in a suburban district of New Hanover County. Plaintiff entered the Fruit Stand, which was open for business, and remained there about 30 minutes. When he came out he saw his wife's sister-in-law, Mary Fender, sitting in a Cadillac automobile parked near his truck. She was sitting in the right front seat of the Cadillac. About this time defendant got in the Cadillac on the driver's side. Plaintiff called Mary's name loudly, and opened the right front door of the Cadillac to speak to her. She and her husband were estranged. Plaintiff's manner was not menacing, and he was not cursing. Defendant started the motor. Plaintiff was standing behind the open door. Defendant began backing the Cadillac "real fast." Plaintiff didn't have time to step aside, and was knocked down and was dragged about 30 feet to the edge of the highway. Defendant drove forward and left the scene. Plaintiff was injured.

The complaint narrates the occurrence in substantial accord with the foregoing summary of the evidence, and alleges that plaintiff's injury was proximately caused by defendant's negligence consisting *inter alia* of reckless driving in violation of G.S. 20-140, excessive speed in violation of G.S. 20-141(a), failure to keep a reasonable lookout, and failure to keep the automobile under proper control.

Defendant denies that he was negligent, and pleads contributory negligence.

Plaintiff's evidence makes out a *prima facie* case of actionable negligence. *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332. Contributory negligence does not appear as a matter of law from plaintiff's evidence.

The judgment below is

Reversed.

PETE MAHARIAS, T/A QUONSET HUT RESTAURANT v. WEATHERS BROTHERS MOVING AND STORAGE.

(Filed 10 October 1962.)

Negligence § 33—

Evidence tending to show that fire originated on defendant's premises, which spread and caused damage to plaintiff's building, that after the fire, rags with furniture polish on them were found in the room in which the fire originated, together with evidence that the fire could have been caused by spontaneous combustion, but also that it was possible that it resulted from any one of a number of causes, *held* insufficient to be submitted to the jury, since the evidence raises a mere conjecture or speculation as to the cause of the fire.

APPEAL by plaintiff from *McLean, J.*, June 18, 1962 Special "A" Term of MECKLENBURG.

Action to recover damages for destruction of and injury to plaintiff's property by fire which originated by reason of the alleged actionable negligence of defendant.

From judgment of involuntary nonsuit, plaintiff appeals.

Plumides & Plumides and Warren D. Blair for appellant.

McDougle, Ervin, Horack & Snepp for appellee.

PER CURIAM. The nonsuit was entered at the close of plaintiff's evidence, which tends to show the following particulars:

Plaintiff is the owner of the Quonset Hut Restaurant located in Charlotte. Defendant owns a warehouse in which it stores and refinishes used furniture. The warehouse is about 4 feet south and to the rear of the restaurant. About 10:00 P.M. on 9 June 1961 a fire started in a room in the northwest corner of the warehouse and spread to other parts of the warehouse and to plaintiff's establishment, causing fire, water and smoke damage to plaintiff's place of business and its contents. The room in which the fire originated had been used by defendant as a location for polishing furniture. Most of the merchandise in this room was destroyed by the fire. After the fire had been extinguished, Mr. Black, the Assistant Fire Chief, inspected the room and found an overturned metal cabinet, evidence of burned rags, and about a half-bushel of charred rags piled in a corner. There was some type of furniture polish on the rags. Mr. Black stated that, in his opinion, the pile of rags "could have caused spontaneous combustion." On cross-examination he stated that he didn't know where the rags were before the fire and that it was "possible that this fire could have happened from any one of a number of causes."

Plaintiff alleges that his loss was proximately caused by the negligence of defendant in permitting a pile of rags covered by highly inflammable fluid to accumulate, and that the fire resulted from spontaneous combustion of the pile of rags.

Nonsuit was proper. The evidence raised a mere conjecture, surmise and speculation as to the cause of the fire. A cause of action must be based on something more than a guess.

The judgment below is

Affirmed.

EVELYN FARMER v.
SIDNEY BRYANT LANDS AND YELLOW CAB COMPANY, INC.

(Filed 10 October 1962.)

1. Trial § 52—

A motion to set aside a verdict for asserted inadequacy or excessiveness of the award is addressed to the sound discretion of the trial court, and the court's determination thereof is not reviewable in the absence of a showing of abuse of discretionary power.

2. Trial § 50—

Where the court refuses to set aside the verdict for asserted misconduct of a juror, such refusal amounts to a finding that movant had failed to show misconduct, and the denial of motion will not be disturbed in the absence of a showing of abuse of discretion.

APPEAL by plaintiff from *Pless, J.*, April 30, 1962 Regular Civil B Term of MECKLENBURG.

Plaintiff was a passenger in a taxicab operated by the individual defendant, owned by corporate defendant. The cab collided with a car ahead which had stopped to make a left turn. Plaintiff brought this action to recover her expenses and compensation for injuries alleged to have resulted from the negligence of defendants.

Defendants denied both the asserted negligence and plaintiff's claim of injuries resulting from the collision.

The jury found defendants negligent and fixed plaintiff's damage at $600. Plaintiff moved to set the verdict aside; the motion was denied; judgment was entered on the verdict; and plaintiff appealed.

Plumides & Plumides by Warren D. Blair for plaintiff appellant.

Helms, Mulliss, McMillan & Johnston by James B. McMillan for defendant appellees.

PER CURIAM. Plaintiff, in her brief, states four questions for decision: (1) Was there error in the admission and exclusion of evidence? (2) Was there error in the charge resulting from the court's summary of defendants' contentions? (3) Did the court err in refusing to set the verdict aside because inadequate? (4) Did the court err in refusing to set the verdict aside for asserted misconduct of a juror?

Plaintiff devotes her argument to the last two questions. She makes no argument indicating either the first or second questions should receive affirmative answer. An examination of the record discloses they are without merit and require no discussion.

Plaintiff's testimony would suffice to establish damages substantially in excess of the amount awarded. She was treated by several doctors and spent considerable time in hospitals. The crucial question for the jury was: Was this treatment necessary because of injuries resulting from the collision or because of physical conditions existing prior to the collision? Plaintiff is only entitled to compensation for injuries resulting from the collision. She carried the burden of establishing the amount of damages to which she was entitled. She does not contend there was error in the charge as it related to the measure of damages.

Whether the trial judge should set aside a verdict because of an asserted inadequate or excessive verdict must be determined by him in the exercise of his sound discretion. *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202; *Evans v. Coach Co.*, 251 N.C. 324, 111 S.E. 2d 187.

Plaintiff also assigned as a reason for setting the verdict aside asserted misconduct of a juror. Judge Pless heard evidence. He refused to set the verdict aside. This was in effect a finding the movant had failed to show misconduct. In that sense the court's refusal to act is described as discretionary. *Stone v. Baking Co.*, 257 N.C. 103.

Where a trial court acts in the exercise of his sound discretion, his ruling cannot be reversed unless there is an abuse of the discretionary power. There is nothing in this record to indicate that Judge Pless did not act properly.

Affirmed.

ROBERT CALVIN WILLIAMS v. ASHEVILLE CONTRACTING COMPANY.

(Filed 10 October 1962.)

1. Appeal and Error § 12—

An appellant may abandon his appeal, and motion for voluntary nonsuit thereafter entered in the trial court is tantamount to abandonment of the appeal, and the court has jurisdiction to hear the motion.

2. Pleadings § 19—

Where plaintiff abandons or fails to perfect his appeal from order sustaining a demurrer to the complaint for failure to state a cause of action, the judgment sustaining the demurrer becomes the law of the case, and plaintiff is precluded from thereafter amending his complaint.

APPEAL by plaintiff from *Fountain, Special Judge,* April Special Civil Term 1962 of NASH.

This action was instituted by the plaintiff on 26 September 1960 to recover for injuries allegedly sustained on 7 March 1960 in a collision between motor vehicles belonging to the parties.

On 13 September 1961, Judge Bundy, presiding at the September Civil Term of the Superior Court of Nash County, sustained a demurrer interposed by the defendant on the ground that the complaint failed to state a cause of action, and dismissed the action.

The plaintiff gave notice of appeal. Plaintiff was given sixty days in which to prepare and serve case on appeal and the defendant was given thirty days in which to file exceptions or serve countercase.

No case on appeal was served, and on 7 November 1961 the plaintiff, having paid the costs, informed the Clerk of the Superior Court of Nash County that he desired to take a nonsuit. The Clerk dismissed the action as of voluntary nonsuit.

This cause came on to be heard before Fountain, Special Judge, upon motion to set aside the judgment of voluntary nonsuit entered by the Clerk on 7 November 1961. His Honor vacated the Clerk's judgment.

On 5 May 1962 the defendant filed a motion in the Supreme Court to docket and dismiss the appeal taken by the plaintiff on 13 September 1961, which motion was allowed on 8 May 1962.

From the order vacating the judgment as of nonsuit taken before the Clerk of the Superior Court of Nash County on 7 November 1961, the plaintiff appeals, assigning error.

Gilliland & Clayton for appellant.
Spruill, Thorp, Trotter & Biggs for appellee.

PER CURIAM. We hold that where an appeal is taken from an order sustaining a demurrer on the ground that the complaint does not state a cause of action, the appellant may abandon his appeal; and a nonsuit entered by the Clerk of the Superior Court, at appellant's request, is tantamount to an abandonment of the appeal. *Leggett v. Smith-Douglass Company, Inc.,* 257 N.C. 646, 127 S.E. 2d 222.

The case on appeal not having been served within the time allowed, it was subject to dismissal in the Superior Court pursuant to G.S. 1-287.1, without moving to docket and dismiss in the Supreme Court.

However, when the appeal was abandoned or not perfected within the time allowed, the order of the court below sustaining the demurrer and dismissing the action became the law of the case and the plaintiff was thereby precluded from amending his complaint which ordinarily may be done when a demurrer is sustained without dismissing the action. *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409.

The order vacating the voluntary nonsuit is reversed.

Reversed.

STATE v. GRAHAM THOMAS NARRON.

(Filed 10 October 1962.)

Automobiles § 59—

The State's evidence tending to show that defendant operated his vehicle at nighttime without lights and collided on defendant's left side of the highway with a vehicle coming from the opposite direction, although controverted by defendant's evidence, *is held* sufficient to be submitted to the jury in a prosecution of defendant for the felonious slaying of a passenger in the other car fatally injured in the collision, the conflicting contentions being fairly submitted to the jury in the charge of the court.

APPEAL by defendant from *Paul, J.,* February 1962 Term of NASH.

The defendant was charged with the felonious slaying of Judy Anne Bryant. The evidence, taken in the light most favorable to the State, is sufficient to establish the following facts:

About 9:30 P.M., on September 20, 1961, a dark foggy night, the defendant, without turning on the lights, backed his 1953 Ford from a private drive into rural paved road No. 1150. After entering the highway he headed north and "wound it out." According to a passenger in the Narron automobile, that means putting the car into low gear, mashing down on the accelerator, and starting off fast. After driving down the highway from seventy-five to one hundred feet without lights, and having attained a speed of from twenty-five to thirty miles per hour, he collided with a 1938 Ford automobile going south in which the deceased, Judy Anne Bryant, was a passenger. The Bryant car was being driven with lights, on its side of the road, at about fifty miles per hour. Judy Anne Bryant was rendered unconscious in the collision and died a short time thereafter without having regained consciousness. The highway patrolman who investigated the accident found debris of glass and dirt three feet across the center line of the

Bryant side of the road. From this debris a streak in the pavement, cut by metal, went to the Bryant vehicle which was on the east side of the road with its back end in the ditch. The Narron vehicle, with the rear slightly on the shoulder, was on the west side of the highway. Both cars were damaged on the right front and right side. The road was eighteen feet wide with a faded center line. At the point of the impact the defendant's car was entering a curve to his right and the Bryant car was leaving the curve.

The jury returned a verdict of involuntary manslaughter. From the sentence imposed the defendant appealed.

Attorney General Bruton, Assistant Attorney General Bullock, for the State.

T. A. Burgess and Hill Yarborough, for defendant appellant.

PER CURIAM. It is not seriously controverted that the death of Judy Anne Bryant was caused by the collision. The evidence was sufficient to justify a finding that the collision was proximately caused by defendant's operation of his motor vehicle at night without lights and on the wrong side of the road at from twenty-five to thirty miles per hour. Such conduct violated statutes enacted for the safety of the traveling public and was incompatible with a proper regard for human life. The defendant's motion for nonsuit was properly overruled. His contentions, arising from his evidence that his lights were on and that he was traveling on his right side of the road, were fairly submitted to the jury in a charge in which we can find no prejudicial error. Defendant's assignments are overruled.

No error.

MACK TRUCKS, INC. v. W. B. LASATER.

(Filed 10 October 1962.)

APPEAL by defendant from *Sink, E. J.*, March 12, 1962, Special "A" Term, MECKLENBURG Superior Court.

This civil action originated as a claim and delivery proceeding instituted by the plaintiff to recover a specifically described Mack truck upon which it held a conditional sales contract. The respondent executed a replevy bond. By stipulation of the parties the only disputed issue of fact is the reasonable market value of the truck on

January 12, 1960, when the replevy bond was filed. The jury answered $4,500. Judgment was drawn, fixing the rights of the parties based on the jury's finding and taking into account stipulated matters. The defendant excepted and appealed.

Francis M. Fletcher, Jr., for plaintiff, appellee.
Neill McK. Ross; Boyle, Alexander & Wade, for defendant, appellant.

PER CURIAM. The parties stipulated the vehicle was reasonably worth $3,000 on November 14, 1960. The plaintiff introduced evidence the reasonable market value shortly before the seizure was $5,500. Apparently the defendant's son had been permitted to replevy the vehicle and retain possession until November 14, 1960. The defendant did not offer evidence. There is nothing in the record to indicate the vehicle was damaged or that its value changed other than by ordinary depreciation. The evidence was sufficient to support the verdict. The record disclosed

No error.

STATE v. CALVIN MEDLIN.

(Filed 10 October 1962.)

APPEAL by defendant from *Burgwyn, E. J.*, March-April Criminal Term 1962 of WILSON.

Criminal prosecution on warrant charging that defendant, on Sunday, November 5, 1961, at 12:30 a.m., on U.S. 301, in Wilson County, "did unlawfully and willfully operate a motor vehicle upon the public streets or highways while under the influence of some intoxicating liquor," in violation of G.S. § 20-138.

Upon trial *de novo* in superior court, on appeal by defendant from conviction and judgment in the General County Court of Wilson County, the jury returned a verdict of guilty, and judgment, "that the defendant pay a fine of $100.00 and costs," was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Assistant Attorney General Jones for the State.
Robert A. Farris and Allen G. Thomas for defendant appellant.

PER CURIAM. The evidence, when considered in the light most favorable to the State, was sufficient to warrant submission to the jury and to support the verdict and judgment. Indeed, this is not challenged by defendant. Defendant assigns as error (1) certain rulings, questions and remarks of the presiding judge during the taking of evidence, and (2) certain portions of the court's instructions to the jury. Each of defendant's assignments has received careful consideration. However, none discloses prejudicial error and particular discussion thereof is deemed unnecessary. Hence, defendant's assignments are overruled.

No error.

THOMAS E. HODGES v. ANNIE J. HODGES.

(Filed 17 October 1962.)

1. Appeal and Error §§ 1, 60—

Where the cause of action stated in the complaint and the decision on appeal are both predicated on the theory of a resulting trust and not on an express trust, plaintiff may not except to the findings on the second trial on the ground that they entitle plaintiff to recover on an express trust, since recovery must be based on the theory of trial and since the decision on the former appeal constitutes the law of the case.

2. Trial § 57—

In a trial by the court under agreement of the parties the weight, credibility, and probative force of the testimony is addressed to the court, and the court's findings of fact are conclusive if supported by competent evidence, even though the evidence might sustain a finding to the contrary.

3. Trusts § 13—

In a trial by the court under agreement of the parties, findings that the property against which plaintiff was asserting a resulting trust was purchased prior to the receipt by the resulting trustee of the proceeds of sale of other property upon which plaintiff had an equitable claim, support the court's conclusion that plaintiff is not entitled to a resulting trust against the property in question, it being necessary to the doctrine of trust pursuit that plaintiff show that money in equity belonging to him was used in the purchase of the very property against which the resulting trust is asserted.

4. Appeal and Error § 49—

Even though a conclusion of law is denominated by the trial court a finding of fact, such conclusion will not be disturbed when it is the

sole legal conclusion that may be drawn from the other findings of fact which are supported by adequate and competent evidence.

5. Same; Trial § 56—

In a trial by the court under agreement of the parties, the fact that the court may have admitted certain incompetent testimony is not ground for a new trial when the fact to which the evidence is addressed is found in favor of appellant.

6. Evidence § 11—

Testimony by a party as to a conversation between decedent and a third person does not come within the purview of G.S. 8-51, since such testimony does not relate to a personal transaction or communication between the witness and the decedent.

APPEAL by plaintiff from *Cowper, J.*, May 1962 Term of NEW HANOVER.

Civil action to impose a trust for plaintiff's benefit on a house and lot on Twenty-First Street in the city of Wilmington conveyed by W. P. Sammons *et ux.* to B. B. Hodges, father of plaintiff by his first wife, by deed recorded on 27 August 1948. B. B. Hodges, deceased, by his last will and testament, dated 14 February 1959 and duly probated 5 December 1959, devised this house and lot to defendant, his widow and fifth and last wife.

A former appeal in this case was heard at the Spring Term 1962. Our decision in the case is reported in 256 N.C. 536, 124 S.E. 2d 524. In this decision the allegations of the complaint (amended or substituted complaint) are summarized, and need not be reported here, as an examination of the record on the former appeal and of the record on the present appeal shows that plaintiff's pleading in each appeal is identical. However, we summarize one additional allegation to the effect that B. B. Hodges, in violation of his trust agreement, by his last will devised the house and lot on Twenty-First Street to defendant. Also in this decision the allegations of the answer are summarized, and need not be repeated.

When the case came on to be heard before Judge Cowper the parties, pursuant to the provisions of G.S. 1-184 *et seq.*, waived a trial by jury. Judge Cowper after hearing the evidence made eight, what he terms, findings of fact, as follows in summary:

FINDINGS OF FACT

One. By deed dated 12 December 1946 B. B. Hodges conveyed property identified as 1013 South Sixth Street in the city of Wilmington to his son, the plaintiff, reserving therein a life estate.

Two. On or about 26 March 1947 B. B. Hodges agreed with plaintiff that if plaintiff conveyed to him his remainder interest in the

property at 1013 South Sixth Street, he would sell it and buy other property, and take title under the same trusts, and that it would belong to plaintiff after his death. Whereupon, plaintiff by deed dated 26 March 1947 conveyed his remainder interest in this property to B. B. Hodges.

Three. B. B. Hodges, pursuant to an agreement made by him on 14 February 1949 to sell the 1013 South Sixth Street property to Alvin H. Hankins, and wife and daughter, by deed dated 26 February 1949 conveyed this property to Alvin H. Hankins, wife and daughter for a purchase price of $3,800.00 to be paid as follows: $2,100.00 to be paid upon the delivery of the deed from the proceeds of a first mortgage or deed of trust to Co-operative Savings and Loan Association of Wilmington, and the balance to be paid $300.00 on 4 March 1949, $300.00 on 31 May 1949, $300.00 on 1 November 1949, $100.00 on 4 February 1949 (sic), together with a second mortgage payable in installments of $10.00 per month.

Four. A trust in favor of plaintiff was imposed upon the proceeds derived from the sale of the property at 1013 South Sixth Street.

Five. By deed duly executed and recorded on 27 August 1948 B. B. Hodges received title to property located at 313 North Twenty-First Street in the city of Wilmington from W. P. Sammons *et ux.*, the terms of the sale being a cash purchase price of $5,900.00.

Six. By deed dated and recorded 29 May 1953 B. B. Hodges conveyed to plaintiff property located at 505 South Fifth Street in the city of Wilmington, reserving to himself a life estate therein.

Seven. B. B. Hodges died, and his will was duly probated on 5 December 1959. In his last will he devised the property situate at 313 North Twenty-First Street to defendant, his widow. In his will he stated he had theretofore conveyed to plaintiff property located at 505 South Fifth Street in the city of Wilmington, and was making no further provision for him.

Eight. Plaintiff has failed to show by clear, cogent and convincing evidence that any funds derived from the sale of the 1013 South Sixth Street property were invested in the property located at 313 North Twenty-First Street in the city of Wilmington by B. B. Hodges.

Whereupon Judge Cowper entered a judgment, based upon what he calls his findings of fact, that plaintiff is not entitled to an equitable lien by virtue of a resulting trust in the property located at 313 North Twenty-First Street in the city of Wilmington, and that he is not the owner of, nor entitled to the possession of, this property.

From this judgment, plaintiff appeals to the Supreme Court.

Rountree and Clark and Isaac C. Wright for plaintiff appellant.
Louis A. Burney and Elbert A. Brown for defendant appellee.

PARKER, J. In our decision on the first appeal of this case we ordered a new trial for error in the charge to the jury. In our former decision in this case the Court speaking by *Rodman, J.*, said:

> "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?
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> * * * * * * * * *
>
> "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. [Citing authority.]
>
> "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."

This statement in the opinion is the law of the case, *Pulley v. Pulley*, 256 N.C. 600, 124 S.E. 2d 571, and it is a correct statement of the applicable law here.

Judge Cowper made these material findings of fact in his findings of fact No. 2 and No. 3: One. Plaintiff by deed dated 26 March 1947 conveyed to B. B. Hodges, his father, his remainder interest in the property situate at 1013 South Sixth Street in the city of Wilmington, pursuant to an agreement between them that B. B. Hodges would sell this property, and buy other property with the proceeds and take title to it in B. B. Hodges for life, remainder in fee to plaintiff, his son. The basis of this finding of fact is the deed from plaintiff dated 26 March 1947 to B. B. Hodges, offered in evidence by plaintiff, and the testimony of Mrs. Thelma Hodges, plaintiff's wife and a witness for him. Two. The agreement between plaintiff and his father was consummated, so far as the sale of the South Sixth Street property was concerned, by B. B. Hodges conveying this property to Alvin H.

Hankins, wife and daughter, by deed dated 26 February 1949. The basis of this finding of fact is the deed from B. B. Hodges dated 26 February 1949 to Hankins *et ux.*, offered in evidence by plaintiff. The deed from B. B. Hodges to Hankins *et ux.* was made pursuant to an agreement between Hodges and Hankins dated on or about 14 February 1949. This portion of the finding of fact is supported by the testimony of Alvin H. Hankins, a witness for plaintiff. The third finding of fact sets forth with particularity how the purchase price was to be paid by Hankins. This portion of the finding of fact is supported by the testimony of plaintiff's witness Alvin H. Hankins.

Plaintiff assigns as error the second finding of fact and contends that under the facts set forth in this finding of fact an express trust was created in the Twenty-First Street property. Under the allegations of plaintiff's complaint there was no express trust on the Twenty-First Street property, but a resulting trust imposed upon it by equity. And further, the law of the case as stated in the opinion on the first appeal is that if plaintiff is to prevail in imposing a trust on the Twenty-First Street property, it must be on the theory of a resulting trust.

The second finding of fact is supported by abundant, competent legal evidence, and plaintiff's assignment of error to it is overruled. Plaintiff does not challenge by assignment of error the third finding of fact, which is supported by abundant, competent legal evidence.

Judge Cowper's findings of fact, based upon and supported by plaintiff's evidence, establish clearly and positively and unequivocally that there was no trust money received by B. B. Hodges from the sale of the South Sixth Street property prior to 26 February 1949.

Judge Cowper further found as a fact that by deed duly executed and recorded on 27 August 1948 B. B. Hodges received title to property located at 313 North Twenty-First Street in the city of Wilmington from W. P. Sammons *et ux.*, the terms of the sale being a cash purchase price of $5,900.00. This finding of fact is not challenged by plaintiff in his assignments of error. The basis for a portion of this finding of fact is the deed from W. P. Sammons *et ux.* to B. B. Hodges recorded 27 August 1948, offered by plaintiff. A portion of this finding of fact is supported by the testimony on cross-examination of Mrs. Gretta Hodges, a fourth wife of B. B. Hodges and a witness for plaintiff, as follows: "I do know he [B. B. Hodges] had War Bonds at the time I married him; he had a metal box and it was almost full of War Bonds.* * *He [B. B. Hodges] paid Mr. and Mrs. Sammons all the purchase price when he bought it. He had War Bonds, that is where he got the money. No, he did not need the money from Tommie's house, but he repaid himself for it* * *."

It is true that Mrs. Gretta Hodges testified on direct examination as follows: "He told me at the time he bought the property at 313 North 21st Street that he was going to sell the house on Sixth Street. He had a colored man by the name of Hankins who wanted to buy it. He sold the property at 1013 South Sixth Street and told me at that time he was going to use the money from this sale to buy the property at 313 North 21st Street, but he didn't have enough money to pay for it cash. He told me he had a bank note this colored man was giving him to pay off the payments on that property, and that money was to purchase the home, so Thomas could live there after his death; that was his home on Sixth Street.* * *Mr. B. B. Hodges sold the Sixth Street property in Wilmington to a man named Hankins, a colored man. The funds he derived from that sale went toward the Princess Street property; I know that." Mrs. Thelma Hodges, wife of plaintiff and a witness for him, testified on direct examination: "Mr. B. B. Hodges told Tom that the money to purchase the 21st Street property was the money he got from the Sixth Street property and he was putting it in the 21st Street home."

The determination of what part of the conflicting testimony of Mrs. Gretta Hodges and of Mrs. Thelma Hodges, in respect to the source of the money which B. B. Hodges used in paying the purchase price of the Twenty-First Street property and as to whether or not he paid for it in cash, was accurate and credible, and what part was inaccurate, was a question addressed to Judge Cowper — a trial by jury having been waived by the parties.

The waiver of trial by jury invested Judge Cowper with the dual capacity of judge and juror. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114. Consequently it was in Judge Cowper's province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case. It was Judge Cowper's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it is entitled to. *Trust Co. v. Lumber Co.*, 221 N.C. 89, 19 S.E. 2d 138; 89 C.J.S., Trial, sec. 593; 53 Am. Jur., Trial, sec. 1123.

When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. *Turnage Co. v. Morton,* 240 N.C. 94, 81 S.E. 2d 135.

In *Main Realty Co. v. Blackstone Valley Gas & E. Co.*, 59 R.I. 29, 193 A. 879, 112 A.L.R. 744, the Court said: "In reaching his conclusions, the trial justice had the benefit of seeing and hearing the wit-

nesses. He also was entitled to consider all the evidence and to draw therefrom such inferences as were reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom."

Since Judge Cowper found that B. B. Hodges had no trust funds derived from the sale of the South Sixth Street property on 26 February 1949 in August 1948 when he purchased the Twenty-First Street property, that he paid cash for the Twenty-First Street property, which finding is supported by competent legal evidence of plaintiff's witness Mrs. Gretta Hodges on cross-examination, and that B. B. Hodges did not have any trust funds derived from the sale of the South Sixth Street property prior to February 1949, it necessarily follows that no trust money derived by B. B. Hodges from the sale of the South Sixth Street property went into the purchase of the Twenty-First Street property. All these findings are supported by competent legal evidence. Therefore, no resulting trust could be imposed by plaintiff by operation of equity on the Twenty-First Street property.

Plaintiff assigns as error Judge Cowper's so-called eighth finding of fact, that plaintiff has failed to show by clear, cogent and convincing evidence that any funds derived from the sale of the 1013 South Sixth Street property were invested in the property located at 313 North Twenty-First Street in the city of Wilmington by B. B. Hodges. This assignment of error is overruled. This, in our opinion, is not a finding of fact, but is in the nature of a legal conclusion of Judge Cowper based upon his findings of fact. *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859; 53 Am. Jur., Trial, sec. 1132; 89 C.J.S., Trial, sec. 609. The facts found by Judge Cowper based upon adequate legal evidence lead inevitably to this conclusion made by Judge Cowper, and we consider the words used in the conclusion "by clear, cogent and convincing evidence" mere surplusage. No other conclusion is logically possible so long as Judge Cowper's findings of fact stand.

Plaintiff assigns as error the admission in evidence, over his objection, of Item Four of the will of B. B. Hodges, which is as follows: "I make no provision for my son, Thomas E. Hodges, Sr. (sic), because I have already conveyed to him a house and lot at No. 505 South Fifth Street, Wilmington, N. C."

Plaintiff contends this was an *ex parte* statement denying the trust by the trustee and incompetent against the *cestui que* trust. It is manifest that Judge Cowper did not consider this Item in the will as a statement denying the trust by B. B. Hodges in making his findings of fact, because his fourth finding of fact is that a trust in favor of plaintiff was imposed upon the proceeds derived from the sale of the

property at 1013 South Sixth Street. Its admission in evidence, if incompetent, was harmless. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668, *certiorari* denied 358 U.S. 888, 3 L Ed. 2nd 115, petition for rehearing denied 358 U.S. 938, 3 L. Ed. 2nd 310. This assignment of error is overruled. This Item in the will might well be considered as a statement by B. B. Hodges of the reason why he left his son nothing in his will.

Mrs. Thelma Hodges, wife of plaintiff and a witness for him, testified on cross-examination: "After the death of Mr. B. B. Hodges, Mrs. Annie Hodges gave me a deed for the property located at 505 South Fifth Street executed to my husband, and he owns it now, and it came from his father." Mrs. Annie Hodges testified to the same effect. Plaintiff states in his brief that this presents the question: Is a deed valid until delivered? The requisites for the valid delivery of a deed are stated in *Ballard v. Ballard,* 230 N.C. 629, 55 S. E. 2d 316. Plaintiff in his complaint does not allege this deed is void for nondelivery, and does not seek to have it declared void. This question does not arise here. Further, the parties stipulated "that the real property at 505 S. 5th St. at the time of the conveyance to T. E. Hodges by B. B. Hodges had a fair market value of $4,500.00." Surely, plaintiff has no desire to give up this property because of a nondelivery of the deed, when according to the record before us no one is challenging his right to own it on the ground his deed is void for nondelivery.

Plaintiff assigns as error that defendant was permitted, over his objection, to answer the question, "Will you tell us exactly what was said and whether or not the conversation took place that Hankins has related here between him and your husband?" as follows: "It did not. The entire conversation centered around and concerned final payment of this note. There was no mention made of the 21st Street property at that time." Plaintiff contends this testimony was admitted in violation of G.S. 8-51. Plaintiff called Hankins to the stand as a witness in his behalf, and examined him as to a conversation between him and B. B. Hodges. Defendant was present at the conversation, and testified as to her version of it. Judge Ervin in *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542, in an analysis of G.S. 8-51, states: "This statute does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:* * *4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?" The challenged testimony of defendant did not concern a personal transaction or communication between her and B. B. Hodges, therefore it is not excluded by G.S. 8-51. This assignment of error is overruled.

All the plaintiff's assignments of error, whether discussed above or not, have been carefully examined and all are overruled. Judge Cowper's findings of fact are abundantly supported by competent legal evidence and are in substantial compliance with the requirements of G.S. 1-185, and his findings of fact support his conclusion, and these in turn support his judgment. No error of law appears upon the face of the record proper. The judgment below is

Affirmed.

FRANK H. COTHRAN, JR. v. AKERS MOTOR LINES, INC.

(Filed 17 October 1962.)

1. Ejectment § 10—

Where plaintiff introduces in evidence a deed conveying to him the land in controversy more than seven years prior to the institution of the action, but fails to introduce any evidence of actual possession by him under the deed or that he and defendant claim under a common source, nonsuit is proper, since plaintiff in ejectment has the burden of showing title in himself and the right to possession under such title.

2. Adverse Possession §§ 2, 23—

In order to establish title by adverse possession, plaintiff must show his actual physical possession and that such possession was so notorious as to put the true owner on notice of his claim, and testimony by plaintiff to the effect that he owned the land and certain buildings thereon, without evidence of actual occupancy of such buildings by himself or his tenants, and that he frequently visited the property, without testimony as to what he did when visiting the property, is insufficient to establish open and hostile possession necessary to ripen title in himself.

APPEAL by plaintiff from *Fountain, S. J.*, June 4, 1962 Special "A" Civil term of MECKLENBURG.

