NORTH CAROLINA REPORTS

Vol. 259

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1963

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1963

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5 " "	"	50	"
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8 " "	"	53	"
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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.

JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1963

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SUPERIOR COURTS, FALL TERM, 1963.

FIRST DIVISION

First District—Judge Morris.

Camden—Sept. 23; Dec. 9†.
Chowan—Sept. 9; Nov. 18.
Currituck—Sept. 2; Dec. 2†.
Dare—Oct. 21.
Gates—Oct. 14.
Pasquotank—Sept. 16†; Oct. 7†; Nov. 4†; Nov. 11*.
Perquimans—Oct. 28.

Second District—Judge Peel.

Beaufort—Sept. 2†; Sept. 16*; Oct. 14†; Nov. 4*; Dec. 2†.
Hyde—Oct. 7; Oct. 28†.
Martin—Aug. 5†; Sept. 23*; Nov. 18† (2); Dec. 9.
Tyrell—Aug. 26†; Sept. 30.
Washington—Sept. 9*; Nov. 11†.

Third District—Judge Bundy.

Carteret—Aug. 26†(a)(2); Oct. 14†; Nov. 4.
Craven—Sept. 2(2); Sept. 30†(2); Oct. 28†(a); Nov. 11; Nov. 25†(2).
Pamlico—Sept. 16(a); Oct. 21.
Pitt—Aug. 19(2); Sept. 16†(2); Oct. 7 (a); Oct. 21†(a); Oct. 28; Nov. 18; Dec. 9.

Fourth District—Judge Hubbard.

Duplin—Aug. 26; Sept. 30†(a); Oct. 7†; Nov. 4*; Dec. 2†(2).
Jones—Sept. 16; Oct. 28†; Nov. 25.
Onslow—July 15(a); Sept. 23(2); Oct. 14†(a)(2); Nov. 11†(2).
Sampson—Aug. 5(2); Sept. 2†(2); Oct. 14*; Oct. 21†; Nov. 18(a).

Fifth District—Judge Mintz.

New Hanover—Aug. 5*(2); Aug. 19†(2); Sept. 9†(2); Sept. 30*; Oct. 14†(2); Oct. 28*(2); Nov. 18†(3); Dec. 9*(2).
Pender—Sept. 2†; Sept. 23; Oct. 7†(a); Nov. 11.

Sixth District—Judge Parker.

Bertie—Aug. 26(2); Nov. 18(2).
Halifax—Aug. 12(2); Sept. 30†(2); Oct. 21*; Dec. 2(2).
Hertford—July 22(a); Oct. 14.
Northampton—Aug. 5; Oct. 28(2).

Seventh District—Judge Fountain.

Edgecombe—Aug. 12*; Sept. 2†(a); Sept. 30*(a); Oct. 28†(2); Nov. 11*.
Nash—Aug. 19*; Sept. 9†(2); Oct. 7*; Oct. 14†(2); Nov. 18*(a)(2); Dec. 9†.
Wilson—July 15*; Aug. 26*(2); Sept. 23† (2); Oct. 14*(a)(2); Nov. 18†(2); Dec. 2*.

Eighth District—Judge Cowper.

Greene—Oct. 7†; Oct. 14*(a); Dec. 2.
Lenoir—Aug. 5†(a)(2); Aug. 19*; Sept. 9†(2); Oct. 14†; Oct. 21*(2); Nov. 11†(a); Nov. 18†; Dec. 9.
Wayne—Aug. 5*(2); Aug. 26†(2); Sept. 23†(2); Nov. 4(2); Dec. 2†(a)(2).

SECOND DIVISION

Ninth District—Judge Hobgood.

Franklin—Sept. 16†(2); Oct. 14*; Nov. 25†.
Granville—July 15; Oct. 7†; Nov. 11(2).
Person—Sept. 9; Sept. 30†(a)(2); Oct. 28; Dec. 2†.
Vance—Sept. 30*; Nov. 4†; Dec. 9†.
Warren—Sept. 2*; Oct. 21†.

Tenth District—Judge Bickett.

Wake—July 8*(a)(2); July 22†#(a); July 29*(a); Aug. 5†; Aug. 12*(2); Aug. 19†#(a); Aug. 26†; Sept. 2*(2); Sept. 2†(a)(2); Sept. 16†(2); Sept. 16†#(a); Sept. 30*(2); Sept. 30†(a)(2); Oct. 21†(2); Oct. 21†#(a); Oct. 28*(a)(2); Nov. 4†(2); Nov. 11†#(a); Nov. 18*(2); Nov. 18†(a)(2); Dec. 2*(2); Dec. 2†(a)(2).

Eleventh District—Judge Williams.

Harnett—July 8†(a)(2); Aug. 12†; Aug. 19†(a); Aug. 26*; Sept. 9†(a)(2); Oct. 7†(2); Oct. 28†(a); Nov. 11*(a)(2); Dec. 9†(a).
Johnston—Aug. 19; Aug. 26†(a); Sept. 23†(2); Oct. 14†(a); Oct. 21; Nov. 4†(2); Dec. 2(2).
Lee—July 29*; Aug. 5†; Sept. 9; Sept. 16†; Oct. 7†(a); Oct. 28*; Nov. 25†.

Twelfth District—Judge Braswell.

Cumberland—Aug. 5†; Aug. 12*; Aug. 26*(2); Sept. 9†(2); Sept. 23*(2); Sept. 23†(a)(2); Oct. 7†(2); Oct. 14*(a); Oct. 21†(2); Nov. 4*(2); Nov. 4†(a)(2); Nov. 25†(2); Dec. 9*.
Hoke—Aug. 19; Nov. 18.

Thirteenth District—Judge Mallard.

Bladen—Aug. 19; Oct. 14*; Nov. 11†.
Brunswick—Aug. 26†; Sept. 16; Oct. 21†; Dec. 2†(2).
Columbus—Sept. 2*(2); Sept. 23†(2); Oct. 7*; Oct. 28†(2); Nov. 18*(2).

Fourteenth District—Judge Hall.

Durham—July 8*(2); July 15†(a); July 22†(2); July 29*(a); Aug. 26*; Sept. 9†(2); Sept. 9*(a); Sept. 30*(2); Sept. 30†(a)(2); Oct. 21†(2); Oct. 28*(a); Nov. 4*; Nov. 11†(2); Nov. 25*(2); Nov. 25†(a)(2); Dec. 9*.

Fifteenth District—Judge Carr.

Alamance—July 15†(a); July 29†; Aug. 12*(2); Sept. 9†(2); Oct. 14*(2); Nov. 11†(2); Dec. 2*.
Chatham—Aug. 26†; Sept. 2; Oct. 28†(2); Nov. 25.
Orange—Aug. 5*; Sept. 23†(2); Nov. 11†(a)(2); Dec. 9.

Sixteenth District—Judge McKinnon.

Robeson—July 8†(a); Aug. 12*; Aug. 26†; Sept. 2*(2); Sept. 16†(2); Oct. 7†(2); Oct. 21*(2); Nov. 11†(2); Nov. 25*.
Scotland—July 22†; Aug. 19; Sept. 30†(a); Nov. 4†; Dec. 2(2).

THIRD DIVISION

Seventeenth District—Judge Gwyn.

Caswell—Sept. 23(a); Dec. 2†.
Rockingham—Aug. 19*(2); Sept. 16†(2); Oct. 14†(a); Oct. 21*(2); Nov. 18†(2); Dec. 9*.
Stokes—Sept. 30; Oct. 7(a).
Surry—Aug. 5*(2); Sept. 2†(2); Oct. 7† (2); Nov. 4*(2); Dec. 2(a).

Eighteenth District—

Schedule A—Judge Shaw.

Guilford Gr.—July 8*; July 22*; Aug. 26*; Sept. 2†; Sept. 9†(2); Sept. 30*; Oct. 7†(2); Oct. 21*; Nov. 4*; Nov. 11†(2); Nov. 25*(2); Dec. 9†#.
Guilford H.P.—Sept. 23*; Oct. 28*.

Schedule B—Judge Crissman.

Guilford Gr.—July 8*; Aug. 26*; Sept. 23†(2); Oct. 7*(2); Oct. 21†(2); Nov. 18† (2); Dec. 2*.
Guilford H.P.—July 15*; Sept. 9†(2); Nov. 4†(2); Dec. 9*.

Schedule C—

Guilford Gr.—Aug. 26†#(a); Sept. 9*(a) (2); Sept. 23†#(a); Nov. 4*(a).
Guilford H.P.—Oct. 14†(a)(2).

Nineteenth District—Judge Armstrong.

Cabarrus—Aug. 19*; Aug. 26†; Oct. 7 (2); Nov. 4†(a)(2); Dec. 9†.
Montgomery—July 8; Sept. 30; Oct. 7† (a); Nov. 18.
Randolph—July 15†(a)(3); Sept. 2*; Sept. 16†(a)(2); Oct. 21†(2); Nov. 4†(2); Nov. 25*; Dec. 2†(a)(2).
Rowan—Sept. 9(2); Sept. 23†; Oct. 21† (a)(2); Nov. 25†(a); Dec. 2*.

Twentieth District—Judge McConnell.

Anson—Sept. 16*; Sept. 23†; Nov. 18†.
Moore—Aug. 12*(a); Sept. 2†(2); Nov. 11.
Richmond—July 15†; July 22*; Aug. 26†(a); Sept. 30†; Oct. 7*; Nov. 4†(a); Dec. 2†(2).
Stanly—July 8; Oct. 14†(2); Nov. 25.
Union—Aug. 19†(a); Aug. 26; Oct. 28(2).

Twenty-First District—Judge Johnston.

Forsyth—July 8†(2); July 22(2); Aug. 5(a); Aug. 26†#(a); Sept. 2(3); Sept. 2† (a)(3); Sept. 23†(2); Oct. 7(2); Oct. 7† (a)(2); Oct. 21†(2); Oct. 28(a)(3); Nov. 11†#; Nov. 18†(2); Dec. 2(2); Dec. 2† (a)(2).

Twenty-Second District—Judge McLaughlin.

Alexander—Sept. 23.
Davidson—July 15†(a); Aug. 19; Sept. 9†(2); Sept. 23(a); Oct. 7†; Oct. 14†(a); Nov. 11(2); Dec. 2†(a); Dec. 9†.
Davie—July 29; Sept. 30†; Nov. 18(a).
Iredell—Aug. 26; Sept. 2†; Oct. 14†; Oct. 21(2); Nov. 25†(2).

Twenty-Third District—Judge Gambill.

Alleghany—Aug. 26; Sept. 30.
Ashe—July 15*; Sept. 9†; Oct. 21*.
Wilkes—July 22; Aug. 19(a); Sept. 16† (2); Oct. 7; Oct. 28†; Nov. 4; Dec. 2.
Yadkin—Sept. 2*; Nov. 11†(2); Nov. 25.

FOURTH DIVISION

Twenty-Fourth District—Judge Huskins.

Avery—July 8(a)(2); Oct. 14(2).
Madison—Aug. 26†(2); Sept. 30*; Oct. 28†; Dec. 2*.
Mitchell—July 29†(a); Sept. 9(2).
Watauga—Sept. 23*; Nov. 4†(2).
Yancey—Aug. 5; Aug. 12†(2); Nov. 18.

Twenty-Fifth District—Judge Farthing.

Burke—Aug. 12; Sept. 30(2); Nov. 18 (2).
Caldwell—Aug. 19(2); Sept. 16†(2); Oct. 21†(2); Dec. 2(2).
Catawba—July 29(2); Sept. 2†(2); Nov. 4(2).

Twenty-Sixth District—

Schedule A—Judge Campbell.

Mecklenburg—July 29*(2); Aug. 12†(a) (2); Aug. 26†; Sept. 2†(2); Sept. 16†(2); Sept. 30*(2); Oct. 14†(a); Oct. 21†(2); Nov. 4†(2); Nov. 18†(2); Dec. 2*(2).

Schedule B—Judge Clarkson.

Mecklenburg—Aug. 12†(3); Sept. 2*(2); Sept. 16†(2); Sept. 30†(3); Oct. 21†(a); Oct. 28*(3); Nov. 18†(2); Dec. 2†(2).

Schedule C—

Mecklenburg—July 8*(a)(2); Aug. 12† (a)(2); Aug. 26†(a)(2); Sept. 9†(a)(2); Sept. 30†a)(2); Oct. 14†(a)(2); Oct. 28† (a)(2); Nov. 11†(a)(3); Dec. 2†(a)(2).

Schedule D—

Mecklenburg—Aug. 12†(a)(2); Aug. 26† (a)(2); Sept. 9†(a)(2); Sept. 30†(a)(2); Oct. 14†(a)(2); Oct. 28†(a)(2); Nov. 11† (a)(3); Dec. 2†(a)(2).

Twenty-Seventh District—Judge Froneberger.

Cleveland—July 8(a)(2); Sept. 23†(2); Oct. 28*; Nov. 25†(a)(2).
Gaston—July 8*; July 8†(a); July 15† (2); July 29†(a); July 29*; Sept. 2*(a); Sept. 2†; Sept. 9†(a)(2); Sept. 23†(a)(2); Oct. 7†(a); Oct. 7*; Oct. 14†(2); Nov. 4† (a); Nov. 4*; Nov. 11†(2); Nov. 25*(2); Dec. 9†.
Lincoln—Sept. 9(2).

Twenty-Eighth District—Judge McLean.

Buncombe—July 8*(2); July 22†(2); Aug. 5†(2); Aug. 19*(2); **Aug. 26†#(a);** Sept. 2†(2); Sept. 16†(a)(2); Sept. 16*(2); Sept.30†(3); Oct. 21*(2); Nov. 4†(2); Nov. 18†#(a); Nov. 18*; Nov. 25†; Dec. 2†(a) (2); Dec. 9*(a).

Twenty-Ninth District—Judge Pless.

Henderson—Aug. 12†(2); Oct. 14.
McDowell—Sept. 2(2); Sept. 30†(2).
Polk—Aug. 26.
Rutherford—Aug. 12*†(a); Sept. 16†*(2); Nov. 4*†(2).
Transylvania—July 8; Oct. 21(2).

Thirtieth District—Judge Patton.

Cherokee—July 29; Nov. 4(2).
Clay—Sept. 30.
Graham—Sept. 9.
Haywood—July 8(2); Sept. 16†(2); Nov. 18(2).
Jackson—Oct. 7(2).
Macon—Aug. 5; Dec. 2(2).
Swain—July 22; Oct. 21.

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Judges

ALGERNON L. BUTLER, *Chief Judge*, CLINTON, N. C.
JOHN D. LARKINS, JR., TRENTON, N. C.

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

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MRS. MAUDE S. STEWART, RALEIGH, N. C.
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MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
MISS CORDELLIA R. SCRUGGS, RALEIGH, N. C.
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MRS. ELEANOR G. HOWARD, NEW BERN, N. C.
MRS. JEANETTE H. ATTMORE, WASHINGTON, N. C.
R. EDMON LEWIS, WILMINGTON, N. C.
L. THOMAS GALLOP, ELIZABETH CITY, N. C.

MIDDLE DISTRICT

Judges

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

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorneys

ROY G. HALL, JR., GREENSBORO, N. C.
HENRY E. FRYE, GREENSBORO, N. C.
R. BRUCE WHITE, JR., GREENSBORO, N. C.

U. S. Marshal

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

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MISS GLORIA RIZOTI, GREENSBORO, N. C.

WESTERN DISTRICT

Judges

J. B. CRAVEN, *Chief Judge*, MORGANTON, N. C.
WILSON WARLICK, NEWTON, N. C.

U. S. Attorney

WILLIAM MEDFORD, ASHEVILLE, N. C.

U. S. Marshal

PAUL D. SOSSAMON, ASHEVILLE, N. C.

Clerk U. S. District Court

THOMAS E. RHODES, ASHEVILLE, N. C.

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MISS M. LOUISE MORISON, ASHEVILLE, N. C.
MISS ELVA McKNIGHT, CHARLOTTE, N. C.
MRS. GLENIS S. GAMM, CHARLOTTE, N. C.
MISS ANNIE ADERHOLDT, STATESVILLE, N. C.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 16th day of August, 1963, and said persons have been issued certificates of this Board.