This action was begun by summons issued 8 January 1960. Plaintiff alleges: He is the owner of a tract of land, specifically described, on the east side of Thrift Belt or Little Rock Road in Mecklenburg County. Its western boundary is the center of the road. Defendant wrongfully dug a ditch on the land in which it laid a four-inch iron pipe for the transmission of sewage into Paw Creek, a stream crossing plaintiff's land. The maintenance and operation of said sewage line and system is a continuing trespass and nuisance. He prays for a mandatory injunction directing defendant to remove the pipe from his property.

Defendant denied plaintiff was the owner of the land described in the complaint. It admitted it had laid a "four-inch cast iron pressure pipe for carrying treated sewage along the easterly shoulder of the Little Rock Road approximately three to four feet from the edge of the paved portion of said road and approximately three and one-half feet underground, all within the aforesaid State Highway right of way. . ." It alleged it had a right to lay and maintain the pipe line. It denied plaintiff was entitled to equitable relief, asserting he had an adequate remedy at law for wrongs, if any, committed.

The court sustained defendant's motion to nonsuit.

Richard M. Welling for plaintiff appellant.

L. B. Hollowell and Helms, Mulliss, McMillan & Johnston by Fred B. Helms for defendant appellee.

RODMAN, J. "Ejectment being a possessory action, it lies only where the lessor of the plaintiff could rightfully enter, and the title to support a recovery must therefore be inseparably connected with the right of possession, and must have this ingredient at least. The title of the defendant is entirely out of view. It is an old maxim that a man must recover by the strength of his own title in ejectment, not in consequence of any weakness in that of his adversary. Every plaintiff in ejectment, says *Lord Mansfield*, in *Atkins v. Hord*, must show a right of possession, as well as a right of property. . ." That was the argument General Davie made in 1791 in the case of *Strudwick v. Shaw*, 2 N.C. 5. The court accepted Davie's statement of the law and nonsuited plaintiff.

Higgins, J., said in *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540, decided in 1956: "In this, as in all ejectment cases, the plaintiffs must recover on the strength of their own title."

In the period intervening between the decisions in *Strudwick v. Shaw* and *Hayes v. Ricard* there has never been a departure from the rule that plaintiff, when his title is denied, must suffer a nonsuit if he fails to show *prima facie* his good title.

Avery, J., outlined in *Mobley v. Griffin*, 104 N.C. 112, the various ways by which a party might prove title. That case was decided in 1889. Because of its clarity and simplicity, it has been cited more than 100 times. See *Shepard's Citations*. What was then said accurately summarizes the law today, *Tripp v. Keais*, 255 N.C. 404, 121 S.E. 2d 596; *Taylor v. Scott*, 255 N.C. 484, 122 S.E. 2d 57; except it is not now necessary to prove the sovereign has parted with its title when not a party to the action. G.S. 1-36.

Plaintiff made no effort to show title by estoppel or that he and

defendant claimed from a common source. He introduced a deed to himself dated in May 1951. The description in that deed is identical with the description in the complaint. It begins in the center of the Thrift Belt Road and proceeds by specific course and distance to embrace the area described in the complaint.

The deed is color of title; but color of title is not sufficient to make a *prima facie* case of title. The color must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. G.S. 1-38.

It was said in *Grant v. Winborne,* 3 N.C. 56, decided in 1798: " [I]t was the intent of the act (statute of limitations) that where a man settled upon and improved lands upon the supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession. Hence arises the necessity for a color of title; for if he has no such color or pretense of title, he cannot suppose the lands are his own, and he settles upon them in his own wrong. The law has fixed the term of seven years both for the benefit of the prior patentee and the settler, that the latter might not be disturbed after that time, and in that time the prior patentee might obtain notice of the adverse claim and assert his own right. Hence arises the necessity that the possession should be notorious and public, and, in order to make it so, that the adverse claimant should either possess it in person or by his slaves, servants or tenants. . ." The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. *Andrews v. Mulford,* 2 N.C. 311; *Simpson v. Blount,* 14 N.C. 34; *Williams v. Buchanan,* 23 N.C. 535; *Gilchrist v. McLaughlin,* 29 N.C. 310; *Loftin v. Cobb,* 46 N.C. 406; *Gudger v. Hensley,* 82 N.C. 481; *Bland v. Beasley,* 145 N.C. 168; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347; *Holmes v. Carr,* 172 N.C. 213, 90 S.E. 152; *Nichols v. York,* 219 N.C. 262, 13 S.E. 2d 565; *Brown v. Hurley,* 243 N.C. 138, 90 S.E. 2d 324.

The only evidence in any way indicative of possession comes from plaintiff. On both direct and cross-examination he refers to the land in controversy as "my land," but this is no evidence of possession. It was a mere means of identifying the land in controversy and plaintiff's assertion of title.

The strongest statements to show adverse possession appear on cross-examination. Plaintiff there testified: "My property on the southerly side of Paw Creek is vacant. On the northerly side of Paw Creek I have a tenant house there, four rooms and another building with two rooms, a deep well, the works. South of Paw Creek there are no improvements on my property. That's where I was going to

build me a house, nothing over there." He gave no testimony tending to show that either of the buildings to which he referred were or had been occupied since he purchased in 1951. He also testified: "Since the sewer line has been there I have not been out there much, I've been so sick of it. When I was figuring on building a house out there I visited very often. I go out there probably at least once a month. Sometimes I get out and walk over the property." He does not tell what he did when visiting the property before the sewer line was constructed nor how often he went there.

Appellee's brief states the question involved on the appeal and pointedly asks if plaintiff, when his title is denied, can maintain his action without proof of ownership. Three pages of appellee's brief are used to show that this question must be answered in the negative. It cites a number of cases, including some of those cited in this opinion. Notwithstanding appellee's position that plaintiff is not entitled to recover unless and until he has shown that he is the owner of the land in controversy, appellant, in his opening statement of facts, says: "The plaintiff since 1951 has owned in fee simple a tract of land on the easterly side of Little Rock Road in Berryhill Township, Mecklenburg County, North Carolina." He makes no argument that there is evidence from which a jury could find plaintiff owned the land described in the complaint.

Since plaintiff has failed to make a *prima facie* showing of title to the land in controversy, it is not necessary to discuss the other questions debated in the briefs.

Affirmed.

JULIUS AMMONS, EMPLOYEE, APPELLANT v. Z. A. SNEEDEN'S SONS, INC., EMPLOYER, AND U. S. FIRE INSURANCE COMPANY, CARRIER APPELLEES.

(Filed 17 October 1962.)

1. Master and Servant § 74—

The provisions of G.S. 97-47 that claim for additional compensation for change of conditions must be filed within twelve months after final payment of compensation under a prior award, *is held* not jurisdictional but provides a plea in bar which may be asserted by the employer, and the employer may be estopped to assert such bar when the employee's delay has been induced by acts, representations, or conduct on the part of the employer.

2. Same—

The evidence tended to show that an employee, dealing solely with

the employer, signed a final settlement for compensation for temporary disability, that within twelve months thereafter the employee gave the adjustor for the employer's insurance carrier notice of change of condition, based upon a subsequent medical examination, that the adjustor promised to take the matter up but failed to do so, and that the employee filed claim with the Industrial Commission shortly after the expiration of the twelve months' period. *Held:* The evidence presents for the determination of the Industrial Commission the question whether the employer is estopped to plead the bar of G.S. 97-47.

3. Master and Servant § 91; Appeal and Error § 49—

Where the award of the Industrial Commission is based upon a misapprehension of the applicable law, the cause must be remanded in order that the Commission may hear the evidence and find the facts in the light of the true legal principles.

APPEAL by plaintiff, employee, from *Edward B. Clark, S.J.*, January 8, 1962, Civil Term, NEW HANOVER Superior Court.

This proceeding originated as a compensation claim. On December 22, 1959, the claimant sustained an injury by accident while he was at work for Z. A. Sneeden's Sons, Inc. The U. S. Fire Insurance Company was the insurance carrier on the risk.

On December 30, 1959, Dr. Mebane certified to the North Carolina Industrial Commission that the employee would be able to return to work on January 15, 1960; that the injury would not result in permanant disability. On January 11, 1960, Dr. Mebane filed with the Commission for its approval an expense account for treatment, and again certified the claimant had not sustained permanent disability.

Claimant returned to work on January 12, 1960. The following day the parties entered into an agreement on the Commission's form No. 21, pursuant to which the employer paid claimant $40.00 temporary total disability to January 12, 1960. On January 13, 1960, the claimant filed a closing receipt that contained the following: "I understand that my compensation payments stop when I sign this receipt. I also understand that if my condition changes for the worse, I can claim further compensation only by notifying the Industrial Commission within one year from the date I receive my last compensation payment." Neither the claim for compensation nor the closing agreement referred to permanent disability. However, the blanks in the receipt for information concerning temporary partial, and permanent partial disability were left unanswered.

On February 1, 1960, the job on which the claimant worked was terminated. The claimant secured work from another employer. He continued to have pain, and on November 20, 1960, again consulted Dr. Mebane who wrote to the insurance carrier advising that the plaintiff needed further medical treatment. On December 7, 1960, the insurance

carrier advised: "I am going to refer this matter to Mr. Robert Triplett of . . . We will contact you in the near future for further information."

Claimant consulted Mr. Cline, adjuster for the carrier, who said he had read the letter from Dr. Mebane. "He would look into it . . . He said I would hear from him, and I never heard anything." Not having heard from the carrier, the plaintiff, for the first time, secured counsel who on February 13, 1961, requested the Industrial Commission to reopen the case "to determine the amount of temporary total disability and the amount of permanent disability." The employer and the insurance carrier objected upon the ground the claimant had not notified the Commission within one year from the date of the closing agreement and the last payment of compensation as required by G.S. 97-47.

At the hearing, Dr. Mebane testified that the claimant, as disclosed by his further examination, had suffered a 15 per cent permanent disability as a result of his injury. The Hearing Commissioner and the Full Commission upon review refused to reopen the claim. The latter found:

> "This case came on for review before the Full Commission in Raleigh, North Carolina, on October 9, 1961. Counsel for both the plaintiff and defendants were present and ably set forth their contentions.
>
> "After the Full Commission carefully reviewed all of the competent evidence, findings of fact and conclusions of law made by the Hearing Deputy Commissioner, it is of the opinion, from reviewing the evidence, that the plaintiff was lulled into a sense of security by the carrier's adjuster in sending the plaintiff back for further medical treatment, etc. Even if the plaintiff was lulled into a sense of security, that does not relieve him of his responsibility under the law of filing his claim within the statutory period."

Upon appeal, the Superior Court of New Hanover County approved the order of the Full Commission. The claimant appealed.

Addison Hewlett, Jr., for plaintiff, appellant.

Ruark, Young, Moore & Henderson, by B. T. Henderson, II, for defendants, appellees.

HIGGINS, J. This case presents the question whether failure of the claimant to notify the Industrial Commission of a change in condition within 12 months from settlement deprives the Commission of jurisdiction; or whether the delay is intended as a bar to further proceedings. This Court, considering G.S. 97-47, held in *Lee v. Rose's*, 205 N.C.

310, 171 S.E. 87: "The statute is plain and unambiguous, and no reason occurs why it should not be enforced according to the plain provisions." What if there is good reason? Suppose an injured employee is under disability and cannot give notice?

The period within which the claim may be asserted goes neither to the extent of the injury nor to the amount of the compensation. The statute merely fixes a date after which the claim is barred.

In this particular case is the employer estopped to plead as its defense the failure of the claimant to notify the Commission? The claimant was without counsel. He settled by agreement with the employer for a temporary total disability of eight days. The settlement was made at the time the period of disability ended. The Workmen's Compensation Act, G.S. 97-47, required the employer to report the voluntary settlement to the Industrial Commission for its approval. The record does not indicate the Commission ever saw or heard from the claimant. He, having dealt exclusively with the employer, and having well within the 12 months' period disclosed his change in condition, should the employer not have anticipated the claimant would rely on it for a fair settlement, or its giving any notice which would keep the negotiations alive? The statute, G.S. 97-47, provides the Commission may review an award upon its own motion or upon the application of any party in interest. May the employer undertake the review, promise a report, delay it until the one year has expired, and then be permitted to interpose a plea in bar? May he lull the claimant into a sense of security and then say, you have lost the right while you waited on me?

We do not agree that a failure to assert a change in condition within 12 months is jurisdictional. Delay for more than one year may be asserted as a plea in bar, but the party interposing and relying on it may be estopped to assert it by inequitable conduct. "The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Nowell v. A & P Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889.

The case of *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E. 2d 777, is not in conflict with, but supports the views here expressed: "It must not be understood that we hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases. We merely hold that the facts here appearing, including those found by the full Commission, are insufficient to invoke the doctrine in this case." (citing authorities)

The showing of equitable estoppel was sufficient to require the Commission to hear evidence, find the facts, and upon them to determine whether the plea in bar should be sustained or set aside. Sustaining the plea will close the case. Overruling it will require the Commission, as the fact-finding body, to hear evidence and determine whether for "change in condition" a further award is justified and, if so, the amount thereof. In assuming it did not have power upon a proper finding to reopen the case, the Commission acted under a misapprehension of law. For that reason its order is set aside.

The judgment of the Superior Court is reversed. The case will be remanded to the North Carolina Industrial Commission for disposition in accordance with this opinion.

Reversed.

TOWN OF HUDSON, A MUNICIPAL CORPORATION v.
O. P. FOX AND WIFE, IDA FOX.

(Filed 17 October 1962.)

Courts § 6—

Where order of the clerk in condemnation proceedings is appealed to the Superior Court, the Superior Court acquires jurisdiction of the whole proceeding, and has the discretionary power to set aside an order of the clerk appointing commissioners to assess the damages when there is no evidence tending to show that respondents received any notice of petitioner's amendment to the petition, the order appointing the commissioners, or their report.

APPEAL by petitioner from *Froneberger, J.*, March-April Term 1962 of CALDWELL.

This is a condemnation proceeding instituted by the Town of Hudson, a municipal corporation, before the Clerk of the Superior Court of Caldwell County, North Carolina, to condemn a 30-foot right of way for a street in said Town of Hudson. The summons was issued on 5 May 1961 and served on the respondents on 10 May 1961.

Respondents filed a motion with said Clerk on 13 May 1961, requesting that a survey be made of the area proposed to be taken for street purposes. The Clerk on 13 June 1961 ordered that such survey be made and that "the results be filed with him by June 19, 1961."

On 19 June 1961, the petitioner filed an amendment to the original petition, amending the description and showing by metes and bounds the roadway to be condemned.

On 18 August 1961, the said Clerk, on motion of the petitioner, signed an order appointing three commissioners to go upon the premises and assess the damages and benefits to the respondents. No answer to the petition had been filed. It appears from the record that the Clerk, after signing the order appointing the commissioners, did not notify the commissioners of their appointment until he had talked with the attorneys who had made the motion on behalf of the respondents for a survey. These attorneys, who live in Hickory, North Carolina, informed the Clerk that they were no longer interested in the proceedings. When this conversation took place is not disclosed. The commissioners were thereafter notified of their appointment and were qualified by taking the required oath before the Clerk on 23 January 1962 and made their report on the same day.

The commissioners assessed the damages at $180.00 and estimated the special benefits enhanced the value of respondents' property in the sum of $240.00

On 5 February 1962 the respondents filed a motion in the Superior Court to set aside the order of the Clerk entered on 18 August 1961, on the ground that the respondents received no notice that the requested survey had been made; that they intended to file an answer but no time was set for filing such answer after the survey was made.

His Honor, presiding at the March-April Term 1962 of the Superior Court of Caldwell County, heard the above motion, the answer thereto, and the argument of counsel, and found that good cause existed for the court to set aside said order; therefore, the trial judge set aside the order entered by the Clerk on 18 August 1961, in his discretion, and allowed the respondents thirty days from 5 April 1962 to answer or otherwise plead to the petition.

The petitioner appeals to the Supreme Court, assigning error.

L. H. Wall, A. R. Crisp for petitioner appellant.
Hugh M. Wilson for respondents appellee.

DENNY, C.J. The petitioner assigns as error the judgment entered on 5 April 1962, setting aside the order of the Clerk of the Superior Court entered on 18 August 1961. The petitioner argues and contends that the Superior Court was without jurisdiction to set the Clerk's order aside.

In the case of *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74, this Court, speaking through Barnhill, J., later, C.J., said: "The Clerk is but a part of the Superior Court. *Williams v. Dunn,* 158 N.C. 399, 74 S.E. 99; *Bynum v. Bank,* 219 N.C. 109, 12 S.E. 2d 898. Whenever a special proceeding begun before him is, for any ground whatever,

sent to the Superior Court before the judge, the judge has jurisdiction. G.S. 1-276; *McDaniel v. Leggett*, 224 N.C. 806, 32 S.E. 2d 602, and cases cited."

Likewise, in *Perry v. Bassenger*, 219 N.C. 838, 15 S.E. 2d 365, Stacy, C.J., said: "The jurisdiction of the Superior Court is not derivative in matters of this kind (a petition for partition) originating before the clerk. He is but a part of the same court. *Cf. Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209. For this reason it is provided by C.S. 637 (now G.S. 1-276), that whenever a civil action or special proceeding begun before the clerk of a Superior Court is 'for any ground whatever' sent to the Superior Court before the judge, the judge shall have juisdiction; and it is his duty, upon request of either party, to proceed to hear and determine all matters in controversy in such proceeding. It has been held that even when the proceeding originally had before the clerk is void for want of jurisdiction, the Superior Court may yet proceed in the matter. *Williams v. Dunn*, 158 N.C. 399, 74 S.E. 99; *In re Anderson*, 132 N.C. 243, 43 S.E. 649."

There is nothing in this record tending to show that the respondents ever received any notice whatever with respect to the survey, the amendment to the petition, the order appointing the commissioners, or the report of the commissioners. Whether this was due to the fault of the attorneys, who filed the original request for the survey, to notify respondents, does not appear. Even so, the order was set aside in the discretion of the trial judge and no abuse of his discretion has been shown or even suggested.

The petitioner's assignment of error is overruled and the judgment of the court below is

Affirmed.

JOSEPH KLEINFELDT v.
SHONEY'S OF CHARLOTTE, INC., A CORPORATION.

(Filed 17 October 1962.)

1. Appeal and Error § 19—

An assignment of error must present within itself the alleged error complained of, and an assignment of error and an exception to a numbered finding of the court, without disclosing the nature of such finding, is insufficient.

2. Process § 4; Judgments § 19—

Affidavits of two persons are sufficient to support the finding of the

court that no copy of the summons was delivered to or served upon defendant.

3. Judgments § 19—

Where there is no service or waiver of service of summons, a judgment rendered in the action is void for want of jurisdiction, and may be set aside upon motion without a showing of a meritorious defense notwithstanding that such judgment is by default for want of an answer.

4. Appeal and Error § 49—

Where the findings of fact support the conclusions of law and the conclusions of law support the judgment, the judgment must be affirmed, no error appearing on the face of the record.

APPEAL by plaintiff from *Pittman, S. J.*, 4 June 1962 Special Civil B Term of MECKLENBURG.

Civil action to recover damages for personal injuries and damage to an automobile allegedly caused by the negligence of the defendant — heard upon a motion by defendant to set aside a judgment by default and inquiry against it.

Judge Pittman heard the motion upon affidavits offered by the parties. He made the following findings of fact:

One. The action was commenced on 12 March 1962 in the superior court of Mecklenburg County by issuance of summons directed to the sheriff of the county.

Two. On 13 March 1962 a copy of the complaint was delivered to Paul Gocke, assistant manager of a restaurant operated by defendant on Morehead Street in the city of Charlotte.

Three. The pages of the complaint were composed of white carbon copies of the pages of the original complaint and were fastened together, but through inadvertence a copy of the summons in the case was not attached to the copy of the complaint when it was delivered to Paul Gocke.

Four. Paul Gocke a day or two later delivered all the papers which had been given to him to W. Terry Young, manager of defendant's restaurant.

Five. No copy of the summons in the case was delivered to or served upon defendant prior to the entry of the judgment by default and inquiry against it.

Six. In Mecklenburg County copies of summonses are printed on yellow colored forms. None of the papers delivered to Paul Gocke were printed on yellow colored forms.

Based upon his findings of fact, Judge Pittman made the following conclusions:

One. The affidavits of Paul Gocke and of W. Terry Young corroborating the affidavit of Paul Gocke, from which the court found the

facts, are clear and unequivocal.

Two. There has never been valid service of process on defendant.

Three. The judgment by default and inquiry against defendant is void for want of service of process upon defendant.

Whereupon, Judge Pittman ordered and decreed that the judgment by default and inquiry entered in the action on 16 April 1962 be, and it hereby is, vacated, and that the action be dismissed for want of legal service of process on defendant.

From this order, plaintiff appeals.

Bradley, Gebhardt, DeLaney & Millette by S. M. Millette for plaintiff appellant.

Carpenter, Webb & Golding by William B. Webb for defendant appellee.

PER CURIAM. Plaintiff's second assignment of error reads: "Assignment of error No. 2: The Court's finding of facts. Exception No. 2." When we refer to the preceding page of the record, we find a grouping of exceptions, and exception No. 2 is to the court's finding of fact No. 4, without stating what finding of fact No. 4 is. This assignment of error is not sufficient in form to present the alleged errors relied on, for the reason that we have repeatedly held that Rules 19 (3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*, require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the Court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. These rules are mandatory, and will be enforced. *Greene v. Dishman*, 202 N.C. 811, 164 S.E. 342; *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829; *Allen v. Allen*, 244 N.C. 446, 94 S.E. 2d 325; *Tillis v. Cotton Mills*, 244 N.C. 587, 94 S.E. 2d 600; *Armstrong v. Howard*, 244 N.C. 598, 94 S.E. 2d 594; *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271; *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405; *Nichols v. McFarland*, 249 N.C. 125, 105 S.E. 2d 294; *McArthur v. Stanfield*, 254 N.C. 627, 119 S.E. 2d 467; *Sanitary District v. Canoy*, 254 N.C. 630, 119 S.E. 2d. 448; *S. v. Reel*, 254 N.C. 778, 119 S.E. 2d 876; *S. v. Burton*, 256 N.C. 464, 124 S.E. 2d 108; *Balint v. Grayson*, 256 N.C. 490, 124 S.E. 2d 364; *Jones v. Saunders*, 257 N.C. 118, 125 S.E. 2d 350. It will readily be perceived that the above assignment of error falls short of the requirements of our rules. Nevertheless, we have examined the affidavits of Paul Gocke and W. Terry Young and the evidence, and they show that the evidence contrary to the officer's return on the original summons consists of more than a single contra-

dictory affidavit (the contradictory affidavit of Paul Gocke), and is clear and unequivocal to the effect that when a copy of the complaint was delivered to Gocke, assistant manager of a restaurant operated by defendant in the city of Charlotte, by a deputy sheriff, copy of the original summons was not delivered to Gocke and was not attached to the copy of the complaint. Judge Pittman's findings of fact are supported by the required amount of competent evidence, *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239. Plaintiff's second assignment of error is overruled.

Plaintiff's third assignment of error reads: "Assignment of Error No. 3: The Court's Conclusion of Law. Exception No. 3." This assignment of error is overruled.

Service of summons, unless waived, is a jurisdictional requirement. *Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 2d 802; *Stancill v. Gay,* 92 N.C. 462. A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons. *Harrington v. Rice, supra.* Judge Pittman having found as a fact there was no service of summons on defendant, and there being no evidence or contention of a waiver of service by defendant, it follows that the judgment by default and inquiry was void, and Judge Pittman's conclusions are correct. *Dunn v. Wilson, supra; Harrington v. Rice, supra; Lumber Co. v. West,* 247 N.C. 699, 102 S.E. 2d 248.

Plaintiff's first assignment of error is to the order, and is overruled. The findings of facts support the conclusions, and the conclusions support the judgment, and no error of law appears on the face of the record proper. *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486.

Defendant adopted the correct procedure of a motion in the case. *Harrington v. Rice, supra.*

The order below is

Affirmed.

BENJAMIN HOWARD, BY HIS NEXT FRIEND, LUTHER HOWARD v. EDWARD EUGENE HOYLE

AND

LUTHER HOWARD v. EDWARD EUGENE HOYLE

AND

WILLIE J. TAYLOR v. EDWARD EUGENE HOYLE.

(Filed 17 October 1962.)

Automobiles § 46; Negligence § 28—

Where the court fails to apply the law relating to proximate cause to the evidence in the case and defines proximate cause solely by analogy to a hypothetical statement of facts at variance with and inapplicable to the facts in evidence, the charge must be held prejudicial.

APPEAL by plaintiffs from *Pless, J.*, June 18, 1962, Special B Term of MECKLENBURG.

On April 9, 1961, between 6:00 and 6:30 p.m., a 1955 Oldsmobile operated by Luther Howard in an easterly direction along the outside eastbound travel lane of U. S. Highway #74 in Gaston County was struck from the rear as it approached the Catawba River Bridge by a 1955 Ford automobile operated by defendant in an easterly direction along said outside eastbound travel lane of said highway. When the collision occurred, there was a hard downpour of rain and the highway was wet and slick.

Luther Howard, the driver, and Benjamin Howard, Luther's minor son, and Willie J. Taylor, passengers in said Oldsmobile, instituted separate actions to recover damages for personal injuries allegedly caused by the negligence of defendant.

As to what caused the collision and injuries resulting therefrom, each plaintiff alleged in substance the following: When the vehicle operated by Luther Howard "reached a point about fifteen (15) or twenty (20) feet west of the intersection of U.S. Highway #74 aforesaid and N.C. Highway #7, and the western end of the Catawba River Bridge, the defendant . . . drove into the left-hand rear end of said vehicle with his 1955 Ford . . ." The collision was proximately caused by the negligence of defendant in that he operated his car at an unlawful and excessive speed, failed to keep a proper lookout, failed to keep his car under proper control, and followed too closely the car operated by Luther Howard.

Defendant, in separate answers, denied all allegations as to his negligence. In the *Luther Howard* case, defendant pleaded the contributory negligence of Luther Howard in bar of his right to recover. With reference thereto, defendant alleged in substance the following: As defendant proceeded along U.S. Highway #74, "the plaintiff sudden-

ly and without any signal or warning applied his brakes and abruptly decreased the speed of his automobile and that this defendant, upon observing the above action of the plaintiff's vehicle, immediately applied his brakes in an effort to avoid colliding with the plaintiff's automobile, but the defendant's automobile skidded forward due to the wet condition of the highway and collided with the rear of the plaintiff's automobile."

On defendant's motion, the three actions were consolidated for trial. Evidence was offered by plaintiffs and by defendant.

Separate issues were submitted in each case. In each case, the only issue answered by the jury was the first issue, to wit, "Was the plaintiff injured by the negligence of the defendant as alleged in the Complaint?" And in each case the jury answered this issue, "No." Thereupon, in each case, judgment "that the plaintiff have and recover nothing of the defendant," was entered. Plaintiffs excepted and appealed, assigning errors.

Wyche, Nivens & Brown for plaintiff appellants.
Haynes & Bernstein for defendant appellee.

PER CURIAM. Plaintiffs assigned as error, *inter alia,* portions of the court's instructions relating to the first issue(s), including that quoted below.

The court's instruction as to proximate cause, as it appears in the record before us, was as follows: "The proximate cause of the injury is the efficient cause, the cause without which it would not have occurred, and the showing of negligence without showing that was the proximate cause of the injury is not sufficient. (To use an illustration here, if it should turn out that if this incident had occurred, say at night, when all lights should be on and should turn out the defendant in this case didn't have a headlight, that met the requirements of the Statutes, that would be negligence, but it wouldn't be actionable negligence, because failure to have proper headlights wouldn't have anything to do with the collision in which a car is struck from the rear, so that would not be the proximate cause or a proximate cause.)" Plaintiff excepted to the portion within parentheses.

Presumably, "the defendant," as used in said challenged portion of the court's instructions, does not refer to the defendant in this action. The (illustrative) instruction seems to relate to a factual situation that would exist if a motorist otherwise in defendant's situation were driving at night without headlights. In such case, according to this instruction, the failure to have proper headlights would not be the proximate cause or a proximate cause of a rear-end collision.

The (illustrative) instruction is erroneous. Where a car traveling on the highway at night is struck from the rear by an overtaking car, whether the overtaking car had proper headlights is relevant in respect of whether the negligence of the driver of the overtaking car proximately caused such rear-end collision. Assuming, as we must, the record correctly brings forward the court's instruction, it seems probable the court had in mind a factual situation in which, although traveling at night, there were no headlights on the forward or overtaken car.

While plaintiffs did not allege defendant operated his car without headlights as a ground of negligence, the extent defendant could see what was in front of him was relevant in determining whether defendant was negligent in the respects alleged and whether such negligence proximately caused the rear-end collision. It is noted that defendant testified: "It was raining hard. You couldn't see too far but could see pretty good. It was dark enough to have lights on. I had my parking lights on. I believe it was that dark anyway."

We cannot know to what extent, if any, the erroneous (illustrative) instruction was prejudicial to plaintiffs. However, "proximate cause" was not defined except in the quoted portion of the charge. Nor do we find the court gave any instruction illustrating (applying) proximate cause in terms of the evidence of this particular case. In these circumstances, we think it probable the erroneous (illustrative) instruction confused the jury and prejudiced plaintiffs to such extent that a new trial should be awarded. It is so ordered.

New trial.

CHARLIE ALBERT LAIL, MINOR, BY HIS NEXT FRIEND, RUSSELL LAIL v. ULYSSES CHAPMAN, MINOR OVER 14 AND W. A. ROBINSON.

AND

BYNUM LAIL v. ULYSSES CHAPMAN AND W. A. ROBINSON.

(Filed 17 October 1962.)

Automobiles § 41c—

Where the evidence discloses that defendant was driving a car in which plaintiff was riding as a passenger, that defendant was forced off the road by a car approaching from the opposite direction, half way over the center line of the highway to that driver's left, that defendant lost control of his vehicle and ran off the road, resulting in the injury in suit, the fact that defendant, in the sudden emergency created by the negligence of the other driver, glanced back and inquired as to the

identity of the other driver, *is held* insufficient to establish actionable negligence.

APPEAL by plaintiffs from *Froneberger, J.,* March, 1962 Term, BURKE Superior Court.

In these civil actions, consolidated for trial, Charlie Albert Lail, minor, b.n.f., seeks to recover for his personal injuries, and Bynum Lail, father, seeks to recover medical expenses and loss of services allegedly caused by the negligent operation of a 1951 Ford automobile, owned by the defendant W. A. Robinson, and driven by the defendant Ulysses Chapman. Charlie A. Lail was a guest passenger at the time of the wreck which occurred about one o'clock on the afternoon of October 3, 1959. The weather was clear. The concrete highway, 18 feet wide, was dry. As the defendant Chapman was driving at about 45-50 miles per hour, rounding a "blind curve," slightly upgrade, he met an automobile "on the wrong side . . . about half way across the center line of the highway . . . Chapman cut to his right . . . got off the shoulder, lost control . . . careened back to the left . . . hit the bank and then turned over . . . If he hadn't cut to the right he would have hit that car . . . She (the driver) was across the white line in our lane of traffic . . . the car went by and he (Chapman) looked around and said, 'Who was that?' "

At the close of the plaintiff's evidence, of which the above is the substance, the court entered judgments of nonsuit, from which the plaintiffs appealed.

C. David Swift, for plaintiffs, appellants.

Patton & Ervin, by Sam J. Ervin, III, for defendants, appellees.

PER CURIAM. The plaintiffs' evidence makes out a clear case of sudden emergency. That Chapman was curious as to the identity of the woman driver who forced him off the road, gave voice to that curiosity, and a fleeting glance in the direction of her departure, are not enough to establish actionable negligence. The judgments of nonsuit are

Affirmed.

Abandonment—Of wife, *S. v. Johnson*, 280; if abandonment takes place in this State our courts have jurisdiction of action for alimony without divorce even though parties are domiciled in another state, *Harris v. Harris*, 416; abandonment as precluding divorce on ground of separation, *Taylor v. Taylor*, 130; as obviating parent's consent to adoption, *Pratt v. Bishop*, 486; of appeal, *Williams v. Contracting Co.*, 769.

Abatement and Revival—Pendency of prior action, *Perry v. Owens*, 98.

Accelerator—Loaning car with defective accelerator, *Gibbs v. Gaimel*, 650.

Access—Diminution of access resulting from change of grade not compensable, *Smith v. Highway Comm.*, 410; taking of access for limited access highway is compensable, *Kirkman v. Highway Comm.*, 428; diminution of access constituting highway four-lane highway with median is not compensable, *Barnes v. Highway Comm.*, 507.

Accident Insurance—See Insurance.

Accidental Means—Within purview of insurance policy, *Sims v. Insurance Co.*, 32.

Accountant—May testify as to the amount of loss disclosed by his investigation, *Transportation Co. v. Brotherhood*, 18; accountant may testify as to amount books disclose to be due, *Teer Co. v. Dickerson, Inc.*, 522.

Account Stated—*Teer Co. v. Dickerson, Inc.*, 522.

Actions—Actions for particular relief see particular titles of actions; criminal prosecutions see Criminal Law and particular titles of crimes; particular remedies see Declaratory Judgment Act, Injunctions, etc; abatement for pendency of prior action, see *Perry v. Owens*, 98; moot questions, *Trust Co. v. Barnes*, 274; *damnun absque injuria*, *Rea v. Credit Co.*, 639; action by plaintiff is *pari delicto*, *Donnell v. Howell*, 175.

Administrative Law—Appeal and review, *McBride v. Board of Education*, 152; *In re Dillingham*, 684.

Admissions—Stipulation of the parties is judicial admission, *West v. West*, 760.

Administrator—See Executors and Administrators.

Advisory Opinions—Actions will not lie in absence of real controversy between parties, *Trust Co. v. Barnes*, 274.

Adoption—*Pratt v. Bishop*, 486.

Adverse Possession — *Cothran v. Motor Lines*, 782.

Agent—Knowledge of agent will not be imputed to principal when agent is acting in his own interest, *Lumber Corp. v. Equipment Co.*, 435; liability of principal for negligent driving of agent see Automobiles.

Alimony—See Divorce and Alimony.

Allegata—Allegations and proof must correspond, *Hall v. Poteat*, 458; *S. v. Overman*, 464.

Amendment—To pleadings see Pleadings.

"Amorous Conduct" — Does not amount to charge of adultery, *Mills v. Mills*, 663.

Answer—See Pleadings.

Appeal and Error — Appeal from Utilities see Utilities Commission; where statute provides appeal from administrative ruling, G.S. 143-307 does not apply, *In re Dillingham*, 684; appeals in criminal cases see Criminal Law; nature and grounds of appellate jurisdiction, *McBride v. Board of Education*, 152; *Surplus Stores v. Hunter*, 206; *In re Drainage*, 337; *Hodges v. Hodges*, 774; supervisory jurisdiction and matters cognizable *ex mero motu*, *Collins v. Simms*, 1; *Stone v. Bak-*

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action in General.

Where a party institutes action in a county court limited as to jurisdictional amount, he may not assert the pendency of such action as ground for abatement of a subsequent action instituted in the Superior Court of another county, demanding a sum in excess of the jurisdictional amount of the county court, even though otherwise such action could be properly asserted as a counterclaim in the county court, since a plea in abatement must be based on the pendency of an action in a court of competent jurisdiction. *Perry v. Owens*, 98.

Appeal held abandoned so that action was no longer pending for purpose of abatement. *Leggett v. Smith-Douglass Co.*, 646.

§ 4. Procedure to Raise Question of Pendency of Prior Action.

Where the pendency of a prior action between the parties does not appear on the face of the complaint, the question of abatement is properly raised by answer. *Perry v. Owens*, 98.

ACCOUNT STATED

§ 1. Nature and Essentials of Account Stated.

An agreement between the parties as to the amount or balance due by the one to the other as the result of prior transactions between them constitutes an account stated. *Teer Co. v. Dickerson, Inc.*, 522.

Failure to object to an account within a reasonable time may amount to an acquiescence constituting it an account stated, but what is a reasonable time is to be determined upon the basis of the circumstances of each case and is ordinarily a question for the jury, certainly when there is conflict in the evidence or if adverse inferences may be drawn therefrom. *Ibid.*

§ 2. Operation and Effect of Account Stated.

An account stated constitutes a new and independent cause of action conclusive upon the parties in the absence of fraud or mistake, but the agreement as to the amount due cannot preclude items not included in the account or a claim for adjustment agreed upon at that time to be the subject of subsequent negotiation. *Teer Co. v. Dickerson, Inc.*, 522.

Where defendant's evidence is to the effect that the parties had reached an agreement as to the amount due upon the account in suit but that at that time it was agreed that defendant's claim of an offset for failure of the material furnished by plaintiff to meet the specifications should be subject to later negotiation, it is error for the court to instruct the jury to the effect that the account had become an account stated by reason of defendant's failure to object thereto within a reasonable time without further instructing the jury upon defendant's contention that defendant was not precluded from asserting an adjustment or counterclaim for failure of the material furnished to meet the specifications. *Ibid.*

ACTIONS

§ 3. Matter Which May Be Subject of Action—Moot Questions.

Where there is no real controversy between the parties the action must be dismissed, since the courts will not give mere advisory opinions with respect to hypothetical situations. *Trust Co. v. Barnes*, 274.

§ 4. Lawful Act with Wrongful Motive: Damnum Absque Injuria.

The exercise of a legal right in a lawful manner cannot support an action either for punitive or compensatory damages. *Rea v. Credit Co.*, 639.

§ 5. Rule that Plaintiff May Not Maintain Action Based on His Own Wrong.

The courts will grant relief to a party *in pari delicto* if the refusal of such relief would result in a condition contrary to public policy or against public morals or good conscience. *Donnell v. Howell*, 175.

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari and Review of Administrative Orders.

Where the record fails to show any appeal from the order of an administrative board when appeal is provided by statute, the Superior Court acquires no jurisdiction, and such defect cannot be supplied by a recital in the judgment that it was rendered on appeal in accordance with statute. *McBride v. Board of Education*, 152.

The statute regulating real estate brokers and salesmen provides adequate procedure for judicial review of an order of the Board revoking a license, G.S. 93A-6 (b), and therefore G.S. 143-307 does not apply, and review of an order of the Board suspending or revoking a license is *de novo* in the Superior Court in all cases, regardless of whether the board has made a record of its proceedings. *In re Dillingham*, 684.

ADOPTION

§ 3. Abandonment of Child as Obviating Consent of Parent.

An abandonment of a child so as to obviate the consent of the parent to the adoption of the child imports a wilful and intentional course of conduct of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *Pratt v. Bishop*, 486.

Evidence of abandonment of child by parent held sufficient to be submitted to the jury. *Ibid.*

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use in General.

In order to establish title by adverse possession, plaintiff must show his actual physical possession and that such possession was so notorious as to put the true owner on notice of his claim. *Cothran v. Motor Lines*, 782.

§ 23. Sufficiency of Evidence and Nonsuit.

Testimony by plaintiff to the effect that he owned the land and certain buildings thereon, without evidence of actual occupancy of such buildings by

ADVERSE POSSESSION—*Continued.*

himself or his tenants, and that he frequently visited the property, without testimony as to what he did when visiting the property, is insufficient to establish open and hostile possession necessary to ripen title in himself. *Cothran v. Motor Lines*, 782.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

Where the Superior Court has no jurisdiction, the Supreme Court can acquire none by appeal. *McBride v. Board of Education*, 152.

The Supreme Court, in passing upon the constitutionality of a statute, will consider only the grounds specifically brought into focus by the parties. *Surplus Store v. Hunter*, 206.

An appeal *ex necessitate* follows the theory of trial in the lower court. *In re Drainage*, 337; *Hodges v. Hodges*, 774.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Where judgment of the Superior Court upon remand of the cause by the Supreme Court fails to conform with the mandate of the Supreme Court, either through insubordination, misinterpretation, or inattention, the Supreme Court, in the exercise of its supervisory jurisdiction, will enforce its own mandate, regardless of the manner in which the cause is brought before it, or even *ex mero motu* if necessary, in accordance with the requirements of justice. *Collins v. Simms*, 1.

Even though a matter is not presented by the appeal, the Supreme Court, in the exercise of its discretionary power, may express an opinion upon the question sought to be raised. *Stone v. Baking Co.*, 103; *Cowart v. Honeycutt*, 136.

Where want of jurisdiction is apparent on the record, the Supreme Court will so declare *ex mero motu*. *Stone v. Baking Co.*, 103.

Where, on appeal from order overruling demurrer from misjoinder of parties and causes, it is impossible to tell from the allegations of the complaint whether plaintiffs were joint assignees so as to be entitled to maintain a joint action on the claims assigned, the Supreme Court, in the exercise of its supervisory jurisdiction, will remand the cause to the end that plaintiffs may move for permission to amend to make the complaint specific and definite. *Morton v. Thornton*, 259.

The Supreme Court is given supervisory jurisdiction over the lower courts by Article IV, § 8, of the Constitution, and will exercise such jurisdiction to prevent a manifest miscarriage of justice, and in the exercise of this jurisdiction, will take notice *ex mero motu* of a fatal error appearing on the face of the record. *In re Burton*, 534.

§ 3. Judgments Appealable; Premature Appeals.

Adjudication that the release for personal injury signed by plaintiff was obtained by fraud does not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the

APPEAL AND ERROR—*Continued.*

trial on the merits from the adjudication that the release was void, is premature and must be dismissed. *Cowart v. Honeycutt*, 136.

When the trial court sets aside the verdict in its discretion and orders a new trial, the case remains on the civil issue docket for trial *de nova*, unaffected by rulings made during the trial, and therefore rulings during trial on motions to nonsuit are no longer pertinent, and the correctness of such rulings cannot be presented for review, there being no final judgment or interlocutory order from which an appeal can be taken. *Goldston v. Wright*, 279.

In a proceeding by a housing authority to condemn respondents' land, motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously or arbitrarily in selecting respondents' land for the site of the housing project, is in effect a demurrer to the plea in bar, and order allowing the motion is appealable, Rule of Practice in the Supreme Court No. 4(a) not being applicable. *Housing Authority v. Wooten*, 358.

Where a motion to strike is directed to an entire cause of action or to an entire defense, so that it is in effect a demurrer, Rule of Practice in the Supreme Court No. 4(a) does not apply, and an appeal will lie from an order allowing the motion. *Williams v. Hunter*, 754.

An order for the examination of an adverse party pursuant to G.S. 1-568.11 is an interlocutory roller which does not affect any substantial right and from which no appeal lies. *Black v. Williamson*, 763.

§ 4. Parties Who May Appeal—Parties Aggrieved.

The executors, in their official capacity, are not parties aggrieved by a judgment construing the will and adjudicating the rights of the beneficiaries, since the judgment is not adverse to them or the estate. *Cline v. Olson*, 110; *Ferrell v. Basnight*, 643.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

Where the trial court denies a motion for a new trial for misconduct of a juror and enters final judgment from which an appeal is taken, the trial court is *functus officio* and has no authority to hear another motion thereafter made for a new trial for misconduct of the juror, and its order on such motion is a nullity. *Stone v. Baking Co.*, 103.

While the Superior Court may dismiss an appeal for failure to serve statement of case on appeal within the time limited, it may not dismiss an appeal after it has been docketed in the Supreme Court. Nevertheless, where appellant thereafter takes a voluntary nonsuit in the trial court such act is tantamount to an abandonment or withdrawal of the appeal and the Superior Court has jurisdiction to hear another action thereafter brought pursuant to G.S. 1-25. *Leggett v. Smith-Douglass Co.*, 646.

An appellant may abandon his appeal, and motion for voluntary nonsuit thereafter entered in the trial court is tantamount to abandonment of the appeal, and the court has jurisdiction to hear the motion. *Williams v. Contracting Co.*, 769.

§ 15.1. Abandonment of Appeal.

An appellant may abandon his appeal. *Williams v. Contracting Co.*, 769.

APPEAL AND ERROR—*Continued.*

§ 16. Certiorari as Method of Review.

Certiorari brings the entire record before the Supreme Court for review. *In re Burton*, 534.

Certiorari will not lie as a substitute for appeal when the right to appeal has been lost by failure to prosecute the appeal within the time allowed. *Johnson v. Taylor*, 740.

§ 19. Form and Requisition of Exceptions and Assignments of Error in General

Assignments of error should disclose the errors relied on without the necessity of going beyond the assignments themselves. *Jones v. Sanders*, 118; *Phillips v. R.R.*, 239; *In re Drainage*, 337; *Pratt v. Bishop*, 486,; *Durham v. Public Service Co.*, 546; *Kleinfeldt v. Shoney's, Inc.*, 791.

An assignment of error must be supported by an exception. *Phillips v. Alston*, 255; *Hines v. Frink*, 723.

In grouping his exceptions, appellant should use language indicating that the matters or things referred to in the exceptions so grouped are assigned as error. *In re Drainage*, 337.

An assignment of error which attempts to raise several separate questions of law based upon separate exceptions is ineffectual as a broadside assignment. *Hines v. Frink*, 723.

§ 20. Parties Entitled to Object and Take Exception.

Appellant may not complain of error in regard to an issue answered in his favor. *Robinson v. Taylor*, 668.

§ 21. Exception and Assignment of Error to the Judgment or to Signing of Judgment.

Where the sole exception and assignment of error is to the judgment, and no error appears on the face of the record proper and the findings are sufficient to support the judgment, the judgment will be affirmed. *Bank v. Bryant*, 42.

A sole assignment of error to the judgment presents the question whether error of law appears on the face of the record proper, including whether the stipulations and agreed facts are sufficient to support the judgment. *Lackey v. Board of Education*, 78.

§ 24. Exceptions and Assignments of Error to the Charge.

Ordinarily, an exception to an excerpt from the charge does not challenge the failure of the court to charge further on the same or another aspect of the case. *Clifton v. Turner*, 92.

An exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct. *Ibid.*

An exception and assignment of error to the charge as a whole for that the court failed to declare and explain the law arising on the evidence in the case are ineffectual. The exception and assignment of error should point out the particular matters which appellant asserts were omitted. *Ibid.*

While exceptions to the charge may be noted after trial, they should be included in appellant's statement of case on appeal as served on appellee in order to apprise appellee at that juncture of the theory of the appeal. *Corns v. Nickelston*, 277.

APPEAL AND ERROR—*Continued.*

The mere notation of exceptions to the charge is insufficient, it being required that the exceptions point out the asserted errors in the charge so as to apprise appellee of the theory of the appeal, and such exceptions cannot be aided by assignments of error setting forth for the first time the asserted error of the court in failing to charge upon matters specified, since such assignments of error are not based upon effective exceptions. *Ibid.*

Each exception to the charge should relate to a single principle of law and pinpoint a specific objection, and an exception to a long excerpt from the charge embracing a number of propositions cannot be sustained if anyone of the propositions is correct. *Doss v. Sewell*, 404.

The right to object to the court's statement of the contentions of a party is waived when the matter is not brought to the attention of the trial court before verdict. *Ibid.*

An exception to the charge will not be sustained if the charge is without prejudicial error when construed contextually. *Ibid.*

§ 28. Necessity for Case on Appeal.

The absence of a case on appeal precludes consideration of exceptions occurring during the progress of the trial, including asserted error in allowing motion to nonsuit and refusal to submit a certain issue, but the absence of case on appeal does not preclude consideration of errors appearing on the face of the record proper, such as the denial of motion to strike allegations from a pleading. *Spivey v Boyce*, 630.

§ 29. Making Out and Service of Case on Appeal.

The failure of the original defendant to serve case on appeal within the time prescribed with respect to an additional defendant's cross action against him results in absence of case on appeal in regard to the cross action, and the case on appeal in regard to the action between the plaintiff and the original defendant cannot supply the deficiency. *Spivey v. Boyce*, 630.

§ 31. Settlement of Case on Appeal.

Where appellants in apt time serve their case on appellees, and appellees file exceptions on the ground that the court's charge contained therein was only a fragment of the charge as actually given, and the trial court, upon appellants' request to settle the case finds that the charge appearing in the record was fragmentary because of the inability of the reporter to hear and take down the charge as given, but that the court could not then reconstitute the charge, a new trial will be awarded, since appellant, without fault, is entitled to have the appellate court have before it for review instructions to which he has aptly entered exceptions. *Wagner v. Eudy*, 199.

§ 38. Form and Contents of the Brief.

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. *Tart v. Register*, 161.

§ 39. Presumptions and Burden of Showing Error.

Where the Justices of the Supreme Court are evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Burke v. R.R.*, 683.

APPEAL AND ERROR—*Continued.*

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be granted for mere technical error which could not have affected the result. *Tart v. Register*, 161.

The burden is upon plaintiff to show error which is prejudicial or harmful. *Graham v. Bottling Co.*, 188; *Pratt v. Bishop*, 486.

A new trial will not be awarded for the admission of incompetent hearsay evidence when such evidence is wholly irrelevant and could not have affected the answer to the issue, since a new trial will not be awarded for mere technical error in the absence of a showing of prejudice by appellant. *Hines v. Frink*, 723.

§ 42. Harmless and Prejudicial Error in Instructions.

A misstatement of the pertinent law must be held prejudicial even though made in stating the contentions of the parties. *Sims v. Ins. Co.*, 32.

Where an erroneous instruction as to the law in regard to one issue is repeated in regard to a subsequent issue, a correction of the error by the court solely in regard to the subsequent issue may not erase the prejudicial effect of the erroneous instruction on the prior issue. *Griffin v. Pancoast*, 52.

Upon appeal from judgment based upon the negative finding of the jury to the issue of the due execution of the paper writing propounded, an instruction to the effect that the subscribing witnesses must have affixed their signatures in the presence of each other, must be held for prejudicial error notwithstanding that all of the evidence tends to show that the witnesses did sign the instrument in the presence of each other, since the negative answer to the issue may have been influenced by the requirement that the jury believe the evidence in regard to this unnecessary element. *In re Will of Long*, 598.

Repeated instruction to the effect that if the jury should find that defendant was guilty of acts of negligence which were a proximate cause of the accident to answer the issue of contributory negligence in the negative, rather than in the affirmative, must be held for prejudicial error. *Beatty v. Bowden*, 736.

§ 45. Whether Error is Cured by Verdict.

An erroneous instruction on one issue must be held prejudicial even though such instruction may not have affected the jury's answer to such issue if it is apparent from the record that such instruction must have influenced the jury in their answers to subsequent issues. *Teer Co. v. Dickerson, Inc.*, 522.

§ 46. Review of Discretionary Orders.

Discretionary power imports sound discretion guided by law. *Stone v. Baking Co.*, 103.

The action of the trial court in setting aside the verdict in its discretion is not subject to review in the absence of manifest abuse of discretion. *Golston v. Wright*, 279.

Where the court enters a discretionary order prior to the introduction of pleadings upon which the discretionary power depends, the discretionary order must be reversed. *Lowther v. Wilson*, 484.

APPEAL AND ERROR—*Continued.*

§ 47. Review of Orders Relating to Pleadings.

Refusal of motion to strike will not be disturbed when it does not result in prejudice. *Spivey v. Boyce*, 630.

§ 49. Review of Findings or Judgment on Findings.

The Supreme Court will attempt to reconcile the findings of fact and stipulations so as to uphold, if possible, the judgment predicated upon them, but when the findings and stipulations are basically antagonistic, inconsistent, or contradictory as to material matters, the judgment based thereon must be vacated and the cause remanded. *Lackey v. Board of Education*, 78.

Where a judgment is based upon a misapprehension of the applicable law the cause must be remanded for findings in the light of the true legal principles. *Ammons v. Sneeden's Sons, Inc.*, 785.

Where the court fails to find a fact necessary to support its judgment, the judgment must be vacated and the cause remanded, notwithstanding the absence of exceptions to the findings, the appeal being an exception to the judgment. *Machinery Co. v. Speciality Co.*, 85.

Where the findings of fact are insufficient to support the adjudication of the rights of the parties, the judgment must be vacated and the cause remanded. *Credit Co. v. Norwood*, 87.

Where the findings of fact support the conclusions of law and the conclusions of law support the judgment, the judgment must be affirmed, no error appearing on the face of the record. *Kleinfeldt v. Shoney's, Inc.*, 791.

Where, in a trial by the court, there are no exceptions to the court's findings, the findings are presumed supported by competent evidence and are binding on appeal. *Phillips v. Alston*, 255.

An exception that there was no evidence or findings to support the court's conclusions of law is, in effect, a motion to nonsuit, and when the evidence is not in the record the exception cannot be sustained. *Ibid.*

Even though a conclusion of law is demoninated by the trial court a finding of fact, such conclusion will not be disturbed when it is the sole legal conclusion that may be drawn from the other findings of fact which are supported by adequate and competent evidence. *Hodges v. Hodges*, 774.

§ 50. Review of Equity Proceedings.

Upon defendant's appeal from an order granting in part plaintiff's prayer for an interlocutory injunction, the sole question on appeal is whether there was error in enjoining the particular acts specified in the order pending the hearing on the merits. *Durham v. Public Service Co.*, 546.

On appeal from an order granting a temporary injunction, the Supreme Court has the power to find the facts. *Ibid.*

§ 51. Review of Judgments on Motions to Nonsuit.

Only the motion to nonsuit made at the close of all the evidence will be considered on appeal. *Clifton v. Turner*, 92; *Tart v. Register*, 161.

§ 51½. Review of Exceptions to Evidence.

Exceptions to the exclusion of evidence cannot be sustained if the evidence is inadmissible on any legal ground. *Sims v. Ins. Co.*, 32.

APPEAL AND ERROR—*Continued.*

§ 54. New Trial.

Where record, though no fault of appellant, is insufficient predicate for review of question, new trial will be ordered. *Wagner v. Eudy*, 199.

Where the evidence and stipulations of the parties are insufficient to support the courts conclusion that as a matter of law the street is question has been dedicated to the public, a new trial must be awarded in order that the questions of law and issues of fact raised by the pleadings may be determined in the light of all pertinent and competent evidence. *Owens v. Elliott*, 250.

§ 60. Law of the Case and Subsequent Proceedings.

A decision of the Supreme Court becomes the law of the case in respect to questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal. *Collins v. Simms*, 1.

Decision that there was no error in the adjudication by the lower court that defendant had not then been elected pastor of the church in question, and that order restraining defendant from attempting to act as pastor violated no constitutional rights of defendant, is the law of the case and precludes defendant from thereafter asserting incumbency based upon any act or transaction occurring prior to the date of the institution of the action, or that the entry of judgment in accordance with the mandate of the Supreme Court violated any constitutional right of defendant. *Ibid.*

After remand of a cause by the Supreme Court, the lower court is bound by the decision, and a judgment of the Superior Court which fails to conform entirely and completely to the mandate of the Supreme Court is erroneous, irregular, or void. *Ibid.*

Decision on a former appeal that there was sufficient evidence of negligence to be submitted to the jury and that the evidence did not disclose contributory negligence as a matter of law, constitutes the law of the case and precludes nonsuit upon substantially the same evidence, but is not conclusive if the evidence upon the second trial is materially different from that of the first. In the present case, the evidence at the two trials upon the issue of contributory negligence *is held* not sufficiently different in material aspects as to justify a different conclusion. *Johnson v. R.R.*, 712.

Decision on a former appeal constitutes the law of the case and is controlling in subsequent proceedings. *Knight v. Associated Transport*, 758; *Hodges v. Hodges*, 774.

APPEARANCE

§ 2. Effect of Appearance.

While a defendant may challenge the validity of the process purporting to subject him to the jurisdiction of the court and at the same time deny the facts upon which plaintiff seeks relief, G.S. 1-134.1, where he appeals from the clerk's order denying his motion to dismiss the matter is properly before the Superior Court, G.S. 1-272, and if in the Superior Court defendant does not request a ruling on the motion to dismiss, but participates in the hearing of plaintiff's motion for alimony *pendente lite*, he waives the right to object to the validity of the process. *Harris v. Harris*, 416.

ARREST AND BAIL

§ 6. Resisting Arrest.

In a prosecution for felonious assault upon a constable who was arresting defendant, the evidence disclosed that after the constable had hit defendant with a blackjack, defendant cut the constable with a knife several times, inflicting wounds requiring thirty-eight stitches to close. *Held:* The evidence was sufficient to be submitted to the jury notwithstanding defendant's contention that the arrest was unlawful, since even though the arrest were unlawful, whether defendant used more force than reasonably appeared to him to be necessary to prevent being taken into custody was for the determination of the jury. *S. v. Morrisey*, 679.

ASSIGNMENTS

§ 1. Rights and Interests Assignable.

A claim for unpaid wages is assignable, and an assignee may maintain an action thereon in his own name together with an action on the assignee's own claim for unpaid wages: if the assignment by some of the employees is to other employees jointly, all the assignees must be parties and recover in their joint right, G.S. 1-70, while if the assignment is not to such employees jointly, the assignees may not maintain a common action against the employer. *Morton v. Thornton*, 259.

Lease and option to purchase are assignable, and registered assignee takes free of subsequent assignment. *Oil Co. v. Furlonge*, 388.

ATTORNEY AND CLIENT

§ 1. Office of Attorney and Unauthorized Practice.

The preparation of legal documents and contracts by which legal rights are secured constitutes practicing law. *S. v. Pledger*, 634.

G.S. 84-4 proscribes the preparation of legal documents by a lay person for another person, firm, or corporation, but does not prohibit a lay person from preparing legal documents so long as he has a primary interest in the transaction, and therefore prepares such documents not for another but for himself. *Ibid.*

A corporation can act only through its officers, agents, and employees, and therefore a lay person who is an officer, agent, or employee of a corporation may prepare legal documents for the corporation when the corporation has a primary interest in the transaction for which the documents are prepared, since his act in so doing is the act of the corporation in furtherance of its own business. *Ibid.*

Where the evidence permits the inference that a lay person prepared legal documents for a corporation and that such lay person was not an agent or employee of the corporation, nonsuit is properly overruled in a prosecution of such lay person for the unauthorized practice of law. *Ibid.*

§ 9. Procedure to Disbar or Discipline Attorney.

Disciplinary action or disbarment may be imposed upon attorneys either under statutory or judicial procedure, both of which partake of the nature of civil actions, but the right to practice is a property right of which an attorney cannot be deprived without due process of law. *In re Burton*, 534.

ATTORNEY AND CLIENT—*Continued.*

The statutory procedure for the disbarment of attorneys does not deprive the courts of their inherent authority over attorneys as officers of the court, but as to alleged misconduct not committed in the presence of the court, the court may administer disciplinary action only upon an order to show cause based upon a sworn, written complaint. *Ibid.*

AUTOMOBILES

§ 4. Title, Certificate of Title, Sale and Transfer of Title.

Under the 1961 amendments to G.S. 20-72(b) and G.S. 20-75, the purchaser of a secondhand automobile from a dealer obtains title when the dealer endorses the old certificate of title to him and he applies for a new certificate of title. Title passes as of that time and not when the new certificate of title is actually issued by the Department of Motor Vehicles. *Credit Co. v. Norwood*, 87. Therefore, a levy under execution by a judgment creditor of the purchaser on the day the certificate of title was endorsed to him has priority over a subsequently registered purchase money mortgage. *Ibid.*

By provision of statute in North Carolina every seller of a motor vehicle is required to expressly warrant title and expressly list all liens and encumbrances, and the effect of failure to list a lien is a warranty that it does not exist. *Seymour v. Sales Co.*, 603.

Where a conditional sale contract for the sale of the motor vehicle provides that if any part of the agreement should be invalid under the laws of the State such part should be deemed amended in conformity with such laws, such contract includes warranty of title and warranty against encumbrances in accordance with State law, irrespective of whether the agreement otherwise contains such warranties and notwithstanding any waiver of implied warranties by provision that no representation or warranties should be binding unless expressly contained in the agreement. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

While the violation of a safety statute or ordinance is negligence, it is actionable only if the proximate cause of injury. *Smith v. Metal Co.*, 143.

The violation of either subsection of G.S. 20-140 constitutes culpable negligence and gives rise to both civil and criminal liability. *Dunlap v. Lee*, 447.

§ 7. Attention to Road, Look-out and Due Care in General.

A motorist is under duty to keep a proper lookout in the direction of travel, and will be held to the duty of seeing what he ought to have seen in the discharge of such duty. *Hamilton v. McCash*, 611.

The failure of a motorist to maintain a reasonably careful lookout is negligence. *Salter v. Lovick*, 619.

A motorist is required, irrespective of statute, to exercise that degree of care in the operation of his vehicle which a reasonably prudent person would exercise under similar conditions, and in the discharge of such duty it is incumbent upon him to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid collision with persons and vehicles upon the highway. *Black v. Milling Co.*, 730.

AUTOMOBILES—*Continued.*

§ 8. Turning and Turning Signals.

Before making a left turn it is required that a motorist give the statutory signal and that he first ascertain that the movement can be made in safety, G.S. 20-154(a), and the failure to observe either of the statutory requirements constitutes negligence as a matter of law, which is actionable if the proximate cause of injury. *Tart v. Register*, 161.

§ 9. Stopping, Parking, Signals and Lights.

The driver of a vehicle stopped or parked on a highway at night is under duty to light his vehicle as required by G.S. 20-134 and G.S. 20-129, which duty is not affected by G.S. 20-161, relating to parking on highways, and the failure to light a vehicle stopped or parked on a highway at nighttime as required by the statute is negligence. *Melton v. Crotts*, 121.

Where plaintiff relies upon the fact that defendant stopped or parked his vehicle on the highway without leaving a clear and unobstructed width of not less than fifteen feet of highway opposite the standing vehicle, the burden is upon plaintiff to prove defendant's violation of G.S. 20-161(a), and where defendant relies upon the fact that his vehicle was disabled so as to render it impossible to avoid stopping and temporarily leaving such vehicle partially on the hard surface of the highway, defendant has the burden of bringing himself within the provisions of G.S. 20-161(c). *Ibid.*

The provisions of G.S. 20-161(c), which limit the provisions of G.S. 20-161(a) by permitting the stopping or parking of a vehicle partially on the hard surface of the highway without leaving at least fifteen feet of the hard surface for the passage of traffic, provided such vehicle is disabled so that it is impossible to move it, must not be given a literal construction, and it is not required that a vehicle be absolutely impossible to move in order for the proviso to apply, but only that it not be reasonably practical under the circumstances to move the vehicle, which is ordinarily a question for the jury upon the facts of each case. *Ibid.*

Neither G.S. 20-134 nor G.S. 20-161 applies to a vehicle parked on a street which is not a part of a State highway but is in a residential district of a city. *Smith v. Metal Co.*, 143.

It is negligence for the driver of a truck to leave his vehicle standing diagonally across the highway so as to leave only 3 or 4 feet unobstructed and fail to give any warning to approaching motorists of the peril. *Chandler v. Bottling Co.*, 245.

§ 10. Negligence and Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.

The rule that a motorist is not under duty to anticipate that a vehicle without lights will be standing in his lane of travel at night does not relieve a motorist of the duty to keep a proper lookout and proceeding as a reasonably prudent man under the circumstances. *Salter v. Lovick*, 619.

§ 13. Skidding.

The failure to equip a vehicle with chains within the first eight to ten miles after snow has begun to fall cannot be considered evidence of negligence. *Fox v. Hollar*, 65.

AUTOMOBILES—*Continued.*

The mere fact that a vehicle traveling five to ten miles per hour on snow skidded as the driver was attempting to turn right, without more, is not evidence of negligence. *Ibid.*

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

The violation of the statutory requirement that the driver of a motor vehicle shall not follow another more closely than is reasonable and prudent with regard to the speed of the vehicles, the traffic, and the condition of the highway, is negligence *per se* and is actionable when the proximate cause of injury. *Fox v. Hollar*, 65.

The statutory provisions relating to passing another vehicle traveling in the same direction, G.S. 20-149, are inapplicable upon evidence which, in plaintiff's version, is to the effect that he collided with defendant's vehicle immediately after defendant had driven into an intersecton with a dominant highway without stopping, and, in defendant's version, is to the effect that the accident did not occur at the intersection but beyond it after defendant had turned to his right, and that it was due to plaintiff's excessive speed and failure to maintain a proper lookout because of a coating of frost on plaintiff's windshield. *Clifton v. Turner*, 92.

It is negligence *per se* for a motorist to follow another vehicle more closely than is reasonable and prudent with regard to the safety of others, the speed of the vehicles, and the traffic and conditions of the highway. *Hamilton v. McCash*, 611.

§ 17. Intersections.

The driver along a dominant highway is entitled to assume and act upon the assumption, even to the last moment, that the operator of a vehicle along a servient highway will stop in obedience to a duly erected stop sign before entering upon the interesection with the dominant highway. *Clifton v. Turner*, 92.