Franklin LeVerne Adams, Jr., Rowland
Ben Ulan Allen, Henderson
Jerry Wofford Amos, Raleigh
Stell Blake Askew, Jr., Chapel Hill
Carl Adam Barrington, Fayetteville
Frank Mebane Bell, Jr., Charlotte
Jean Allen Benoy, Forest City
Donald Ray Billings, Winston-Salem
John Harvey Bingham, Hickory
Larry Thomas Black, Burlington
James Franklin Blue, III, Red Springs
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1963

THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, AN UNINCORPORATED RELIGIOUS ASSOCIATION; AND M. L. JOHNSON, MODERATOR; DEWEY BOLING, ASSISTANT MODERATOR; R. N. HINNANT, CLERK; RALPH BARNES, TREASURER; OFFICERS OF SAID CONFERENCE, M. L. JOHNSON, R. N. HINNANT, EARL GLENN, R. H. JACKSON AND RALPH BARNES, EXECUTIVE COMMITTEE OF SAID CONFERENCE, AND J. G. TEASLEY, OLIF PASCHALL, CALVIN GRIFFIN, JOE PEELE, THE BOARD OF DEACONS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH; AND H. M. ALFORD, LEONARD GIBBS, BOYCE MOIZE, INDIVIDUALLY AND AS TRUSTEES; AND LEO PASCHALL, CHURCH CLERK; AND H. A. STEWART, CHURCH TREASURER, ALL OFFICERS OF THE OFFICIAL BOARDS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH AND OTHERS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH UNITED IN INTEREST AS RECOGNIZED BY THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, KNOWN AS THE J. G. TEASLEY FACTION, v. JAMES A. MILES, LLOYD WILLIFORD, RICHARD BLAKE, SAM WELLS, MACON PERRY, BOBBY McCORKLE, TOM LEE, ARNOLD GOODMAN, CLYDE POWELL, ALL DEFENDANTS PURPORTING TO BE MEMBERS OF THE BOARDS OF DEACONS OF THE EDGEMONT FREE WILL BAPTIST CHURCH; AND, GROVER C. MYERS: AND J. E. CHAPPELL, INDIVIDUALLY AND AS THE PURPORTED BOARD OF TRUSTEES OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH, AND OTHERS UNITED IN INTEREST WITH THE ABOVE NAMED, KNOWN AS THE JAMES A. MILES FACTION.

AND

THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, AN UNINCORPORATED RELIGIOUS ASSOCIATION, M.

CONFERENCE *v.* MILES AND CONFERENCE *v.* CREECH AND TEASLEY *v.* CREECH.

L. JOHNSON, MODERATOR, DEWEY C. BOLING, ASSISTANT MODERATOR; R. N. HINNANT, CLERK, RALPH BARNES, TREASURER, CONSTITUTING THE OFFICERS OF SAID CONFERENCE; M. L. JOHNSON, R. N. HINNANT, EARL GLENN, R. H. JACKSON, AND RALPH BARNES, CONSTITUTING THE EXECUTIVE COMMITTEE OF SAID CONFERENCE, v. RONALD CREECH.

AND

J. G. TEASLEY, OLIF PASCHALL, CALVIN GRIFFIN, JOE PEELE, THE BOARD OF DEACONS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH; AND H. M. ALFORD, LEONARD GIBBS, BOYCE MOIZE, TRUSTEES; AND LEO PASCHALL, CHURCH CLERK; AND H. A. STEWART, CHURCH TREASURER, ALL OFFICERS OF THE OFFICIAL BOARD OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH, AND OTHERS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH, UNITED IN INTEREST AS RECOGNIZED BY THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, KNOWN AS THE J. G. TEASLEY FACTION v. RONALD CREECH.

(Filed 6 March 1963.)

1. Trial § 33—

The court is required to apply the law to the conflicting factual situations presented by the evidence upon an issue and to bring into focus the controlling elements of controversy thereon. G.S. 1-180.

2. Appeal and Error § 45—

Error in the instructions in placing an excessive burden upon one of the parties in respect to an issue is cured by a verdict on the issue in favor of such party.

3. Religious Societies § 3—

Civil courts will not adjudicate ecclesiastical matters except when and to the extent necessary to determine civil and property rights.

4. Same—

When civil courts are required to determine ecclesiastical questions they will do so in accordance with the laws, customs, and usages of the church involved, and the decisions of an authorized church tribunal will be accepted by the courts as conclusive when the church tribunal has acted within the scope of its authority and has observed its own organic forms and rules unless its procedure is arbitrary or manifestly unfair.

5. Same—

Subject to the limitation that an ecclesiastical tribunal may not follow procedure which is patently arbitrary or unfair, its procedure in matters properly within its jurisdiction is to be determined by such tribunal, and a civil court may not require it to observe the usual incidents of trial.

6. Same—

Where it is established by the answer to the first issue that an ecclesiastical tribunal has final ecclesiastical authority and jurisdiction to decide between factions of a church congregation in the event of a division within the congregation, it is error for the court in charging the

jury on succeeding issues to fail to explain the law arising on the conflicting evidence as to whether the circumstances and activities within the congregation were such as to invoke the jurisdiction of the tribunal and whether the procedure of the tribunal was arbitrary and unfair. Further, it is error for the court to charge that the procedure of an ecclesiastical tribunal must follow the only procedure known to it in determining such dispute.

7. Pleadings § 28—

Plaintiffs must prevail, if at all, upon the theory of the complaint.

8. Religious Societies § 2—

The right to possession and use of church property belongs to those of the congregation who have remained faithful to the doctrines, polity, and fundamental customs and rules of the denomination as accepted by the congregation prior to dissension.

9. Pleadings § 29—

The issues arise upon the pleadings.

10. Trial § 40—

The number, form, and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to enter judgment fully determining the cause.

11. Religious Societies § 3— Rules for determining conclusiveness of decision of ecclesiastical tribunal.

When it is established that an ecclesiastical tribunal has jurisdiction to determine as between factions of the congregation which is the true congregation of a particular church, the determinative question in an action involving civil and property rights of members of the church, dependent upon the decision of the church tribunal, is whether a schism or division exists within the congregation so as to invoke the jurisdiction of the ecclesiastical tribunal and whether it had substantial factual ground upon which to base its decision in favor of one of the factions, and, if both questions are determined affirmatively by the jury, whether the tribunal, or the committee acting for it, gave the other faction reasonable notice of the nature of the charges against it, the general identity of its accusers, and reasonable opportunity to be heard, and thus establish that the ecclesiastical tribunal did not act arbitrarily or with manifest unfairness.

APPEAL by plaintiffs from *Hobgood, J.*, March 1962 Civil Term of DURHAM.

These cases were docketed and argued as cases 672, 673 and 674, respectively, at the Fall Term 1962. They involve the right to possession, use and control of the properties and records of the Edgemont Original Free Will Baptist Church of Durham (Edgemont), certain jurisdictional rights of the Western Conference of Original Free Will

Baptists of North Carolina (Western Conference), and the right of Ronald Creech to serve as pastor of Edgemont.

The parties to the actions are: (1) Plaintiff Western Conference, an unincorporated regligious association; (2) plaintiffs J. G. Teasley and others (Teasley faction), who are allegedly the true congregation, some of them officials, of Edgemont; (3) defendants James A. Miles and others (Miles faction), who are allegedly the true congregation, some of them officials, of Edgemont; and (4) defendant Ronald Creech, allegedly pastor of Edgemont.

In each of the cases the court entered judgment adverse to plaintiffs. Plaintiffs appeal.

Arthur Vann and Clarence M. Kirk for plaintiffs, appellants.

Lake, Boyce & Lake for defendants, appellees.

I. Joseph Horton for Central Conference of Original Free Will Baptist of North Carolina, Amicus Curiae.

Hubert Phillips for North Carolina State Convention of Original Free Will Baptists, Amicus Curiae.

Johnson, Gamble & Hollowell for Cape Fear Conference of Original Free Will Baptists of North Carolina, Amicus Curiae.

R. S. Langley and Robert D. Wheeler for Eastern Conference of Original Free Will Baptists of North Carolina, Amicus Curiae.

Maupin, Broughton, Taylor & Ellis for National Association of Original Free Will Baptists of the United States, Amicus Curiae.

William A. Mahler, Jr., for State Association of Original Free Will Baptists of N. C., Blue Ridge Association of Original Free Will Baptists of N. C., Coastal Association of Original Free Will Baptists of N. C., General Conference of Original Free Will Baptists of N. C., Jack's Creek Association of Original Free Will Baptists of N. C., and Piedmont Association of Original Free Will Baptist of N. C. Amicus Curiae.

MOORE, J. This is the second time we have heard appeals in these cases. At the Fall Term 1961 defendants appealed from orders continuing temporary injunctions to the final hearings. We modified and affirmed the temporary restraining orders, and as a result defendants were enjoined, pending final determination of the actions, in general as follows: (1) The Miles faction was restrained from excluding the Teasley faction from the use and possession of the church property; (2) defendant Creech was restrained from holding himself out as an Original Free Will Baptist minister by reason of ordination by or membership in the Western Conference; and (3) defendant Creech was

restrained from serving as pastor of Edgemont. *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619. The opinion summarizes proceedings had prior to and in the course of that appeal, and sets out the injunctive orders in detail.

At the March 1962 Term of Superior Court the case first listed in the caption, *Western Conference and Teasley faction v. Miles faction* (our Docket No. 666), came on for trial before Judge Hobgood and a jury. The other two cases were not tried on the merits.

Plaintiffs' evidence (in case 666), offered in support of the allegations of the complaint, tends to show in substance the following facts (paragraphed and numbered by us):

(1). The Original Free Will Baptist denomination of North Carolina originated in 1727. There are presently 50,000 members in the State. The local churches send delegates to an annual State Convention. The local churches have membership in geographically convenient Conferences within the State. There are nine Conferences. The Western Conference was formed in 1886. Presently about fifty churches, having a total of about 10,000 members, are associated in the Western Conference.

(2). Many years ago the State Convention adopted and promulgated a treatise of faith and government (Discipline) for the Original Free Will Baptists of North Carolina. It has been revised from time to time, and was last revised in 1955. It has been recognized, observed and adopted as the ecclesiastical law of the denomination by the Conferences and local churches. The Western Conference has been governed by it. The Western Conference adopted the 1955 revision in an annual session held at Edgemont. The Western Conference has a constitution and by-laws of its own, not inconsistent with the Discipline. Certain customs, practices and usages, as disclosed by the official minutes of the Conference sessions, have become recognized and accepted by the Original Free Will Baptists of North Carolina as a part of their church polity. According to the Discipline "The Annual Conference, the highest tribunal, shall have final disciplinary authority over the local church." As between the Conference and the local church there is a connectional form of government. Local churches are organized by the Conferences, and the Conferences have exclusive authority to ordain and discipline pastors. By custom and usage the Conference may discipline local churches and decide between factions within the local church.

(3). Edgemont was formed in accordance with the Discipline in 1922, was received into the membership of the Western Conference in

1923, has at all times since had continuous membership therein, has adhered to the customs, practices and usages of the Original Free Will Baptists of North Carolina, and has participated in the programs and policies of the Western Conference and the denomination. Title to the property of Edgemont is in "Trustees of Edgemont Free Will Baptist Church."

(4). In August 1960 unrest, strife and dissension arose in Edgemont Church. The Miles faction and Creech, then pastor, had set out upon a course of departure from the fundamental tenets, faith, polity and customs of the Original Free Will Baptists of North Carolina. The Teasley faction remained true to the faith and reported the offenses and derelictions of the Miles group to the officials of the Western Conference. The Executive Committee and the Board of Ordination, which function for the Western Conference when not in session, attempted during the latter part of 1960 and the early part of 1961 to have the Miles faction and Creech attend meetings called by the Committee and Board that the charges might be heard and discussed and that recommendations might be made. Though notice of the charges and the time and place of meetings was given, the Miles faction refused to be present and participate in any of the meetings, but undertook to expel the Teasley faction from offices and membership in the church, to withdraw the church from the Western Conference, to petition for membership in another Conference, to confer authority upon Creech to perform marriage ceremonies, and to otherwise defy the jurisdiction and authority of the Western Conference. They seized the church property and by threats barred the Teasley faction therefrom. The Executive Committee and the Board of Ordination finally heard the charges in the absence of the Miles faction, though the latter had been given notice of the meeting and had been directed to attend. The Committee and Board made a written report to the Conference.

(5). At a session of the Western Conference the report was heard and considered. By a vote of 88 to 10 the Conference recognized the Teasley faction as the true congregation of Edgemont. Thereafter, the Teasley faction demanded possession of the church property. Defendants refused. The Teasley faction, as the true congregation, elected trustees and other officers for Edgemont.

(6). The Miles faction has departed from the tenets, faith, polity and customs of the Original Free Will Baptists of North Carolina, as they were recognized and observed prior to August 1960, in that it failed and refused to cooperate with the Western Conference, State

Convention and other churches in support of denominational institutions, programs and enterprises; advocated and tolerated the doctrine of "eternal security" which is contrary to the declaration of faith entitled "Perseverance of the Saints," as set out in the Discipline; refused to use the Sunday School literature printed and distributed for and on behalf of the denomination; refused to avow and re-affirm adherence to the Discipline and the customs and usages of the denomination when requested to do so by the Conference; defied the orders and requests of the Western Conference and undertook to appeal therefrom to the National Association when no such appeal is authorized by the Discipline; seized the property and records of the church and retained them in defiance of the orders of the Western Conference; expelled members maliciously and without a hearing; arbitrarily removed from office duly elected officials; recognized Creech as pastor after the Conference had withdrawn his credentials, and undertook to confer on him the authority to perform marriage ceremonies; refused to support the Mount Olive Junior College and openly criticized it; ceased making gifts to the Board of Superannuation of Original Free Will Baptist Churches of North Carolina; discontinued support of the Mission Boards and the Free Will Baptist Children's Home; permitted the Western Conference officials and member ministers to be openly criticized in the church bulletin; and permitted independent ministers to fill its pulpit in preference to ministers duly ordained by the Conferences.

In summary, defendants' evidence tends to show:

(1). Edgemont is an independent, autonomous, congregational type church of the Original Free Will Baptist faith. Its government is by majority rule. The Western Conference is a voluntary association of churches organized to promote activities and enterprises in which the member churches are interested. It does not represent individual churches. The Discipline is not an official document of the Western Conference, but it provides that "Each local church is a distinct and independent organization, with full authority to manage its own internal affairs, elect its officers, receive, dismiss, discipline and exclude members." No Conference has ever interfered with local church affairs. The Conference may act only if called upon by the entire congregation of a local church to mediate and arbitrate local church matters. It cannot force a congregation into trial; it can only make recommendations. Its only disciplinary authority is the right to withdraw the hand of fellowship from the local church.

(2). Edgemont is the largest Free Will Baptist Church in the State, having 850 members. For a long time it had no conference connection. It voluntarily associated with the Western Conference, but in doing so it did not surrender any property rights, or any right to manage its internal affairs and govern itself.

(3). For several years Edgemont gave some financial support to Mount Olive Junior College which was founded by a group of Free Will Baptists of eastern North Carolina. About 1956 the College began to pursue liberalistic policies not in conformity with the tenets of the denomination or the teachings of the Holy Bible. Edgemont ceased supporting the College and thereafter steadfastly refused to give it further support. The Treasurer and Business Manager of the College is an official of the Western Conference. He entered into a conspiracy with J. G. Teasley and a few others to remove Creech as pastor of Edgemont and procure a minister in sympathy with the College. A vote was taken by the Official Board of Edgemont on the question of the retention of Creech — the vote was 7 to 2 for retention. In June 1960 the congregation voted 310 to 16 to retain Creech. Teasley and others were told to cease promoting strife, but they continued to cause unrest and held secret meetings with the College Treasurer. By a majority vote of the congregation Teasley and four others were removed from church offices and expelled from membership.

(4). The so-called Teasley faction consists only of five families out of a membership of 850 and at no time after June 1960 were members of the church or a faction within the Church.

(5). The College Treasurer, as an official of the Western Conference, notified Edgemont that charges had been filed with the Conference against it. The specific charges and the names of the accusers were not disclosed, though defendants made every effort to obtain this information. Under these circumstances defendants refused to attend meetings called by Conference officials, and refused to submit to trial by them. Orders were made against the church by the Conference without a hearing.

(6). By majority vote of the congregation Edgemont withdrew from the Western Conference and applied for membership in another Conference. Defendants are the true congregation of the church, have always adhered to the tenets and doctrine of the Free Will Baptist faith and have never departed therefrom. The local church holds title to the church property. Edgemont has been a member of the National Association of Free Will Baptists for many years, has appealed from the orders of the Western Conference to the National Association, and

is abiding by the decision of the National Association. The National Association has affirmed Edgemont's right to appeal.

The foregoing review of plaintiffs' and defendants' evidence is a bare summary of 489 pages of the record and many letters and documents presented to this Court in original form. The evidence tends to support the pleadings.

Three issues were submitted to and answered by the jury as follows:

"1. Did the Western Conference of the Original Free Will Baptists of North Carolina have authority and jurisdiction at the time of its reconvened session on January 18, 1961 to decide between the Teasley and Miles factions of the Edgemont Original Free Will Baptist Church and determine which faction should be recognized as the true congregation of said church?

"ANSWER: Yes.

"2. If so, was the action of the Western Conference in deciding and recognizing that the Teasley faction is the true congregation of the Edgemont Original Free Will Baptist Church within its authority, jurisdiction, forms and rules?

"ANSWER: No.

"3. Is the Teasley faction of Edgemont Original Free Will Baptist Church entitled to the use and control of the real and personal property of Edgemont Original Free Will Baptist Church?

"ANSWER: No."

The court entered judgment dismissing the action, vacating all temporary injunctions theretofore entered in the cause, ordering all real and personal property of Edgemont delivered to defendants and the trustees named by them, and restraining plaintiffs from asserting any claim to such property.

The issues, considered in the light of the court's instructions with respect thereto, do not support the judgment. The court erred in failing to apply the law to the facts on the second issue and to bring into focus the controlling elements of controversy on that issue. ". . . (T)he statute (G.S. 1-180) requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' 53 Am. Jur., Trial, section 509." *Lewis v. Watson,* 229 N.C. 20, 23, 47 S.E. 2d 484.

The jury answered the first issue "Yes." Therefore plaintiffs will not be heard to complain as to matters relating to that issue, though the court placed a somewhat excessive burden upon plaintiffs with respect thereto and required plaintiffs to prove facts beyond the pur-

view of the issue as framed. The errors, if any, relating to the matters involved on the first issue were cured by the verdict. *Randle v. Grady*, 228 N.C. 159, 165, 45 S.E. 2d 35. For the purposes of the trial, the jury's answer to the first issue, considered in the light of the court's instructions, established the proposition that the Western Conference, at the time of its reconvened session on 18 January 1961, when decision was made, had final ecclesiastical authority and jurisdiction to decide between the Teasley and Miles factions of Edgemont and to determine which faction is the true congregation of Edgemont. In other words, the jury found that there is a connectional relationship between the local church and the Western Conference and that the Conference is the "highest tribunal" and has authority and jurisdiction to decide between factions in the local church.

The ultimate question for determination in this lawsuit is whether the Teasley faction is the true congregation of Edgemont to the exclusion of the Miles faction. ". . . (W)here factional differences occur in an ecclesiastical body, the rule of the civil courts in dealing with the property rights disputed between the factions is to give effect to the will of that part of the organization acting in harmony with the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute arose." *Skyline Missionary Baptist Church v. Davis*, 17 S. 2d 533 (Ala. 1944); *Reid v. Johnston*, 241 N.C. 201, 206, 85 S.E. 2d 114.

The Western Conference decided in effect that the Teasley faction adhered and remained true to the ecclesiastical laws, usages, customs, faith and doctrines accepted by Edgemont before the dissension arose; and that the Miles faction had departed therefrom. "Ordinarily it is for the superior organization or judicatory with which a congregation is associated to determine which of two contending groups represent the true faith." 76 C.J.S., Religious Societies, s. 85, p. 873; *First English Evangelical, Etc., Church v. Dysinger*, 6 P. 2d 522 (Cal. 1931); *Gibson v. Trustees of Pencader Presbyterian Church*, 20 A. 2d 134 (Del. 1941); *Trustees of Pencader Presbyterian Church v. Gibson*, 22 A. 2d 782 (Del. 1941); *Carlson v. Fox*, 31 S.E. 2d 597 (Ga. 1944). It is an ecclesiastical matter.

"The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies. . . ." *Reid v. Johnston, supra.* "An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of

membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals." 76 C.J.S., Religious Societies, s. 85, p. 872; 24 L.R.A. (N.S.) 703; *Watson v. Jones,* 13 Wall. 679; *Puckett v. Jessee,* 81 S.E. 2d 425 (Va. 1954); *Stone v. Bogue,* 181 S.W. 2d 187 (Mo. 1944); *Krecker v. Shirey,* 30 A. 440 (Pa. 1894). "Civil courts adjudicate ecclesiastical matters only when civil or property rights are involved, and then only when their determination is necessary and incident to the adjudication of civil or property rights, and will go no further in considering ecclesiastical matters than is necessary for a determination of the case before it. When property rights are involved, ecclesiastical questions are to be determined in accordance with the laws, customs, and usages of the church involved and the decisions by authorized church tribunals will be accepted by the courts as conclusive on such questions, it has been held, unless they clearly violate the church law or are in conflict with the law of the State." 76 C.J.S., Religious Societies, s. 86, pp. 876-7; 45 Am. Jur., Religious Societies, s. 60, p. 770; 24 L.R.A. (N.S.) 702; 32 L.R.A. 98; *Presbytery of Bismark v. Allen,* 22 N.W. 2d 625 (N.D. 1946); *Krecker v. Shirey, supra.*

But it has been held that the decree of a church tribunal, affecting civil and property rights, is binding only when it is affirmatively shown that the tribunal acted within the scope of its authority and has observed its own *organic* forms and rules. 45 Am. Jur., Religious Societies, s. 41, p. 751. If a judgment of an ecclesiastical judicatory is not recognized and followed by the civil courts it is because it clearly involves an infraction of the fundamental laws of the church, the church court exceeded its jurisdiction, or the ecclesiastical tribunal proceeded arbitrarily, was clearly wrong and manifestly unfair. The civil court examines the judgment on its merits. 24 L.R.A. (N.S.) 701; 49 L.R.A. 395-399; *Olear v. Haniak,* 131 S.W. 2d 375 (Mo. 1939); *Mack v. Kime,* 58 S.E. 184, 24 L.R.A. (N.S.) 675 (Ga.); *West Kosh-Konong Cong v. Ottesen,* 49 N.W. 24 (Wis.); *Schweiker v. Husser,* 34 N.E. 1022 (Ill.); *O'Hara v. Stack,* 90 Pa. 477.

The validity of a decree of a church tribunal does not depend on technical procedural regularity. "It is generally held that the mode of procedure to be adopted by an ecclesiastical tribunal in the trial of a matter properly within its jurisdiction must be left to the determination of such tribunal, and a civil court has no power to require a church court to observe the usual incidents of trial, such as *formulation* of charges and notice." 45 Am. Jur., Religious Societies, s. 46, p. 756. Every competent tribunal must of necessity regulate its own formulas.

49 L.R.A. 397. A decree of an ecclesiastical judicatory will be held invalid on procedural grounds only if there was an infraction of a fundamental organic form or rule of the church or the procedure followed was such as to show an arbitrary unfairness.

The trial court's summary and final instruction on the second issue was as follows: ". . . if you find from the evidence and by its greater weight that the Western Conference had under its customs and practices and under the Statement of Faith and Discipline and Constitution and By-Laws authorized the Executive Committee to hear grievances from members and churches within the Conference and that the Executive Committee and Board of Ordination of the Western Conference did attempt to mediate the dispute in Edgemont Church between the Miles faction and the Teasley faction, and that the Executive Committee and Board of Ordination prepared and presented a report entitled "Edgemont Church" to the Western Conference at its reconvened session on January 18, 1961 in keeping with the authority and jurisdiction of the Conference, and that this was the only procedure known to this Conference in determining disputes of this nature, and if you should further find that this Conference did act on January 18, 1961 in keeping with their custom and practice and authority, forms and rules, and you find all of these facts from the evidence and by its greater weight, the Court instructs you that you will answer the second issue 'yes'. . . . Now, if you fail to so find from the evidence and by its greater weight, then you will answer issue No. 2 'no'."

The vice of this instruction is that on the material points of conflict it is too general and furnishes no guidance, and insofar as it is specific it deals only with narrow and technical matters of procedure. Under this instruction, plaintiffs could not prevail unless they could show by the greater weight of the evidence that the procedure followed by the Conference "was the *only* procedure known to this Conference in determining disputes of this nature." This instruction requires the jury to answer the issue "no" if it finds any deviation from usual procedures. The instruction as a whole leaves the jury to conjecture as to the essential elements to be proved by plaintiffs. The court failed to present certain essential aspects of the case to the jury, and the verdict was therefore inconclusive.

What the essential elements in controversy are must be determined by the pleadings and the evidence offered in support thereof. "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request, and to apply the law to the various factual situations presented

by the conflicting evidence. . . . A charge which fails to submit one of the material aspects of the case presented by the allegation and proof is prejudicial." 4 Strong: N. C. Index, Trial, s. 33, pp. 331-2.

If the plaintiffs are to prevail, they must do so on the theory of the complaint and not otherwise. *Atkinson v. Atkinson,* 225 N.C. 120, 33 S.E. 2d 666; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. Plaintiffs allege that a schism has arisen in the congregation of Edgemont Church, the Teasley faction has remained faithful to the dogma, polity and customs of the church as recognized and followed prior to the outbreak of dissension, the Miles faction has materially departed therefrom, the Western Conference is the highest church tribunal and had authority and jurisdiction to determine which is the true congregation, the Western Conference has heard and determined the controversy and has decided that the Teasley faction is the true congregation of Edgemont and the Teasley faction is entitled to the possession and use of the church property. Defendants deny that the Western Conference is the highest church tribunal and has authority and jurisdiction to decide between factions within the congregation of a member church, deny that any division existed within the Edgemont congregation, deny that the Miles faction is or has been unfaithful to the doctrines, polity and customs of the Original Free Will Baptists of North Carolina as accepted and followed by Edgemont before the alleged schism arose, and aver that the Miles faction was not given any notice of the charges against it, was not informed of the identity of its accusers, and was not given an opportunity to be heard in its defense.

The title to the church property is vested in "Trustees of Edgemont Free Will Baptist Church," and therefore the ownership and right to possession and use belong to those of the congregation who have remained faithful to the doctrines, polity and fundamental customs and rules of the Free Will Baptist denomination as accepted and followed by Edgemont's congregation prior to the alleged dissension. *Reid v. Johnston, supra.* It is not denied that the Western Conference has decided that the Teasley faction has remained true, is the true congregation, and is entitled to the church property, and the Miles faction has departed from the faith. The jury's answer to the first issue has, for the purposes of this lawsuit, established that the Western Conference is the highest church tribunal and had authority and jurisdiction to decide between the factions and "determine which faction should be recognized as the true congregation of said church," at the time it undertook to do so.

The judgment below will be vacated and a new trial had on the matters involved in the second and third issues submitted by the court below, that is, on the points of controversy raised by the pleadings and purportedly covered by these issues. The decision of the jury on the first issue submitted (that the Western Conference, at the time proceedings were had and decision was made by it, had final ecclesiastical authority and jurisdiction to decide between factions of the Edgemont Church congregation, and to determine which is the true congregation) will not be disturbed.

Issues arise upon the pleadings. *Darroch v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589. If there is no material change in the pleadings and the purport of the evidence at the retrial of this case, the factual controversies may be more clearly resolved by submitting two questions to the jury in substantially the following form (we refer to these as "questions" in order that there may be no confusion as to whether we are referring to these proposed issues or the issues submitted at the former trial):

1. Were the conditions, circumstances and activities within the congregation of the Edgemont Church in 1960 and until January 18, 1961, such as to justify and invoke the exercise of the authority and jurisdiction of the Western Conference to decide between factions in the Edgemont Church?

2. Was the Miles faction given reasonable notice of the nature of the charges against it, the general identity of its accusers, and opportunity to be heard in its defense?

We hasten to say that the presiding judge at the retrial is not required to adopt the number, form and phraseology of the questions suggested by us. We cannot, of course, foresee what the developments of the trial will be. It is within the province of the trial judge to frame the issues, and when he has done so they will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to enter judgment fully determining the case. *Rubber Co. v. Distributors,* 253 N.C. 459, 466, 117 S.E. 2d 479.

With respect to the first suggested question, the burden is on plaintiffs to satisfy the jury by the greater weight of the evidence that (1) a schism or division exists within the congregation of the Edgemont Church, consisting of the Teasley and Miles factions, and (2) Western Conference had substantial factual grounds upon which to base its decision that the Miles faction had departed from the doctrines, polity, usages and customs of the Free Will Baptist Denomination, as recognized and followed in the Edgemont Church prior to the time the al-

leged schism arose, and that the Teasley faction had remained faithful thereto. If, as defendants contend, there is no schism *within the congregation* of Edgemont Church, there was no basis for the Western Conference to exercise jurisdiction to decide between factions. Or if there is no substantial evidence (that is, not more than a mere scintilla) that the Miles faction was unfaithful to the doctrines, polity, usages and customs of the Free Will Baptist Denomination, as recognized and followed in Edgemont Church prior to the alleged schism, the Conference was acting beyond its authority and jurisdiction in deciding that the Teasley faction is the true congregation, to the exclusion of the Miles faction. To prevail on the first suggested question, plaintiffs must sustain both propositions (1) and (2), above in this paragraph. If the jury answers the question "no," defendants will be entitled to a judgment dismissing the action and dissolving the injunction; and if the question is answered "no," the jury need not consider or answer the second suggested question. But if the jury answers the question "yes," it must also consider and answer the second suggested question.

With respect to the second suggested question, the burden is on the plaintiffs to satisfy the jury by the greater weight of the evidence that the Western Conference, or the committee acting for it, gave defendants reasonable notice of the nature of the charges against them, the general identity of their accusers, and reasonable opportunity to be heard. The decision of an ecclesiastical court will not be recognized and sustained by the civil courts, where property rights are involved, if it acts arbitrarily and with manifest unfairness.

If both suggested questions are answered "yes," judgment will be entered declaring the Teasley faction entitled to the exclusive ownership, use and possession of the Edgemont Church property, and granting permanent injunctive relief. If the first suggested question is answered "yes," and the second "no," the court will enter an order directing the Western Conference to proceed to another hearing, according to its customs and practices, after notice to defendants of the nature of the charges and the accusers.

It is necessary for clarity that we again refer to the third issue submitted by the court at the trial below. It was purely formal; the jury's answer thereto does not determine the property rights involved. The court directed the jury: "If you answer issue No. 2 'no', then I instruct you, you will answer issue No. 3 'no.'" Thus, the answer to the third issue was made to depend directly upon the answer to the second issue. Since there was error affecting the second issue, the answer to the third issue is ineffective. The third issue was not necessary

to a determination of the case on its merits and was probably included that the issues might appear complete without reference to other parts of the record. It is optional with the trial court whether the third issue be submitted on the same terms when the case is again tried. It will perhaps be less confusing to the jury if it is omitted altogether.

After judgment had been entered in the case of *Teasley Faction and Western Conference v. Miles Faction* (our Docket No. 666), defendants moved for judgment in *Western Conference v. Creech* (our Docket No. 667) and in *Teasley Faction v. Creech* (our Docket No. 668). The court being of the opinion that the judgment in 666 resolved the controversies in 667 and 668, entered judgments for defendant Creech dissolving the temporary injunctions theretofore entered in these cases and dismissing the actions. We express no opinion as to whether the judgment in case 666, had it been sustained, would have resolved the issues in cases 667 and 668. Since there must be a partial new trial in case 666, the judgments entered in cases 667 and 668 must be vacated.

Case No. 666, Partial new trial.

Case No. 667, Reversed.

Case No. 668, Reversed.

MARY SAWYER WEAVER, ADMINISTRATRIX OF THE ESTATE OF JACKIE WEAVER v. R. J. BENNETT AND WELDON O. PARRISH.

(Filed 6 March 1963.)

1. Negligence §§ 24a, 26—

Evidence that the operator of a Unit Backhoe which ran on caterpillar tractors, backed the machinery while his view of the area immediately to the rear of the machinery was blocked by its platform, without first seeing that the movement could be made in safety, resulting in injury to a workman whose leg was caught under the treads, *held* sufficient to be submitted to the jury on the issue of negligence of the operator of the machinery and not to show contributory negligence as a matter of law on the part of the workman.

2. Appeal and Error § 1—

Where a subsequent trial is necessary, the Supreme Court will refrain from discussing the evidence further than is necessary to explain the conclusions reached.

3. Master and Servant § 7—

When one employer lends or hires machinery with an operator to another, which of the two employers is the superior in the performance of

the work by the employee must be determined upon the facts of each particular case, and factors to be considered are whether the general employer retains the right to hire and fire, whether the general employer is in the business of lending equipment with workmen to operate it, and whether the general employer retains control of the manner of performing the work as distinguished from merely pointing out the place where and the time when the work should be performed.

4. Master and Servant § 86—

An employee whose injuries are compensable under the Workmen's Compensation Act may not maintain an action against a fellow employee to recover for such fellow employee's negligence in causing the injury, and the factor determinative of whether the tort-feasor is a fellow employee or a third person tort-feasor is whether he is conducting the business of the common employer at the time of the negligent act inflicting injury.

5. Same— Evidence held not to show affirmatively that operator of rented machinery was fellow employee.

The evidence tended to show that a person in the business of renting heavy machinery with skilled operators rented a Unit Backhoe to the employer of plaintiff's intestate, that he retained the sole right to hire and fire the operators of the machinery, and that intestate's employer directed the operator concerning the work to be done but not the manner of performing it. The evidence further tended to show that the operator of the Backhoe suddenly backed the machinery while his view of the area immediately to the rear of the machinery was blocked by its platform, resulting in injury to intestate whose leg was caught under the treads. *Held:* The evidence does not affirmatively disclose that at the time of the injury the operator of the machinery was conducting the business of the specific employer within the meaning of G.S. 97-9 and nonsuit was erroneously entered in plaintiff's action at common law against the operator of the Backhoe and the lessor thereof.