The driver of a vehicle upon servient highway is not required to stop at the stop sign duly erected on the servient highway, but is required to stop at a point before entering the intersection at which he may observe traffic on the dominant highway and determine when, in the exercise of due care, he may enter or cross the intersecting highway with resonable safety. *Ibid.*

The fact that a motorist is faced with a green traffic control signal at an intersection does not warrant such motorist in entering the intersection blindly in reliance upon the signal, but he remains under duty to maintain a lookout and to exercise reasonable care under the circumstances, since the green signal is not a command to go but a qualified privilege to proceed with the care of a reasonably prudent man under the circumstances. *Beatty v. Bowden*, 736.

§ 19. Sudden Emergency.

The doctrine of sudden emergency is not available to a party whose own negligence causes or contributes to the creation of the emergency. *Salter v. Lovick*, 619.

Where the driver of a car is confronted with a sudden emergency arising from the jamming of the accelerator pedal, such driver cannot be held guilty

AUTOMOBILES—*Continued.*

of contributory negligence as a matter of law in failing to pursue the wisest choice of conduct, the driver not having contributed to the creation of the emergency. *Gibbs v. Gaimel*, 650.

§ 21. Brakes and Defects in Vehicles.

The owner who with knowledge lends a car with a defective accelerator to another without disclosing the defect may be guilty of negligence. *Gibbs v. Gaimel*, 650.

§ 25. Speed in General.

The authority of the State Highway Commission to promulgate special speed restrictions by the erection of proper signs along the highway, G.S. 20-141(d) extends to State highways within the territory of a municipality and to territory annexed by a municipality, and therefore where the State Highway Commission has posted a speed limit of 35 miles per hour along a highway approaching an intersection within territory annexed by municipality, such special speed restriction is effective. *Davis v. Jessup*, 215.

The rule of a reasonably prudent man requires that a motorist not operate his vehicle at a speed greater than that which is reasonable and prudent under the existing circumstances and that he not operate it carelessly and unlawfully without due regard to the safety of others. *Hamilton v. McCash*, 611.

A witness may not testify that the speed limit at a particular locality was less than the general statutory maximum. *Hensley v. Wallen*, 675.

It is negligence *per se* for a motorist to operate his vehicle on a highway at a speed greater than that which is reasonable and prudent under the conditions then existing. *Black v. Milling Co.*, 730.

§ 33. Pedestrians.

A pedestrian crossing an intersection of streets as defined by G.S. 20-38(1) has the right of way when there are no traffic control signals at the intersection, notwithstanding that the interesection has no marked crosswalks for pedestrians. *Griffin v. Pancoast*, 56.

A pedestrian crossing a street between intersections at a place where there is no marked crosswalk must yield the right of way to traffic. *Ibid.*

A pedestrian and a motorist, in accordance with which is given the statutory right of way, have the right to assume that the other will obey the rules of the road and accord the right of way to the one having that privilege. *Ibid.*

§ 34. Children On or Near Highway.

A motorist is under duty to exercise due care to avoid injury to children whom he sees, or by the exercise of due care should see, on or near the highway. *Hamilton v. McCash*, 611.

§ 34½. Permitting Debris or Substances Dangerous to Traffic to Remain on Highway.

Where crates of bottled drinks have fallen from a truck as the truck was driven from a side road onto the highway, it is a breach of the common law duty to exercise due care for the driver to fail to remove from the highway the broken glass and other debris or to fail to warn approaching motorists of its presence. *Chandler v. Bottling Co.*, 245.

AUTOMOBILES—*Continued.*

§ 35. Pleadings and Parties in Automobile Accident Cases.

A defendant in an action for negligence does not raise the issue of contributory negligence when his only allegations of negligence on the part of plaintiff are contained in his counterclaim, with allegation that the acts of negligence referred to in the countrclaim were proximate causes which contributed to plaintiff's injury, since contributory negligence may not be pleaded by reference to the counterclaim. *Hines v. Frink*, 723.

Where plaintiff alleges cause of action in negligence against a defendant and such defendant files a cross-action, plaintiff is entitled to have the issue of contributory negligence submitted to the jury on the counterclaim even though plaintiff's action is nonsuited, since plaintiff is not required to repeat the same allegations in a reply in order to raise the issue of contrbutory negligence. *Ibid.*

Failure of defendant to allege plaintiff's violation of G.S. 20-152(b) precludes defendant from relying on violation of the statute as constituting contributory negligence; nevertheless defendant's allegation of plaintiff's excessive speed under circumstances presents the question of plaintiff's negligence in following a preceeding vehicle too closely at the speed plaintiff was traveling. *Black v. Milling Co.*, 730.

Prior judgment in action between drivers bars subsequent cross action for contribution by the one against the other. *Williams v. Hunter*, 754.

§ 37. Relevancy and Competency of Evidence.

Where each of two occupants successively drives the car on the fatal trip, and one of them is killed in the accident, the survivor cannot testify, in an action against the owner of the other vehicle sought to be held liable under the doctrine of agency, that the deceased was driving at the time of the accident. *Tharpe v. Newman*, 71.

§ 38. Opinion Evidence as to Speed.

Where there is no allegation or evidence that the scene of the accident was in a business or residential district or that any signs had been posted giving notice of any special speed restriction, it is error for the court to permit a witness to testify and to charge the jury on such testimony, that the speed at the scene of the accident was limited to a speed less than the general statutory maximum, even though the scene is within the boundaries of a municipality. G.S. 20-141(a), G.S. 20-141(b) (4). *Hensley v. Wallen*, 675.

Whether speed is limited at a particular locality to a speed less than the general statutory maximum is a mixed question of law and of fact, and while a witness may testify as to the posting of signs restricting the speed limit, and as to the frontage of residences and business establishments from which it may be determined whether the area is a business or residential district, a witness may not invade the province of the jury by testifying as to a particular speed limit less than the general statutory maximum. *Ibid.*

§ 40. Relevancy and Competency of Declarations and Admissions.

Declarations of passengers in a car, immediately before the driver thereof attempted to make a left turn, that a car was approaching from the rear at a fast pace and that the driver "better not turn" or the other car would "hit us" are competent as spontaneous declarations admissible as *pars res*

AUTOMOBILES—*Continued.*

gestae, and testimony of such declarations is also competent to rebut the driver's allegations that the passengers were guilty of contributory negligence in failing to warn the driver of the approaching danger. *Tart v. Register*, 161.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Where the allegations are to the effect that defendant drove his automobile without lights from the right shoulder of the road into plaintiff's lane of travel, and the evidence is that platintiff struck defendant's vehicle which was standing without lights in plaintiff's lane of travel, nonsuit is properly granted, since plaintiff must make out his case as alleged in the complaint. *Hall v. Poteat*, 458.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Testimony held sufficient to support finding that defendant was operating his car on the left side of the highway and collided with a vehicle approaching from the opposite direction, and therefore the evidence required the submission of the issue of negligence to the jury irrespective of any other aspect of negligence. *Wagner v. Eudy*, 199.

Evidence that defendant lost control of his vehicle, skidded to the left and crashed head-on into plaintiff's car which was approaching from the opposite direction, *held* to take the issue of negligence to the jury. *Gatlin v. Parsons*, 469.

Where the evidence discloses that defendant was driving a car in which plaintiff was riding as a passenger, that defendant was forced off the road by a car approaching from the opposite direction, half way over the center line of the highway to that driver's left, that defendant lost control of his vehicle and ran off the road, resulting in the injury in suit, the fact that defendant, in the sudden emergency created by the negligence of the other driver, glanced back and inquired as to the identity of the other driver, *is held* insufficient to establish actionable negligence. *Lail v. Chapman*, 797.

§ 41e. Sufficiency of Evidence of Negligence in Stopping without Signal or Parking without Lights.

Evidence that truck driver stopped at night without lights blocking both lanes of highway, *held* to take issue of negligence to jury in action by motorist hitting the truck. *Smith v. Nunn*, 108.

Any negligence of driver in failing to give signal before stopping on highway to permit oncoming traffic to pass before making left turn held insulated by negligence of driver of following car in crashing into his rear. *Poston v. Sewell*, 113.

Plaintiff's evidence tending to show that defendant stopped his car partially on the hard surface after a flat tire, and that the car was thus stationary on the highway without lights when it was struck by the car driven by plaintiff's agent, who did not see the stationary vehicle in time to avoid the collision because of the lights of an approaching car, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to comply with G.S. 20-134. *Melton v. Crotts*, 121.

AUTOMOBILES—*Continued.*

Plaintiff introduced evidence that defendant's truck was parked on a street in the residential section of a city in violation of a municipal ordinance prohibiting parking in such area. Plaintiff's evidence also disclosed that vehicles customarily were parked at the place in question, that plaintiff knew of such custom, and that plaintiff, blinded by the lights of an oncoming vehicle, drove some 200 feet and collided with the rear of the parked vehicle. *Held:* The evidence fails to disclose any causal connection between defendant's violation of the ordinance and the accident in suit. *Smith v. Metal Co.*, 143.

The evidence tended to show that as defendant driver drove his truck from a side road onto the highway crates of bottles fell to the highway from the truck, that the driver left the vehicle standing diagonally across the hard-surface blocking all but 3 or 4 feet thereof, and that plaintiff motorist, rounding a curve, applied his brakes upon seeing the conditions, but that he was unable to avoid running over broken glass, causing a blowout, and resulting in his losing control of the car, which ran into a ditch, resulting in the damages and injuries in suit. The evidence further tended to show that the accident occurred some twenty minutes after the truck had been stopped and that the driver did not remove any of the debris from the highway or give any warning to approaching motorists of the peril. *Held:* The evidence was sufficient to be submitted to the jury on the issue of the driver's negligence. *Chandler v. Bottling Co.*, 245.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely or in Hitting Preceding Vehicle.

Evidence of negligence in following preceding vehicle too closely under circumstances held to raise issue for jury. *Fox v. Hollar*, 65.

Evidence held to show that negligence of driver crashing into rear of car, which was stopped on highway to permit oncoming traffic to pass before turning left, was sole proximate cause of collision. *Poston v. Sewell*, 113.

The mere fact of collision with the rear of a preceding vehicle furnished some evidence that the following motorist was negligent as to speed, in following too closely, or in failing to keep a proper lookout, but whether such accident is the result of culpable negligence depends upon the circumstances of each particular case, and evidence tending to show that failure to keep a proper lookout was the sole proximate cause of the rear-end collision is insufficient to present the question of defendant's violation of the reckless driving statute. *Dunlap v. Lee*, 447.

Evidence of negligence in hitting rear of unlighted vehicle held for jury. *Salter v. Lovick*, 619.

Where a motorist is traveling within the maximum speed limit prescribed by law, his inability to stop within the radius of his lights is not negligence *per se* but may be considered with other facts upon the issue of negligence, and a charge which instructs the jury in effect that the inability of a motorist, traveling at a lawful speed, to stop within the radius of his lights would constitute negligence *per se* must be held for prejudicial error. *Ibid.*

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

Evidence tending to show that when plaintiff's vehicle entered the well-lighted intersection defendant's vehicle was approximately 900 feet from the intersection, and that when plaintiff turned his vehicle to the left and entered

AUTOMOBILES—*Continued.*

defendant's lane of travel, defendant's car was still some 400 feet from the intersection, that the highway had two lanes of travel in the direction in which the vehicles were proceeding, and that defendant did not slacken speed until it was too late to avoid collision, *is held* to preclude nonsuit. *Beatty v. Bowden*, 736.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Allegations and evidence held sufficient on question of negligence in making turn without first ascertaining that movement could be made in safety. *Tart v. Register*, 161.

§ 41k. Sufficiency of Evidence of Negligence in Backing.

Evidence tending to show that plaintiff had opened the door to a parked vehicle to speak to his estranged wife's sister, who was sitting on the front seat as a passenger, that defendant got into the driver's seat, backed the car suddenly and rapidly so that plaintiff did not have time to step aside, and was struck by the open door and drug to his injury, and that defendant then drove forward and left the scene, *is held* sufficient to be submitted to the jury on the issue of negligence and not to show contributory negligence as a matter of law, there being no evidence of any menace by plaintiff by word or demeanor. *Benson v. Sawyer*, 765.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children on Highway.

Evidence tending to show that a ten year old boy, on a dark night, suddenly ran onto the highway and collided with the right front fender of defendant's truck, that the impact occurred on the paved portion of the road some two and one-half feet from the edge, and that the view of the boy was obstructed by a tree and undergrowth, without evidence that the truck was being operated at excessive speed and without allegation that the truck was being operated without lights, *is held* sufficient to exonerate the defendant driver from liability under the "sudden appearance doctrine." *Dixon v. Lilly*, 228.

Evidence of negligence of defendant proximately causing injury to child on highway held for jury. *Hamilton v. McCash*, 611.

Evidence tending to show that defendant was driving some five miles per hour between cars parked on either side of the street and that a six year old child ran from behind one of the parked cars into the path of defendant's car, that because of the obstruction of the parked car defendant did not see the child, but that the car did not cover more than six or seven feet after the child ran into its path and that defendant stopped the car within a foot after running over the child's legs, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Johns v. Day*, 751.

§ 41p. Sufficiency of Evidence of Identity of Driver.

Evidence of identity of deceased as the driver of the car at the time in question held insufficient, the testimony of the survivor occupant that deceased was driving at the time of the accident being incompetent. *Tharpe v. Newman*, 71.

AUTOMOBILES—*Continued.*

§ 41r. Sufficiency of Evidence of Negligence in Operating or Loaning Defective Vehicle.

Evidence permitting the inference that the accelerator of defendant's car was defective so that it occasionally permitted gasoline to continue to flow to the engine after the release of pressure from the accelerator pedal, that defendant, with knowledge of the condition, loaned the vehicle to plaintiff without disclosing the defect, with further evidence that plaintiff was injured in an accident resulting from the sticking of the accelerator, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Gibbs v. Gaimel*, 650.

§ 42d. Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence *held* not to show contributory negligence as a matter of law on part of motorist hitting truck stopped on highway at night without lights. *Smith v. Nunn*, 108.

Evidence tending to show that plaintiff's driver was operating plaintiff's vehicle at a lawful speed at nighttime, that before the headlights of plaintiff's car had picked up defendant's car, which was stopped partially on the paved portion of the highway without lights, plaintiff's driver lowered the beam of his headlights because of an approaching vehicle, and that plaintiff's car had not passed the approaching vehicle when it collided with the rear of the stationary car, *is held* not to establish the single conclusion that plaintiff's driver was negligent. *Melton v. Crotts*, 121.

Plaintiff's evidence tending to show that he struck the rear of a vehicle parked on a street in the residential section of a municipality some 200 feet from the intersection at which plaintiff entered the street, and that plaintiff, blinded by the lights of an approaching vehicle which had turned into the street, did not see the parked vehicle until a moment before he crashed into its rear, *is held* to disclose contributory negligence as a matter of law, since plaintiff either drove "blind" for 200 feet, or, if the approaching car turned into the street after plaintiff did, plaintiff should have seen the parked vehicle before being blinded by the lights of the approaching car. *Smith v. Metal Co.*, 143.

Evidence held not to show contributory negligence as a matter of law on part of motorist in failing to stop before running into an area of broken glass. *Phillips v. Bottling Co.*, 245.

§ 42e. Contributory Negligence in Following and Passing Preceding Vehicle.

Evidence held to show contributory negligence as a matter of law on part of truck driver in following another truck at a speed greater than prudent under circumstances. *Black v. Milling Co.*, 730.

§ 42g. Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence that when plaintiff was some 100 to 200 feet from an intersection with a servient highway he saw defendant's vehicle moving after it had passed the stop sign on the servient highway, and that plaintiff did not slacken his speed and struck defendant's vehicle immediately after it had entered the intersection without stopping and had turned right, *is held* not to disclose

contributory negligence as a matter of law, since plaintiff had the right to assume that defendant would stop his vehicle before entering the intersection notwithstanding defendant had passed the stop sign. *Clifton v. Turner*, 92.

Evidence tending to show that the automobile in which the owner was riding as a passenger approached an intersection with its headlights burning, within the maximum speed, that the driver decreased speed when he passed a sign warning him of his approach to the intersection, and that as he proceeded into the intersection an unlighted truck entered the intersection from his left from a servient road into the path of the automobile, *is held* not to disclose contributory negligence as a matter of law on the part of the driver and owner of the automobile. *Hines v. Frink*, 723.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

The evidence in this action by passengers tended to show that the driver, wishing to turn left into a driveway, stopped his car to permit oncoming traffic to pass, and that a car approaching from the rear crashed into the stopped vehicle. The evidence further tended to show that the driver approaching from the rear could have seen the stopped vehicle for some 300 feet. *Held:* The evidence discloses that the negligence of the driver striking the rear of the stopped car was the sole proximate cause of the accident, and under the circumstances, any failure of defendant driver to have given the proper signal before stopping could not have been a proximate cause of the collision. *Poston v. Sewell*, 113.

The evidence tended to show that the driver of one vehicle approached a "T" intersection on his right at a speed of some 50 miles per hour, that special speed restrictions of 35 miles per hour had been posted on the approach to the intersection, and that immediately before he reached the intersection a vehicle traveling in the opposite direction pulled out of a line of traffic and attempted to turn left into the intersecing highway, resulting in the collision in suit. *Held:* The evidence does not warrant nonsuit on the ground of the intervening negligence of the driver of the car turning left into the intersection, since such act could have been reasonably foreseen and expected. *Davis v. Jessup*, 215.

Where the evidence discloses that plaintiff's car and the car of one of defendants collided head-on, that then plaintiff's car was struck from the rear by a bus driven by the additional defendant, and that the second collision resulted in some damage to plaintiff's car but did not contribute to plaintiff's personal injuries, with some evidence that the bus was following plaintiff's vehicle too closely, the question of the liability of the bus driver and the bus company is properly submitted to the jury, but is properly limited to contribution for the damages to plaintiff's car. *Gatlin v. Parsons*, 469.

§ 44. Sufficiency of Evidence to Require submission of Issue of Contributory Negligence.

Evidence that defendant lost control of his vehicle, skidded to the left, and crashed head-on into plaintiff's vehicle, which was approaching from the opposite direction on its right side of the highway, *is held* sufficient to be submitted to the jury on the question of defendant's negligence and is insufficient to raise the issue of contributory negligence on the part of plaintiff. *Gatlin v. Parsons*, 469.

AUTOMOBILES—*Continued.*

§ 46. Instructions in Auto Accident Cases.

It is not error for the trial court to fail to charge upon aspects of negligence in the operation of an automobile when the allegations in regard thereto are not supported by evidence, or upon aspects of negligence presented by the evidence but which are not supported by allegation, since allegation and evidence must correspond. *Fox v. Hollar*, 65.

Where defendant's evidence is to the effect that he stopped his vehicle on the highway because of a flat tire, that although he drove the vehicle as near as possible to the ditch on the right shoulder he was unable to get the vehicle entirely off the hard surface at that place, and that the nearest place in defendant's direction of travel at which the vehicle could be stopped entirely off the hard surface was some 1000 to 1500 feet distant, it is the duty of the court to instruct the jury upon the provisions of G.S. 20-161(c). *Melton v. Crotts*, 121.

The evidence tended to show that defendant ran into the rear of plaintiff's car when plaintiff stopped in her proper lane of travel to permit a car preceding her to turn right into a driveway. The evidence further tended to show that the impact was slight and there was no evidence that defendant was traveling at excessive speed or was following plaintiff's vehicle too closely. *Held:* It was prejudicial error for the court to instruct the jury in regard to defendant's violation of G.S. 20-140(b). *Dunlap v. Lee*, 447.

Where the court fails to apply the law relating to proximate cause to the evidence in the case and defines proximate cause solely by analogy to a hypothetical statement of facts at variance with an inapplicable to the facts in evidence, the charge must be held prejudicial. *Howard v. Hoyle*, 795.

§ 47. Liability of Driver to Guests or Passengers.

Under the laws of the State of Virginia, a gratuitous passenger in an action in which there is no allegation of wilful and wanton disregard of the safety of the passenger and no plea of contributory negligence, is entitled to recover upon a showing of gross negligence. *Doss v. Sewell*, 404; *Smith v. Stepps*, 422.

Evidence held sufficient to be submitted to jury on issue of gross negligence of driver. *Ibid.*

Evidence tending to show that defendant was assisting his 64 year old guest-passenger to enter his automobile, during daylight, that he opened the door, holding her arm, that she placed her right hand on the gooseneck casement, or cowl, which enclosed the curved windshield, and that as she was in the act of seating herself defendant closed the door, crushing plaintiff's hand between the protruding windshield casement and the steel portion of the door, causing serious injury, *is held* sufficient to be submitted to the jury on the question of defendant's negligence. *Carter v. Bradford*, 481.

§ 48. Right of Passenger to Sue Jointly or Severally Tort-Teasors Causing Injury.

Where the passenger sues the driver of the car in which he was riding and the drivers of the cars sucessively hitting his car, and the jury finds that neither the driver of the car in which he was riding nor the driver of one of the other cars was negligent, recovery is limited to the injuries resulting from the collision in which the third driver was involved. *Fox v. Hollar*, 65.

A passenger injured by the concurring negligence of the drivers of the vehicles involved in the collision may sue either one or both. *Salter v. Lovick* 619.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence held insufficient to show contributory negligence as a matter of law on the part of a passenger in riding with driver whose view of the highway was partially obstructed by frost on the windshield. *Wagner v. Eudy*, 199.

Evidence that plaintiff passenger entered a car while it was being driven by the owner, that thereafter on the trip the owner permitted an inexperienced person to drive, that plaintiff passenger remonstrated with the inexperienced drive as to speed, at which times the driver would slow down momentarily and then resume excessive speed, *is held* insufficient to show contributory negligence of the passenger as a matter of law in refusing to continue the trip, notwithstanding repeated acts of negligence in the operation of the car by such driver. *Smith v. Stepp*, 422.

§ 50. Negligence of Driver Imputed to Passenger.

Testimony elicted on cross-examination of the administratix of a minor that the minor handled her own pay check as she saw fit and was purchasing the car in question with her own money, and drove it wherever she wanted to, is sufficient to amount to an admission that the intestate was the owner of the vehicle, notwithstanding the vehicle was registered in the name of her father, so as to raise a presumption that while she was riding therein with her husband driving on a joint interprise, he was her agent, and nothing else appearing, such presumption warrants an instruction to the effect that his negligence would be imputed to her as a matter of law. *Davis v. Jessup*, 215.

§ 52. Liability of Owner for Driver's Negligence in General.

The negligence of the employee of the owner of a vehicle while driving the vehicle within the scope of his employment is imputed to the owner. *Black v. Milling Co.*, 730.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Where plaintiff offers no evidence in support of the allegation that the automobile was registered in the name of defendant, the plaintiff cannot benefit by the presumption of agency created by G.S. 20-71.1. *Griffin v. Pancoast*, 52.

Where the evidence of negligence on the part of defendant driver is sufficient to be submitted to the jury and there is evidence that the vehicle was registered in the name of the other defendant, plaintiff is entitled to go to the jury against such other defendant by virtue of G.S. 20-71.1(b). *Hamilton v. McCash*, 611; *Salter v. Lovick*, 619.

Evidence tending to show that the insignia of defendant was painted on the side of the truck involved in the collision establishes a *prima facie* case of the ownership of the vehicle and that it was being driven by an employee of defendant in the course of his employment, and takes the issue of *respondeat superior* to the jury, even though defendant introduces evidence that it was not operating a vehicle at the time and place of the accident, but such *prima facie* case does not alter the burden of proof and permits but does not

compel the jury to find the issue in the affirmative. *Knight v. Associated Transport*, 758.

§ 55. Family Purpose Doctrine.

The family purpose doctrine relates to agency and obtains when the parent controls or has the right to control the operation of the car by his minor child, and whether the parent or the child owns the car is relevant only insofar as it indicates the right to control its operation. *Griffin v. Pancoast*, 52.

Evidence to the effect that defendant parent did not know that his son was the owner of the auomobile in question until after the purchase was consummated, and that the parent never exercised any control over the use or manner of operation of the car by his son, is insufficient to raise the issue of the parent's liability for the son's operation of the car under the family purpose doctrine, notwithstanding evidence that at least a part of the purchase price and operating expenses were obtained from money furnished by the parent. *Ibid.*

The test of whether a parent is liable for the operation of an automobile by a minor child under the family purpose doctrine depends upon the parent's control or right to control the use of the automobile and not upon ownership. *Tart v. Register*, 161.

Evidence that the car in question was a gift to the child but was registered in the mother's name, that the child paid for the operation and upkeep of the car and used it in going to work and for other purposes, and had the right to use the car without her mother's permission, but that the child lived in the home of her parents and usually told her mother where she was going if her mother was present, etc., *is held* sufficient to be submitted to the jury on the parent's liability under the family purpose doctrine. *Ibid.*

Evidence held sufficient on the question of the father's liability under the family purpose doctrine for the negligent operation of the vehicle by his minor son. *Wagner v. Eudy*, 199.

§ 59. Sufficiency of Evidence of Culpable Negligence and Nonsuit.

Evidence tending to show that defendant had been drinking, that he attempted to pass a car preceding him in the same direction in disregard of on-coming traffic and collided head-on with a car approaching from the opposite direction, *is held* sufficient to be submitted to the jury on the question of culpable negligence in this prosecution for manslaughter. *S. v. Gurley*, 270.

State's evidence tending to show that defendant operated his vehicle at nighttime without lights and collided on defendant's left side of the highway with a vehicle coming from the opposite direction, although controverted by defendant's evidence, *is held* sufficient to be submitted to the jury in a prosecution of defendant for the felonious slaying of a passenger in the other car fatally injured in the collision, the conflicting contentions being fairly submitted to the jury in the charge of the court. *S. v. Narron*, 771.

§ 60. Instructions in Homicide and Assault Prosecutions.

Testimony of an officer that from his observation of defendant immediately after the accident defendant had drunk some intoxicating liquor, with testimony of a physician that he examined defendant less than an hour after the accident and found no evidence that defendant had been drinking, and that

AUTOMOBILES—*Continued.*

defendant's actions and manner of talking at the scene of the accident were due to his injuries, *is held* insufficient predicate for an instruction in regard to the drunken driving statute as bearing upon the question of defendant's culpable negligence. *S. v. Gurley*, 270.

§ 64. Elements of Offense of Reckless Driving.

Failure to keep a reasonable lookout does not constitute reckless driving unless the failure is accompanied by a dangerous speed or perilous operation, G.S. 20-140(b), and therefore evidence supporting the conclusion that defendant failed to keep a proper lookout, without evidence of excessive speed or perilous operation, does not present the question of defendant's violation of that statute. *Dunlap v. Lee*, 447.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Evidence held insufficient to show that defendant was under the influence of intoxicating liquor so as to warrant instruction thereon as element of culpable negligence. *S. v. Gurley*, 270.

The evidence, considered in the light most favorable to the State, *is held* sufficient to be submitted to the jury on the question of defendant's intoxication and his operation of a vehicle on a public street of a municipality while so intoxicated. *S. v. Thompson*, 452.

§ 75. Verdict and Judgment in Prosecutions for Drunken Driving.

Where the warrant charges defendant with operating a motor vehicle on a public street while under the influence of intoxicating liquor or opiates, a verdict of guilty as charged in the warrant will be upheld when the theory of trial, the evidence, and the charge of the court all relate solely to acts of defendant while under the influence of intoxicating liquor, since in such instance the ambiguity in the verdict is resolved. *S. v. Thompson*, 452.

§ 76. Failing to Stop after Accident—"Hit and Run" Driving.

In order to sustain a conviction under G.S. 20-166(a), the State must prove that defendant was operating a motor vehicle at the time alleged in the indictment, that the vehicle was involved in a collision resulting in injury to the person named in the indictment, and that defendant failed to stop his vehicle immediately at the scene. *S. v. Overman*, 464.

In order to sustain a conviction in a prosecution under G.S. 20-166(c) the State must prove that defendant was the operator of a motor vehicle involved in an accident or collision which resulted in injury to the named victim, that defendant failed to give his name, address, operator's license number, and the registration number of his vehicle to such victim, that it was apparent that medical treatment was necessary to the victim but that defendant failed to render the victim reasonable assistance. *Ibid.*

Where, in a prosecution for violation of G.S. 20-166(a) and G. S. 20-166(c), defendant contends that he was not the driver of the vehicle which struck the pedestrian and also that there was no collision between the pedestrian and any vehicle, it is prejudicial error for the court to assume that the vehicle in question collided with the pedestrian and that thereafter the party injured needed medical attention. *Ibid.*

BANKS AND BANKING

§ 9. Collection of Checks and Drafts.

Evidence held not to show negligence or damages in action against bank failing to return promptly unpaid draft. *Benthall v. Hog Market*, 748.

BASTARDS

§ 2. Jurisdiction, Warrant and Indictment for Wilful Refusal to Support.

A prosecution of a defendant for wilful failure to support his illegitimate child may not be instituted and heard in a court of a justice of the peace. *S. v. Dixon*, 653.

Prosecution of a male defendant for wilful refusal to support his illegitimate child must be instituted by the child's mother or, in the event the child is likely to become a public charge, by the Director of Public Welfare. *Ibid.*

§ 6. Sufficiency of Evidence in Prosecutions for Wilful Refusal to Support.

Nonsuit should be allowed in a prosecution for wilful refusal to support an illegitimate child when there is no evidence of notice to defendant or request for support, it being incumbent upon the State to show that the refusal or neglect to provide support was wilful. *S. v. Dixon*, 653.

§ 7. Instructions.

Instructions in a prosecution for wilful refusal to support an illegitimate child that if the jury should find that defendant was the father of the child and that demand had been made upon him for support, to answer the issue of the wilful refusal to support the child in the affirmative, must be held for prejudicial error, since the State has the burden of showing beyond a reasonable doubt that the failure to provide support was wilful. *S. v. Dixon*, 653.

BILL OF DISCOVERY

§ 3. Examination of Witnesses to Obtain Evidence to Be Used at Trial.

The commissioner for the examination of designated persons pursuant to G.S. 1-568.11, is not vested with judicial authority and may not determine in his discretion whether the witnesses to be examined should be sequestered, or whether a certain person summoned is an agent of the adverse party and therefore subject to examination, G.S. 1-568.4(e), and the commissioner's rulings thereon are void. *Berry Brothers Corp. v. Adams-Millis Corp.*, 263.

Where a commissioner appointed pursuant to G.S. 1-568.11 enters an order allowing the sequestration of witnesses and enters an order holding that one of the witnesses was an agent and subject to examination, such orders are void, but an appeal will not lie therefrom to the judge of the Superior Court, the proper procedure being for the commissioner to refer the judicial questions, at least in the first instance, to the clerk who issued the order for the examination. *Ibid.*

Where the examination of an adverse party pursuant to informal consent of the parties has broken down upon disagreement as to the propriety of one

of the questions asked on examination, a subsequent order for the examination of the party pursuant to G.S. 1-568.11 will not be held erroneous as subjecting the adverse party to an examination *de novo* when movant disclaims any intention to again subject the party to an examination with respect to the matter concerning which she has already testified. *Black v. Williamson*, 763.

BOUNDARIES

§ 7. Nature and Essentials of Processing Proceedings.

Where respondents in a processioning proceeding admit plaintiff's title to land and claim title to contiguous land by adverse possession, and dispute the boundaries asserted by petitioner between the two tracts of land, no issue of title is raised and the clerk has jurisdiction to enter judgment declaring the boundaries. *Johnson v. Taylor*, 740.

BROKERS AND FACTORS

§ 8. Licensing and Regulation.

The statute regulating real estate brokers and salesmen provides adequate procedure for judicial review of an order of the Board revoking a license, G.S. 93A-6 (b), and therefore G.S. 143-307 does not apply, and review of an order of the Board suspending or revoking a license is *de novo* in the Superior Court in all cases, regardless of whether the board has made a record of its proceedings. *In re Dillingham*, 684.

The North Carolina Real Estate Licensing Board has authority to revoke or suspend the license of a real estate broker or a real estate salesman solely for misconduct which is connected with the pursuit by the licensee of the business of broker or salesman, and evidence of a licensee's guilt of criminal offenses not related to the pursuit of his licensed privileges, even though they be of infamous, vile and depraved character, and evidence of his fraud or deceit in selling his own notes secured by deeds of trust, are irrelevant in determining whether his license should be revoked or suspended. *Ibid.*

CARRIERS

§ 1. Definition of Common Carrier; State and Federal Regulation.

Those who operate taxicabs are common carriers. *Hardy v. Ingram*, 473.

§ 18. Liability of Carrier for Injury to Passengers.

Operators of taxicabs, like other common carriers, are not insurers of the safety of their pasengers, but owe them the highest degree of care to transport them to their destination with an opportunity to alight in safety at a safe place. *Hardy v. Ingram*, 473.

The assistance, if any, which a carrier must provide a passenger in alighting at destination depends on the carrier's knowledge, actual or implied, of the passenger's need for, and extent of assistance reasonably necessary to terminate the journey in safety. *Ibid.*

Evidence held insufficient to show negligence on part of taxicab operator in failing to assist plaintiff to alight. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 12. Priorities.

On the date judgment debtor purchased a secondhand automobile from a dealer and received the old certificate of title endorsed to him and made application for new certificate of title, levy on the automobile was made under execution upon the judgment. Two days later the lien of the purchase money mortgage was filed for registration. G.S. 47-20. *Held:* Under the 1961 amendments to G.S. 20-72(b) and G.S. 20-75, judgment debtor obtained title to the vehicle on the day the execution was levied, and therefore the lien of the levy has priority over the subsequently registered chattel mortgage, provided the levy was valid. *Credit Co. v. Norwood*, 87.

§ 15. Default and Repossession for Sale.

Where a conditional seller grants an extension of time for the payment of the money due or to become due under the contract, he waives default in the payment of the purchase price and may not repossess during the term of the extension. If the extension of time is not for a definite period it will be construed to be for a reasonable period under the circumstances, and reasonable notice of forfeiture must be given. *Seymour v. Sales Co.*, 603.

After default the mortgagee is entitled to possession of the mortgaged chattel and may seize and take possession of the chattel without legal process provided he may do so without provoking a breach of the peace. *Rea v. Credit Co.*, 639.

§ 17. Sale.

Where, after default, the mortgagee repossesses the chattel and sells it without advertisement as required by law, the mortgagor may recover the amount by which the value of the chattel at the time of its seizure exceeds the balance owing and secured by the conditional sale contract. *Rea v. Credit Co.*, 639.

Where goods of the mortgagor are in the chattel at the time of its repossession by the mortgagee, the mortgagor is entitled to recover the value of such goods, and provision of the conditional sale contract that the mortgagor should give notice within 24 hours of claim for any articles taken which were not covered by the mortgage can have no application when the chattel is repossessed without knowledge of the mortgagor, since the mortgagor cannot be held to the duty of giving notice of a fact of which he had no knowledge. *Ibid.*

CLERKS OF COURT

§ 1. *Jurisdiction and Authority of Clerks in General.*

It is the duty of the clerk to determine judicial questions relating to the examination of designated persons pursuant to G.S. 1-568.11, and when the commissioner determines such questions his orders are void, but appeal therefrom will not lie to the Superior Court, the proper procedure being for the clerk to determine such questions, at least in the first instance. *Berry Brothers Corp. v. Adams-Millis Corp.*, 263.

CONSPIRACY

§ 2. Actions for Civil Conspiracy.

Complaint held to state cause of action against individual defendant and corporate defendant for conspiracy to destroy plaintiff's business. *Nye v. Oil Co.*, 477.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

Party whose fundamental property or personal rights are threatened by statute may maintain action to enjoin the enforcement of the statute. *Surplus Store v. Hunter*, 206.

§ 11. The Police Power in General.

A statute enacted in the exercise of the police power to protect or promote the health, morals, safety or general welfare of the public must have a rational, real, or substantial relation to the accomplishment of such purpose, and arbitrary or unnecessary restrictions upon lawful activities do not come within the police power. *Surplus Store v. Hunter*, 206.

§ 12. Regulation of Trades and Professions.

"Blue law", G.S. 14-356.2, proscribing the sale on Sunday of particular articles held unconstitutionally vague and indefinite. *Surplus Store v. Hunter*, 206.

§ 14. Morals and Public Welfare.

The General Assembly, in the exercise of the police power, has the authority to enact, or to confer upon municipal corporations the power to enact, regulations proscribing all secular activities on Sunday and to proscribe exceptions thereto, provided the exceptions are not arbitrary, unreasonable, and discriminatory. *Surplus Store v. Hunter*, 206.

"Blue law", G.S. 14-356.2, held unconstitutionally vague and indefinite. *Ibid.*

§ 19. Monopolies and Exclusive Emoluments and Privileges.

A pension paid a governmental employee for long and efficient service is a deferred payment of a portion of the compensation earned by such employee, and therefore is an emolument for services rendered not coming within the proscription of Article I, § 7 of the State Constitution. *Ins. Co., v. Johnson*, 367.

§ 23. Rights Protected by Due Process Clause.

Person may not be deprived of liberty by order of commitment in mental hospital without notice and opportunity to be heard. *In re Wilson*, 593.

§ 26. Full Faith and Credit to Foreign Judgments.

Where a decree of divorce is obtained in another state by connivance of the parties in perpetrating a fraud on the jurisdiction of the court by falsely making it appear that the plaintiff was a resident of that state, such decree is not entitled to full faith and credit under Art. IV § 1, of the Constitution of the United States, and, there being no adjudication of the residence of the parties in any adversary manner by the court rendering the divorce decree, a court of this State, in an action properly instituted here, is not bound by the

CONSTITUTIONAL LAW—*Continued.*

findings of the divorce forum as to the jurisdictional fact of domicile, but may find for itself that no domicile in fact existed in the foreign state. *Donnell v. Howell*, 175.

§ 30. Due Process in Criminal Prosecutions in General.

The term "law of the land" as used in Art. I, § 17, of the Constitution of North Carolina, is synonymous with "due process of law" as used in the Fourteenth Amendment to the Federal Constitution. *Surplus Stores v. Hunter*, 206.

"Blue law", G.S. 14-356.2 held unconstitutionally vague, uncertain and indefinite. *Ibid.*

§ 31. Right to Confrontation and Time to Prepare Defense.

A defendant has the right to be present throughout the trial and at the time sentence is pronounced, but he does not have the right to be present on the presentence investigation, although he should be given an opportunity to rebut any condenatory matters brought out thereat. *S. v. Pope*, 326.

CONTEMPT OF COURT

§ 2. Direct and Criminal Contempt.

Contempt committed in the view and presence of the court may be punished summarily, but conduct which would amount to contempt in the presence of a duly constituted court of proper jurisdiction would not necessarily be contemptuous in a *de facto* court, and a person may always insist upon his rights. *In re Burton*, 534.

In holding a person in contempt for conduct in the presence of the court, the court must specify the particulars of the offense on the record by stating the words, acts, or gestures amounting to the direct contempt, and when the record fails to specify such words, acts, or gestures but contains only conclusions that the conduct of the party in question was contemptuous, contemnor is entitled to his discharge. *Ibid.*

§ 3. Civil Contempt.

Where there has been no sworn complaint in regard to the conduct of an attorney and no show cause order issued, a judge of the Superior Court has no authority to order an attorney to appear before him for investigation of the matter, and such order being void *ad initio*, the wilful disobedience of such order by the attorney cannot be made the basis for contempt. *In re Burton*, 534.

CONTRACTS

§ 12. General Rules of Construction.

A contract must be interpreted in the light of the existing law relating to the subject matter. *Goodyear v. Goodyear*, 674.

An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used. *Ibid; Preyer v. Parker*, 440.

If the language of a contract is not ambiguous the effect of the instrument is a question of law for the court, while if its terms are ambiguous

CONTRACTS—*Continued.*

extrinsic evidence relating to the agreement may be competent to clarify its terms, and its meaning ascertained by the jury under proper instructions by the court. *Goodyear v. Goodyear*, 674.

Where the language of a contract is explicit and unambiguous, its legal effect is for the determination of the court. *Oil Co. v. Furlonge*, 388.

General rules for construction of contracts applies to construction of easement deed to determine the extent of the right conveyed. *Weyerhaeuser v. Light Co.*, 717.

§ 14. Third Party Beneficiaries.

The right of a third party to recover on an agreement made for his benefit must be predicated upon the existence of a valid and enforceable contract. *Pickelsimer v. Pickelsimer*, 696.

Where a third party interferes with the performance of a contract, either party to the contract may maintain an action against him, but each party's action must be based upon damages accruing to himself by reason of such wrongful interference and he may not predicate his action upon damages accruing to the other party to the contract. *Walker v. Nickolson*, 744.

§ 29. Measure of Damages for Breach of Contract.

Where the contract specifically provides that if defendant could not furnish the subject materials in the quantities needed by plaintiff in plaintiff's performance of his contract with a third person, plaintiff should purchase the additional materials needed on the open market, plaintiff may not recover any damages for delay in the performance of his contract with such third person because of defendant's failure to furnish the materials in the quantity required, since it is clear that damages for such delay were not within the contemplation of the parties when the contract was made. *Teer Co. Dickerson, Inc.*, 522.

CORPORATIONS

§ 6. Powers and Authority of Officers and Agents in General.

While ordinarily the knowledge of the officers and agents of a corporation in connection with the corporate business will be imputed to the corporation, this rule does not apply when such officer or agent receives the knowledge while acting in his own behalf or for his personal gain, and not in any official or representative capacity for the corporation. *Lumber Co. v. Equipment Co.*, 435.

COURTS

§ 6. Appeal to Superior Court from Clerk.

An appeal will not lie directly to the Superior Court from an order involving judicial discretion entered by a commissioner to take depositions, the proper procedure being for the clerk to determine such questions in the first instance, after which an appeal to the Superior Court will lie, *Berry Brothers Corp. v. Adams-Millis Corp.*, 263.

Certiorari may not be used as a substitute for appeal, and where respondents fail to except to judgment of the clerk in processioning proceed-

COURTS—*Continued.*

ings fixing the boundary line between the contiguous tracts, and fail to take an appeal from such judgment within the time allowed by statute, G. S. 38-3 (a), without any showing of excusable neglect, petition for *certiorari* to review the judgment of the clerk is properly denied. *Johnson v. Taylor*, 740.

Where order of the clerk in condemnation proceedings is appealed to the Superior Court, the Superior Court acquires jurisdiction of the whole proceeding, and has the discretionary power to set aside an order of the clerk appointing commissioners to assess the damages when there is no evidence tending to show that respondents received any notice of petitioner's amendment to the petition, the order appointing the commissioners, or their report. *Hudson v. Fox*, 789.

§ 9. Jurisdiction of Superior Court after Orders or Judgments of Another Superior Court Judge.

After one Superior Court judge has ordered a reference another Superior Court judge has no power to revoke the order of reference and place the case on the civil issue docket. *Coburn v. Timber Corp.*, 222.

One Superior Court judge may not modify, reverse, or set aside judgment of another Superior Court judge as being erroneous. *In re Burton*, 534.

Notwithstanding that an amendment is filed under permissive order of one Superior Court judge, another judge may hear a motion to strike the amended allegations when the motion to strike relates to an entire defense and therefore amounts to a demurrer. *Williams v. Hunter*, 754.

§ 14. Jurisdiction of Courts Inferior to Superior Court.

A court inferior to the Superior Court has only such jurisdiction as is given it by statute, and such jurisdiction cannot be enlarged by implication, and therefore the fact that such court has jurisdiction of an action does not give it jurisdiction of a counterclaim to such action when the amount demanded in the counterclaim is in excess of the jurisdictional amount of such court. *Perry v. Owens*, 98.

§ 19. Enforcement of Federal Statutes in Courts of This State.

The State Court has jurisdiction of an action under the Labor Management Relations Act to recover damages for an unlawful strike and secondary boycott, but must accept the interpretation placed upon the Act by the U. S. Supreme Court. *Transportation Co. v. Brotherhood*, 18.

§ 20. What Law Controls—Laws of This and Other States.

In an action in this State to recover for injuries received in an automobile accident occurring in another state, the substantive law of such other state controls. *Doss v. Sewell* 404; *Smith v. Stepp*, 422.

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General.

A statute creating a criminal offense must be sufficiently explicit to inform a person of ordinary intelligence with reasonable precision of what acts are proscribed. *Surplus Store v. Hunter*, 206.

CRIMINAL LAW—*Continued.*

§ 32. Burden of Proof and Presumptions.

Defendant's plea of not guilty places the burden upon the State to satisfy the jury beyond a reasonable doubt of every element of the offense charged in the bill of indictment. *S. v. Overman*, 464.

§ 72. Admissions and Declarations.

In this prosecution of a husband for abandonment and wilful refusal to provide support, testimony of a wife that she advised her husband by telephone that the children did not have food and that she was without funds to purchase food, and that in reply the husband stated that she would have to go to court to see what she could do and that he was through, *is held* competent as an admission by defendant. *S. v. Johnson*, 280.

§ 79. Evidence Obtained by Unlawful Means.

Where defendant consents to a search without a warrant, evidence obtained by such search is competent. *S. v. Hauser*, 158.

§ 87. Consolidation of Indictments for Trial.

Where indictments are consolidated for trial, the counts in the separate bills of indictment will be treated as separate counts in one bill. *S. v. Pledger*, 634.

§ 100. Necessity for Motion to Nonsuit and Renewal.

The sufficiency of the State's evidence as to any essential element of the offense should be raised by motion to nonsuit and cannot be properly raised by exceptions to excerpts from the charge of the court. *S. v. Thompson*, 452.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

A confession which is corroborated by other evidence is sufficient to take the issue of guilt to the jury. *S. v. Hauser*, 158.

§ 102. Nonsuit for Variance.

Where the indictment in a prosecution under G. S. 20-166 (a) and G. S. 20-166 (c) charges the name of the injured person as "Frank E. Nutley" while the proof is that the injured person is "Frank E. Hatley," there is a material variance warranting nonsuit. *S. v. Overman*, 464.

§ 107. Instructions—Statement of Evidence and Application of Law Thereto.

It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case. *S. v. Gurley*, 270.

An exception to the charge on the ground that the court failed to refer specifically to certain portions of defendant's testimony cannot be sustained when the charge applies the law to the evidence in the case and gives the position taken by the parties as to each essential feature, a recapitulation of all of the evidence not being required. *S. v. Thompson*, 452.

It is error for the court, after charging that if the jury were satisfied beyond a reasonable doubt that a stated hypothesis were the facts the jury should return a verdict of guilty, to fail to charge that if the jury were not so satisfied they should acquit the defendant. *S. v. Overman*, 464.

CRIMINAL LAW—*Continued.*

§ 108. Expression of Opinion on Evidence by Court in the Charge.

In charging the jury, the court may not assume as true the existence or non-existence of any material fact in issue. *S. v. Overman*, 464.

§ 118. Sufficiency and Effect of Verdict.

An apparently ambiguous verdict may be given significance and correctly interpreted by reference to the charge, the facts in evidence, and the instructions of the court. *S. v. Thompson*, 452.

§ 121. Arrest of Judgment.

Defendant waives mere duplicity in the bill of indictment or warrant by failing to move to quash, and may not later raise the question by motion in arrest of judgment. *S. v. Thompson*, 452.

§ 127. Pre-Sentence Investigation and Form and Requisites of Judgment in General.

A defendant in a criminal prosecution has the common law right to be present at the time sentence or judgment is pronounced, which right is separate and apart from his constitutional or statutory right to be present throughout the trial. *S. v. Pope*, 326.

Pre-sentence investigation to obtain information bearing upon the aggravation or mitigation of punishment after plea or verdict of guilty has been entered is favored and encouraged by the law, and in such investigations the trial judge must be given wide latitude and is not restricted by the rules of evidence applicable to the trial of the issue of guilt or innocence; nevertheless, oral testimony should not be heard in defendant's absence and hearsay testimony should be disregarded, and defendant should be given full opportunity to rebut any defamatory and condemnatory matters, to give his version of the offense charged, and to introduce any relevant facts in mitigation. *Ibid.*

A judgment is presumed valid and just with the burden upon appellant to show error amounting to the denial of some substantial right, and a judgment will not be disturbed for procedures in the judge's pre-sentencing investigation in the absence of a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. *Ibid.*

A sentence entered after plea or verdict of guilty will not be disturbed because information bearing upon the aggravation or mitigation of sentence is heard by the court in the absence of defendant when such information is known or disclosed to defendant or his counsel before judgment is entered, and defendant is given opportunity to refute any unfavorable aspects of the information. *Ibid.*

§ 135. Suspended Judgments and Executions.

Prayer for judgment may be continued from term to term without defendant's consent if no conditions are imposed. *S. v. Pledger*, 634.

§ 141. Judgments Appealable.

When prayer for judgment is continued there is no judgment and no appeal will lie. *S. v. Pledger*, 634.

CRIMINAL LAW—*Continued.*

Where several indictments are consolidated for trial and final judgment is imposed upon conviction on some of the counts and judgment is continued as to other counts, the appeal from the judgment is permissible, and all counts are before the Supreme Court, but as to counts upon which prayer for judgment was continued the cause must be remanded, and as to them the cause remains in the trial court for appropriate action upon motion of the solicitor, with right of defendant to appeal from any final judgment adverse to him entered thereon. *Ibid.*

§ 151. Conclusiveness of Record.

The record imports verity and the Supreme Court is bound thereby. *S. v. Hardison*, 661.

§ 154. Necessity for and Form and Sufficiency of Exceptions and Assignments of Error in General.

An exception to the entry and signing of the judgment raises the sole question whether error of law appears on the face of the record proper. *S. v. Thompson*, 452.

Where defendant does not assign as error the failure of the trial court to allow his motion for judgment as of nonsuit, the Supreme Court cannot consider any of the questions raised by the motion. *S. v. Overman*, 464.

§ 156. Exceptions and Assignments of Error to Charge.

An exception to the charge must specifically point out the portion of the charge challenged. *S. v. Hauser*, 158.

§ 161. Harmless and Prejudicial Error in Instructions.

An error in charging that the burden was on the State to prove an element of the offense "by the greater weight" of the evidence, rather than "beyond a reasonable doubt," must be held prejudicial. *S. v. Hardison*, 661.

§ 164. Whether Error Relating to One Count Alone Is Prejudicial.

Where separate prosecutions are consolidated for trial and but a single judgment is pronounced upon conviction of both offenses, upon granting a new trial on one of the charges the cause must also be remanded for judgment on the other charge, since the judgment may have been augmented by reason of the conviction on both charges. *S. v. Hardison*, 661.

DAMAGES

§ 5. Special Damages.

Loss of profits resulting to plaintiff from defendant's wrongful act may not be based upon mere speculation and conjecture, but may be recovered if plaintiff introduces evidence from which the amount of such loss can be ascertained by the jury with reasonable certainty. *Transportation Co. v. Brotherhood*, 18.

Where the contract specifically provides that if defendant could not furnish the subject materials in the quantities needed by plaintiff in plaintiff's performance of his contract with a third person plaintiff should purchase the additional materials needed on the open market, plaintiff may not recover any damages for delay in the performance of his contract with such

third person because of defendant's failure of furnish the materials in the quantity required, since it is clear that damages for such delay were not within the contemplation of the parties when the contract was made. *Teer Co. v. Dickerson, Inc.*, 522.

A purchaser who has been deprived of possession or use of the chattel as a result of breach of warranty against encumbrances may not recover the profits he would have realized from the use of the chattel unless he alleges and proves that such special damages were within the contemplation of the parties at the time of the execution of the contract. *Seymour v. Sales Co.*, 603.

§ 7. Direct and Remote, Sole and Contributing Cause of Damage.

Plaintiff passenger was injured when the car in which he was riding was successively hit by two other cars. The jury found that his injuries were not proximately caused by any negligence on the part of two of the drivers. *Held:* Plaintiff may no longer recover on the theory that his injuries were the result of successive, joint, and concurrent torts, and may recover from the third driver only for those injuries resulting solely from the collision between the car in which he was a passenger and the car of such defendant. *Fox v. Hollar*, 65.

Where plaintiff suffers personal injury and damage to his car as the result of negligence causing the collision with one defendant's vehicle, and the successive collision with the other defendant's vehicle, resulting from the negligence of the other defendant, caused some damage to plaintiff's car but did not contribute to plaintiff's personal injury, the question of liability of the second defendant is properly submitted to the jury but is properly limited to contribution for the damages to plaintiff's car. *Gatlin v. Parsons*, 469.

Where defendant is not liable for the injury received by plaintiff, defendant cannot be held liable for failure to provide plaintiff medical assistance or for injuries received by plaintiff in a fall thereafter occurring. *Hardy v. Ingram*, 473.

§ 9. Credit on Damages for Sums Paid by Other Persons.

Hospital and doctor's bills of an injured passenger, paid under the autobile medical payments insurance clause of a policy for which defendant paid the premium, should be deducted in ascertaining the damages recoverable by the passenger, and when the jury has been permitted to include such medical expenses in ascertaining the amount of damages, the judgment will be modified so as to allow a credit for the amount paid under the policy, notwithstanding that such payment was not predicated upon the negligence of insured. *Tart v. Register*, 161.

§ 10. Punitive Damages.

Punitive damages are never awarded as compensation, but are awarded above and beyond actual damages in proper instances as punishment inflicted for intentionally wrongful conduct. *Transportation Co. v. Brotherhood*, 18.

The Labor Management Relations Act does not authorize the recovery of punitive damages, and it is error to submit the question of punitive damages

DAMAGES—*Continued.*

in an action under the Act when the complaint does not join with the cause of action under the Act a cause of action under State law for a tort of violence. *Ibid.*

§ 15. Instructions on Issue of Damages.

In a personal injury suit it is error for the court to instruct the jury to the effect that the jurors, in fixing the amount of damages for pain and suffering, should each put himself in plaintiff's place and see how much it would be worth to him to suffer the pain inflicted upon plaintiff since such instruction tends to permit the admeasurement of such damages through sympathy and thus varies and supersedes the established legal rule for the admeasurement of such damages. *Dunlap v. Lee*, 447.

DEATH

§ 6. Expectancy of Life and Damages.

Where plaintiff in an action for wrongful death produces no evidence tending to show any pecuniary loss resulting to the estate of his decedent, nonsuit will not be disturbed, since neither punitive nor nominal damages are recoverable in such action and, in the absence of evidence of damage, the court would be required to instruct the jury to answer nothing to the issue of damages. *Hines v. Frink*, 723.

DEDICATION

§ 1. Acts Constituting Dedication.

Permissive use of land by the public does not constitute a dedication or constitute the land a public way. *Owens v. Elliott*, 250.

A valid offer to dedicate must be made by the legal or equitable owner of the fee or, at least, with his consent. *Ibid.*

§ 4. Title and Rights Acquired.

While the sale of lots in a subdivision with reference to a map showing streets constitutes a dedication of such streets to the purchasers of lots within the subdivision, the owners of lots outside the subdivision have no rights other than those of the public generally, and as to the public there is only an offer of dedication which does not constitute such streets public ways until the offer is accepted in some recognized legal manner by the proper authorities. *Owens v. Elliott*, 250.

§ 5. Enforcement of Easements Acquired by Dedication.

An individual owning land outside a subdivision may not restrain the obstruction of streets therein even if the offer of the owner of the subdivision to dedicate such streets has been accepted by the public, unless he will suffer some injury by such obstruction distinct from the injury to the public generally. *Owens v. Elliott*, 250.

§ 7. Delivery, Acceptance and Registration.

The registration of a deed, even though done after the death of grantor, creates a rebuttable presumption that it was signed, sealed, and delivered by the grantor, and where the deed reserves a life estate in the grantor, such

DEDICATION—*Continued.*

presumption is not rebutted by evidence that, after its execution, grantor listed and paid taxes on the land, and that, the deed not having been recorded, easement was obtained for a power line from the grantor, and that after grantor's death, grantee, the daughter of grantor, made statements that she did not know "how things were," and handed a sealed envelope to her sister saying, "here is what papa left for you," there being no evidence that the statements had reference to the deed. *Jones v. Saunders*, 118.

DIVORCE AND ALIMONY

§ 1. Jurisdiction and Pleadings in General.

Jurisdiction of the marital status is necessary to give the courts of a state jurisdiction to alter such status by decree of divorce, and where the parties perpetrate a fraud on the jurisdiction of the court, the wife by falsely alleging domicile within that state for the period required by its statutes and the husband by waiver or admission of such domicile, so that the decree of divorce rendered by such court is void under its laws for want of jurisdiction, the decree may be collaterally attacked by the husband in an action in this State in which the fraud on the jurisdiction of the foreign court is made to appear of record. *Donnell v. Howell*, 175.

While residence is a condition to the maintenance of an action for divorce in this State it is not required for an action for alimony without divorce, and where the husband abandons the wife while they are living in this State, our courts have jurisdiction of an action for alimony without divorce based upon such abandonment, G. S. 50-16, notwithstanding the parties are domiciled in another state. *Harris v. Harris*, 416.

§ 13. Divorce on the Grounds of Separation.

The husband is not entitled to absolute divorce on the ground of two years separation if the separation was due to his wilful abandonment of his wife, but that the separation was due to abandonment is an affirmative defense which the wife must allege and prove by the greater weight of evidence. *Taylor v. Taylor*, 130.

Where, in the husband's action for divorce on the ground of two years separation, the wife pleads the husband's prior conviction of abandonment relating to the same separation, the husband's admission of the fact of his conviction, without appeal, is a bar to his action for divorce. *Ibid.*

Where husband and wife execute a valid separation agreement and pursuant thereto live separate and apart physically for an uninterrupted period of two years with the intention of ceasing matrimonial co-habitation, such separation is ground for divorce under G. S. 50-6, and such cause for divorce is not affected by the fact that the husband fails to comply completely with the provisions of the agreement as to the amounts and time for payment of support for the children of the marriage, there being no contention that the execution of the separation agreement was procured by fraud or duress. *Richardson v. Richardson*, 705.

Where husband and wife voluntarily execute a valid separation agreement and thereafter live separate and apart for a period of two years, the wife is precluded from asserting as a defense to his action for divorce

DIVORCE AND ALIMONY—*Continued.*

that the separation was due to his misconduct prior to the date of the separation, even though such conduct may have been sufficient to have justified the wife in separating herself from her husband, since the actual separation was by mutual consent. *Ibid.*

§ 16. Alimony Without Divorce.

Residence is not a condition to the maintenance of an action for alimony without divorce, *Harris v. Harris*, 416.

§ 18. Alimony and Subsistance Pendente Lite.

Evidence that after the institution of an action for alimony without divorce, defendant's counsel discussed the settlement of the matters in controversy with counsel for plaintiff, *is held* to disclose that defendant's counsel had sufficient authority to warrant the service of notice upon them of plaintiff's motion for a hearing for alimony *pendente lite*, G. S. 1-585, and therefore evidence that defendant's counsel had more than five days' notice of such motion is sufficient to support a finding that defendant had the notice required by G. S. 50-16. *Harris v. Harris*, 416.

Where, upon hearing of a motion for alimony *pendente lite* in the wife's action for alimony without divorce, there is evidence sufficient to support the court's finding that the parties were husband and wife, the order for alimony *pendente lite* will not be disturbed upon the husband's contention that he and plaintiff were not lawfully married, the matter being finally determinable upon the hearing upon the merits if the issue should be raised. *Ibid.*

While the court, ordering alimony *pendente lite*, has authority to secure as much of the husband's estate as may be necessary to insure compliance with its order, G. S. 50-16, where the husband has realty in this State and the order for alimony *pendente lite* is made a lien thereon, and it further appears that the husband has a large income from properties in this State, it is error for the court *sua sponte* to order a receiver to take over all of defendant's property, since the record fails to show the necessity for the appointment of the receiver. *Ibid.*

A judge of the Superior Court has no authority out of term to inquire into the matter of alimony *pendente lite* or custody of a child of the marriage at the instance of one party without notice to the other. *In re Burton*, 535.

The failure of the court to make a specific finding that the husband was able to pay the alimony *pendente lite* awarded to the wife is not fatal, the order itself indicating that the court considered the allowance to be reasonable and there being plenary evidence to support such finding. *Mills v. Mills*, 663.

The husband's allegations that during the pendency of the action the wife had engaged "in amorous conduct" is insufficient to raise the question of adultery for the determination of the court before ordering alimony *pendente lite*. *Ibid.*

§ 22. Jurisdiction to Award Custody of Children.

Consent of the parties as to the custody of the child and the monthly payments the father should make for its support cannot bind the court, or

give it jurisdiction to approve it *pro forma*, but it is the duty of the court upon a hearing after notice to award custody of the child and order payments for its support in accordance with the best interests of the child. *In re Burton*, 534.

§ 25. Validity and Attack of Foreign Decrees.

Where, in the wife's action for divorce in another state, the husband files answer and waiver admitting the false and fraudulent allegations of the wife that she was a resident of that state, but the husband does not appear in person or by counsel in that state, held in an action instituted in this State for partition of lands upon the ground that the divorce decree constituted the parties tenants in common, the husband is not estopped to attack the divorce decree, since the wife was not misled or deceived and did not act to her detriment in reliance upon any representation or act of the husband, and since to permit the divorce decree to stand would be an offense against public morals and good conscience. *Donnell v. Howell*, 175.

DRAINAGE

§ 6. Assessments, Liens and Enforcement.

Petitioners' evidence together with as much of respondents' evidence not in conflict therewith but which tends to clarify or explain petitioners' evidence, *is held* to constitute affirmative and substantial evidence that the drainage proposed by the drainage district in suit would benefit the lands of respondents, and therefore respondents' motion of nonsuit on the ground of lack of sufficient evidence on this aspect was properly denied. *In re Drainage*, 337.

EASEMENTS

§ 8. Nature and Extent of Easement.

A deed conveying an easement constitutes a contract to be construed according to the general rules governing the construction of contracts in ascertaining the intent of the parties as to the extent of the easement conveyed. *Weyerhauser Co. v. Light Co.*, 717.

In construing the extent of an easement conveyed by deed, the primary purpose is to ascertain the intention of the parties at the time of the execution of the instrument as gathered from its language read contextually and not in detached portions, considered in the light of the purposes sought to be accomplished, the subject matter of the contract, and the situation of the parties. *Ibid.*

Where the language of an easement deed is unambiguous, effect must be given to its terms taken in their plain, ordinary and popular sense, and the court may not, under the guise of construction, reject language inserted by the parties, or insert language which the parties elected to omit, or grant relief merely because the contract is a hard one. *Ibid.*

Deed held to convey right to cut such trees outside of easement which endangered transmission line. *Ibid.*

EJECTMENT

§ 10. Sufficiency of Evidence and Nonsuit.

Where plaintiff introduces in evidence a deed conveying to him the land in controversy more than seven years prior to the institution of the action, but fails to introduce any evidence of actual possession by him under the deed or that he and defendant claim under a common source, nonsuit is proper, since plaintiff in ejectment has the burden of showing title in himself and the right to possession under such title. *Cothran v. Motor Lines*, 782.

ELECTIONS

§ 4. Conduct of Elections.

It is improper for precinct officials to fail to keep a record of the persons voting in an election. *Ponder v. Cobb*, 281.

ELECTRICITY

§ 3. Rates.

Evidence tending to show that the cost of facilities necessary to provide energy to meet the maximum demand of customers has increased, while the cost of producing a KWH of energy has decreased, *held* to support the order of the Utilities Commission approving a rate schedule which, while not increasing the total revenue to the utility, would increase the percentage of revenue from the demand component while decreasing the revenue per *KWH* of energy furnished. *Utilities Com. v. Area Development*, 560.

A rate schedule must be fair, just and reasonable to the utility as well as to the consumer. *Ibid.*

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking."

When the work of changing the grade of an existing public highway is performed completely within the right of way, without allegation of negligence in the manner or method of doing the work, the fact that such change of grade results in a diminution of access to the owner of the fee of abutting property, who also owns the fee subject to the easement in a part of the highway, does not constitute a partial "taking" of the landowner's property, since the easement includes the right to change the grade of the highway as the public convenience and necessity may require and there is no statutory or constitutional provision in this State for the recovery of compensation in such instance. *Smith v. Highway Com.*, 410.

Limit of access from highway to businesses on remaining land incident to dividing highway by median is not compensable. *Barnes v. Highway Commission*, 507.

§ 5. Measure of Compensation.

While loss of profits or injury to a going business are not elements of compensation which may be recovered in eminent domain proceedings, where the taking of an abutting landowner's access to a highway results in

EMINENT DOMAIN—*Continued.*

a loss of business which in turn renders the land less valuable, the diminution in value of the land itself is a proper element of compensation. *Kirkman v. Highway Com.*, 428.