APPEAL by plaintiff from *Gwyn, J.*, January 22, 1962, Term of FORSYTH, docketed and argued as No. 388 at Fall Term 1962.

The administratrix of Jackie Weaver, deceased, instituted this action to recover damages for the death of her intestate and the pain and suffering and expenses incurred between injury and death.

Weaver, then twenty-six years old, was fatally injured October 17, 1958, when a portion of his body was caught and crushed by a piece of heavy ditch digging equipment known as a Unit Backhoe. Defendant Bennett was the owner, and defendant Parrish was the operator, of the Unit Backhoe.

There was evidence tending to show the facts narrated below.

The fatal accident occurred in Stokes County, North Carolina, where R. J. Reynolds Tobacco Company was engaged in constructing its Brook Cove storage plant. Reynolds had rented the Unit Backhoe

(also other equipment) from Bennett, the owner, under a written contract in which Bennett agreed to furnish all fuel and a competent operator. For the use of this equipment and fuel therefor and the services of the operator, Reynolds agreed to pay Bennett a stipulated amount ($12.00) per hour.

Weaver, employed by Reynolds as a pipe fitter's helper, was a member of a pipe laying crew of five, of which Gilmer Sisk was foreman, all employees of Reynolds. Since June, 1958, the Unit Backhoe, with Parrish as operator, had worked with the Sisk crew in laying water and sewer pipes.

The Sisk crew worked under the supervision of Sherrell Dean Wood, employed by Reynolds as foreman of the pipe shop. Wood showed Parrish where he wanted a ditch dug, how wide, how deep, etc., but gave Parish no instructions as to the operation of the Unit Backhoe.

The Unit Backhoe weighs "about 19 tons." It travels on (two) tracks consisting of metal tank-type treads. The operator's cab and the diesel motor are on a platform over said tracks. A boom some fourteen feet long with a digging bucket on the end extends in front of the platform. The entire platform can be turned 360 degrees in either direction.

The Unit Backhoe, when moving on its tracks, has only one speed, approximately one mile per hour. It starts with a jerk from a standstill to that speed. When engaged in digging operations, the machine is standing still on its tracks. In the process of digging, the bucket is lowered and pulled toward the machine. Then the bucket is raised and swung by the boom to the place where its contents are released. The machine moves *on its tracks* only when being moved to a new position to resume digging operations or to a different site.

Prior to Weaver's fatal injury the Unit Backhoe was standing still. The platform and the boom in front were turned to the operator's right at a 45-degree angle. A keg (cooler) containing drinking water for the workmen was on the platform at the right rear. In the machine's then position, the right rear of the platform was over the rear of the left track. When the platform was so turned, the operator could not see the portion thereof where the water keg was sitting. In backing to a new position, the operator had a clear view in the direction of travel only when the platform and boom were turned to the right or left approximately at a 90-degree angle.

On October 17, 1958, the Sisk crew was engaged in laying fire protection water lines. The ditch for the pipeline was being dug in an open field. No other crew was working within three hundred yards of where the Sisk crew was working. Starting work at 7:30 a.m., the Sisk crew

had laid two lengths of pipe. Sisk and Weaver had been in the ditch. Weaver came out of the ditch, passed two other members of the Sisk crew and walked by the Unit Backhoe. Shortly thereafter, and before the Sisk crew had started back to work, the Unit Backhoe, without signal or warning of any kind, "started moving," backing. Weaver's leg was caught under the treads of the left track. In response to cries from members of the Sisk crew, Parrish stopped the machine. He then moved it forward, thereby releasing Weaver.

Other evidential facts will be set forth in the opinion.

Plaintiff alleged her intestate's injury and death were proximately caused by the negligence of Parrish when acting as an employee of Bennett and within the course and scope of his employment by him.

Answering, defendants denied negligence and pleaded as further defenses: (1) Plaintiff's intestate was contributorily negligent. (2) Weaver and Reynolds were subject to and bound by the provisions of the Workmen's Compensation Act; that plaintiff had been paid full compensation as provided therein; and that Parrish, on the occasion of Weaver's fatal injuries, was acting as agent, servant and employee of Reynolds and was conducting the business of Reynolds and therefore was immune from suit under the provisions of G.S. 97-9. (3) In any event, neither Reynolds nor its insurance carrier is entitled to enforce subrogation on account of their payment of compensation because Parrish was acting under the supervision and direction of the officers and supervisors of Reynolds.

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

Deal, Hutchins & Minor and W. Scott Buck for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for defendant appellees.

BOBBITT, J. Careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission for jury determination of issues as to the alleged negligence of Parrish and as to the alleged contributory negligence of Weaver. Having reached this conclusion, we deem it appropriate to refrain from further discussion of the evidence (relevant to said issues) presently before us. *Tucker v. Moorefield,* 250 N.C. 340, 342, 108 S.E. 2d 637, and cases cited.

Even so, defendants contend that, under the provisions of G.S. 97-9 and G.S. 97-10, plaintiff's *exclusive* remedy is against her in-

testate's employer and its insurance carrier for compensation as provided in our Workmen's Compensation Act, "whose injury arose out of and in the course of his employment, cannot maintain an action at common law against his co-employee whose negligence caused the injury." *Warner v. Leder,* 234 N.C. 727, 732, 69 S.E. 2d 6; *Bass v. Ingold,* 232 N.C. 295, 60 S.E. 2d 114; *Essick v. Lexington,* 232 N.C. 200, 60 S.E. 2d 106. In *Warner,* the factual situation in each pertinent prior decision is discussed.

In *Warner,* this Court, in opinion by *Denny, J.,* (now C.J.), said: "We hold that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of G.S. 97-9, and entitled to the immunity it gives; (citations) and that the provision in G.S. 97-10 which gives the injured employee or his personal representative 'a right to recover damages for such injury, loss of service, or death from any person other than the employer,' means any other person or party who is a stranger to the employment but whose negligence contributed to the injury. And we further hold that such provision does not authorize the injured employee to maintain an action at common law against those conducting the business of the employer whose negligence caused the injury. To hold otherwise would, in a large measure, defeat the very purposes for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act, G.S. 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency. The Legislature never intended that officers, agents, and employees conducting the business of the employer, should so underwrite this economic loss."

Under *our* Workmen's Compensation Act, as held in the cited decisions, where an employee's injury or death is compensable the sole remedy against the employer and "those conducting his business" (G.S. 97-9) is that provided by its terms. As noted in *Warner,* in jurisdictions where the Workmen's Compensation Act does not contain a similar immunity clause, fellow workmen are generally treated as

third parties within the meaning of the Act. See 30 N.C.L.R. 474. Thus, in *Nepstad v. Lambert* (Minn.), 50 N.W. 2d 614, 624, discussed below, this statement appears: "It is clear under the Wisconsin law that if one co-employe negligently injurers his fellow employe it is no defense in a suit against him to assert that both were employed under one master."

The rule stated in *Warner* has been applied and recognized in subsequent decisions: *McNair v. Ward,* 240 N.C. 330, 82 S.E. 2d 85; *Johnson v. Catlett,* 246 N.C. 341, 98 S.E. 2d 458; *Wesley v. Lea,* 252 N.C. 540, 114 S.E. 2d 350; *Jackson v. Bobbitt,* 253 N.C. 670, 117 S.E. 2d 806. In each prior decision based on the rule stated in *Warner,* the person who was conducting the employer's business and whose negligence caused the injury was an officer or otherwise in the general employment of the employer of the injured person.

This question is presented: Does the evidence, when considered in the light most favorable to plaintiff, disclose affirmatively that Parrish, at the time Weaver was fatally injured, was *conducting the business* of Reynolds within the meaning of G.S. 97-9 and therefore, under the provisions of our Workmen's Compensation Act, immune from suit? The alleged liability of Bennett, if any, rests solely on the doctrine of *respondeat superior.*

It is noted: The record contains no evidence or stipulation that Weaver and Reynolds on October 17, 1958, were subject to and bound by the provisions of our Workmen's Compensation Act and that plaintiff has been paid full compensation in accordance with its terms. However, since these facts underlie contentions advanced by both plaintiff and defendants in their briefs, our further discussion assumes the existence of such facts.

Pertinent evidential facts are as follows:

The Unit Backhoe was one of some twenty pieces of equipment covered by a "purchase order" dated June 18, 1958, from Reynolds to Bennett. By its terms, Bennett agreed to furnish the equipment listed therein at locations in Forsyth and Stokes Counties specified by Reynolds during the period of one year beginning July 1, 1958. Bennett agreed to furnish a competent operator and all fuel for each piece of equipment. Bennett also agreed to keep in force at all times "(s)ufficient public liability and property damage insurance to protect the R. J. Reynolds Tobacco Company against any and all claims for damage in connection with use of said equipment. . ." Reynolds agreed to pay a specified amount per hour for each piece of equipment, the operator and the fuel. For the period October 16-October 22, 1958, the

amount paid by Reynolds to Bennett under this contract exceeded $6,000.00.

The rental of such equipment upon such terms was in the regular course of Bennett's business. The equipment was operated over an extended period on the premises of Reynolds and for the benefit of Reynolds.

The Unit Backhoe was a complicated machine. Operation thereof required skill and experience. Its two clutches and seven levers required ". . . a certain rhythm, like playing a piano, to run a unit backhoe." Parrish operated the Unit Backhoe and did the field maintenance. He was a competent operator of long experience.

Parrish had worked for Bennett for nearly twenty years. Bennett paid him by the week, after first deducting taxes, insurance, and social security. Bennett gave him his W-2 form on taxes withheld by Bennett. Reynolds never paid Parrish. Parrish turned in his time to Bennett's foreman on the Brook Cove project and not to Reynolds. When Parrish wanted time off, Bennett (not Reynolds) granted such permission. He was hired by Bennett and could be fired by Bennett. Bennett's foreman checked Parrish daily and Bennett himself came around at regular intervals. Bennett ". . . wasn't interested in the work, it was the machine, more or less."

Defendants, in supplemental brief, cite and stress our decision in *Peterson v. Trucking Co.*, 248 N.C. 439, 103 S.E. 2d 479. This is in the line of decisions in which this Court has held that an interstate carrier, which exercises its franchise rights by transporting freight in leased equipment under leases providing that such equipment during the term of the lease shall be solely and exclusively under the direction and control of the lessee, is liable in damages for injuries to third parties caused by the negligent operation of such equipment in the prosecution of such carrier's business. *Wood v. Miller*, 226 N.C. 567, 39 S.E. 2d 608; *Motor Lines v. Johnson*, 231 N.C. 367, 57 S.E. 2d 388; *Eckard v. Johnson*, 235 N.C. 538, 70 S.E. 2d 488; *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133; *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732; *McGill v. Freight*, 245 N.C. 469, 96 S.E. 2d 438.

And, with specific reference to the Workmen's Compensation Act, this Court has held: (1) The dependents of a lessor-operator, who was transporting freight for the lessee, an interstate carrier, *under authority of the lessee's I.C.C. franchise and license plates*, were entitled to recover death benefit compensation from the lessee. *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71. (2) The dependents of the lessor's driver, whose death occurred while operating the leased equipment *under like circumstances*, were entitled to death benefit compen-

sation from the lessee. *Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64. (3) The dependents of an assistant driver, who was fatally injured when the leased equipment was being operated by the owner-lessor *under like circumstances,* were entitled to death benefit compensation from the lessee. *McGill v. Freight, supra.*

Reference has been made to the hybrid nature of these lease agreements. *Employment Security Comm. v. Freight Lines,* 248 N.C. 496, 501, 103 S.E. 2d 829; *Watkins v. Murrow,* 253 N.C. 652, 657, 118 S.E. 2d 5.

The bases for the decisions relating to these lease agreements are well stated by Barnhill, J. (later C.J.), in *Roth v. McCord, supra,* as follows:

"(1) Roth, at the time of his injury and death, was operating a vehicle being used by the Motor Lines to haul freight in the course of its business as a common carrier under franchise from the Interstate Commerce Commission. The vehicle was being operated under its identification plate. 'The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier.' *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71.

"(2) It is stipulated in the lease contract that while they are in the service of the Motor Lines, the vehicle and its driver shall be under the exclusive supervision, control, and direction of the lessee. The all-inclusive extent of this right of control is spelled out in the lease in detail. As the Motor Lines has contracted, so is it bound."

The bases of said decisions relating to the lease of equipment, including operator(s), to an interstate carrier for use in the exercise of its franchise rights, are not present in the case now before us.

In *Shapiro v. Winston-Salem,* 212 N.C. 751, 194 S.E. 479, the City of Winston-Salem, as sponsor of the W.P.A. project for improving Hanes Park, agreed to furnish a truck and driver, or trucks and drivers, "for an equivalent of 400 hours." While at work on said project, a city truck operated by a city employee backed into and fatally injured the plaintiff's intestate. It was held the truck driver was not, at the time the plaintiff's intestate was fatally injured, an employee of the city within the meaning of the doctrine of *respondeat superior.* The basis of decision was that the truck driver was working under the supervision and direction of the W.P.A. officials.

In *Wadford v. Gregory Chandler Co.,* 213 N.C. 802, 196 S.E. 815, the defendant rented a tractor and driver to the North Carolina Employment Relief Administration. The plaintiff alleged he was injured

by the negligence of the driver of the defendant's tractor. The evidence was to the effect that the "E.R.A. supervisor had full authority to direct the operation of the Gregory Chandler equipment, tell them what to do, when to start to work, how to do it, and where to go. . . . Mr. Matthews, the E.R.A. supervisor, directed the work; gave orders to the foreman." In a *per curiam* opinion judgment of nonsuit was affirmed on authority of *Shapiro v. Winston-Salem, supra,* and *Liverman v. Cline,* 212 N.C. 43, 192 S.E. 849.

In *Leonard v. Transfer Co.,* 218 N.C. 667, 12 S.E. 2d 729, this Court upheld a verdict and judgment in a personal injury action based on the alleged negligence of the defendant's employee while operating the defendant's truck on a public highway. The defendant had furnished the Bryant Electric Company with the truck and a driver at the price of $1.25 per hour. The Bryant Electric Company was to furnish the gas and oil and load the poles. The Bryant Electric Company had a contract with the R.E.A. and the truck was used to transport poles over the highway to the locations where the poles were to be placed. This Court held the evidence was sufficient to support a finding that the defendant retained sufficient control over the driver (his employee) to subject the defendant to liability for his negligence. This Court, in opinion by Seawell, J., said: "A person, natural or corporate, may lend or let a servant to another in such a way as to be relieved from liability arising out of injury to another through the negligence of the servant. But to bring this about, the control of the original employer over the acts of the employee must be so completely surrendered as to virtually suspend, temporarily, at least, any responsibility which might reasonably be associated with control."

In *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 227, this Court upheld a verdict and judgment in a property damage action based on the alleged negligence of McGuire's employee while operating a bulldozer on plaintiffs' premises. Plaintiff Hodge had rented a bulldozer from McGuire at a rental of $10.00 per hour, which included the wages of the operator and fuel. McGuire provided the bulldozer and an experienced operator but did not go upon the Hodge premises. Hodge gave general directions as to what he wanted done in his land-clearing project but worked elsewhere and was not present when the damage occurred. While Haley, the operator, was working on it, a big red oak fell across the top of the Hodge house and caused the damages for which the action was brought. This Court held the evidence was sufficient to support a finding that the defendant retained sufficient control over the driver (his employee) to subject the defendant to liability for his negligence.

In *Hodge v. McGuire, supra,* the opinion of Johnson, J., states that the *Liverman, Shapiro,* and *Wadford* cases are factually distinguishable, and that the *Leonard* case is more nearly in point. This portion of the opinion of Johnson, J., is significant: "Here, however, it is significant that Hodge gave no direction or instruction as to the mechanical operation of the bulldozer. And, by the great weight of authority, it is held that 'a servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out to the servant the work to be done, or supervises the performance thereof, or designates the place and time for such performance, or gives the servant signals calling him into activity, or gives him directions as to the details of the work and the manner of doing it, . . .' 57 C.J.S., Master and Servant, Section 566, pp. 287 and 288." Decisions are cited, and two leading cases are discussed, *Standard Oil Co. v. Anderson,* 212 U.S. 215, 53 L. Ed. 480, 29 S. Ct. 252, and *Driscoll v. Towle,* 181 Mass. 416, 63 N.E. 922, which "illustrate the necessity of discriminating between acts of the hirer which denote authoritative control over the servant, as distinguished from mere suggestions in respect to details which amount to no more than incidental or necessary co-operation, *such as pointing out the work to be performed.*" (Our italics)

In *Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589, the decision was based upon the rule that "where a servant has two masters, a general and special one, the latter, *if having the power of immediate direction and control,* is the one responsible for the servant's negligence." (Our italics) The evidence was held sufficient to support a finding that a surgeon was liable for the negligence of a nurse, a general employee of the hospital, while acting under the immediate direction and control of the surgeon during the performance of an operation. It was stated by Johnson, J.: "The power of control is the test of liability under the doctrine of *respondeat superior.*"

In *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. 2d 558, and in *Harris v. Construction Co.,* 240 N.C. 556, 82 S.E. 2d 689, the evidence was held sufficient to support a finding that defendant was liable under the doctrine of *respondeat superior* for the negligence of the owner-operator of a truck engaged in hauling asphalt for the defendant at a stated price per ton.