The highest and most profitable use for which property is adaptable is one of the factors properly considered in arriving at the market value. *Ibid.*

While special and general benefits accruing to the remainder of petitioner's land are to be considered as an offset in determining the amount of damages sustained by petitioner in the taking of a part of his tract of land, the burden is on condemnor to prove the existence of such special and general benefits as actual and appreciable and not merely conjectural or hypothetical. Further, such benefits having once been allowed in a previous proceeding cannot be again allowed in a subsequent one. *Ibid.*

The evidence disclosed that petitioner had theretofore conveyed a right of way for highway purposes, reserving access points to the highway from its remaining lands. Petitioner instituted this proceeding to recover compensation for the later taking of his access. Under the facts it *is held* that the failure of the court to submit the question of special and general benefits was not error, since special and general benefits had already been taken into account in ascertaining compensation for the conveyance of the right of way, and since it is evident that no appreciable benefit resulted to petitioner's remaining land from the mere fact that his access to the highway had been closed. *Ibid.*

A part of petitioner's land was taken to widen a two-lane highway into a four-lane highway with a median dividing the two northbound and two southbound lanes. *Held:* Any diminution in value of the businesses located on petitioner's remaining land by reason of the fact that there was direct access therefrom to the southbound traffic lanes only, so that northbound traffic had no direct access to such businesses, is not damage for which compensation may be recovered, since such damage results not from the taking of any interest in the land but from a police regulation governing the use of the highway by the public generally. *Barnes v. Highway Com.*, 507.

Where the Highway Commission constructs curbing along a highway adjacent to petitioner's land so as to limit access to the land except at definite spaces provided in the curbing, petitioner is entitled to recover compensation to the extent, if any, such curbing substantially impairs free and easy access to his land and the improvements thereon. Such restriction does not constitute the highway a limited access highway within the purview of G. S. 136-89.48, *et seq.*, the right of access to abutting land not being entirely cut off. *Ibid.*

§ 7c. Condemnation by Housing Authorities.

Allegations of facts upon which respondents assert the legal conclusions that petitioner housing authority's act in selecting respondents' land for a low-rent housing project was arbitrary and capricious, amounting to a manifest abuse of discretion, *is held* to constitute a plea in bar to petitioner's right to condemn respondents' land. *Housing Authority v. Wooten*, 358.

Allegation held insufficient predicate for conclusion that housing authority acted arbitrarily in selecting site for project. *Ibid.*

EMINENT DOMAIN—*Continued.*

§ 11. Actions by Owner for Compensation.

Issue of damages to leasehold estates may be determined in same action with lessor's suit for damages. *Barnes v. Highway Com.*, 507.

EVIDENCE

§ 3. Judicial Notice of Facts within Common Knowledge.

It is common knowledge that modern hospitals are staffed by medical, surgical and technological experts, and that the accuracy of daily records made by them is essential to the proper operation of the hospital and the welfare of the patient. *Sims v. Ins. Co.*, 32.

It is a matter of common knowledge that insurance companies from time to time change the terms of their policies. *Setzer v. Ins. Co.*, 396.

§ 8. Prima Facie Proof and Burden of Going Forward with Evidence.

Where a *prima facie* case arises upon a particular set of facts the burden is upon plaintiff to establish the predicate facts by the greater weight of the evidence, in which event the jury may but is not compelled to find the issue in the affirmative, and defendant is under no burden to offer evidence but merely risks an adverse verdict if he fails to do so. *Knight v. Associated Transport*, 758.

§ 11. Transactions or Communications with Decedent or Lunatic.

Where it appears that each of two occupants of an automobile had successively driven the car on the night in question, and that the car was involved in an accident which killed one of them, testimony of the survivor as to the identity of the driver immediately preceding the wreck involves their relation *inter se* and constitutes a personal transaction between them within the meaning of G. S. 8-51. *Tharpe v. Newman*, 71.

Testimony of the surviving occupant of a car tending to show that the other occupant, killed in the accident, was driving at that time is incompetent in an action by the survivor against the owner of the vehicle, sought to be held liable under the doctrine of agency, since the owner after having paid such liability, would have a right of action against the estate of the deceased, and therefore the transaction comes within the spirit if not the letter of G. S. 8-51. *Ibid.*

Testimony by a party as to a conversation between decedent and a third person does not come within the purview of G. S. 8-51, since such testimony does not relate to a personal transaction or communication between the witness and the decedent. *Hodges v. Hodges*, 774.

§ 14. Communications between Physician and Patient.

Hospital records are privileged under G.S. 8-51 insofar as the entries are made by a physician or surgeon or under his direction and control and pertain to communications and information, obtained professionally, relating to matters necessary to diagnosis or treatment, but the privilege does not extend to notations made by nurses, technicians and others unless they were assisting, or acting under the direction of, a physician or surgeon. *Sims v. Ins. Co.*, 32.

EVIDENCE—*Continued.*

The provisions of G.S. 8-53, being in derogation of the common law, are to be strictly construed, and the privilege therein provided is for the benefit of the patient and not the physician or surgeon nevertheless the courts must not limit the scope of the statute so as to exclude from its coverage transactions coming within the plain meaning of its language. *Ibid.*

G.S. 8-53 gives the judge of the Superior Court discretionary power to compel the disclosure of information by a physician or surgeon in regard to a patient, including information on hospital records entered by a physician or surgeon or by another under his direction and control, and the Superior Court should not hesitate to exercise this power when necessary to a proper administration of justice, in which instance the court should enter upon the record his finding of such necessity. *Ibid.*

§ 16. Like Facts and Transactions.

In action to recover for explosion of bottled drink, evidence of explosion of other bottles is incompetent when evidence does not show that circumstances were substantially the same. *Graham v. Bottling Co.*, 188.

§ 16.1. Evidence of Matters Subsequent to Institution of Action Indicating Consciousness of Weakness of Case.

In proceedings for adoption based upon the abandonment of the child by its parent, evidence that after the institution of the proceedings the parent obtained possession of the child from petitioner by false pretense in violation of a restraining order theretofore issued in the cause, negotiated for the return of the child to the petitioner for a large sum of money, and revealed the whereabouts of the child only after being ordered to do so in a *habeas corpus* proceeding in another state, *is held* competent as disclosing conduct on the part of the parent indicating a consciousness on his part that his cause was a bad or weak one. *Pratt v. Bishop*, 486.

§ 19. Evidence at Former Trial or Proceeding.

Allegation by the wife and the admission by the husband of his former conviction of abandonment relating to the same separation is a bar to his action for divorce. *Taylor v. Taylor*, 130.

§ 20. Admission of Pleadings in Evidence.

A party may introduce in evidence a portion of his adversary's pleading. *Smith v. Metal Co.*, 143.

§ 21. Depositions.

Objection made to the introduction of a deposition in evidence immediately before the jury is empaneled is not made before trial within the purview of G. S. 8-81, and therefore the right to object to the competency of the deposition is waived. *Pratt v. Bishop*, 486.

§ 25. Accounts, Ledgers and Private Writings.

Hospital records properly identified and shown to have been entered in the usual course, reasonably contemporaneously the occurrence of the facts referred to therein, by persons having knowledge of the data set forth, and

EVIDENCE—*Continued.*

which are made *ante litem motam*, are not rendered incompetent by the hearsay rule, but constitute an exception to that rule. *Sims v. Ins. Co.*, 32.

§ 30. Declarations Contributing Part of the Res Gestae.

Declarations of passengers in a car, immediately before the driver thereof attempted to make a left turn, that a car was approaching from the rear at a fast pace and that the driver "better not turn" or the other car would "hit us" are competent as spontaneous declarations admissible as *pars res gestae*, and testimony of such declarations is also competent to rebut the driver's allegations that the passengers were guilty of contributory negligence in failing to warn the driver of the approaching danger. *Tart v. Register*, 161.

§ 38. Testimony as to Physical Ability.

Plaintiff a bookkeeper and stenographer, had her hand seriously crushed in the door of an automobile. *Held:* It was competent for plaintiff to testify that at the time of testifying, she had lost 90 per cent of the use of her right hand, since a lay witness may express an opinion about his present state of health, ability to do work, etc. *Carter v. Bradford*, 481.

§ 41. Invasion of Provience of Jury by Nonexpert.

In an action by election officials for libel in the publication of communications charging them with improper conduct of an election, such officials may testify as to the way and manner in which they performed their duties in the conduct of the election in question, but they may not testify that the returns made by them correctly reflected the votes cast, since this is the very question to be decided by the jury and the testimony constitutes an invasion of the jury's province. *Ponder v. Cobb*, 281.

§ 43. Competency and Qualification of Experts.

Evidence of the education and experience of the witness over a period of years in the field of accounting *is held* sufficient to support the court's finding that the witness was an expert in cost accounting so as to render competent testimony of the witness from synopsis sheets made by him or under his direction from the original records as to the amount of loss suffered by the plaintiff in regard to the pertinent items of damage, including loss of prospective profits. *Transportation Co. v. Brotherhood*, 18.

§ 44. Medical Expert Testimony.

It is competent to ask a physician who had examined plaintiff, particularly scars and depressed areas on plaintiff's forehead, etc., whether the headaches which plaintiff testified he habitually suffered could be the result of the injuries, and if a part of the testimony is not responsive to the question, defendant waives the right to object thereto by not moving to strike the unresponsive part of the answer. *Gatlin v. Parsons*, 469.

§ 50. Expert Testimony of Accountants.

It is competent for an expert accountant to testify as to what the books examined by him disclosed as to the amount due by defendant to plaintiff the entries in the books of defendant being competent as admissions and the accountant's testimony not purporting to state the ultimate fact as to the amount due, if any, by defendant to plaintiff. *Teer Co. v. Dickerson, Inc.*, 522.

EVIDENCE—*Continued.*

§ 54. Rule That Party is Bound by his Own Witness or Evidence.

A party introducing in evidence a portion of his adversary's pleading is bound thereby. *Smith v. Metal Co.* 143.

EXECUTION

§ 5. Priorities.

A judgment creditor obtains a lien on the personalty of the judgment debtor from the time officer armed with judicial process acts in conformity therewith and thus makes a valid levy. G.S. 1-313(1). If the judgment debtor does not have title at that time, there can be no valid levy. *Credit Co. v. Norwood*, 87.

Levy on the day the purchaser of a car obtained title would have priority over a subsequently registered purchase money chattel mortgage. *Ibid.*

EXECUTORS AND ADMINISTRATORS

§ 2. Appointment of Administrators.

Where, less than thirty days after the death of intestate, the clerk appoints as administrator the nominee of one of the next of kin without citation to the others of equal right, and two of such other persons apply for letters within six months of the death of intestate, the court, upon appeal from the refusal of the clerk to revoke the letters of administration, properly remands the matter to the clerk with direction that the clerk consider the qualifications of all three persons, but should not revoke the letters if the clerk should find that the person appointed is better qualified and more suitable to administer the estate. *Royals v. Baggett*, 681.

§ 24a. Right of Action for Personal Services Rendered Decedent.

A party rendering personal services in consideration of the recipient's promise to devise real property may, upon breach of the contract, recover from the recipient's estate the value of such services upon *quantum meruit*. *Pickelsimer v. Pickelsimer*, 696.

Plaintiffs mother, in consideration of the deceased's promise to devise property to plaintiff, forbore bringing bastardy proceedings against deceased and moved into deceased's home and performed personal services in looking after deceased and his ligitimate children during their minority. *Held:* Plaintiff's mother may have a right of action to recover the value of the services rendered upon *quantum meruit*, but, upon the plea of the statute of frauds, plaintiff may not maintain an action as the third party beneficiary of the void contract, the doctrine of part performance not being recognized in this State. *Ibid.*

§ 24d. Amount of Recovery and Evidence of Value.

In an action in *quantum meruit* to recover for breach of contract to devise realty in consideration of personal services, the measure of damages is the reasonable value of the services, and evidence of the value of the estate promised is irrelevant to the question of damages. *Pickelsimer v. Pickelsimer*, 696.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 31. Distribution of Estates under Family Settlements.

Family settlement held not to adversely affect rights of infants and was fair and in accordance with testatrix' intent. *Bank v. Bryant*, 42.

Under facts of this case no exigencies threatening validity or dissipation of trusts existed so as to warrant approval of family settlement. *Stellings v. Autry*, 303.

A family agreement at variance with the clear intention of testator will not be approved for the convenience of beneficiaries *in esse* at the expense of ultimate beneficiaries, but such agreement may be approved only when exigencies growing out of the trusts themselves or directly affecting the estate arise, and such settlement is necessary to preserve the trust and effectuate the intent of testator. *Ibid.*

FIREMEN'S PENSION FUND

Pension for firemen may be paid out of general State revenue but the 1959 amendment imposing a tax on fire insurance contracts to raise funds to be used in the payment of the pensions, is unconstitutional. *Ins. Co. v. Johnson*, 367.

FOOD

§ 1. Liability of Manufacturer to Consumer.

In this action to recover for injuries received from the explosion of a bottled drink after it had fallen eight inches to the floor, evidence of the explosion of other bottled drinks was properly excluded when the evidence did not show that they exploded after a fall, and the charge of the count held to have correctly submitted the question of defendant's liablity on the theory that the bottles were filled with excessive pressure and that the bottle in question exploded because of an internal defect. *Graham v. Bottling Co.*, 188.

FRAUD

§ 1. Nature and Elements of Fraud in General.

A release from liability is vitiated by fraud in the same manner as any other instrument, and fraud vitiates the entire instrument and not merely that part to which the fraudulent misrepresentation relates. *Coucart v. Honeycutt*, 136.

§ 3. Material Misrepresentation of Past or Subsisting Fact.

In order for silence to be tantamount to a positive misrepresentation as the basis for fraud, such silence must relate to a material matter which the person remaining silent is under duty to disclose by reason of a relationship of trust and confidence existing between the parties, or because the party relying upon the want of disclosure does not have equal opportunity to ascertain the facts, which facts are within the knowledge of the party remaining silent, so that the silence amounts to an affirmation of a material fact upon which the other party has a reasonable right to rely. *Setzer v. Ins. Co.*, 396.

FRAUD—*Continued.*

§ 5. Reliance on Misrepresentation and Deception.

The failure of a party to read an instrument will not preclude him from attacking the instrument for fraud if he is prevented from reading it by some artifice or misrepresentation which would be relied upon by a reasonably prudent man under the circumstances, since the law does not require a person to deal with everyone as a rascal. *Cowart v. Honeycutt*, 136.

Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, his failure to read the instrument will bar him from thereafter asserting that he believed it contained provisions which in fact it does not, unless his failure to read the instrument is prevented by some trick or device or misrepresentation upon which he has a reasonable right to rely. *Setzer v. Ins. Co.*, 396.

§ 11. Sufficiency of Evidence of Fraud and Nonsuit.

Inadequacy of consideration, if not gross, is alone insufficient to set aside an instrument for fraud, although it is properly considered with other evidence upon the issue, but if the inadequacy of consideration be so gross as to shock the moral sense, it may alone be sufficient to warrant the submission of the issue to the jury. *Cowart v. Honeycutt*, 136.

Evidence held sufficient to raise the issue of whether release was procured by fraud for determination of jury. *Ibid.*

FRAUDS, STATUTE OF

§ 3. Pleadings.

The defense of the applicable statute of frauds may be raised by pleading the statute specifically, by denying the contract, or by alleging another and different contract. *Pickelsimer v. Pickelsimer*, 696.

§ 4. Estoppel, Waiver and Part Performance.

The doctrine of part performance does not obtain in this jurisdiction. *Pickelsimer v. Pickelsimer*, 696.

§ 6b. Contracts to Convey or Devise.

An oral contract to devise realty, as well as an indivisible oral contract to devise both real and personal property, is void and may not be enforced if the statute of frauds is pleaded. *Pickelsimer v. Pickelsimer*, 696.

GAS

§ 3. Rates.

A gas company's original costs of capital improvements, its increase in taxes resulting from a change in its depreciation rate, its contributions to its employees' pension fund, should all be taken into consideration in fixing its rates. *Utilities Com. v. Public Service Co.*, 233. Also, under a requirement of its banks that it maintain a large minimum balance in order to borrow money, such balance should be considered as working capital. *Ibid.*

HABEAS CORPUS

§ 2. To Obtain Freedom from Unlawful Restraint.

The right of any person imprisoned or restrained of his liberty to apply to any Judge or Justice for *habeas corpus* extends to a person sentenced for contempt of court. *In re Burton*, 534.

Upon the hearing of *habeas corpus* at the instance of a person restrained of his liberty, the only question is whether petitioner is being held pursuant to a valid judgment of a court of competent jurisdiction. *Ibid.*

Upon the hearing of *habeas corpus* upon petition of a person sentenced for contempt of court, an order staying execution so that contemnor might have notice and time to prepare his defense, and setting a time for another hearing, in effect sets aside the order of contempt and provides a rehearing after notice, and such order as well as the subsequent hearing pursuant thereto are nullities, since the sole authority of hearing judge is to inquire into the legality of contemnor's restraint on the then existing record. *Ibid.*

Habeas corpus may not be used as a substitute for appeal. *Ibid.*

HIGHWAYS

§ 1. Powers and Functions of Highway Commission in General.

The State Highway Commission is an agency of the State created for the purpose of constructing and maintaining our public highways. *Smith v. Highway Com.*, 410.

§ 2. Ordinances and Regulations of Commission.

The State Highway Commission has authority to promulgate special speed restrictions on public highways, including highways within municipal corporations. *Davis v. Jessup*, 215.

§ 4. Ways that are State Highways or Public Roads.

Permissive use of land by the public does not constitute a dedication or constitute the land a public way. *Owens v. Elliott*, 250.

§ 10. Obstructing Public Roads.

An individual may restrain the wrongful obstruction of a public way only if he will suffer injury thereby distinct from the injury to the public generally. *Owens v. Elliott*, 250.

If a public way is obstructed to the peculiar injury of an individual, such individual may be entitled to injunctive relief to end the obstruction and may recover such special damages as he has suffered up to the time the obstruction is removed, but he is not entitled to recover permanent damages measured by the difference in the market value of his own land before and after the obstruction. *Ibid.*

HOMICIDE

§ 20. Sufficiency of Evidence and Nonsuit.

The State's evidence to the effect that defendant threw deceased to the floor and stomped him in the stomach six or more times, with expert testimony that deceased died as a result of peritonitis from the perforation of the upper intestinal tract and that such perforation might have resulted

HOMICIDE—*Continued.*

from the assault, is sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter, notwithstanding the expert's testimony on cross-examination that such perforation might have resulted from the constant and excessive use of alcoholic beverages by deceased. *S. v. Bartlett*, 669.

HUSBAND AND WIFE

§ 4. Wife's Separate Estate.

G.S. 30-1, G.S. 30-2 and G.S. 30-3, insofar as they give a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate are unconstitutional to the extent that they diminish *pro tanto* a devise of her separate estate in accordance with a will executed by her. *Dudley v. Staton*, 572.

§ 11. Separation Agreements.

Provision in a separation agreement that the husband pay to the wife specified sums monthly for the support of the adopted children of the marriage will be construed in the light of the existing legal principles that it is the father's primary duty to support the children during their disability, including adopted children, and that he cannot relieve himself of this obligation by contract, etc., and therefore that the provision for such payments need not have been contemplated as a complete discharge of the husband's duty to support the children. *Goodyear v. Goodyear*, 374.

Under terms of separation agreement, husband was obligated to make payments specified in the contract for the support of the children without deducting sums expended by him for their support. *Ibid.*

Payments made to the wife by the husband for the support of the children of the marriage under the provisions of a separation agreement belong to the children, and the wife is a mere trustee for them, so that she must account to them for that part of the payments not expended for their reasonable support and maintenance. *Ibid.*

The separation agreement in suit provided that the husband should purchase for the wife a new automobile as soon after a specified date as the business conditions of the husband reasonably warranted. It appeared that before the separation the husband had purchased an automobile of a particular make for the wife. *Held:* The provision is not necessarily void for indefiniteness, since it may be assumed that the parties contemplated an automobile in the same price class as the one theretofore purchased by the husband, and evidence of his financial condition on the date specified as compared with his financial condition when he purchased the car may be introduced in explanation of the terms of the agreement, but *held further*, if such provision is void for indefiniteness the wife may recover fair compensation for surrender of her rights in consideration of the husband's agreement to purchase the car. *Ibid.*

§ 21. Competency and Sufficiency of Evidence in Prosecutions for Abandonment.

In this prosecution of a husband for abandonment and wilful refusal to provide support, testimony of a wife that she advised her husband by

HUSBAND AND WIFE—*Continued.*

telephone that the children did not have food and that she was without funds to purchase food, and that in reply the husband stated that she would have to go to court to see what she could do and that he was through, *is held* competent as an admission by defendant. *S. v. Johnson*, 280.

INDICTMENT AND WARRENT

§ 9. Charge of Crime.

An indictment and warrant need not refer to the statute under which it is drawn, and even when it charges the offense in the language of a former statute, it will be upheld when the language is sufficient to charge the offense under an existing statute. *S. v. Thompson*, 452.

§ 11. Identification of Victim.

A charge that the victim was "Frank E. Nutley" and proof that the victim was "Frank E. Hatley" is a fatal variance. *S. v. Overman*, 464.

§ 14. Time of Making Motions to Quash and Waiver of Defects.

By failing to move to quash and by going to trial upon a warrant charging that defendant operated a motor vehicle on a public street while under the influence of "intoxicating liquor or bitters, morphine or other opiates," defendant waives duplicity in the warrant and may not later raise the question by motion in arrest of judgment. *S. v. Thompson*, 452.

INFANTS

§ 6. Attack of Judgment against Infant for Want or Inadequacy of Appointment of Guardian Ad Litem.

While the courts are alert to protect the rights of minors, whether represented by guardians or not, and will scan with extra care all records affecting the interests of minors, the appointment of a guardian *ad litem* for a minor is not jurisdictional, and whether a judgment against an infant will be vacated because the infant was not represented by a guardian *ad litem* must be determined on the facts of each particular case on the basis of whether the infant was duly protected in his rights and property. *Tart v. Register*, 161.

The fact that a guardian *ad litem* for a minor defendant was not appointed until after verdict does not require that the verdict be set aside and a new trial ordered when the trial court finds upon competent evidence that the interests of the minor had been fully and amply protected by the attorney for defendants to the same extent as if a guardian *ad litem* had been appointed at the outset. *Ibid.*

INJUNCTIONS

§ 2. Invasion of or Threat to Rights of Party Suing in General.

A party may not be enjoined from doing what it has already done. *Durham v. Public Service Co.*, 546.

Injunction lies to prevent a threatened or imminent injury and it is not appropriate to redress a completed tortious act. *Walker v. Nicholson*, 744.

INJUNCTIONS—*Continued.*

§ 3. Inadequacy of Legal Remedy and Irreparable Injury in General.

Ordinarily, an injunction will not lie where there is a full, adequate and complete remedy at law which is as practical and efficient as is the equitable remedy. *Durham v. Public Service Co.*, 546.

Injunction should not issue when defendant has filed bond providing complete and efficient remedy if plaintiff prevails on merits. *Ibid.*

Mere averment that defendant will continue his wrongful acts unless enjoined is but a conclusion of the pleader, and is insufficient to support injunctive relief, it being required that plaintiff allege facts supporting the conclusion of defendant's intention to continue the commission of the wrongful acts and that such acts will result in injury not compensable in money. *Walker v. Nicholson*, 744.

§ 5. Enjoining Enforcement of Statute.

While injunction does not ordinarily lie to restrain the enforcement of a statute, the remedy will lie to prevent the denial of fundamental property or personal rights in violation of constitutional guarantees. *Surplus Store v. Hunter*, 206.

§ 13. Issuance of Temporary Orders Upon a Hearing; Continuance and Dissolution of Temporary Orders.

Upon the hearing of an order to show cause why a temporary restraining order should not be issued pending the determination of the action on the merits, the ultimate merits of the action are not before the court, and, while the court, in treating the complaint as an affidavit, must consider the facts alleged in determining in its sound discretion whether interlocutory injunction should be issued, an adjudication of the merits contained in the order for temporary injunctive relief must be stricken. *Durham v. Public Service Co.*, 546.

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals.

An order committing a person to a mental hospital for observation and treatment does not create a presumption of mental incapacity. G.S. 122-46. *In re Wilson*, 593.

An order committing a person to a mental hospital permanently or indefinitely deprives him of his liberty within the purview of constitutional safeguards, and a person may not be so deprived of his liberty except by judgment rendered in accordance with due process of law, which implies an opportunity to be heard and to prepare for the hearing. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Federal Constitution. *Ibid.*

Where a person has been committed to a mental hospital for observation and treatment, G. S. 122-46, the clerk may not thereafter upon the report of the hospital superintendent order the commitment of such person for an indefinite time without giving such person notice and an opportunity to be heard. If G.S. 122-46.1 does not contemplate notice and a hearing, it is unconstitutional, but under the 1957 amendment a hearing may be had under G.S. 35-3, 35-4 and 35-4.1. Under this procedure a guardian *ad litem*

INSANE PERSONS—*Continued.*

should be appointed so that the person committed will be bound by the judgment if the issue is found adverse to him. *Ibid.*

INSURANCE

§ 3. Construction and Operation of Policies in General.

An insurance contract is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions. *Hawley v. Ins. Co.*, 381.

Where an insurance company issues successive separate contracts of insurance, as distinguished from mere renewals of an original policy, insured does not have the right to assume that a new contract will conform to the terms of a prior policy of the same type. *Setzer v. Ins. Co.*, 396.

§ 7. Reformation.

Allegations held insufficient to state cause of action for reformation for failure of insurance company to disclose limitation of coverage. *Setzer v. Ins. Co.*, 396.

§ 17. Avoidance of Life Policy for Misrepresentation or Fraud.

False statements in regard to health upon an application for a policy of life insurance are deemed material as a matter of law, and therefore it is error for the court in its charge to submit to the jury, in addition to the questions of whether insured made the statements and whether they were false, further question of whether the statements were material. *Sims v. Ins. Co.*, 32.

§ 34. Death or Injury by Accident or Accidental Means.

Evidence tending to show that insured died shortly after receiving a blow to the head, together with testimony that the witness did not know whether the blow was inflicted by another person or by accident, or how it was inflicted, is insufficient to show death by accidental means from bodily injury sustained solely through external, violent and accidental means. Further the court should explain in its charge the term "accidental means." *Sims v. Ins. Co.*, 32.

§ 53. Auto Insurance—Payment and Subrogation.

Payment by the insurer to the insured subrogates insurer *pro tanto* to insured's claim against the *tort-feasor* causing the damage; where insurer pays the full damages it is subrogated to the entire right of action and alone may sue, if the sum paid is partial compensation of the damages the injured party is a necessary party to the action and insurer is a proper party, while if the insured refuses to bring the action, insurer may bring it and join insured as a defendant. *Phillips v Alston*, 255.

§ 57. Drivers Insured under Liability Policies.

Under an "omnibus clause" in an automobile liability policy, persons using the vehicle with the express or implied permission of insured are covered, and implied permission involves an inference arising from language or conduct of insured or someone having authority to bind insured in this

respect, or a relationship between the parties, under circumstances signifying assent. *Hawley v. Ins. Co.*, 381.

Evidence tending to show that the employer gave possession of the insured vehicle to its employee with permission to keep it overnight, with the understanding that the employee was not to "do too much running around with it at night," *is held* to permit the conclusion that the employer gave the employee express permission to use the vehicle on personal missions, subject to the limitation against "excessive use," and is sufficient to be submitted to the jury on the question of such employee's coverage under the "omnibus clause" of an automobile accident policy while driving the vehicle on a personal mission at night. *Ibid.*

In this State, consonant with statutory provisions, G.S. 20-279.21 (b) (2), coverage of an employee under the "omnibus clause" in an automobile liability policy extends only to use by the employee with the express or implied permission of the employer, and while a slight deviation by the employee is not sufficient to exclude him from coverage, a material deviation from the permission given is a use without permission. The fact that while driving the vehicle for a permitted use the employee permits passengers to ride with him contrary to the instructions of the employer will not alone take such use out of the coverage. *Ibid.*

In determining coverage under an "omnibus clause" in a policy of automobile insurance, the act of the employer in giving initial permission to the employee to use an insured vehicle does not extend to any use thereafter made by the employee while the vehicle is in his possession unless expressly prohibited, but in this State coverage is limited to use by the employee with the permission of the employer, express or implied, and an instruction applying the more liberal rule must be held for prejudicial error. *Ibid.*

§ 61½. Compromise and Settlement of Claim by Insurer.

Where insurer for defendant obtains a release from plaintiff with knowledge that plaintiff's insurer had paid plaintiff a sum for property damage, the release will not bar plaintiff's insurer from recovery on its subrogated claim, since the release will be construed as an adjustment only of those damages not compensated for by plaintiff's insurer. *Phillips v. Alston*, 255.

Where defendant relies upon a release from plaintiff obtained by defendant's insurer as precluding action by plaintiff's insurer to recover on its subrogated claim for the amount paid by it to plaintiff under its policy contract with plaintiff, defendant may not assert that his insurer was without authority to obtain the release, since by asserting rights resulting from the settlement he ratified it, and by accepting its benefits is estopped to reject its obligations. *Ibid.*

§ 73. Fire Insurance—Property Insured.

A policy of fire insurance on contents of a building used by insured to process goods of his customers in his hands as bailee, covering the loss of "property of the insured or for which the insured is liable," *is held* to include in the coverage property held by insured as bailee and destroyed by fire of unknown origin, notwithstanding the absence of legal liability of

INSURANCE—*Continued.*

insured for such loss, although insured will hold the payments for the bailed articles as trustee for the benefit of the owners. *Rouse v. Insurance Co.*, 267.

§ 84. Fire Insurance—Companies Liable and Adjustment of Loss between Companies Liable.

Where separate insurers issue respectively a policy of fire insurance upon the same property, each policy containing provisions that in case of other valid insurance any loss should be apportioned, insured may sue both insurers in one action to recover the loss by fire of the insured property, since the presence of both the insurers is necessary for a proper apportionment of the loss and to fix the liability of each. *Rouse v. Ins. Co.*, 267.

§ 93. Burglary and Theft Insurance.

Under a policy of insurance in favor of lessees of a store building, covering loss from burglary and damage to the premises owned by lessees or for which they are liable, insurer is liable for the cost of repairing doors to the store damaged in a burglary when lessees are liable under the terms of the lease for the repair of the premises except damage resulting from "unavoidable accidents." *Tayloe v. Indemnity Co.*, 626.

JUDGMENTS

§ 13. Judgments by Default.

Judgment by default cannot be rendered upon a complaint which fails to state a cause of action. *Walker v. Nickolson*, 744.

The trial court may refuse in its discretion to render judgment by default and may extend the time of filing answer. *Ibid.*

§ 16. Parties Who May Attack Judgment.

The fact that the party attacking a judgment of another state for fraud upon that court's jurisdiction participated in the fraud does not exclude such party from attacking the judgment when to permit the judgment to stand would be an offense against public morals and good conscience. *Donnell v. Howell*, 175.

§ 18. Direct and Collateral Attack in General.

Where the Supreme Court holds the judgment appealed from is irregular and remands the cause, judgment of the Superior Court thereafter entered which is in conformity with the mandate so far as the judgment goes, but which inadvertently fails to strike out or modify the former judgment, *is held* contrary to the course and practice of the Court, and the proper procedure to make it conform with the mandate of the Supreme Court is by motion in the cause. *Collins v. Simms*, 1.

Decree of another state obtained by fraud on its jurisdiction may be collaterally attacked. *Donnell v. Howell*, 175.

§ 19. Attack of Judgments as Void.

Where there is no service or waiver of service of summons, a judgment rendered in the action is void for want of jurisdiction, and may be set aside upon motion without a showing of a meritorious defense notwith-

JUDGMENTS—*Continued.*

standing that such judgment is by default for want of an answer, *Kleinfelt v. Shoney's, Inc.*, 791.

§ 21. Irregular Judgments.

An irregular judgment is not void, and even after decision of the Supreme Court holding it to be irregular such judgment stands until it is set aside by judgment entered in the trial court in conformity with the mandate of the Supreme Court. *Collins v. Simms*, 1.

§ 24. Attack of Judgments for Fraud.

Where the parties perpetrate a fraud on the jurisdiction of the court of another state rendering the judgment so that the judgment is void under its laws, such judgment is void here and may be collaterally attacked. *Donnell v. Howell*, 175.

§ 29. Parties Concluded.

Persons not parties to an action and not represented therein are not bound by the judgment rendered therein. *Cline v. Olson*, 110.