In *Jones v. Aircraft Co.,* 251 N.C. 832, 834, 112 S.E. 2d 257, the opinion states, incident to a consideration of the exception of defendant Douglas to the court's refusal of nonsuit, that there was evidence sufficient to permit but not to compel a jury to find, *inter alia,* that "Jones, when he left Charlotte Equipment Company with the crane

to work for Boyd & Goforth, became, for the period so employed, the servant of Boyd & Goforth. *Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589." However, for the reasons stated in *Jones v. Aircraft Co.,* 253 N.C. 482, 117 S.E. 2d 496, the quoted statement was not the basis of decision on first appeal.

In *Griffin v. Blakenship,* 248 N.C. 81, 102 S.E. 2d 451, the defendant had furnished a bulldozer and an operator for $10.00 an hour. This Court held the evidence insufficient to establish actionable negligence on the part of the operator. Hence, it was unnecessary to determine whether the defendant would be liable if the actionable negligence of the operator of the bulldozer had been established.

"Though well established, the loaned-servant principle has proved troublesome in its application to individual fact situations. The criteria for determining when a worker becomes a loaned servant are not precise; as a result, the state of the law on this subject is chaotic. Respectable authority for almost any position can be found, for even within a single jurisdiction the decisions are in conflict." *Nepstad v. Lambert, supra,* and decisions and articles cited therein. 57 C.J.S., Master and Servant § 566; 35 Am. Jur., Master and Servant § 541; Annotation: "Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle," 17 A.L.R. 2d 1388.

In the Restatement, Agency § 227, this appears:

"§ 227. Servant Lent to Another Master.

"A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others.

"*Comment:*

"*a. Service in relation to a specific act.* Whether or not the person lent or rented becomes the servant of the one whose immediate purposes he serves depends in general upon the factors stated in § 220 (2). Starting with a relation of servant to one, he can become the servant of another only if there are the same elements in his relation to the other as would constitute him a servant of the other were he not originally the servant of the first. Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other. It is not conclusive that in practice he would be likely to obey

the directions of the general employer in case of conflict of orders. The question is as to whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act. This is a question of fact in each case.

"*b. Inference that original service continues.* In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.

"*c. Factors to be considered.* A continuation of the general employment is indicated by the facts that the general employer may at any time substitute another servant, that the time of employment is short, and that the lent servant has the skill of a specialist.

"A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality and these may be divergent from the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise permits his servant and instrumentality to assist another, is more apt to intend to surrender control."

In our view, this statement correctly sets forth the pertinent general principles and appears to be gaining widespread approval.

The subject, "Lent Employees and Dual Employment," is discussed fully in *Larson,* Workmen's Compensation Law, § 48.00. It is there stated: "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) The employee has made a contract of hire, express or implied, with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work."

In discussing "Transfer of Right of Control" (§ 48.30), the author states: "The factor that seems to play the largest part in lent-employee cases is that of furnishing heavy equipment. Many cases have found continuing liability in the general employer when he furnishes operators together with road equipment, excavating equipment, steam and truck shovels, trucks, air drills, air riveters and barges. Although there are *contra* cases, the majority of the decisions have been influenced by the arguments both that the general employer would naturally reserve the control necessary to ensure that his equipment is properly used, and that a substantial part of any such operator's duties would consist of the continuing duty of maintenance of the equipment." In this connection, see *Insurors Indemnity & Insurance Co. v. Pridgen* (Tex.), 223 S.W. 2d 217, involving the rental of a "fully operated" dragline, in which it is held that the control of the machine, not the determination of what is to be done, is the decisive factor. See also, *Goodwin v. Wilhelm Steel Construction Co.* (Tex. Civ. App.), 311 S.W. 2d 510.

True, whether Parrish, if injured, would be entitled to compensation from Bennett and his insurance carrier, if any, or from Reynolds and its insurance carrier, if any, is not presented. However, the legal principles applicable in such case and in the present case would seem to bear close resemblance.

In *Mature v. Angelo,* 373 Pa. 593, 97 A. 2d 59, a closely analogous factual situation was considered. Based on decisions cited, including *Standard Oil Co. v. Anderson, supra,* and in accord with Restatement, Agency § 227, Stern, C.J., for the Supreme Court of Pennsylvania, stated "(t)he law governing tort liability arising from the negligence of a 'borrowed' employee" as follows:

"1. One who is in the general employ of another may, with respect to certain work, be transferred to the service of a third person in such a way that he becomes, for the time being and in the particular service which he is engaged to perform, an employe of that person. (citations)

"2. The crucial test in determining whether a servant furnished by one person to another becomes the employe of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it.* (citations)

"3. A servant is the employe of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually *exercises* that control or not. (citations)

"4. Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or

operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and, unless that presumption is overcome by evidence that the borrowing employer *in fact* assumes control of the employe's *manner of performing the work*, the servant remains in the service of his original employer. (citations)

"5. Facts which indicate that the servant remains the employe of his original master are, among others, that the latter has the right to select the employe to be loaned and to discharge him at any time and send another in his place, that the lent servant has the skill of a technician or specialist which the performance of the work requires, that the hiring is at a rate by the day or hour, and that the employment is for no definite period. (citations)

"6. The mere fact that the person to whom a machine and its operator are supplied points out to the operator from time to time the work to be done and the place where it is to be performed does not in any way militate against the continuance of the relation of employe and employer between the operator and his original master. (citations)"

Nothing in the written contract suggests that Bennett agreed to surrender or that Reynolds agreed to assume control of the Unit Backhoe or of the operator. Indeed, the provision that Bennett was to provide sufficient public liability and property damage insurance to protect Reynolds against any and all claims for damage "in connection with the use of said equipment" would seem to negative any idea that it was intended that Reynolds should assume any control whatsoever as to the manner in which the Unit Backhoe was to be operated.

Reynolds had no right to discharge Parrish. If displeased by the conduct of Parrish, the sole remedy of Reynolds was to terminate its relationship with Bennett or to require Bennett to provide a different operator.

Without repeating the evidential facts set forth above, it is sufficient to say there is evidence tending to show, in the language of *Mature* v. *Angelo, supra,* "that this is an ordinary, typical case of the renting of a machine with an operator specially skilled for the purpose from one who is in the business of renting out such machines and operators, where neither the person renting such machine and operator, nor his own employes, are competent to run such a machine and merely direct the operator concerning the work to be done,—not the manner of performing it."

In *Nepstad v. Lambert, supra,* it appeared conclusively (as stated in syllabus by the Court) "that the special employer alone had such right of control over the act of the servant which negligently caused plaintiff's injury" and that the special employer and not the general employer was liable therefor under the doctrine of *respondeat superior.* There is no conflict between the general legal principles stated in the opinion of Christianson, J., and those set forth in Restatement, Agency § 227. The basis of decision, factual in nature, is stated as follows: "The application of these principles to the instant case compels the conclusion that Pasma, the crane operator, was under the detailed authoritative control of the Arnold company (plaintiff's employer) exclusively with respect to the act which caused the injury. Every movement of the crane while it was being used on the job was directed through hand signals by an Arnold company employe. Signals were given indicating when and how far to swing the boom of the crane, when to stop the movement, when and how far to raise or lower the boom, and when and how far to slacken or tighten the hoisting cable. Without these signals, Pasma lacked the knowledge or authority to make a move, because only Morris, the Arnold company's steel foreman, with the aid of his blueprints, knew the pattern and progress the work was to take. More detailed control can hardly be conceived. The crane operator was virtually an automatic eye which caused the machinery of the crane to respond to signals given by the Arnold company's employees."

Too, a sound distinction may exist when the operator inflicts the damage complained of by doing what the lessee directs him to do. Thus, the lessee of a backhoe and operator was held liable to the adjoining landowner when the operator as directed by the lessee removed a boundary wall. *Van Gorder v. Eastchester Estates,* 137 N.Y.S. 2d 789.

Applying the legal principles stated above, the conclusion reached is that plaintiff's evidence does not disclose affirmatively that Parrish, at the time Weaver was fatally injured, was conducting the business of Reynolds within the meaning of G.S. 97-9. Moreover, the evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that Parrish, on the occasion of Weaver's fatal injury, was operating Bennett's Unit Backhoe in the course of and within the scope of his employment by Bennett.

For the reasons stated, the judgment of involuntary nonsuit is reversed.

Reversed.

OVERTON *v.* OVERTON.

DOROTHY ISABELLA OVERTON, WIDOW, PETITIONER v. ANNABELLE OVERTON, NON COMPOS MENTIS, JENNETTE OVERTON, FREDERICK OVERTON, SYLVIA LEE OVERTON, MINORS, AND ELIJAH CHERRY, TRUSTEE AND EXECUTOR OF THE ESTATE OF ANTHONY ASHLEY OVERTON, DECEASED, RESPONDENTS.

(Filed 6 March 1963.)

1. Wills § 60; Dower § 4; Executors and Administrators § 23—

G.S. 31-1, prescribing that a widow may dissent from the will of her husband at any time within six months after probate is a statute of limitations and not a condition precedent annexed to the remedy, both with regard to the widow's statutory right to a year's support, G.S. 30-15, and to the widow's right to dower as to testate property, G.S. 30-1, and therefore the six months' limitation must be pleaded in the same manner as is required for the pleading of any other statute of limitations.

2. Limitation of Actions § 16—

Unless a statutory limitation is a condition precedent annexed to the cause of action itself, the bar of the statute must be affirmatively pleaded by answer.

3. Same—

Mere denial, in the answer, of plaintiff's allegations that she had instituted claim in apt time and in the proper manner is not a sufficient plea of the applicable statute of limitations, certainly when it does not affirmatively appear from plaintiff's pleadings that the claim was not instituted within the time allowed, but defendant is required to set up the affirmative defense of the statute, not merely by pleading the legal conclusion that plaintiff's claim is barred, but by alleging facts disclosing the lapse of time in excess of the statutory limitation between the date the cause accrued and the date the claim or action was instituted.

4. Same; Infants § 1—

The court will not deem the statute of limitations pleaded in behalf of minors when their duly appointed guardian *ad litem* has not entered such plea.

5. Judgments § 8—

The power of the court to sign a consent judgment is based upon the unqualified consent of the parties, and the judgment is void if the parties do not consent thereto at the time the court promulgates it as a consent judgment.

6. Judgments § 25—

The proper procedure to attack a consent judgment on the ground that a party thereto did not give his consent to the judgment as entered is by motion in the cause, and the court's findings of fact in regard thereto are conclusive when the findings are supported by any competent evidence.

7. Same—

The agreements of the parties to a consent judgment are reciprocal, and therefore when the judgment is void as to one of the parties because of the want of his consent at the time the judgment was entered, it is error for the court to eliminate from the judgment only that part which affects that party alone, since what is left is not what was agreed to by the other parties, and therefore the judgment must be set aside in its entirety.

APPEAL by petitioner from *Bundy, J.*, September 1962 Term of PASQUOTANK.

Special proceeding for allotment of widow's year's allowance and dower.

J. Kenyon Wilson, Jr., and Killian Barwick for petitioner appellant.

Frank B. Aycock, Jr., and W. C. Morse, Jr., for respondents, appellees.

MOORE, J. Anthony Ashley Overton and Dorothy Isabella White were married in 1929 in the State of New York. Without having obtained a divorce, Overton entered into a marriage ceremony with Annabelle Hollowell in 1938 in Camden County, North Carolina. He and Annabelle lived together in North Carolina and three children, Sylvia, Frederick and Jennette Overton, were born to them. Anthony died testate on 12 November 1958. His will was admitted to probate on 17 November 1958 in Pasquotank County. His estate was devised and bequeathed to Annabelle, Sylvia, Frederick and Jennette, and the will refers to Annabelle as his wife and Sylvia, Frederick and Jennette as his children. Elijah Cherry was named executor and trustee and qualified as such.

Dorothy filed a dissent to the will on 22 May 1959, six months and five days after the will was admitted to probate. She instituted a special proceeding on 5 September 1959 for allotment of year's allowance and dower. Frederick and Jennette were minors and Gerald F. White was appointed guardian *ad litem* for them. The clerk of the superior court found as a fact that Annabelle was *non compos mentis* and appointed Ray Etheridge guardian *ad litem* for her.

Elijah Cherry, executor and trustee, and Sylvia filed a joint answer. Gerald F. White and Ray Etheridge, guardians *ad litem*, each filed answer. All of the answers denied the material allegations of the petition generally, and denied that Dorothy was the widow of testator.

A consent judgment was entered by the clerk on 1 November 1960 and was approved by Morris, Resident Judge. The consent judgment

provided for payment of $5500 and costs to petitioner in lieu of year's support, dower and all other claims of petitioner against the estate. The judgment was signed, indicating consent, by attorneys for petitioner, attorneys for executor-trustee and Sylvia, Elijah Cherry, executor-trustee, Ray Etheridge and Gerald F. White, guardians *ad litem.*

Thereafter Annabelle moved to set aside the consent judgment, alleging that she was not insane and had not consented to the judgment or authorized anyone to consent for her. The motion was heard by Judge Morris, who found as a fact that Annabelle had been an inmate of the State Hospital for the Insane at Goldsboro for a number of years but had been released and discharged five months before the consent judgment was entered, and had not consented to the entry of the judgment or authorized anyone to consent for her. The judge made an order decreeing that "as to the movant Annabelle Overton . . . the judgment . . . is null and void and of no effect," and allowing her to answer. Annabelle's answer consists of a denial that Dorothy is widow of testator, and a general denial of other material allegations.

The proceeding came on for trial before Judge Bundy. One issue was submitted to and answered by the jury as follows: "Is Dorothy Isabella Overton the widow of Anthony Ashley Overton, as set forth in her petition? Answer: Yes." Before verdict respondents moved to be permitted, as a matter of right and also in the court's discretion, to amend the answers and plead the six months statute of limitations, G.S. 30-1. The motion was denied. After verdict, respondents renewed this motion and also moved for judgment notwithstanding the verdict. The motions were denied.

All parties agreed that judgment might be signed out of term and out of the county. Judgment was signed in Camden County, ruling that petitioner was not entitled to a year's allowance or dower, decreeing that "petitioner take nothing by her proceeding," and dismissing the petition. Petitioner appeals.

Petitioner assigns as error the following conclusions of law upon which the judgment was based:

> "1. Dissent to the will of the testator is a condition precedent to allotment of the widow's year's allowance provided for in G.S. 30-15 since such allowance is a statutory right and she must comply with the statute. *PERKINS v. BRINKLEY,* 133 N.C. 86, 45 S.E. 465. The petitioner, not having complied with the statute as to dissent, G.S. 30-1, is not entitled to the widow's year's allowance.

"2. While a statute of limitations is a positive defense and must be pleaded, when it has been properly pleaded, the burden is upon the plaintiff to show that his claim is not barred, and not upon the defendant to show that it is barred, EXCEPT WHERE THE STATUTE IS RELIED UPON TO GIVE TITLE, AS IN AN ACTION FOR LAND, WHERIN THE DEFENDANT MUST MAKE GOOD HIS TITLE TO DEFEAT PLAINTIFF'S TITLE WHEN PROVED (emphasis added.) McIntosh North Carolina P & P, Section 372.

" 'Defendants were at liberty to establish their title to the land in controversy without having to plea the source or manner in which they acquired title.' *BUMGARNER v. CORPENING,* 246 N.C. 40.

"The petitioner 'had no right to dissent after the lapse of six months after the probate' of the will. *PERKINS v. BRINKLEY, et al, supra.* As to dower in the lands described in the petition, the petitioner has acquiesced for six months to the will of the man found by the jury to be her husband. While G.S. 30-1 is a statute of limitations and dower a common law right of property, she must comply with the statute and, not having done so, the Court rules as a matter of law that she is not entitled to dower.

"It is thereupon ordered, adjudged and decreed that petitioner take nothing by her proceeding, that this petition be dismissed."

G.S. 30-1, as phrased prior to the 1961 revision, states that "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." This is a statute of limitations. Dissent within six months is not a condition precedent to the right of a widow, whose husband dies testate, to dower. Failure to dissent within the time specified does not extinguish the right, it simply bars the action therefor. *Trust Co. v. Willis,* 257 N.C. 59, 125 S.E. 2d 359; *Whitted v. Wade,* 247 N.C. 81, 100 S.E. 2d 263; *Hinton v. Hinton,* 61 N.C. 410.

It is argued that dower is a common law right and even if G.S. 30-1 is not a condition precedent to the right of dower as to testate property, dissent within six months is a condition precedent to a widow's right to a year's support from such property, by judicial interpretation and the language of G.S. 30-15. It is true that the right of a widow to a year's support is purely statutory. *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216. And G.S. 30-15 (as it existed prior to its revision in 1961) confers the right on "every widow of an intestate, or

of a testate from whose will she has dissented." It is stated in *Perkins v. Brinkley,* 133 N.C. 86, 45 S.E. 465, in which allotment of a year's allowance was involved, that the widow "had no right to dissent after the lapse of 'six months after the probate' of the will." See also *Jones v. Callahan,* 242 N.C. 566, 570, 89 S.E. 2d 111. Appellees construe the statement in *Perkins* as a ruling that dissent within six months is a condition precedent to the right to a year's support. But the time of dissent was not in question in either the *Perkins* or the *Jones* case. In neither of those cases had there been a dissent from the will at any time before proceedings for the allowance were instituted. We perceive no real distinction between the purport of the language of G.S. 30-15 and the principles applied to dower as to testate property. G.S. 30-1 confers no right of dower or year's support; these rights exist independently. G.S. 30-1 merely limits the time within which the rights may be asserted. The time element in the dissent statute is a statute of limitations with respect to both rights.

"Under the present code, the objection that the claim is barred by the statute can be taken only by answer; and even when it appears from the face of the complaint that the claim is barred, objection cannot be made by demurrer, nor by motion to dismiss because the complaint does not state a cause of action. In possessory actions which involve the title to land, it is not necessary to plead the statute specially, but objection may be taken under a general denial, since the statute in such cases confers a title, and does not simply bar the remedy." 1 McIntosh, North Carolina Practice and Procedure (2d Ed.), s. 371, p. 210. The court below seems to have relied upon the last sentence in this quotation from McIntosh, illustrated by the holding in *Bumgarner v. Corpening,* 246 N.C. 40, 97 S.E. 2d 427. It is not apposite. The *Bumgarner* case involves a dispute over land boundaries, and defendants therein claimed title to the disputed area by virtue of adverse possession under color of title. In the instant case respondents' title is not in question.

The objection that an action was not commenced within the time limited can only be taken by answer. G.S. 1-15. Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. *Elliott v. Goss,* 250 N.C. 185, 108 S.E. 2d 475; *Stamey v. Membership Corp.,* 249 N.C. 90, 96, 105 S.E. 2d 282; *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125.

The petition alleges that petitioner, "in apt time and in proper manner, filed her dissent from said will." In the answers this allegation "is denied." Respondents contend that the denials amount to an

affirmative pleading of the statute. We do not agree. "It is an established principle of pleading that the plaintiff need not in his pleading anticipate or negative possible defenses. . . ." 34 Am. Jur., Limitation of Actions, s. 424, p. 335. It is the majority view that "The bar of the statute of limitations is an affirmative defense and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection. As a general rule, unless the facts that raise the bar of the statute appear to be admitted or the fact that a cause of action is barred appears upon the face of the complaint, . . . it is necessary, in order that a defendant may invoke the statute of limitations as a defense, that he plead the statute specially . . .; if he fails to do so, the defense is not available, for it is deemed waived, and the plaintiff may recover as in other cases, notwithstanding the statute has run. Ordinarily the defense of the statute may not be raised under a plea of the general issue." *ibid,* s. 428, pp. 337-8. This rule is somewhat more favorable to respondents than the holdings in this jurisdiction (see the quotation from McIntosh in the second paragraph next above), and even under this general rule respondents' answers do not qualify as affirmative pleas in bar. Petitioner's allegation that she had "in apt time and in proper manner, filed her dissent" is not an admission of the facts that raise the bar of the statute, but is to the contrary; and the fact that the proceeding is barred does not appear upon the face of the complaint. If the filing of dissent within six months were a condition precedent to the institution and maintenance of the proceeding, which it is not, proof by petitioner upon trial that dissent was filed six months and five days after probate of the will would require dismissal of the action. But since there was no affirmative plea in bar, such proof does not justify dismissal. Furthermore, petitioner's allegation is a mere conclusion of the pleader, and respondents' general denial of the conclusion is not affirmative pleading. "The plea of the statute is ineffectual in the absence of factual allegation showing the lapse of time between the date the cause of action accrued and the date on which the case of action was instituted." 3 Strong: N. C. Index, Limitation of Actions, s. 16, p. 154; *Janicki v. Lorek,* 255 N.C. 53, 120 S.E. 2d 413; *Allen v. Seay,* 248 N.C. 321, 103 S.E. 2d 332; *Jennings v. Morehead City,* 226 N.C. 606, 39 S.E. 2d 610.

The courts will not deem the statute of limitations pleaded in behalf of minors in the absence of an actual plea thereof by the guardian *ad litem* appointed to represent them. "Apparently, the only case in which the objection may be taken when not pleaded is the case of an insane person where the statute provides that he shall be given the benefit of all defenses, whether pleaded or not, and this includes the

statute of limitations." 1 McIntosh, North Carolina Practice and Procedure (2d Ed.) s. 374, p. 231. See G.S. 1-16.

The judgment below is vacated, and the cause is remanded that judgment be entered in accordance with the verdict and this opinion. When judgment is accordingly entered, respondents may appeal therefrom if so advised.

One thing more. Judge Morris set aside the consent judgment for cause — lack of consent by Annabelle. The order purported to set the judgment aside only as to Annabelle. Petitioner contends that it is valid and binding as to the other consenting parties. But this is not the correct interpretation of the law. "Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given. . . ." *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955; *Boucher v. Trust Co.,* 211 N.C. 377, 190 S.E. 226. "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment." *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794; *King v. King,* 225 N.C. 639, 35 S.E. 2d 893. A consent judgment rendered without the consent of a party will be held inoperative in its entirety. *Lynch v. Loftin,* 153 N.C. 270, 69 S.E. 143. When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, will determine the question. The findings of fact made by the trial judge in making such determination, where there is some supporting evidence, are final and binding on this Court. *Ledford v. Ledford, supra.* When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorius defense in order to vacate the void judgment. *Owens v. Voncannon,* 251 N.C. 351, 111 S.E. 2d 700. "It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety." 30A Am. Jur., Judgments, s. 639, p. 612; 139 A.L.R. 421, 443; *Walker v. Walker,* 185 N.C. 380 117 S.E. 167; *Edwards v. Sutton,* 185 N.C. 102, 116 S.E. 163. The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. The agreements of the parties are reciprocal, and each is the consideration for the other. If that which affects one party is taken out, what is left is not what

was agreed to by the others. *Bank v. McEwen,* 160 N.C. 414, 76 S.E. 222, Ann. Cas. 191 4c 542. Respondents are entitled to an order setting aside the consent judgment in its entirety.

Error and remanded.

ANNIE LEE COX, ADMINISTRATRIX OF THE ESTATE OF SIMON W. COX, DECEASED, AND GUARDIAN OF SIMON RAY COX AND OTHERS, MINOR DEPENDANTS OF SIMON W. COX, DECEASED v. PITT COUNTY TRANSPORTATION COMPANY, INC., AND FIDELITY & CASUALTY COMPANY OF NEW YORK, COMPENSATION CARRIER.

(Filed 6 March 1963.)

1. Master and Servant § 82, 84; Declaratory Judgment Act § 1—

Where the widow of a deceased employee has received a settlement from the third person tort-feasor for negligence in causing the death of the employee, the proceeds from such settlement must be disbursed according to the provisions of the Workmen's Compensation Act, G.S. 97-10.2, and the Industrial Commission has exclusive original jurisdiction of the disbursement of such funds.

2. Same—

Where the widow has received a settlement from the third person tort-feasor for negligence in causing the death of the employee, neither she nor the other dependants may maintain a proceeding under the Declaratory Judgment Act to establish their right to retain the complete settlement and remit the employer and its insurance carrier to proceedings against the third person tort-feasor for reimbursement of amounts paid under the Compensation Act, and the Superior Court can acquire jurisdiction of the disbursement of such fund only by appeal from the Commission.

APPEAL by plaintiffs from *Mintz, J.,* 27 August Term 1962 of PITT.

This is a civil action instituted in the Superior Court of Pitt County on 4 June 1962 for a declaratory judgment.

Plaintiffs' intestate, Simon W. Cox, was employed by Pitt County Transportation Company, Inc., and was subject to the provisions of the North Carolina Workmen's Compensation Act, and while so employed and acting in the furtherance of the employer's business came to his death by accident in the Town of Greenville, Tennessee, on 29 December 1961, through the alleged negligence of one James Jackie Shore, an employee of the H. W. Miller Trucking Company, Inc. of Durham, North Carolina.

Plaintiffs' deceased left surviving as his dependents his widow, Mrs. Annie Lee Cox, and five minor children, ranging in age from nineteen months to nine years, and his surviving widow pregnant and expecting a sixth child in August 1962, which child was born 5 August 1962. Annie Lee Cox qualified as administratrix of the estate of her husband, Simon W. Cox, and as guardian of the minor dependents of said deceased, before the Clerk of the Superior Court of Greene County, North Carolina, but is now a resident of Pitt County, North Carolina.

Following the death of Simon W. Cox, his employer, Pitt County Transportation Company, Inc., gave notice thereof to the North Carolina Industrial Commission (hereinafter called Industrial Commission) and to the Fidelity & Casualty Company of New York, its insurance carrier. On 21 March 1962, the Industrial Commission entered an award, directing payment of $35.00 per week for 274-2/7 weeks to the widow and children of the deceased, and the sum of $400.00 for funeral expenses.

In the meantime, the widow made demand on H. W. Miller Trucking Company, Inc. for damages for the wrongful death of her husband, Simon W. Cox, pursuant to the provisions of the Tennessee Code, section 20-607. After several months of negotiations, the H. W. Miller Trucking Company, Inc. agreed to pay into court for the benefit of the estate of said deceased the sum of $50,000, for full and complete release and discharge of all claims and demands arising out of the death of said deceased, and further agreed to indemnify the administratrix to the extent of such amount, if any, as she might be legally required to repay for compensation paid to her by reason of said settlement, which settlement was duly authorized and approved by the Clerk of the Superior Court of Greene County and affirmed by the Resident Judge of the Third Judicial District. Said funds have been paid into the office of the Clerk of the Superior Court of Greene County and said funds are now held by said Clerk.

The defendant Fidelity & Casualty Company of New York gave notice in writing on 20 March 1962 to the plaintiffs and to the H. W. Miller Trucking Company, Inc., that it was subrogated to all the rights of the deceased employee by reason of the payment by it of compensation awarded and its acceptance, and that it was entitled to recover and be reimbursed out of any recovery or settlement made by the administratrix all compensation paid by it on account of the death of Simon W. Cox, employee, under the provisions of the North Carolina Workmen's Compensation Act (section 97-10.2 of the General Statutes), which the plaintiffs deny and assert the same has no application under the facts in this case.

The plaintiffs pray for a declaratory judgment, adjudging as follows:

"1st. That the defendants have no legal right to demand of the plaintiffs reimbursement or repayment of any amount paid or awarded to be paid as compensation under the North Carolina Workmen's Compensation Act on account of the death of Simon W. Cox, by reason of the settlement made by the plaintiffs with H. W. Miller Trucking Company.

"2nd. That the plaintiffs are entitled to receive the full compensation awarded by the North Carolina Industrial Commission and the defendants be ordered to fully comply with said award.

"3rd. That the defendants have no right or claim whatever by reason of the settlement of the death claim by the plaintiffs.

"4th. That all matters in controversy in this action be judicially determined by entry of a Declaratory Judgment, and for the recovery of the costs of the action."

This cause came on to be heard on 27 August 1962, pursuant to notice, and being heard upon motion of the defendants herein to dismiss this action for that the original jurisdiction of this cause of action is in the North Carolina Industrial Commission, and that the respective rights of the plaintiffs and the defendants may be determined in the proceeding now pending before said Commission. The court, being of the opinion that defendants' motion should be allowed, entered an order sustaining the motion and dismissing the action.

The plaintiffs appeal, assigning error.

Lewis G. Cooper and Charles H. Whedbee, attorneys for plaintiffs.
Teague, Johnson & Patterson, attorneys for defendants.

DENNY, C.J. The primary question presented on this appeal is whether our Declaratory Judgment Act may be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third party, tort feasor, under the provisions of G.S. 97-10.2, or does the Industrial Commission have the exclusive original jurisdiction to determine the question posed herein.

It is pointed out in G.S. 97-10.2 (f) (1): "If the employer has filed a written admission of liability for benefits under this chapter with, or if an award final in nature in favor of the employee has been entered by, the Industrial Commission, then *any amount obtained by any person by settlement with, judgment against, or otherwise from*

the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

"a. First to the payment of actual court costs taxed by judgment.

"b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not be subject to the provisions of section 90 of this chapter but shall not exceed one third of the amount obtained or recovered of the third party.

"c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.

"d. Fourth to the payment of any amount remaining to the employee or his personal representative." (Emphasis added.)

G.S. 97-91 provides: "All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

"As a general rule where a statute provides a special form of remedy for a specific type of case, the statutory remedy must be followed, and under such circumstances a declaratory judgment will not be granted. This is especially so where the statutory remedy is exclusive * * *." 26 C.J.S., Declaratory Judgments, section 20, page 89.

"A court will not take jurisdication to render a declaratory judgment where another statutory remedy has been especially provided for the character of case presented, if the effect would be to interfere with the right of the parties to appeal to the court given jurisdiction in that particular matter by the statute. Likewise, a declaration will not be made where the purpose is to affect proceedings which may be taken before a public board which has full power to act in the matter and which would not be bound by the declaratory judgment. * * *" 16 Am. Jur., Declaratory Judgments, section 21, page 295.

In the case of *Insurance Co. v. Unemployment Compensation Com.,* 217 N.C. 495, 8 S.E. 2d 619, the plaintiff instituted a declaratory judgment proceeding in the Superior Court to have determined the question whether it should contribute to the unemployment compensation plan in behalf of one of its agents, which it claimed was an independent contractor. This Court held the defendant's demurrer interposed in the Superior Court was properly sustained. *Inter alia,* this Court said: "Where an administrative remedy is provided by

statute for revision, against collection, or for recovery of taxes assessed or collected, the taxpayer must first exhaust the remedy thus provided before the administrative body, otherwise he cannot be heard by a judicial tribunal to assert its invalidity. *Distributing Corp. v. Maxwell,* 209 N.C. 47, 182 S.E. 724; *Hart v. Comrs.,* 192 N.C. 161, 134 S.E. 405; *Maxwell v. Hinsdale,* 207 N.C. 37 (175 S.E. 847). He must not only resort to the remedies that the Legislature has established but he must do so at the time and in the manner that the statute and proper regulations provide."

In *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918, the plaintiff brought an action under the Declaratory Judgment Act to determine the right of the county to collect a certain tax. The Court said: "If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. G.S. 105-406; *Hunt v. Cooper,* 194 N.C. 265, 139 S.E. 446. And if the statute provides an administrative remedy, he must first exhaust that remedy before resorting to the courts for relief."

In the case of *Worley v. Pipes,* 229 N.C. 465, 50 S.E. 2d 504, the plaintiff, a physician, rendered services to an injured employee without knowledge that the injury was covered by the Compensation Act, and thereafter upon discovery that the injury was compensable, filed a claim for such services with the Industrial Commission. The Industrial Commission approved a sum less than the full amount of the claim. The plaintiff accepted the amount approved without requesting a hearing by the Industrial Commission and then brought an action against the injured employee to recover the balance claimed. The Court held that the plaintiff had not exhausted his remedies before the Industrial Commission and was barred by the terms of the Act. " * * * (S)ince the Act provides that fees for physicians be subject to the approval of the commission, and makes it a misdemeanor for any one to receive any fee for services so rendered unless it be approved by the Commission, any promise made by defendant, the employee, to pay plaintiff the balance due on his account is unenforceable and void."

In an action instituted in the Superior Court under the Declaratory Judgment Act or otherwise, when the pleadings disclose an employee-employer relationship exists so as to make the parties subject to the provisions of the Workmen's Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. *Powers v. Memorial Hospital,* 242 N.C. 290, 87 S.E. 2d 510; *Tscheiller v. Weaving Co.,* 214 N.C. 449, 199 S.E. 623. Moreover, the Superior

Court can acquire jurisdiction in such cases only when a party to such proceeding duly appeals from the Commission to said court on matters of law involved therein. *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799. To like effect are *Moore v. Louisville Hydro-Electric Co.*, 226 Ky. 20, 10 S.W. 2d 466 and *American Casualty Co. of Reading v. Kligerman*, 365 Pa. 168, 74 A 2d 169.

As hereinbefore pointed out, it is mandatory under the provisions of the Workmen's Compensation Act that any recovery against a third party by reason of an injury to or death of an employee subject to the Act, the proceeds received from such settlement with or judgment against the third party, shall be disbursed according to the provisions of the Workmen's Compensation Act.