In an action by a passenger in an automobile against the driver of a truck involved in a collision with the car and against an individual alleged to be the employer of the truck driver, the driver of the car was joined as an additional defendant for contribution. The additional defendant plead a prior judgment in his favor in his action against the driver of the truck and the alleged corporate employer of the truck driver. *Held:* The negligence of the respective drivers was necessarily at issue in the prior action and precludes the cross action asserted by the truck driver, and upon joint demurrer, also precludes the employer even though the employer was denominated an individual in the one action and a corporation in the other. *Williams v. Hunter*, 754.

§ 33. Judgments of Nonsuit as Bar to Subsequent Action.

A judgment of nonsuit for variance between allegation and proof does not preclude plaintiff from instituting a new action. *Hall v. Poteat*, 458.

§ 34. Consent Judgments as Bar to Subsequent Action.

A consent judgment that the deed of trust in question is valid and which fixes the balance of the note secured thereby precludes the mortgagor from thereafter attacking the validity of the deed of trust or the amount then due so long as the consent judgment remains in full force and effect. *Leggett v. Smith-Douglass Co.*, 646.

JURY

§ 2. Special Venires.

Whether the court should grant a motion for a special venire is addressed to its sound discretion and is not subject to review in the absence of a showing of abuse of discretion, and the fact that matters, raising questions as to the qualifications of certain jurors and improper influence upon other jurors during the course of the trial, subsequently occur does not show abuse of discretion in denying the motion when none of the matters could have been anticipated at the time the ruling on the motion was made. *Ponder v. Cobb*, 281.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions.

The word "kidnap" as used in G. S. 14-39 means the unlawful taking and carrying away of a person by force or fraud and against his will, or the unlawful seizure and detention of a person by force or fraud and against his will, and therefore the contention that the statute, since it repeals C.S. 4221, and omits the word "fraud" or "fraudulently," or words of similar import, does not embrace an unlawful detention or carrying way of a person against his will by fraud, is untenable. *S. v. Gough*, 348.

Evidence that defendant induced a young girl to go with him in his car by means of false representations that he wished her to baby-sit with his two children, and that such representations were made by defendant falsely, knowingly, and with intent to deceive the young girl so he could carry her off in his automobile for some immoral purpose, *is held* sufficient to be submitted to the jury in this prosecution for violation of G. S. 14-39, since her consent, having been obtained by false representations and fraud, was no consent in law, so that the asportation was in fact against her will. *Ibid.*

Where, in a prosecution under G. S. 14-39, the evidence tends to show that defendant kidnapped prosecutrix by fraud, but there is no evidence that he used threatening words or violence or any overt act or an attempt, with force and violence, to do injury to prosecutrix, there is no evidence of assault upon a female, and therefore the court correctly refrains from submitting the question of defendant's guilt of assault upon a female, and correctly confines the jury to a verdict of guilty or not guilty of the offense charged. *Ibid.*

LANDLORD AND TENANT

§ 7. Duty to Repair.

Under the terms of a lease obligating lessees of a store to keep the premises in repair, "unavoidable accidents excepted," lessees are liable for the cost of repairing the doors to the store damaged in a burglary, since such damage results from the intentional act of the burglar or burglars, and therefore is not the result of an unavoidable accident. *Tayloe v. Indemnity Co.*, 626.

§ 8. Assignment and Subletting.

A lease is assignable even without the use of the word "assigns" in the absence of contractual restrictions or unless there is a relation of personal confidence between lessors and lessees or the lease contemplates personal services by lessees. *Oil Co. v. Furlonge*, 388.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit.

Defendant's confession that he had stolen the goods in question, corroborated by the finding of the goods, identified as having been stolen, in the trunk of his car, *is held* sufficient to withstand motion to nonsuit. *S. v. Hauser*, 158.

LIBEL AND SLANDER

§ 8. Qualified Privilege.

A letter written by the chairman of a major political party to the Governor and a letter written by him to the chairman of the State Board of Elections, criticizing election officials in the conduct of an election, are qualifiedly privileged. *Ponder v. Cobb*, 281.

As a general rule, a privileged communication does not lose its character as such unless there is excessive publication, and, since it must be assumed that every citizen of this State is interested in each State-wide election being properly held in each and every precinct of the State, a release to newspapers of the State and to a wire service by the chairman of a major political party of letters written by such chairman to the Governor and the chairman of the State Board of Elections, charging irregularities in certain precincts in a designated county, does not constitute excessive publication so as to deprive the publication of its qualified privilege. *Ibid.*

Where matter is qualifiedly privileged there is a presumption that the author made the statements in good faith and without malice, and the burden is upon plaintiff to establish by the greater weight of the evidence that defendant made his charges in bad faith, without probable cause, and with express malice. *Ibid.*

§ 13. Competency and Relevancy of Evidence.

The fact that election officials of a precinct, instead of keeping a poll book, kept a card index containing the respective names of the voters and, as each voter voted, separated his card without making any identifying marks on the cards and then re-inserted the cards in the alphabetical card index before the truth or falsity of charges of irregularity could be checked, *is held* improper, G. S. 163-21 (5), and is some evidence to be considered by the jury on the question of good faith on the part of a person making charges of fraud in the conduct of the election. *Ponder v. Cobb*, 281.

In such case, the election officials may testify as to the manner in which they performed their duties, but may not testify that the returns made by them correctly reflected the votes cast. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit.

In this action by election officials to recover for libel contained in communications published by defendant charging election frauds, the evidence *is held* sufficient to be submitted to the jury on the question of whether the privileged communications were false and made with actual malice. *Ponder v. Cobb*, 281.

LIMITATION OF ACTIONS

§ 11. Disabilities.

Where an infant or insane person has no guardian at the time of the accrual of a cause of action, the statute of limitations, in instances in which the incompetent does not have title to realty, begins to run when a guardian is appointed or the disability is removed, whichever first occurs. *Trust Co. v. Willis*, 59.

LIMITATION OF ACTIONS—*Continued.*

§ 12. Institution of Action, Discontinuance and Amendment.

Where an amendment is filed which introduces a new cause of action, the statute of limitations continues to run until the time of the filing of the amendment. *Roberts v. Bottling Co.*, 656.

Where plaintiff obtains an extension of time to file complaint for a cause of action based on negligence, but instead files a complaint stating a cause of action for breach of warranty, the action for breach of warranty is instituted as of the time of filing the complaint and does not relate back to the time of entry of order extending the time for pleading. *Ibid.*

§ 18. Sufficiency of Evidence and Determination of Issue.

When the facts are admitted, the applicability of the statute of limitations becomes a question of law. *Roberts v. Bottling Co.*, 656.

MASTER AND SERVANT

§ 9. Actions to Recover Salary or Wages.

Failure of an employer to pay his employees the compensation to which they are entitled under the contract of employment gives rise to separate causes of action by each employee against the employer, even though the contracts of employment are identical, and one unpaid employee cannot authorize another employee to bring action for the unpaid wages of both, since each action must be maintained by the real party in interest. *Morton v. Thornton*, 259.

§ 14. State and Federal Regulations.

The State Court has jurisdiction of an action under the Labor Management Relations Act to recover damages for an unlawful strike and secondary boycott, but must give the Act the interpretation given it by the U. S. Supreme Court. *Transportation Co. v. Brotherhood*, 18.

§ 16. Strikes and Picketing.

The introduction of evidence of defendant labor union's constitution, showing control by the union over its local unions, with right to suspend a local's charter and place it in trusteeship, together with evidence that the union issued letters requesting exchange carriers not to handle cargo for plaintiff carrier, contributed to the expenses of maintaining the strike against plaintiff, and that its local unions, including local unions under trusteeship and the joint council, participated in the alleged unlawful strike and secondary boycott, *is held* sufficient to raise the question of the liability of the union under the doctrine of *respondeat superior*. *Transportation Co. v. Brotherhood*, 18.

The National Labor Management Relations Act does not authorize the recovery of punitive damages, and while punitive damages may be recovered when the complaint alleges a cause of action under the Act and also a cause of action for a tort of violence under State law, when the complaint alleges only a cause of action under the Act, punitive damages may not be recovered. *Ibid.*

§ 74. Review of Award by Commission for Change of Condition.

The provisions of G. S. 97-47 that claim for additional compensation for change of conditions must be filed within twelve months after final payment

MASTER AND SERVANT—*Continued.*

of compensation under a prior award, *is held* not jurisdictional but provides a plea in a bar which may be asserted by the employer, and the employer may be stopped to assert such bar when employee's delay has been induced by acts, representations, or conduct on the part of the employer. *Ammons v. Sneeden's Sons, Inc.*, 785.

The evidence held to require Industrial Commission to make findings determinative of whether employer was estopped to plead the bar of the statute. *Ibid.*

§ 91. Review of Award of Industrial Commission.

Where the award of the Industrial Commission is based upon a misapprehension of the applicable law, the cause must be remanded in order that the Commission may hear the evidence and find the facts in the light of the true legal principles. *Ammons v. Sneeden's Sons, Inc.*, 785.

MORTGAGES AND DEEDS OF TRUST

§ 39. Suits to Set Aside Foreclosure.

In an action to set aside the foreclosure of a deed of trust on the ground of irregularities in the advertisement and sale, demurrer is properly entered sustained when there are no facts alleged supporting the legal conclusions of the pleader. *Leggett v. Smith-Douglass Co.*, 646.

MUNICIPAL CORPORATIONS

§ 4. Municipal Housing Authorities.

A municipal housing authority is given wide discretionary power in the selection of a site for a low-rent housing project, and the allegations of the complaint in this action held insufficient predicate for the conclusion that the authority acted arbitrarily in selecting the site in question. *Housing Authority v. Wooten*, 358.

§ 5. Distinction between Governmental and Private Powers.

The organization and operation of a municipal fire department is authorized by G. S. 160-235 and is a governmental and not a private or proprietary function of a municipal corporation. *Ins. Co. v. Johnson*, 367.

NEGLIGENCE

§ 8. Concurring and Intervening Negligence.

If the acts of two parties operating independently of each other join and concur in producing the injury complained of, each is liable therefor jointly and severally as joint *tort-feasors. Tart v. Register*, 161; *Salter v. Lovick*, 619.

One defendant may not rely upon the acts of another to insulate his negligence when such acts transpire prior to or simultaneously with his own acts, since the principle of insulating negligence refers to conduct subsequently occurring. *Tart v. Register*, 161.

Where there are successive accidents, but the jury finds that one of defendants was not negligent, the other defendant may not be held liable as a

joint tort-feasor, and is liable only for the damages resulting from his negligence alone. *Fox v. Hollar* 65.

Where the evidence discloses that plaintiffs car and the car of one of defendants collided head-on, that then plaintiff's car was struck from the rear by a bus driven by the additional defendant, and that the second collision resulted in some damage to plaintiff's car but did not contribute to plaintiff's personal injuries, with some evidence that the bus was following plaintiff's vehicle too closely, the question of the liability of the bus driver and the bus company is properly submitted to the jury, but is properly limited to contribution for the damages to plaintiff's car. *Gatlin v. Parsons*, 469.

In this action to recover for injury resulting from the asserted negligence of defendant, contributed to by the acts of a stranegr to the action, the court's charge *is held* to have correctly instructed the jury that defendant would be liable if defendant were guilty of negligence constituting a proximate cause of the injury, or one of them. *Graham v. Bottling Co.*, 188.

The independent act of one tort-feasor will not insulate the negligence of another if such intervening act and resultant injury could have been reasonably foreseen and expected by the author of the primary negligence, and the question of intervening negligence is ordinarily one for the determination of the jury. *Davis v. Jessup*, 215.

If each defendant is liable to plaintiff only for the wrong separately done by each defendant, each must be sued separately, but if there is a joint invasion of plaintiff's rights by separate defendants such defendants may be sued jointly or severally. *Nye v. Oil Co.*, 477.

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance applies in those instances in which the plaintiff or plaintiff's intestate has placed himself in a position of peril, and defendant knows, or by the exercise of reasonable care should have discovered, such perilous position in time to have avoided the injury or death, and negligently fails to use the available time and means to avoid such injury or death, and the charge of the court in this case upon the doctrine *is held* without prejudicial error. *Phillips v. R. R.*, 239.

§ 14. Sudden Emergency as Affecting Contributory Negligence.

A defendant cannot be held guilty of contributory negligence as a matter of law in failing to pursue the wisest choice of conduct when confronted with a sudden emergency. *Gibbs v. Gaimel*, 650.

§ 16. Contributory Negligence of Minors.

A child between the ages of 7 and 14 years is not held to the same degree of care for his own safety as an adult and is rebuttably presumed incapable of contributory negligence, with the burden upon defendant to prove by the greater weight of evidence that such child failed to exercise that degree of care for his own safety as would ordinarily be exercised by a child of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances. *Phillips v. R. R.*, 239.

A nine year old boy is rebuttably presumed incapable of contributory negligence. *Hamilton v. McCash*, 611.

NEGLIGENCE—*Continued.*

§ 20. Pleadings in Negligence Actions.

Contributory negligence of plaintiff may not be pleaded by reference to the allegations of plaintiff's negligence contained in the counterclaim, but plaintiff is not required to file a reply to the counterclaim in order to raise the defense of contributory negligence to the counterclaim, even though plaintiff's action is nonsuited. *Hines v. Frink*, 723.

§ 21. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact that there has been an accident and an injury. *Johns v. Day*, 751.

§ 24c. Sufficiency of Evidence of Negligence—Circumstantial Evidence.

Negligence may be proved by circumstantial evidence from which the conclusion of negligence may be inferred. *Gibbs v. Gaimel*, 650.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff establishes contributory negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom. *Phillips v. Bottling Co.*, 245.

Since a nine-year old boy is rebuttably presumed incapable of contributory negligence, nonsuit may not be entered on the ground of such child's contributory negligence. *Hamilton v. McCash*, 611.

§ 28. Instructions in Negligence Actions.

Charge of contributory negligence of 13 year old boy held without error when construed as a whole. *Phillips v. R. R.*, 239.

Charge failing to apply law of proximate cause to facts in evidence *held* prejudicial. *Howard v. Hoyle*, 795.

§ 33. Negligence in Maintenance and Use of Lands and Buildings in General.

Evidence tending to show that fire originated on defendant's premises, which spread and caused damage to plaintiff's building, that after the fire, rags with funiture polish on them were found in the room in which the fire originated, together with evidence that the fire could have been caused by spontaneous combustion, but also that it was possible that it resulted from any one of a number of causes, *held* insufficient to be submitted to the jury, since the evidence raises a mere conjecture or speculation as to the cause of the fire. *Maharias v. Storage Co.*, 767.

§ 34. Condition and Maintenance of Sidewalks.

Evidence tending to show that plaintiff fell on ice some 12 to 18 inches wide across the sidewalk, which ice had formed from water draining from the driveway on defendant's property, is held insufficient to establish negligence on the part of defendant in failing to provide drainage, knowingly maintaining its driveway so as to cause water to concentrate in excessive quantity on the sidewalk, or in failing to take any precaution to prevent the formation of ice on the sidewalk. *Towe v. Tomlinson, Inc.*, 154.

NEGLIGENCE—*Continued.*

§ 37a. Invitees.

A prospective purchaser of fish who is invited into the owner's truck for the purpose of inspecting iced fish transported therein is an invitee. *Johnson v. Restaurants*, 115.

§ 37b. Duties to Invitees.

The owner of a truck transporting fish is not an insurer of the safety of a customer invited into the truck to inspect the fish, but is under legal duty to exercise due care to keep the inside of the truck in reasonably safe condition for the purpose. *Johnson v. Restaurants*, 115.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitee.

Evidence tending to show that a prospective purchaser of fish, after inspecting the iced fish in boxes, transported in the owner's truck, was leaving the inside of the truck, illuminated only from light coming in the open door, when he tripped over the handle of a shovel protruding from between boxes, that he put his foot out to catch himself and hit what he supposed was ice, and fell to his injury, is held insufficient to make out a *prima facie* case of negligence against the truck owner. *Johnson v. Restaurants*, 115.

Evidence tending to show that a customer was injured in entering the premises through a small door, cut in a large overhead garage door, when the spring of the small door caused it to close with force and catch her foot after her body had cleared the entrance, *is held* insufficient to show any actionable negligence on the part of the owner of the premises. *Sossaman v. Chevrolet Co.*, 157.

PARENT AND CHILD

§ 4. Right to Earnings of Child and Right to Recover for Injuries to Child.

Where a parent, as next friend, brings an action to recover damages for negligent injury to a child, including hospital and medical expenses, the parent waives the right to maintain a separate suit to recover such medical expenses, and they may be included in the award of damages in the action in behalf of the child. *Doss v. Sewell*, 404.

§ 7. Liability of Parent for Torts of Child.

Ordinarily a parent is not liable for the negligent acts of his minor child. *Griffin v. Pancoast*, 52.

PARTIES

§ 2. Parties Plaintiff.

Insurer paying part of damages is subrogated *pro tanto* and is a proper party; insurer paying full damages alone must sue the tort-feasor causing the damage. *Phillips v. Alston*, 255.

Failure of an employer to pay his employees the compensation to which they are entitled under the contract of employment gives rise to separate causes of action by each employee against the employer, even though the contracts of employment are identical, and one unpaid employee cannot au-

PARTIES—*Continued.*

thorize another employee to bring action for the unpaid wages of both, since each action must be maintained by the real party in interest. *Morton v. Thornton*, 259. But the assignee of the employees may maintain the one action on all the claims. *Ibid.*

PARTITION

§ 7. Actual Partition.

Whether the division of land by the commissioners in an actual partition is fair and equitable is a question of fact to be determined by the court upon appeal from a judgment of the clerk affirming the report of the commissioners, and the court's findings are conclusive and binding if supported by any evidence, even though the evidence be conflicting. *West v. West*, 760.

PARTNERSHIP

§ 2. Transaction of Partnership Business.

The assignment by one partner of all his rights in the partnership to a stranger does not affect the rights of the other partner who is not a party to such assignment, and such assignment cannot transfer title to partnership property. *Oil Co. v. Furlonge*, 388.

§ 9. Dissolution and Accounting.

Even though a partnership ceases to do business, the partnership is not terminated until the winding up of its affairs has been completed. *Oil Co. v. Furlonge*, 388.

PLEADINGS

§ 2. Statement of Cause of Action in General.

The complaint should contain a concise statement of the ultimate facts to which the pertinent legal conclusions or equitable principles are to be applied, and should not allege mere evidentiary facts required to prove the existence of the ultimate facts. *Tart v. Register*, 161; *Nye v. Oil Co.*, 477.

§ 6. Time for Filing Answer and Extension of Time.

Even when the complaint states a cause of action, the court, in the exercise of its discretion, may refuse to enter judgment by default for want of an answer and may extend the time for filing an answer, and a *fortiori* may do so when the complaint contains a defective statement of a good cause of action. *Walker v. Nicholson*, 744.

§ 8½. Pleas in Bar.

A release defeats plaintiff's entire cause of action and therefore a plea release is a plea in bar. *Cowart v. Honeycutt*, 136.

The trial court has the discretionary power to order that a plea in bar to plaintiff's entire right to maintain the action be tried prior to the trial on the merits. *Ibid.*

PLEADINGS—*Continued.*

§ 12. Office and Effect of Demurrer.

Upon demurrer, the complaint will be construed liberally in favor of the pleador with a view to substantial justice between the parties. *Nye v. Oil. Co.*, 477.

§ 14. Statement of Grounds, Form and Requisities of Demurrer.

A demurrer which merely charges that the petition fails to state a cause of action is a broadside demurrer and ineffectual, it being required that a demurrer point out specifically the alleged defects of the pleading. *Pratt v. Bishop*, 486.

§ 18. Demurrer for Misjoinder of Parties and Causes of Action.

A joint demurrer cannot be sustained on the grounds of misjoinder if the complaint alleges a cause of action against any defendant. *Rouse v. Ins. Co.*, 267; *Williams v. Hunter*, 754.

Held: The complaint alleged a single cause of action to recover for a completed conspiracy to destroy plaintiff's business, and demurrer for misjoinder of parties and causes of action was properly overruled and motion of the corporate defendant to strike all allegations with respect to the fraudulent conspiracy was properly denied. *Nye v. Oil Co.*, 477.

§ 19. Demurrer for Failure to State Cause of Action.

Where the complaint contains a defective statement of a good cause of action in failing to allege the facts necessary to support the legal conclusions, the action should not be dismissed prior to the expiration of time for amending the pleading. Nor may the action be dismissed upon demurrer on the ground of the pendency of a prior action between the parties until sufficient matter is made to appear to determine the identity of the actions. *Leggett v. Smith-Douglass Co.*, 646.

If the complaint states a defective cause of action the action should be dismissed upon demurrer, but if the complaint merely fails to allege some of the facts essential to a statement of a good cause of action, the action should not be dismissed but plaintiff should be given opportunity to amend. *Walker v. Nicholson*, 744.

Where plaintiff abandons or fails to perfect his appeal from order sustaining a demurrer to the complaint for failure to state a cause of action, the judgment sustaining the demurrer becomes the law of the case, and plaintiff is precluded from thereafter amending his complaint. *Williams v. Contracting Co.*, 769.

§ 20. Aider by Answer.

Where the petition in adoption proceedings against the father of the child fails to allege that the child's mother had consented in writing to the adoption, the defect in the petition is cured when the father's verified answer admits that the mother had filed a written consent to the adoption after the institution of the proceeding. *Pratt v. Bishop*, 486.

§ 28. Variance between Allegation and Proof.

Allegation and evidence must correspond. *Fox v. Hollar*, 65; *Hall v. Poteat*, 458.

PLEADINGS—*Continued.*

§ 34. Motions to Strike.

The court wrongfully strikes allegations of fact constituting a statement of a good cause of action, but the striking of allegations which are merely repetitious of matter appearing in an exhibit attached to the complaint will not be held for error. *Seymour v. Sales Co.*, 603.

But in an action on contract allegations of loss of prospective profits are properly stricken in the absence of allegation that such special damages were within the contemplation of the parties at the time the contract was executed. *Ibid.*

A party may move to strike allegations of an amendment filed under prior order of another Superior Court judge when the motion relates to an entire defense and therefore amounts to a demurrer. *Williams v. Hunter*, 754.

§ 34. Motions to Strike.

The refusal to strike an allegation setting up an estoppel by settlement as a defense to the original defendant's cross action against one of the additional defendants will not be held for error when the original defendant takes a voluntary nonsuit as to such additional defendant prior to trial and such additional defendant is not a party at the time of trial, since the mere reading of the allegations and the original defendant's denial thereof could not have resulted in prejudice. *Spivey v. Boyce*, 630.

PROCESS

§ 4. Proof of Service or Nonservice.

Affidavits of two persons are sufficient to support the finding of the court that no copy of the summons was delivered to or served upon defendant. *Kleinfeldt v. Shoney's, Inc.*, 791.

PUBLIC OFFICERS

§ 8. Performance of Official Duties.

There is a presumption that public officials have discharged their duties in good faith consonant with the spirit and purpose of the law. *Housing Authority v. Wooten*, 358.

RAILROADS

§ 5. Crossing Accidents.

Evidence held insufficient to establish contributory negligence as a matter of law on part of motorist at railroad crossing. *Johnson v. R. R.*, 712.

The failure of automatic signal lights at a railroad crossing, in the absence of other timely warning, while not warranting a motorist in entering blindly upon the crossing, does constitute an implied permission to a motorist to proceed upon the crossing in those cases in which the motorist has taken reasonable precaution and made reasonable observation under the circumstances, and therefore the absence of signal lights is properly considered upon the question of such motorist's contributory negligence. *Ibid.*

RAILROADS—*Continued.*

§ 8. Injury to Persons on or Near Tracks.

Thirteen year old boy climbing over standing freight cars in attempting to cross tracks held by jury guilty of contributory negligence barring recovery for his death resulting when train started and threw him to his fatal injury. *Phillips v. R. R.*, 239.

REFERENCE

§ 1. Nature and Grounds of Remedy.

After a reference has been ordered by one Superior Court Judge another Superior Court Judge has no power to revoke the order of reference and place the case on the civil issue docket except for good cause shown relating to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case. *Coburn v. Timber Corp.*, 222.

§ 2. Consent Reference.

Where the parties agree to a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke the order without consent of both parties. *Coburn v. Timber Corp.*, 222.

§ 5. Appointment and Removal of Referee.

A referee who willfully fails to discharge his duties or intentionally disregards the order of reference may be removed by the trial judge, but the court should remove a referee only for good and substantial reasons upon motion supported by proper and specific allegations and proof. *Coburn v. Timber Corp.*, 222.

A party who proceeds with the reference after the day fixed for the final report may not assert the failure of the referee to file his report within the time fixed as ground for removal. *Ibid.*

§ 7. Report of Referee and Exceptions Thereto.

Where an appeal is taken from an order which erroneously revokes a prior order of reference, the Superior Court is without jurisdiction pending the appeal, and the parties have the right to file exceptions to the referee's report within thirty days from the date the opinion of the Supreme Court reversing the order of revocation is certified to the Superior Court. *Coburn v. Timber Corp.*, 222.

§ 8. Review of Exceptions by Superior Court.

G. S. 1-194 and G. S. 1-195 must be construed *in pari materia*, and the trial court does not have the power to set aside the report of the referee *ex mero motu* prior to the expiration of the time for filing exceptions thereto, since the power of the court to amend, modify, set aside, make additional findings and confirm, in whole or in part, the report of a referee, may be exercised only in passing upon exceptions to the report. *Coburn v. Timber Corp.*, 222.

An order setting aside the report of the referee does not set aside the order of reference. *Ibid.*

§ 11. Trial by Jury upon Exceptions.

Where compulsory reference is ordered in a case coming within the purview of G. S. 1-189 (3) and the parties reserve their right to jury trial, it is

REFERENCE—*Continued.*

the duty of the court to formulate the ultimate issues of fact to be determined by the jury. *Coburn v. Timber Corp.*, 222.

REFORMATION OF INSTRUMENTS

§ 2. For Mistake Induced by Fraud.

Mistake of one party alone affords no ground for the relief of reformation unless such mistake is induced by the fraud of the other. *Setzer v. Ins. Co.* 396.

Allegations held insufficient to state cause of action for reformation of insurance policy for failure of insurance company to disclose that coverage of successive policy of life insurance issued in connection with loans from finance company did not contain indemnity provisions for loss of hand or foot. *Ibid.*

RELIGIOUS SOCIETIES

§ 2. Government, Management and Property.

A person becomes a pastor of a church pursuant to contract made with the person or body having authority to employ. *Walker v. Nicholson*, 744.

While a pastor may sue for the wrongful interference with his duties by another purporting to be the pastor, he may recover only for his own damages and not those accruing to the congregation, and he is not entitled to injunctive relief in the absence of allegation of facts supporting the conclusions that such other intended to continue such wrongful interference and that his acts would cause irreparable injury to the pastor. *Ibid.*

SALES

§ 2. Delivery of Goods and Right to Refuse Delivery.

An agreement to purchase machinery to be reconditioned by the seller at a stipulated price f.o.b. the seller, with right of inspection and thirty days trial by the purchaser, does not entitle the purchaser to reject the machinery delivered if it was the machinery purchased and had been reconditioned in accordance with the terms of the contract, and the purchaser is not entitled to return the machinery without inspection solely because it decided the machinery was too small for its purposes. *Machinery, Inc., v. Specialty Co.*, 85.

§ 5. Express Warranties.

In order for the seller's representations to constitute a warranty, the purchaser must have relied upon them, and where the purchaser testifies that he examined the parts and equipment purchased before he bought them, he may not rely upon the seller's representations as to value as constituting a warranty. *Garner v. Kearns*, 149.

Under North Carolina law the seller of a motor vehicle expressly warrants that the vehicle is free from all liens not expressly listed on the certificate of title. *Seymour v. Sales Co.*, 603.

SALES—*Continued.*

§ 12. Remedies of Purchaser in General.

The seller may not assert his right to recover for shortage of parts and equipment purchased when he uses some of the parts and equipment for almost a year before making inventory, and waits for almost two years after the purchase before complaining of any shortage. *Garner v. Kearns*, 149.

§ 13. Actions or Counterclaims to Rescind.

Breach of warranty against encumbrances entitles the purchaser to rescind the contract of sale, but if, upon discovery of such breach, the purchaser keeps the chattel and relies on the seller's agreement to discharge the prior lien, he waives his right to rescind. *Seymour v. Sales Co.*, 603.

§ 14c. Pleadings in Actions on Warranties.

Complaint held to state cause of action for breach of warranty against encumbrances in sale of motor vehicle. *Seymour v. Sales Co.*, 603.

§ 14g. Measure of Damages for Breach of Warranty.

Breach of warranty against encumbrances does not entitle the purchaser to anything more than nominal damages until he has paid the amount of the outstanding lien or has been deprived of possession by reason of the lien in question. *Seymour v. Sales Co.* 603.

SEARCHES AND SEIZURES

§ 1. Necessity for Search Warrant.

Where a defendant consents to the search of the trunk of his car and there is no evidence of coercion or duress, the articles found as the result of the search are competent in evidence notwithstanding that at the time defendant gave his consent to the search he was under arrest. *S. v. Hauser*, 158.

STATE

§ 5f. Tort Claims Act—Appeal and Review.

Where the record fails to show any appeal from the order of the Industrial Commission in a proceeding under the State Tort Claims Act as permitted by G. S. 143-293, the Superior Court obtains no jurisdiction, and such defect cannot be supplied by a recital in the judgment of the Superior Court that the judgment was rendered upon an appeal in accordance with the statute. *McBride v. Board of Education*, 152.

STATUTES

§ 3. Form and Contents; Vague and Contradictory Statutes.

The exclusion of contracts of fire insurance written on property in "unproctected areas" from the general tax levied on fire insurance contracts does not render the statute void for indefiniteness, since the phrase "unprotected areas" has a definite and well understood meaning when related to fire insurance coverage. *Ins. Co. v. Johnson*, 367.

STATUTUS—*Continued.*

§ 4. Construction in Regard to Constitutionality.

Where a statute prohibits the sale or offering for sale of merchandise within certain categories, with exceptions referring to merchandise within the same categories, and the exceptive provisions are so vague as to be void, the prohibitory provisions cannot be upheld as a valid part of the statute, since the prohibitory and exceptive provisions are interrelated and inseparable parts of the same act. *Surplus Store v. Hunter*, 206.

Whether separate statutes must be treated as a single act in determining whether the enactments attempt to accomplish a prohibitive objective or attempt to accomplish a permitted objective by a prohibitive route, the court must look to the legislative history and background and all legislative pronouncements bearing upon the question, particularly any provisions in the separate acts disclosing that they are interrelated. *Ins. Co. v. Johnson*, 367.

Chapter 1211, imposing a tax on certain insurance companies, Chapter 1212, creating a firemen's pension fund, and Chapter 1273, appropriating moneys from the general fund to the North Carolina Firemen's Pension Fund, must be construed as but a single statute in view of the legislative history and the provisions of the acts themselves disclosing their interrelation. *Ibid.*

§ 5. General Rules of Construction.

The caption of a statute may be considered in its construction only when the meaning of the act is doubtful, and the caption cannot control when the language of the statute is clear and unambiguous. *Sims v. Ins. Co.*, 32.

A statute must be read contextually with reference to its subject matter and objectives to ascertain the legislative intent. *In re Dillingham*, 684.

When a statute, in describing its application, enumerates specific classifications followed by words of general description, the general words will be limited to classifications of the same general nature or class as those particularly and specifically enumerated. This rule is especially applicable to penal and criminal statues, which must be strictly construed. *Ibid.*

TAXATION

§ 2. Uniform Rule and Discrimination.

Tax on insurance companies, levied on all fire and lightning contracts except such contracts written on property in unprotected areas, *is held* not unconstitutional as discriminatory, since the General Assembly has the power to make reasonable classifications of those subject to a privilege tax. *Ins. Co. v. Johnson*, 367.

§ 7. Public Purpose.

Allocation of a part of the general tax revenue of the State to aid municipal corporations in paying pensions to retired firemen is for a public purpose, since the State may assist a municipality as an agency of the State in the discharge of a government function. *Ins. Co. v. Johnson*, 367.

§ 8. Tax on One Group or Community for Benefit of Another.

A tax imposed on fire insurance contracts for the purpose of providing funds for the payment of pensions to retired firemen is unconstitutional

under Art. I, § 17 of the State Constitution, since it imposes a tax on a particular group of tax payers for the special benefit of a particular group of public employees. *Ins. Co. v. Johnson*, 367.

§ 23. Construction of Taxing Statutes in General.