Therefore, the judgment of the court below is

Affirmed.

MELVIN T. MAY, ADMINISTRATOR OF THE ESTATE OF EVA REBECCA MAY BUTNER, DECEASED v. SOUTHERN RAILWAY COMPANY, W. B. STANLEY, CLARENCE C. KINGSBURY, J. M. FORRESTER, G. S. STAFFORD AND J. W. SCOTT.

(Filed 6 March 1963.)

1. Automobiles § 10—

If a motorist is traveling within the legal speed limit, his inability to stop within the range of his headlights is not negligence *per se* but is only evidence of negligence to be considered with the other evidence in the case. G.S. 20-141(b).

2. Master and Servant § 32; Railroads § 5—

Where the jury finds that the railroad company's employees were not guilty of negligence in the particulars alleged with respect to warning plaintiff's intestate of the backing of a box car over the crossing, such finding exonerates the railroad company sought to be held liable under the doctrine of *respondeat superior*, since any verdict against it must be predicated upon the negligence of its employees or agents.

3. Railroads § 5—

The fact that a railroad company permits its crossing to become obstructed with vegetation or other objects does not constitute actionable negligence within itself, since such obstacles relate solely to whether the crossing was unusually dangerous so as to require the train crew to give warning of the approach of its train.

4. Appeal and Error § 2—

The Supreme Court will take notice *ex mero motu* of the failure of the complaint to state a cause of action.

APPEAL by plaintiff from *Johnston, J.*, February 5, 1962 Civil Term of GUILFORD, Greensboro Division. This appeal was docketed in the Supreme Court as Case No. 605 and argued at the Fall Term 1962.

Action for wrongful death. Plaintiff's intestate was killed about 8:50 p.m. on September 4, 1958 when the 1955 Ford automobile she was driving collided with the lead end of a boxcar which defendants were backing over an industrial spur track at a grade crossing at Raleigh Street in the City of Greensboro. The defendants are the Southern Railway Company and its employees, the crew who were operating a switch engine and two boxcars. J. L. Forrester was the engineer; C. C. Kingsbury, fireman; G. S. Stafford, conductor; J. W. Scott and W. B. Stanley, brakeman and flagman.

Raleigh Street is paved, forty feet wide, and runs approximately north and south for a distance of three quarters of a mile between East Market Street and Bessemer Avenue. It is a heavily traveled street through an industrial area. About one quarter of a mile north of East Market Street, two spur tracks of the defendant Southern Railway Company cross Raleigh Street at an angle of approximately forty-five degrees in a northwesterly and southeasterly direction. In the center of the street they are sixteen feet apart. The street is fairly level both north and south of the crossing and one could see from Bessemer Street to East Market Street.

The P. Lorillard Tobacco Company is within one quarter of a mile of this crossing. Plaintiff's intestate, Mrs. Butner, was a twenty-one year old woman who had been employed at P. Lorillard Tobacco Company since August 29, 1957. She worked on the second shift which began at 4:30 p.m. She, along with the other employees on that shift, had a thirty-minute lunch period beginning at 8:45 p.m. At the time of her death Mrs. Butner and another employee, Stella Johnson, were traveling north on Raleigh Street en route to a restaurant on Bessemer Avenue. Miss Johnson was seriously injured at the time Mrs. Butner was killed. She testified that she could recall none of the events of the day except that they were going to lunch.

The night was clear but dark. There were street lights approximately four hundred feet south of the crossing and five hundred feet north of it. There were no lights or signals of any kind at the crossing.

On September 4, 1958, the following ordinance of the City of Greensboro was in full force and effect:

> Chapter 9 (Railroads) Section 9.7: "Rolling stock not to be backed over unprotected crossing unless preceded by flagman.— No railroad, nor any of its agents or employees, shall push or back any train, locomotive or other rolling stock over any grade crossing in the city, which is unprotected at the time by a crossing watchman or flagman on duty, unless it be preceded in the daytime by a flagman on foot carrying a flag, and in the nighttime by a flagman on foot carrying a lighted lantern; and it shall be the duty of the railroad and of every such flagman to give timely warning to pedestrians and persons in vehicles of the approaching rolling stock. . ."

Plaintiff alleged that because of the heavy traffic on Raleigh Street, the absence of lights at the crossing, the angle at which the track crossed the street, and vegetation to the east of Raleigh Street which obscured the view of a train approaching from the east, this was an unusually hazardous crossing at night; that notwithstanding, the defendants, suddenly and without any signal or warning of its approach, pushed an unlighted boxcar from the east directly in front of Mrs. Butner's approaching automobile, thereby proximately causing her death. Plaintiff further alleged that the backing train was not preceded by any flagman as required by the quoted ordinance; that the Railway Company had negligently permitted "the space between Raleigh Street and its railroad track to grow up so thickly with trees, bushes, weeds and permitted an earth embankment to remain on its right of way on the east side of Raleigh Street at said grade crossing"; that plaintiff's intestate could not see the unlighted boxcar as it was pushed into the street; and that under these circumstances the failure to give any warning lulled intestate into the belief that no train was near and caused her to attempt to cross the track when she would not have done so had the defendants taken precautions commensurate with the danger of the crossing.

The defendants denied all the plaintiff's allegations of their negligence and plead the contributory negligence of plaintiff's intestate in bar of his right to recover.

No eye witnesses testified for plaintiff. George Campbell and Gordon Osborne, fellow employees who left the plant behind intestate, observed that the collision had occurred when they topped a rise 300 to 400 feet from the crossing. At that time they saw no person at the scene, no lights on the train, and heard no bell. The first man they

saw came down the side of the track with a lantern from the direction of the engine.

After skidding approximately eight feet, the Butner car collided with the south side of the boxcar at the wheel section about four feet back from the edge. The right rear wheel was twenty-seven feet from the east curb; the right front wheel, twenty-one feet after the collision.

Plaintiff's evidence tended to show that east of Raleigh Street on the north side of the track was a thick stand of tall trees; on the south side, a bank, grown up in weeds, ran from fifty to one hundred feet parallel with the road. This bank, with the weeds and brush on it, was about two feet taller than the roof of a 1957 Ford station wagon sitting in the street.

The defendants' evidence tended to show these facts:

The train was backing towards the south crossing at a speed of two to four miles an hour. Its automatic bell was turned on and, in the opinion of the engineer, could have been heard from one and a half to two blocks away. The engineer was on the north side of the engine; the fireman, on the south. The headlight on the rear of the engine was on; there were no lights on the boxcars. The two boxcars being pushed by the engine were approximately fifty feet long and twelve to fourteen feet high. The cab of the engine was about fourteen feet high. Stafford and Scott, each with a lighted lantern, were in the crossing between the two tracks. Scott was in the middle of the street and Stafford a little to the northwest between the crossing and the engine. The deceased approached the crossing at thirty miles an hour. Stafford and Scott attempted to flag her down with their signal laterns, but she continued to approach at unabated speed. When she was from seventy-five to one hundred feet from the crossing and the train was approximately at the east curb line of the street they realized she was not going to stop. They signaled the engineer and ran to the west side of the street to avoid being run over. He stopped the train within three feet after getting the signal with the lead boxcar about twenty-seven feet into the intersection.

Immediately after the collision the conductor ran around the west end of the train, saw the condition of the occupants of the car, and left to call an ambulance before anyone else arrived. Stanley, the brakeman, left "to telephone the office." Scott went to the car and was there when Osborne and Campbell came. The engineer cut off the automatic bell, and he and the fireman walked down the south side of the track to the accident. The windows of the Butner car were up.

The morning after the accident, at the instance of the Railway

Company, a commercial photographer took pictures of the crossing and of the train. These pictures were introduced in evidence without limitation and indicate that the weeds along the east side of Raleigh Street were not high enough to cut off view of the train.

At the close of all the evidence the court allowed the motions of the defendants Stanley and Kingsbury for judgment as of nonsuit. Five issues were submitted to the jury and answered as follows:

1. Was the plaintiff's intestate killed by the negligence of the defendant, J. M. Forrester, as alleged in the plaintiff's complaint?
   Answer: *NO*
2. Was the plaintiff's intestate killed by the negligence of the defendants, G. S. Stafford and J. W. Scott, as alleged in the plaintiff's complaint?
   Answer: *NO*
3. Was the plaintiff's intestate killed by the negligence of the defendant, Southern Railway Company, as alleged in the plaintiff's complaint?
   Answer: *YES*
4. Did the plaintiff's intestate by her own negligence contribute to her death as alleged in the answer?
   Answer: *YES*
5. What amount of damages, if any, is the plaintiff entitled to recover?
   Answer: *$6,500.00*

On this verdict the judge entered a judgment that the plaintiff recover nothing. The plaintiff appealed, assigning errors in the charge with reference to the third issue.

Frazier and Frazier by H. Vernon Hart for plaintiff appellant.

McLendon, Brim, Holderness and Brooks by L. P. McLendon, Jr., for defendant appellees.

SHARP, J. The jury having answered the issue of contributory negligence against the plaintiff, the defendants are entitled to a judgment unless there is error in the trial below entitling the plaintiff to a *venire de novo. Bullard v. Ross,* 205 N.C. 495, 171 S.E. 789.

There is error in the charge on the fourth issue which, nothing else appearing, would entitle the plaintiff to a new trial. His Honor, in effect, charged the jury that if Mrs. Butner approached the crossing at a speed so great she could not stop her automobile within the range of her headlights, she would be guilty of negligence *per se.* There was

no evidence that she was exceeding the maximum speed prescribed by G.S. 20-141(b). Therefore, such speed would not have been negligence *per se* but only evidence to be considered along with the other facts in the case in determining whether she was guilty of contributory negligence. Chapter 1145, Session Laws of 1953.

However, to award plaintiff a new trial now would be a Pyrrhic victory. There was no error in the trial with reference to the first two issues and the plaintiff has assigned none. The judge correctly instructed the jury on the duty of the train crew to give reasonable and timely warning before backing an unlighted boxcar across a highway at night, and he thoroughly reviewed all the contentions of the plaintiff. Nevertheless, the jury exonerated the employees remaining in the case of any negligence.

When the servant is the actor, the employer cannot be called upon to respond in damages for his act which was not wrongfully or negligently committed. *Morrow v. R.R.*, 213 N.C. 127, 195 S.E. 383. When the master must be held, if at all, under the doctrine of *respondeat superior*, a verdict and judgment against plaintiff on the issue of negligence in an action against the servant bars a later action by the same plaintiff against the master. *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366.

In this case the judge charged the jury that if they answered either of the first two issues YES they would answer the third issue YES, but if they answered the first two issues NO they would still consider the third issue because "a railroad company is required to use due care in maintaining its right of way so as not to obstruct the vision of persons approaching on a public street." Under this instruction the jury answered the third issue YES.

Since the judgment below was in favor of the defendant Railway Company it did not appeal. Hence the propriety of this instruction *as such* is not presented on this record and is not before us for consideration. *Jeffreys v. Burlington*, 256 N.C. 222, 123 S.E. 2d 500. It is noted, however, that there was no evidence that the vegetation complained of was on the Railroad's right of way. Vegetation along the side of the public road is not chargeable to the Railroad but, if such growth obscures the view of those approaching the track, it becomes the duty of the Railroad to use means commensurate with the danger created by that growth to warn the public of an approaching train. 74 C.J.S., Railroads, Section 722.

However, with the members of the train crew exonerated of any negligence, this question arises: Does the complaint allege any facts

upon which the Railroad may now be held independently liable? The answer is NO.

The substance of the allegations of the complaint with reference to the obstructions at the crossing are set out in the statement of facts. The purpose of these allegations was to establish the duty which the train crew owed intestate to warn her of the approaching train. If obstructions made a blind crossing, they were a vital factor in determining the duty which defendants owed her as well as in determining whether intestate herself was guilty of contributory negligence in going upon the tracks. However, "(o)bstructions in themselves have never been considered negligent, . . . but if they exist, and the railroad is aware of them, it is then incumbent on the railroad to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains." *Parrish v. R.R.*, 221 N.C. 292, 20 S.E. 2d 299; *Coltrain v. R.R.*, 216 N.C. 263, 4 S.E. 2d 853.

Permitting such obstacles on the right of way and near the crossing would not in itself constitute actionable negligence, and independently would not give rise to a cause of action. *Childress v. Lake Erie & W. R. Co.*, 182 Ind. 251, 105 N.E. 467. The cause of action depends upon whether or not the train crew gave the warning and took the precautions which an unusually dangerous crossing required. In this case the jury has said that they did.

When the complaint fails to state a cause of action, a defect appears upon the face of the record proper. On appeal, the Supreme Court will take notice of it and will *ex mero motu* dismiss the action. *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910; *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774; *Skinner v. Transformadora, S. A.*, 252 N.C. 320, 113 S.E. 2d 717.

This action is remanded to the Superior Court of Guilford County with instructions to enter a judgment on the first two issues decreeing that the plaintiff recover nothing of the individual defendants and dismissing the action against the Southern Railway Company.

Error and remanded.

GILBERT SPITZER AND WIFE, BARBARA O'NEAL SPITZER v. CLAUDE H. LEWARK AND WIFE, MARGARET BLADES SPITZER LEWARK.

(Filed 6 March 1963.)

1. Habeas Corpus § 3—

The findings of fact by the trial court in a hearing to determine the right to custody of a minor child as between its parents and the paternal grandmother and stepgrandfather of the child, are conclusive if supported by any competent evidence.

2. Appeal and Error § 21—

A sole exception to the entry of judgment presents whether the facts found support the judgment and whether error of law appears on the face of the record.

3. Parent and Child § 5—

Parents are the natural guardians of their children and have the legal right to the custody, companionship, and control of their children, which right, while not absolute, may not be interfered with or denied except when the interest and welfare of the children clearly require it.

4. Same; Habeas Corpus § 3— Mental illness alone is insufficient ground to deprive mother of custody of child if she remains capable of proper supervision.

In this proceeding to determine the right to custody of a minor child as between the child's parents and the child's paternal grandmother and stepgrandfather, with whom the child had been living while its mother was confined to a mental hospital, there was evidence that the mother, while suffering from schizophrenia, had, since her release from the hospital, made adjustments and had looked after her other child in a satisfactory manner, that the mother was taking medicine as prescribed, etc. *Held:* The evidence supports the finding of the court that the mother, with continuing medicine and treatments, is a fit and suitable person to have the care and custody of the child, and the findings support the judgment awarding the custody of the child to the child's father and mother.

APPEAL by respondents from *Bundy, J.*, December 1962 Term of PASQUOTANK.

Habeas corpus proceeding, G.S. 17-39.1, to determine the custody of Katrine Anne Spitzer, age two years, between petitioners, her parents, and respondents—the *feme* respondent is the paternal grandmother of the child, and the male respondent is her step-grandfather.

Two children were born of the marriage between the petitioners: Gilbert Spitzer, Jr., age three years, and Katrine Anne Spitzer. On 3 September 1954 the *feme* petitioner was admitted to the Dorothea Dix Hospital for what was diagnosed as Schizophrenic Reaction, Un-

differentiated Type. From then until she was discharged in December 1957 she was in this hospital much of the time. She was later readmitted in December 1960, and again discharged in May 1961.

From December 1960 to May 1961, while the *feme* petitioner was in Dorothea Dix Hospital, the male petitioner and the two children lived in the home of the respondents. After May 1961 the petitioners established a home of their own in Elizabeth City, and their son went there to live with them. The respondents refused to permit petitioners to take their daughter, Katrine Anne, to their home. Hence, this preceeding.

The order of Judge Bundy is as follows:

"This matter came on to be heard before the undersigned Judge of the Superior Court on December 3, 1962, in Pasquotank County, and after hearing affidavits and oral testimony, by consent, the matter was continued and taken under advisement, pending a clinical outpatient examination of the Barbara O'Neal Spitzer, petitioner and mother of the Katrine Anne Spitzer, and other investigation as to the present mental condition of said Barbara Ann Spitzer, and her ability to take care of said minor child, in addition to her other duties, and the Court having had the advantage of the results of said clinical examination and other information, finds:

"1st: That Katrine Anne Spitzer has lived with the respondents since December, 1960, when her mother, Barbara Ann Spitzer, entered Dorothea Dix Hospital, where she remained until May, 1961, upon advice of the Department of Public Welfare and others, and has remained in the custody of the respondents, the *femme* respondent being the paternal grandmother, until the said Barbara Ann Spitzer was able to have the care and custody of said child.

"2nd: The *femme* petitioner is now functioning in an acceptable manner, and has done so for some time; she has made many adjustments, and bids fair to be able to live a normal life, with the help of others and continuing medicine and treatment, and is now a fit and suitable person to have the care and custody of said child.

"THEREFORE, IT IS ORDERED that the care, custody, nurture and control of Katrine Anne Spitzer be and the same is awarded to the petitioners, the father and mother of said child, with the admonition that she be permitted to visit the respondents, and that they be permitted to visit said child, in such manner as

members of a family visit among themselves, in order to make for the best interests of said child.