A party asserting that he comes within the exceptions of a taxing statute has the burden of proof, since exceptions or exemptions from taxes must be construed in favor of the taxing power. *Chemical Corp. v. Johnson*, 666.

§ 27. Liability for Estate and Gift Taxes.

Reasonable payments to widow after employee's death in recognition of his services is not subject to income or gift taxes against employer. *Boylan-Pearce Co. v. Johnson*, 582.

§ 28c. Computation of Income Tax Liability of Corporations.

Reasonable payments to widow after employee's death in recognition of his services is not subject to income or gift taxes against employer. *Boylan-Pearce Inc. v. Johnson*, 582.

§ 29. Liability for Sales and Use Taxes.

A herbicide does not come within the provisions of the sales tax statute excluding insecticides from sales tax. *Chemical Corp. v. Johnson*, 666.

TAXICABS

Those who operate taxicabs are common carriers. *Hardy v. Ingram*, 473.

Evidence held insufficient to show negligence on part of taxicab operator in failing to assist aged passenger to alight. *Ibid.*

TORTS

§ 2. Whether Tort is Joint or Several.

If each defendant is liable to plaintiff only for the wrong separately done by such defendant, each defendant must be sued separately, but if there is a joint invasion of plaintiff's right by separate parties, warranting a judgment against them jointly, plaintiff may join all such defendants in one action. *Nye v. Oil Co.*, 477.

§ 7. Release from Liability and Covenants Not to Sue.

A release from liability is a complete defense, and therefore the plea of a release is a plea in bar which the court may order tried prior to the trial on the merits. *Cowart v. Honeycutt*, 136.

A release obtained by fraud is void, and the evidence in this case is held sufficient to raise the issue of fraud for the determination of the jury. *Ibid.*

TRIAL

§ 5. Course and Conduct of Trial in General.

The sequestration of witnesses lies in the discretion of the trial court *Berry Brothers Corp. v. Adams-Millis Corp.*, 263.

TRIAL—*Continued.*

§ 6. Stipulations.

A stipulation of the parties is a judicial admission precluding any of them from thereafter controverting the truth of the matters stipulated, and therefore where the parties stipulate that the issues raised by the pleadings were properly disposed of by a judgment (which judgment was by consent) a party may not thereafter contend that the judgment was void as to him for lack of his consent. *West v. West*, 760.

§ 8. Consolidation of Actions for Trial.

The court has discretionary power to consolidate actions to recover for the deaths of the driver and passenger in one automobile against the estate of the driver of the other car involved in the collision, and the act of the court in so doing will not be disturbed in the absence of a showing of prejudice. *Davis v. Jessup*, 215.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

Where a deposition introduced in evidence is set out in narrative form in the record, an objection to the introduction of the deposition is a broadside objection to the deposition *en masse*, notwithstanding that the assignment of error is to "each and every question and each and every answer contained therein," and such objection cannot be sustained if any part of the evidence contained in the deposition is competent. *Pratt v. Bishop*, 486.

Where objection to the admission of evidence is based upon a specified ground, the competency of the evidence will be determined solely on the basis of the ground specified, even though there may be another ground upon which the evidence might be held incompetent. *Ibid.*

Objection to the introduction of a deposition immediately before the jury is empaneled is not in apt time. *Ibid.*

§ 17. Admission of Evidence for Restricted Purpose.

One defendant may not object that the other defendant was permitted to introduce evidence relevant and competent in support of his allegations when the court properly restricts such evidence to the question of that defendant's liability. *Tart v. Register*, 161.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to him, giving him the benefit of every favorable inference that can be legitimately drawn therefrom, and defendant's evidence which tends to support plaintiff's claim must be assumed to be true and considered, but defendant's evidence which contradicts that of plaintiff or tends to establish a different set of facts must be ignored. *Fox. v. Hollar*, 65.

On motion for nonsuit, plaintiffs are entitled to have the evidence considered in the light most favorable to them. *Preyer v. Parker*, 440.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Contradictions and discrepancies, even in plaintiff's evidence, are to be resolved by the jury and do not warrant nonsuit. *Hawley v. Ins. Co.*, 381.

§ 26. Nonsuit for Variance.

Nonsuit is properly entered for material variance between allegation and proof. *Hall v. Poteat*, 458.

TRIAL—*Continued.*

§ 29. Voluntary Nonsuit.

Where a judge intimates an opinion adverse to the plaintiff on the law upon which his case is based or excludes evidence material and necessary to prove his case, he may submit to a nonsuit and appeal. *Pickelsimer v. Pickelsimer*, 696.

§ 32. Function and Sufficiency of Charge in General.

A prime purpose of the charge is to eliminate irrelevant matter and causes of action, or allegations not supported by evidence, so that the jury may understand and appreciate the precise facts that are material and determinative. *Dunlap v. Lee*, 447.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

The trial court properly refuses to change on an aspect not supported by evidence or on an aspect not supported by allegation, since allegation and evidence must correspond to present a theory of liability. *Fox v. Hollar*, 65.

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. *Melton v. Crotts*, 121

It is not required that every clause and sentence of the trial court's instructions express the law applicable to the facts in the case when considered out of context, it being required only that the charge when construed as a whole should explain to the jury the law applicable to such facts so that there is no reasonable ground to believe that the jury was misled or misinformed. *Phillips v. R. R.*, 239.

It is error for the court to charge on an abstract principle of law which is not raised by proper pleading and supported by evidence. *Dunlap v. Lee*, 447.

§ 35. Expression of Opinion by Court on Evidence in Charge.

An excerpt from the charge lifted out of context will not be held for error as containing an expression of opinion by the court upon the evidence when it is apparent in construing the charge contextually that the court was merely stating a contention of a party and was not expressing an opinion upon the evidence. *Kirkman v. Highway Com.*, 428.

§ 38. Requests for Instructions.

Charge held to have given special instructions requested insofar as necessary to the facts of the case. *Graham v. Bottling Co.*, 188.

§ 40. Form and Sufficiency of Issues.

The issues are sufficient when they present to the jury proper inquiries as to all the determinative issues of fact in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *In re Drainage*, 337.

§ 46. Impeaching the Verdict.

A juror will not be heard to impeach the verdict, and therefore denial of a motion for a new trial for misconduct of a juror, with request to

examine the juror, but without supporting affidavits or other evidence as to the alleged misconduct, or that the alleged misconduct was prejudicial in any way, cannot be held an abuse of discretion. *Stone v. Baking Co.*, 103.

§ 48. Power of Court to Set Aside Verdict in General.

The action of the trial court in setting aside the verdict in its discretion is not subject to review in the absence of manifest abuse of discretion. *Goldston v. Wright*, 279.

§ 50. New Trial for Misconduct of or Affecting Jury.

A motion for a new trial on the ground of misconduct of a juror is ordinarily addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed in the absence of manifest abuse of discretion. *Stone v. Baking Co.*, 103.

A new trial will not be granted because of a conversation between a juror and a stranger while the case was being tried unless it is shown that movant was prejudiced thereby. *Ibid.*

Where it appears that a juror has a conversation with a stranger while the jury was eating at a public place during recess of the cause, but it is not made to appear that the stranger knew or had any interest in the case, and it appears that the conversation had no reference or relation to the case but was a casual conversation in regard to methods of avoiding jury duty, the incident is insufficient as a basis for the exercise of the discretionary power of the trial court to set the verdict aside, injustice or prejudice not having been shown. *Ibid.*

Where the court refuses to set aside the verdict for asserted misconduct of a juror, such refusal amounts to a finding that movant had failed to show misconduct, and the denial of motion will not be disturbed in the absence of a showing of abuse of discretion. *Farmer v. Lands*, 768.

§ 52. Motions to Set Aside Verdict for Inadequate or Excessive Award.

A motion to set aside the verdict for inadequacy of the award is addressed to the sound discretion of the trial court, and the court's ruling thereon is not reviewable when no abuse of discretion is shown. *Robinson v. Taylor*, 668.

A motion to set aside a verdict for asserted inadequacy or excessiveness of the award is addressed to the sound discretion of the trial court, and the court's determination thereof is not reviewable in the absence of a showing of abuse of discretionary power. *Farmer v. Lands*, 768.

§ 54.1. Effect of Order of Mistrial or Setting Aside the Verdict.

When the trial court sets aside the verdict in its discretion and orders a new trial, the case remains on the civil issue docket for trial *de novo*, unaffected by rulings made during the trial, and therefore rulings during trial on motions to nonsuit are no longer pertinent, and the correctness of such rulings cannot be presented for review, there being no final judgment or interlocutory order from which an appeal can be taken. *Goldston v. Wright*, 279.

TRIAL—*Continued.*

§ 57. Trial by the Court—Findings, Judgment and Review.

Where more than one inference of fact may be drawn from the evidentiary facts stipulated by the parties, the court, in a trial by the court under agreement of the parties, may find the ultimate facts from the evidence stipulated. *Boylan-Pearce v. Johnson*, 582.

In a trial by the court under agreement of the parties the weight, credibility, and probative force of the testimony is addressed to the court, and the court's findings of fact are conclusive if supported by competent evidence, even though the evidence might sustain a finding to the contrary. *Hodges v. Hodges*, 774.

In a trial by the court under agreement of the parties, the fact that the court may have admitted certain incompetent testimony is not ground for a new trial when it is manifest that the court did not consider such testimony in finding the determinative facts. *Ibid.*

TROVER AND CONVERSION

§ 1. Nature and Essentials of Action for Trover and Conversion.

If the mortgagee repossesses the chattel without notice and sells it during an extension of time for payment, the mortgagee is guilty of conversion of the chattel. *Seymour v. Sales Co.*, 603.

§ 2. Actions in Trover and Conversion.

Allegations to the effect that the chattel sold by defendant was subject to a prior lien in violation of warranty against encumbrances, and that defendant granted plaintiff an extension of time for the payment of the balance of the purchase price, but repossessed the chattel without notice and sold it under the chattel mortgage, *held* to state a cause of action for breach of warranty and a cause of action for wrongful conversion. *Seymour v. Sales Co.*, 603.

Where the conditional seller wrongfully repossesses and sells the vehicle prior to default or during the time of an extension of time for payment, the measure of damages is the fair market value of the chattel less the indebtedness secured by the conditional sale contract. *Ibid.*

TRUSTS

§ 13. Creation of Resulting Trusts.

In a trial by the court under agreement of the parties, findings that the property against which plaintiff was asserting a resulting trust was purchased prior to the receipt by the resulting trustee of the proceeds of sale of other property upon which plaintiff had an equitable claim, support the court's conclusion that plaintiff is not entitled to a resulting trust against the property in question, it being necessary to the doctrine of trust pursuit that plaintiff show that money in equity belonging to him was used in the purchase of the very property against which the resulting trust is asserted. *Hodges v. Hodges*, 774.

USURY

§ 1. Contracts and Transactions Usurious.

In order to constitute usury there must be a loan, express or implied, with an understanding between the parties that the money lent should be repaid, and a greater rate of interest than allowed by law must be exacted or promised, with the corrupt intent to take more than the legal rate of interest for use of the money. *Preyer v. Parker*, 440.

Contract held ambiguous and not to establish as matter of law unlawful intent to charge usury. *Ibid.* Evidence held insufficient to be submitted to jury on question of usury. *Lumber Corp. v. Equipment Co.*, 435.

UTILITIES COMMISSION

§ 1. Nature and Functions of Commission in General.

The Utilities Commission may regulate its own procedure and prescribe and adopt reasonable rules with respect thereto provided it does not infringe upon statutory provisions governing its actions. *Utilities Com. v. Area Development, Inc.*, 560.

§ 6. Hearings and Orders in Respect to Rates.

The provision of G. S. 62-124 that the Utilities Commission, in addition to the factors stipulated, may consider all other facts that will enable it to determine what are reasonable and just rates, authorizes the Commission to consider only such other facts as have a bearing on value and rates which are established by evidence, found by the Commission, and set forth in the record, to the end that they may be properly reviewed by the courts. *Utilities Com. v. Public Service Co.*, 233.

Original costs of capital improvements should not be ignored by the Utilities Commission in fixing rates of a public utility. *Ibid.*

Where the evidence of a public utility tends to support its right to change its depreciation rate, which results in the payment of a substantial amount in additional taxes, the amount of such additional taxes should be taken into consideration by the Utilities Commission in fixing rates. *Ibid.*

Where the evidence tends to support the right of a public utility to establish a pension fund for employees and make reasonable contributions thereto, the amount paid by the utility in such contributions should be considered by the Utilities Commission in fixing rates. *Ibid.*

Where the evidence of a public utility tends to support its contention that the banks from which it borrowed money required the maintenance of a large balance, the minimum balance required by the banks should be considered as working capital by the Utilities Commission in fixing rates. *Ibid.*

The Utilities Commission must determine whether a hearing brought before it is a general rate case or a complaint proceeding, and its determination thereof will not be disturbed in the absence of a clear showing of prejudice to the complaining party. *Utilities Com. v. Area Development, Inc.*, 560.

Determination by Commission that hearing was a complaint proceeding held not prejudicial to respondents. *Ibid.*

UTILITIES COMMISSION—*Continued.*

§ 9. Appeal and Review.

Where the findings of the Utilities Commission in determining the factors which it considered in fixing the rate base of a public utility are not supported by evidence, the cause must be remanded in order that the Commission may determine, in the manner prescribed by law, a rate schedule which is fair, reasonable, and nondiscriminatory. *Utilities Com. v. Public Service Co.*, 233.

The courts have no authority to regulate utilities but may consider only questions of law presented on appeal from orders of the Utilities Commission. *Utilities Com. v. Area Development, Inc.*, 560.

VENDOR AND PURCHASER

§ 1. Requisites, Validity and Construction of Contracts of Bargain and Sale and Options.

A lease and an option to purchase contained therein are assignable even without the use of the word "assigns" in the absence of statutory or contractual restrictions. *Oil Co. v. Furlonge*, 388.

Provision in a lease and option that lessors agree not to sell the property during the term of the lease to any person other than lessees is not a limitation on lessees' right to assign, but is only a recognition that lessors could not, during the term of the lease, sell to anyone except those exercising the right to purchase pursuant to the option. *Ibid.*

§ 2. Necessity for Tender.

Where the purchaser notifies vendors of his election to exercise the option and that he is ready, able, and willing to pay the purchase price upon tender of deed, vendors' disavowal of the contract by notification that they would not convey constitutes a waiver of actual tender of the purchase price. *Oil Co. v. Furlonge*, 388.

§ 4. Specific Performance.

The fact that an assignment of an option by a partnership is conditional may be asserted as a defence to specific performance only by the members of the original partnership and may not be asserted by the owner of the land as against the assignee of the partnership, certainly when the original partners thereafter perform their agreement by executing an unconditional assignment. *Oil Co., v. Furlonge*, 388.

VENUE

§ 8. Removal for Convenience of Parties and Witnesses.

It is premature for the court to grant a motion for change of venue for the convenience of witnesses before defendants have filed any pleadings, since prior to the joinder of issues there is no basis for the exercise by the court of its discretionary power to order change of venue on this ground. *Lowther v. Wilson*, 484.

WILLS

§ 2. Contracts to Devise and Bequeath.

An indivisible contract to devise and bequeath is void under the Statute of Frauds. *Pickelsimer v. Pickelsimer*, 696.

§ 3. Requisites of Attested Wills.

It is not required that witnesses to an attested will should affix their signatures in the presence of each other, but only that they do so in the presence of testator. *In re will of Long*, 598.

§ 22. Instructions in Caveat Proceedings.

Upon appeal from judgment based upon the negative finding of the jury to the issue of the due execution of the paper writing propounded, an instruction to the effect that the subscribing witnesses must have affixed their signatures in the presence of each other, must be held for prejudicial error notwithstanding that all of the evidence tends to show that the witnesses did sign the instrument in the presence of each other, since the negative answer to the issue may have been influenced by the requirement that the jury believe the evidence in regard to this unnecessary element. *In re will of Long*, 598.

§ 27. General Rules and Construction.

A will must be construed to effectuate the intent of testator as expressed in the language employed, considered in the light of the conditions and circumstances existing at the time the will was made. *Stellings v. Autry*, 303.

§ 29. Presumptions.

The possibility that a daughter of testatrix might have children after reaching the age of 53 years is insufficient to affect the validity of a trust on the ground that it made no provision for any child which might be born after that date. *Bank v. Bryant*, 42.

§ 33. Fees, Life Estates and Remainders.

Where the beneficiary of a life estate in realty and personalty is the sole child of the widowed testatrix, and the will makes no provision for the vesting of the remainders after the life estates, the beneficiary, surviving the testatrix, takes the fee in the realty and the absolute gift in the personalty to the exclusion of collateral kin, since the remainders vest in her as heir and distributee of testatrix. *Banks v. Bryant*, 42.

§ 35. Defeasible Fees and Shifting Uses.

A devise to a person and her heirs, with provision that if such person should die without issue the estate should go to testator's heirs, creates a defeasible fee, and upon the death of the devisee without issue the estate devolves to the heirs of testator. *Scott v. Jackson*, 658.

§ 40. Rule against Perpetuities.

Provisions of a testamentary trust that the trust should continue until such time as "the law of perpetuities" should cause the trusts to be dissolved and that then the trust estates should be divided among testator's lineal descendants *per stirpes*, are valid and the intent of testator must be given effect and the trusts terminate 21 years after the death of the last survivor of

testator's descendants who were alive at the time of testator's death. *Stellings v. Autry*, 303.

§ 42. "Heirs" and "Children."

G. S. 41-6 applies only when a devise is to the heirs of a living person, and cannot have any application to a devise of a contingent limitation over to the heirs of testator upon the termination of a defeasible fee. *Scott v. Jackson*, 658.

A devise of a contingent limitation over to the heirs of the childless testator takes the remainder to the heirs of testator upon the termination of the defeasible fee, and the word "heirs" will not be construed to mean "children" so as to take the estate to the heirs of the devisee for want of an ultimate taker, since such construction would not only be strained but would also be at variance with the intent of testator as expressed in the instrument. *Ibid.*

§ 60. Dissent of Spouse.

G. S. 30-1, requiring that a widow's dissent from the will of her husband be filed within six months, is a statute of limitations which does not extinguish the right but limits the time within which it may be enforced. *Trust Co. v. Willis*, 59.

Where an incompetent widow is without a guardian at the time of the death of her husband, her right to dissent from his will is barred after six months from the date of the appointment of a guardian, and, the will being of record, the guardian's contention that he had no knowledge of the will is immaterial. *Ibid.*

The fact that the husband's will leaves nothing to his widow does not alter the necessity that her dissent from the will be filed within the time limited. *Ibid.*

G. S. 30-1, G. S. 30-2, and G. S. 30-3, insofar as they give a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate are unconstitutional to the extent that they diminish *pro tonto* a devise of her separate state in accordance with a will executed by her. *Dudley v. Staton*, 572.

§ 71. Actions to Construe Wills.

While a trustee under a will may seek the advice of a court of equity to settle conflicting interpretations placed on the instrument by the interested parties, the courts will not give mere advisory opinions with respect to hypothetical situations, and when the allegations are insufficient to show any disagreement between the parties as to the proper interpretation of the instrument, and there are no allegations or evidence sufficient to form a basis for the determination of the questions propounded, the judgment of the Superior Court must be vacated. *Trust Co. v. Barnes*, 274.

The executor is not a "party aggrieved" by judgment adjudicating the rights of the beneficiaries under the will and, none of the beneficiaries affected by the judgment having appealed, the appeal will be dismissed. *Cline v. Olson*, 110; *Ferrell v. Basnight*, 643.

GENERAL STATUTES, SECTIONS OF, CONSTRUED,

1-17. In cases not involving realty, statute begins to run against infant from time of appointment of guardian or removal of disability, whichever first occurs. *Trust Co. v. Willis*, 59.

1-25. Motion for voluntary nonsuit after appeal is abandonment of appeal and Superior Court has jurisdiction of another action therein instituted. *Leggett v. Smith-Douglass Co.*, 646.

1-57. Each employee has separate action for unpaid wages. *Morton v. Thornton*, 259.

1-70. If assignment of claim for wages is not to other employees jointly, each employee must bring action on assignment separately. *Morton v. Thornton*, 259.

1-122. Complaint should contain plain and concise statement of facts constituting cause of action. *Nye v. Oil Co.*, 477.

1-131. If complaint is defective in stating good cause of action, pleader should be given opportunity to amend. *Walker v. Nicholson*, 744.

1-133. Where pendency of prior action does not appear on face of complaint, question of abatement must be raised by answer. *Perry v. Owens*, 98. Where counterclaim is beyond jurisdiction of court in which prior action was instituted, plea in abatement must be overruled. *Ibid.*

1-134.1; 1-272. Where defendant does not request ruling on motion to dismiss by Superior Court on appeal, and participates in hearing on merits, he waives right to object to validity of process. *Harris v. Harris*, 416.

1-138. Contributory negligence may not be pleaded by reference to counterclaim. *Hines v. Frink*, 723.

1-151. Complaint will be liberally construed upon demurrer. *Nye v. Oil Co.*, 477.

1-152. Court may refuse to render judgment by default and extend time for filing answer. *Walker v. Nicholson*, 744.

1-183. Only motion to nonsuit made at the close of all the evidence will be considered on appeal. *Clifton v. Turner*, 92.

1-189(3). When parties to reference preserve right to jury trial, it is duty of court to formulate issues of fact to be submitted to jury. *Coburn v. Timber Corp.*, 222.

1-194; 1-195. Must be construed *in pari materia;* Superior Court may not set aside referee's report prior to expiration of time for filing exceptions. *Coburn v. Timber Co.*, 222.

1-277; 1-568.11. No appeal lies from order for examination of adverse party. *Black v. Williamson*, 763.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

1-313(1). A valid levy determines priority of lien of execution on personalty. *Credit Co. v. Norwood*, 87.

1-568.11; 1-568.4. Commissioner has no judicial authority, and may not determine whether witnesses should be sequestered or whether witness is subject to examination. *Berry Brothers Co. v. Adams-Millis Corp.*, 263.

1-585; 50-16. Service of notice on counsel who participated in conference for settlement is sufficient notice of motion for alimony *pendente lite*. *Harris v. Harris*, 416.

8-51. Surviving occupant may not testify that deceased occupant was driver at time of fatal accident. *Tharpe v. Newman*, 71. Testimony by a party of telephone conversation between deceased and a third person does not come within the statute. *Hodges v. Hodges*, 774.

8-53. Hospital records insofar as they are made by physician or under his direction, are privileged. *Simms v. Ins. Co.*, 32. But judge has discretionary power to compel testimony notwithstanding. *Sims v. Ins. Co.*, 32.

8-81. Objection to deposition must be made before jury is enpanelled. *Pratt v. Bishop*, 486.

14-39. Includes unlawful carrying away of a person by fraud. *S. v. Gough*, 348.

14-356.2 Is unconstitutional. *Surplus Store v. Hunter*, 206.

22-2. Oral contract to devise realty or mixed property comes within statute of frauds. *Pickelsimer v. Pickelsimer*, 696.

20-38(1). Definition of interesection. *Griffin v. Pancoast*, 52.

20-71.1 Evidence that vehicle was registered in name of defendant is sufficient to be submitted to jury on issue of *respondeat superior*. *Hamilton v. McCash*, 611; *Salter v. Lovick*, 619. In absence of evidence that automobile was registered in name of defendant, plaintiff is not entitled to presumption created by the statute. *Griffin v. Pancoast*, 52.

20-72(b); 20-75. Effect of failure to list lien is a warranty that it does not exist. *Seymour v. Sales Co.*, 603.

20-72(b); 20-75; 47-75. Priority between chattel mortgage and levy under execution. *Credit Co. v. Norwood*, 87.

20-129; 20-156. Evidence held to raise issues of negligence and contributory negligence in hitting truck parked without lights on highway. *Smith v. Nunn*, 108.

20-134; 20-161. Driver is required to have lights on vehicle at nighttime irrespective of statute relating to flares back of parked vehicle *Melton v. Crotts*, 121. Neither applies to parking of vehicle on street which is not part of State Highway. *Smith v. Metal Co.*, 143.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-140. The violation of either subsection of the statute constitutes culpable negligence and gives rise to both civil and criminal liability. *Dunlap v. Lee*, 447.

20-140(b). Failure to keep proper lookout does not constitute reckless driving unless the failure is accompanied by dangerous speed or perilous operation. *Dunlap v. Lee*, 447.

20-141(a). It is negligence *per se* for motorist to drive at speed greater than that which is reasonable and prudent under circumstances. *Black v. Milling Co.*, 730.

20-141(a); 20-141(b) (4). Witness may not testify that speed limit at scene was less than general statutory maximum, even though in a city, when there is not evidence that scene was in business or residential district or that signs had been posted. *Hensley v. Wallen*, 675.

20-141(d). Authority of Highway Commission to promulgate special speed restrictions extends to highways within municipalities. *Davis v.* Jessup, 215.

20-149. Has no application to intersection accident. *Clifton v. Turner*, 92.

20-152(a). It is negligence *per se* for a motorist to follow another more closely than is reasonable and prudent under circumstances. *Hamilton v. McCash*, 611.

20-152(b). Where pleadings fail to charge that vehicle was following another at distance of less than 300 feet, pleader may not rely on statute. *Black v. Milling Co.*, 730.

20-154(a). Statute not only requires turn signal but also that mortorist ascertain that movement can be made in safety. *Tart v. Register*, 161.

20-158. Motorist is required to stop not at a sign but at point at which he may observe traffic along dominant highway. *Clifton v. Turner*, 92.

20-161(a). It is negligence for motorist to leave crates of broken bottles on highway without giving warning. *Chandler v. Bottling Co.*, 245.

20-161(c). Does not require that it be absolutely impossible to move vehicle but only that it not be reasonably practical under circumstances to move it. *Melton v. Crotts*, 121.

20-166(a); 20-166(c). Where defendant contends that he was not driver of vehicle which struck pedestrian and also that there was no collision between the pedestrian and any vehicle, it is error for court to assume in its charge that the vehicle in question collided with the pedestrian and that he thereafter needed medical attention. *S. v. Overman*, 464.

20-174(a). Determination of right of way as between pedestrain and vehicles. *Griffin v. Pancoast*. 52.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-279.21(b). Coverage of employee under omnibus clause in auto liability policy extends only to use by employee with the express or implied permission of employer. *Hawley v. Ins. Co.*, 381.

28-6(b); 28-15. Clerk should not appoint nominee of one of next of kin without citation to others of equal right. *Royals v. Baggett*, 681.

30-1. Is statute of limitations and bars remedy but does not extinguish it. *Trust Co. v. Willis*, 59.

30-1; 30-2; 30-3. Are unconstitutional insofar as they preclude married woman from devising her estate to persons other than husband. *Dudley v. Staton*, 572.

31-3(d). It is not required that witnesses affix signatures in presence of each other. *In re Will of Long*, 598.

35-3; 35-4; 35-4.1; 122-46. Where person has been committed to mental hospital for observation, clerk may not thereafter commit her indefinitely upon report of superintendent without giving such person notice and an opportunity to be heard *In re Wilson*, 593.

38-3. Where sole question is location of boundary line, proceeding is processioning proceeding and clerk has jurisdiction, and *certiorari* will not lie from clerk's judgment when no appeal is taken within time allowed. *Johnson v. Taylor*, 740.

40-8; 40-11. There is no public policy that grantee of continuing easement to cut trees endangering transmission line should pay for trees as cut. *Weyerhaeuser v. Light Co.*, 718.

40-12; 40-23. Court has discretionary power to submit, in addition to issue of damages for entire taking, issue as to amount of damages to holders of leasehold estates. *Barnes v. Highway Com.*, 507.

41-6. Applies to devise to heirs of living person and has no application to devise to heirs of testator. *Scott v. Jackson*, 658.

48-2(3). Allegations held sufficient to allege abandonment by parent obviating necessity of consent to adoption. *Pratt v. Bishop*, 486.

49-7. Prosecution for wilful refusal to support illegitimate child may not be heard by justice of the peace; may be instituted by child's mother or Director of Public Welfare but not by others. *S. v. Dixon*, 653.

50-6. Right to divorce on ground of separation is not affected by failure of husband to pay amounts stipulated in deed of separation. *Richardson v. Richardson*, 705. Prior conviction of abandonment precludes husband's action for divorce on ground of separation. *Taylor v. Taylor*, 130.

50-16. Residence is not requisite to action for alimony without divorce. *Harris v. Harris*, 416. Order for receiver to take over husband's estate held not warranted. *Ibid.* Failure of court to find that husband was able to pay alimony *pendente lite* ordered is not fatal; alle-

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

gation that wife had engaged in "amorous conduct" not sufficient to allege adultery. *Mills v. Mills*, 663.

59-55(2). Assignment of partnership assets by one partner does not affect rights of other partner. *Oil Co. v. Furlonge*, 388.

62-12; 62-26. Utilities Commission may promulgate own rules provided it does not infringe on statutory provisions. *Utilities Commission v. Area Development, Inc.*, 560.

62-71. Increase in rates will not be enjoined when utility has filed bond. *Durham v. Public Service Co.*, 546.

62-124. Utilities Commission is authorized to consider only such other facts as relate to reasonable rates. *Utilities Com. v. Public Service Co.*, 233.

84-2.1; 84-4. Corporate agent may prepare legal documents for corporation when the corporation has primary interest therein. *S. v. Pledger*, 634.

93A-6; 143-307. Where statute prescribes procedure for appeal from administrative board, the statute controls. *In re Dillingham*, 684.

97-47. Statute provides a plea in bar, and employer may be estopped from asserting the bar. *Ammons v. Sneeden's Sons*, 785.

105-147(23); 105-188. Reasonable payments to widow after employee's death in recognition of his services is not subject to income or gift taxes against employer. *Boylan-Pearce, Inc. v. Johnson*, 582.

105-164.13(2). Herbicide is not exempt from sales tax. *Chemical Corporation v. Johnson*, 666.

122.46. Order committing person to hospital for insane for observation does not create presumption of mental incapacity. *In re Wilson*, 593.

136-91. It is negligence for motorist to leave creates of broken bottles on highway without giving warning. *Chandler v. Bottling Co.*, 245.

136-89.48. Partial curbing does not constitute highway limited access highway. *Barnes v. Highway Com.*, 507.

143-293. Where record fails to show appeal from order of Industrial Commission, Superior Court does not obtain jurisdiction. *McBride v. Board of Education*, 152.

160-235. Organization and operation of fire department is governmental function of municipality. *Ins. Co. v. Johnson*, 367.

163-21(5). It is improper for precinct officials to fail to keep records of persons voting. *Ponder v. Cobb*, 281.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF CONSTRUED.

ART.

I, §17. Is synonymous with due process of law; "blue law" unconstitutional. *Surplus Store v. Hunter*, 206.
Person may not be committed to mental hospital indefinitely without notice and opportunity to be heard. *In re Wilson*, 593.
Tax imposed on fire insurance companies to pay pensions to firemen is unconstitutional in imposing tax on one group for benefit of another. *Ins. Co. v. Johnson*, 367.

I, §§3, 5. In actions under Labor Management Relations Act, State court must accept interpretation of U. S. Supreme Court. *Transporation Co. v. Brotherhood* 18.

I, §7. Pension to governmental workers is deferred payment of compensation and therefore is emolument in consideration of services. *Ins Co. v. Johnson*, 367.

IV, §8. Supreme Court will exercise supervisory jurisdiction to prevent manifest miscarriage of justice. *In re Burton*, 535.
Where judgment of Superior Court is not in accordance with mandate of Supreme Court, Supreme Court will enforce its mandate *ex mero motu* in exercise of supervisory jurisdiction. *Collins v. Simms*, 1.

IV, §1. Full faith and credit clause does not require that judgment obtained in another state by fraud on its jurisdiction be honored here. *Donnell v. Howell*, 175.

V, §3. Allocation of State revenues to aid cities in paying pension to firemen is for public purpose. *Ins. Co. v. Johnson*, 367.

X, §6. Statutes permitting husband to dissent from wife's will are unconstitutional. *Dudley v. Staton*, 572.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED

Sixth Amendment, §2. In action under Labor Management Relations Act, State must accept interpretation of U. S. Supreme Court. *Transportation Co. v. Brotherhood*, 18.

Fourteenth Amendment. Is synonymous with law of the land; "blue law" unconstitutional. *Surplus Store v. Hunter*, 206.

Person may not be committed to mental hospital indefinitely without notice and opportunity to be heard. *In re Wilson*, 593.