"This order shall become effective forthwith, and is retained for further orders should circumstances require."

By consent of the parties this order was entered by Judge Bundy out of the County and out of the District on 22 December 1962.

From the order, respondents appeal to the Supreme Court.

Russell E. Twiford and Gerald F. White of Aydlett & White, for respondent appellants.

No counsel for petitioners.

PARKER, J. Respondents assign as error Judge Bundy's second finding of fact on the ground that there is no competent evidence in the record to support it. This assignment of error is overruled.

The second finding of fact finds support in the joint affidavit of Lindsey and Alma Swindell, the affidavit of Roxana O'Neal, mother of *feme* petitioner, and in the reports of Dr. Walter A. Sikes, superintendent of Dorothea Dix Hospital, of Dr. Ben E. Britt, clinical director of Dorothea Dix Hospital, and of Emma J. Edwards, director of public welfare of Pasquotank County, to Judge Bundy. There was no objection to this evidence by respondents. Dr. Walter A. Sikes wrote to Judge Bundy on 30 November 1962: "This morning we received a request from Russell E. Twiford, Attorney at Law, Elizabeth City, North Carolina that we send you information concerning Barbara O'Neal Spitzer. We understand a hearing concerning the custody of her child is to be scheduled for Monday, December 3 at 2.:30 P.M. before your court." There is in the Record what is termed "Outpatient Clinical Notes" in respect to the *feme* petitioner from Dorothea Dix Hospital, dated 13 December 1962, which states in part:

"This 31 year old girl with a long history of rather severe schizophrenia has been out of the hospital for the past twenty-two months, apparently making a comfortable adjustment in view of the rather trying circumstances of her present existence. She has been taking care of her oldest child and has been denied the custody of her youngest child.

* * * * * * * * *

"Information from her, her attorney and members of her family indicate she has done an adequate job of caring for her oldest child and the oldest child appears to be functioning in an adequate

fashion during the interview today. The patient certainly appears to be disturbed over loss of her baby and displays obsessive thoughts about the baby to the point that this appears to be one of the major stresses in her life at the present time.

"Mental illness in itself does not necessarily mean incompetence to rear children. Some patients who appear clinically much sicker than Barbara does have proven adequate as parents. While the future course of her illness cannot be predicted with accuracy at the present time, her history does indicate that she has been showing improvement recently. She has been able to remain out of the hospital longer this time than ever before since the onset of her illness. She has been taking medication regularly and has shown a willingness to try to cope with her difficulties, both domestically and psychiatrically. In addition to the improvement in her own intrapsychic condition, the present history indicates there is an improvement in the environmental situation, both within her immediate family and her parent's family, thus promoting a more favorable prognosis for the patient."

On 2 December 1962 Emma J. Edwards, director of public welfare of Pasquotank County, wrote to Judge Bundy as follows: "I believe that she [*feme* petitioner] has made many adjustments and with the help of the social worker, her mother, and continuing medicine prescribed, she should have the chance to look after her baby. This seems to be her one and only trouble at the present time and that within itself would upset a normal person."

The second finding of fact by Judge Bundy is supported by competent evidence, and is conclusive on appeal. *In re Kimel,* 253 N.C. 508, 117 S.E. 2d 409.

Respondents next assign as error the entry of the judgment. This presents the question whether the facts found support the judgment, and is there error of law apparent on the face of the record. Strong, Supplement to Vol. 1 of N. C. Index, Appeal and Error, section 21.

Judge Bundy awarded the custody of Katrine Anne to her father and mother—not to her mother alone. The appellants are the paternal grandmother of Katrine Anne and her paternal step-grandfather. This is not a proceeding to determine rights of parents *inter sese* as to the custody of their child.

As a general rule at common law, and in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and the same being a natural and substantive right may not lightly be denied or interfered with by

action of the courts. However, the right is not absolute, and it may be interfered with or denied, but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interest and welfare of the children clearly require it. *Latham v. Ellis*, 116 N.C. 30, 20 S.E. 1012; *Newsome v. Bunch*, 144 N.C. 15, 56 S.E. 509; *In re Fain*, 172 N.C. 790, 90 S.E. 928; *Brickell v. Hines*, 179 N.C. 254, 102 S.E. 309; *In re Shelton*, 203 N.C. 75, 164 S.E. 332; 67 C.J.S., Parent and Child, section 11, a and c. See: *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759; *In re Woodell*, 253 N.C. 420, 117 S.E. 2d 4.

In 67 C.J.S., Parent and Child, section 11, c, page 640, it is said:

> "The prima facie right to the custody and care of minor children is generally in the parents, * * *and accordingly, unless the circumstances strongly indicate that a third person should be selected as custodian, * * *a natural parent, father or mother, as the case may be, who is of good character and a proper person to have the custody of the child and is reasonably able to provide for it ordinarily is entitled to the custody as against all other persons, and according to the judicial decisions on the question such as other relatives, including grandparents, or as against an institution."

It seems from the Record before us that the controversy was as to whether or not the *feme* petitioner was a fit and suitable person to have the custody of her daughter Katrine Anne. There is no evidence that the father of Katrine Anne is not a fit and suitable person to have her custody, and respondents make no contention that he is not a fit and suitable person to have her custody. A study of the home conditions of petitioners made by the Public Welfare Department of Pasquotank County, dated 30 November 1962, appears in the record, and reads in part: "In summary, Mr. and Mrs. Spitzer present a normal home life with ample space, adequate equipment, and financial stability to take care of their two children. They are the natural parents and both express love for both of their children." The Record also shows that the *feme* respondent has been generous in furnishing financial help to her son, the male petitioner, who is receiving disability benefits from the Veterans Administration, and is also earning $67.00 a week as a civilian worker at a local U. S. Coast Guard Repair Base.

The love of a mother for her child is one of the most powerful of the human emotions. Usually, it is the best guaranty of the child's welfare. The home, though one of narrow circumstances, in which that love finds expression is infinitely more preferable for the child than

the home of a wealthier third person with its luxury and social advantages.

"The angels, whispering to one another,
Can find, among their burning terms of love,
None so devotional as that of 'Mother.'"

Edgar Allan Poe—"To My Mother."

The findings of fact of the judge below are very meager. It would have been far more preferable if they had been fuller. However, considering the findings of fact in the light of the theory of the hearing below, and the evidence in the Record before us, the findings of fact suffice to support the judgment awarding the custody of Katrine Anne *to her father and her mother.*

Courts should never lightly disregard the legal rights of parents to their infant children during their infancy, nor should their natural and emotional ties with their children be overlooked. "* * *the law seeks to work in harmony with nature, and to continue those ties which bind man to his own flesh* * *." *Morris v. Grant,* 196 Ga. 692, 27 S.E. 2d 295.

The judgment below is

Affirmed.

DEWEY CROWE v. STANLEY SAM CROWE.

(Filed 6 March 1963.)

1. Automobiles § 41a—

Evidence that while defendant was attempting to negotiate a left curve at some 40 to 50 miles per hour his right front tire suddenly blew out, causing him to lose control and resulting in injury to his passenger, without evidence that there were special speed restrictions at the *locus*, *held* insufficient to overrule nonsuit, since the blowout was not reasonably foreseeable under the circumstances, and therefore the injuries resulted from an unavoidable accident.

2. Negligence § 7—

Foreseeability of injury is an essential element of proximate cause.

3. Negligence § 3; Automobiles § 19—

The fact that a motorist, in an emergency caused by the blowout of a tire, suddenly applies his brakes will not be held for negligence since a person acting in a sudden emergency is not required to select the wisest

choice of conduct but only such choice as an ordinarily prudent person, similarly situated, would have made.

APPEAL by plaintiff from *Pless, J.*, October 1962 Term of GASTON.

Action to recover damages for personal injuries.

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

Henry M. Whitesides for plaintiff appellant.

Mullen, Holland & Cooke by Philip V. Harrell for defendant appellee.

PER CURIAM. Plaintiff offered evidence as follows:

About 10:00 o'clock a.m. on 30 April 1961 plaintiff was riding as a passenger in a Ford station wagon owned and driven by his son, the defendant, on what is known as the Hudson Prison Camp Road in Caldwell County. This is a hard-surfaced road. After defendant passed the prison camp there were two curves in the road ahead of him—one to the right, "then 200 to 225 straight," and then a sharp curve to the left. At this place in the road there is a white line in the center of the road and yellow lines on both sides of the white line nearly all of the way. Defendant was driving at a speed of 40 to 50 miles an hour in the middle of the road in the vicinity of the curves. After he got out of the first curve to the right, plaintiff told him he had better slow down because the next curve was a sharp curve. When defendant started into the left curve, he was driving 40 to 50 miles an hour in the center of the road. Suddenly his right front tire blew out. He "throwed on" his brakes, and the station wagon started skidding, and skidded about 30 feet into a ditch and into a bank, where it came to rest. Plaintiff was thrown into the dashboard, ended up on the floorboard, and sustained injuries.

There is no evidence that the tires on the station wagon were worn or slick or old. Plaintiff testified, "he [defendant] usually kept good tires on his car."

Plaintiff testified, "there is a 35 mile per hour speed sign where you turn onto Hudson Prison Camp Road from U. S. Highway #321." That is a considerable distance from where the accident occurred. His son-in-law, J. D. Buchanan, a witness for him, testified, "there are not any speed signs on Hudson Prison Camp Road near the accident."

It is manifest that the sole proximate cause of plaintiff's injuries was the sudden blowout of the right front tire on defendant's station wagon. There is nothing in the evidence tending to show that defendant, or any person of ordinary prudence, could have reasonably fore-

seen that the right front tire on his station wagon would suddenly blow out under the facts as they then and there existed. "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796.

Plaintiff was injured in an unfortunate accident, but it was an accident pure and simple. While defendant in "throwing on" his brakes may not have pursued the safest course or acted with the best judgment or the wisest prudence, in the light of what occurred, still it is not thought that this should be imputed to him for negligence, because with a tire blowout on his front wheel as he was entering a curve in the road, he was faced with an emergency which required instant action without opportunity for reflection or deliberation. Some allowance must be made for the excitement of the moment and strain on the nerves. *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; *Patterson v. Ritchie,* 202 N.C. 725, 164 S.E. 117. "One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Ingle v. Cassady, supra.*

Plaintiff's evidence, considered in the light most favorable to him, and giving to him the benefit of every legitimate inference to be drawn therefrom, fails to show any negligence on defendant's part which was a proximate cause of his injuries.

The judgment of compulsory nonsuit below is

Affirmed.

WILLIAM BRYSON DAVIS v. TOM B. SUMMITT AND ST. PAUL FIRE & MARINE INSURANCE COMPANY.

(Filed 6 March 1963.)

Master and Servant § 63—

Evidence that claimant received an injury while attempting, alone, to elevate and hold a 175 pound cabinet in place while another workman secured it to the wall, and that three men were usually assigned to the installation of such cabinets on the construction job, is held sufficient to sustain a finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment.

APPEAL by defendants from *McConnell, S.J.*, November, 1962 Civil Term, GASTON Superior Court.

This proceeding originated as a compensation claim filed before the North Carolina Industrial Commission to recover temporary total and permanent partial disability benefits for injury sustained in an industrial accident.

The evidence tended to show, and the Hearing Commissioner found that three men were usually assigned to the installation of cabinets on the employer's construction jobs. On the occasion of claimant's injury, he and one fellow employee (Adams) were given the assignment. A base cabinet had been installed. "Adams got up on the bottom cabinet while the plaintiff stood on the floor; both were handling the cabinet—approximately six and one-half feet long, forty-two inches tall, and weighed approximately 175 pounds." The claimant alone was attempting to hold the cabinet in place while Adams secured it to the wall. According to plaintiff's testimony, corroborated by Adams, the claimant suffered injury in attempting to elevate and hold the cabinet in place — a task usually assigned to two men. His medical testimony supported the claim of injury.

The Hearing Commissioner, the Full Commission, and the Superior Court approved the findings of fact and sustained the award of compensation. The defendants appealed.

Whitener & Mitchem, by Basil Whitener, by Wade W. Mitchem, for defendants, appellants.

No counsel contra.

PER CURIAM. The jurisdictional facts, including the average weekly wage, were stipulated. The evidence was sufficient to permit the finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment. The defendants' objections go to the weight of the evidence rather than to its competency. The weight was for the Commission. The judgment awarding compensation is

Affirmed.

FRANCES ELOISE FALATOVITCH v. CITY OF CLINTON.

(Filed 6 March 1963.)

1. Municipal Corporation § 12—

A municipality is under duty to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for travel by those using them

in a proper manner and with due care, but it is not an insurer of the safety of its sidewalks.

2. Same—

Evidence that a broken place in the sidewalk some ten inches by seven inches had filled with dirt and trash level with the sidewalk, and that in walking along the sidewalk plaintiff's heel went into the hole and her ankle turned over causing her to fall, *is held* insufficient to overrule nonsuit, since a municipality's failure to correct such minor defect in the sidewalk cannot constitute a breach of its legal duty.

APPEAL by plaintiff from *Parker, J.*, October Civil Term 1962 of SAMPSON.

Personal injury action.

Plaintiff alleged she fell and was injured April 22, 1961; that she was walking along the sidewalk on College Street, Clinton, N. C., directly in front of the premises of Clinton Appliance and Furniture Company; that her fall was proximately caused when she stepped into an "opening and hole" in said sidewalk, "left uncovered and uneven" by defendant; and that defendant was negligent in that, with knowledge or notice thereof, it failed to correct said defective condition.

Answering, defendant denied negligence and pleaded contributory negligence.

At the conclusion of plaintiff's evidence, the court entered judgment of involuntary nonsuit and plaintiff appealed.

Chesnutt & Chambliss for plaintiff appellant.
Harry M. Lee and M. B. Fowler for defendant appellee.

PER CURIAM. Plaintiff's evidence tends to show:

On Saturday, April 22, 1961, about 10:00 a.m., in leaving Clinton Appliance and Furniture Company, plaintiff stepped off the bottom step "into a hole about 10 inches long and about 6 inches wide, turned over (her) foot, and fell broadside." It was an "old hole" in the cement sidewalk. A witness who described the "crack" as "10 inches long and three or four inches wide" testified it had existed to his knowledge more than three years. It was filled with dirt, sand and trash and was "level with the street" (sidewalk).

Plaintiff had not noticed the defective place when she entered the store that morning. Nor had she noticed it on her previous visits to the store.

Plaintiff's testimony does not disclose what portion of her shoe went into the hole or crack. A witness testified he noticed plaintiff's

heel "could have fallen in that hole because there was rubber on the side of the crack." Another witness testified he observed "the print of (plaintiff's) heel where it went in the hole." Another witness testified that "(y)ou could tell by the sand that was dug out where her heel went in."

The complaint contains no description of the hole or crack. It is described in the evidence as set out above. There was no evidence as to the depth of the hole or crack.

The legal duty of defendant, a municipal corporation, is to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for travel by those using them in a proper manner and with due care. It is not an insurer of the safety of its sidewalks.

While the evidence tends to show there was a hole or crack in the cement sidewalk, the evidence, in our opinion, was insufficient to establish actionable negligence. Defendant's failure to correct what must be considered a minor defect did not constitute a breach of its legal duty. Hence, the judgment of the court below is affirmed.

Affirmed.

W. S. CROOM v. TOWN OF BURGAW.

(Filed 6 March 1963.)

Municipal Corporations § 10—

A municipality may not be held liable for injuries inflicted by its police officer in assaulting a person arrested by him, notwithstanding allegations that the police officer was an agent of the municipality and that the municipality was negligent in failing to exercise ordinary care in the selection of its police officers, since a municipalty may not be held liable in tort for acts committed by its agent in the performance of a governmental duty.

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

APPEAL by plaintiff from *Bone, J.*, November Civil Term 1962 of PENDER.

This is an action instituted against the Town of Burgaw to recover for damages for an alleged unlawful assault upon the plaintiff by Porter Ward, Chief of Police of the Town of Burgaw, which assault resulted in serious bodily injuries to the plaintiff.

Plaintiff alleged that at all times pertinent to the matters about which he complains, the said Porter Ward "was the agent, servant and

employee of the defendant Town of Burgaw, and was about his master's business and acting within the scope of his employment."

The plaintiff further alleged that the defendant was grossly negligent in that said Chief of Police was not qualified by experience or training to perform the duties of a police officer; that the defendant was negligent in that it failed to use ordinary care in the selection of said Porter Ward for the office of Chief of Police; that had the defendant used due care in investigating the qualifications of said officer it would have found that he was a person of bad character and reputation and who had a criminal record.

The defendant demurred to the complaint, for that "It appears on the face of the complaint that said cause of action, if any, as is alleged against this defendant is within the governmental immunity of this defendant as a municipal corporation and, hence, this defendant is not liable in damages therefor and is exempt from liability thereon."

When the matter came on for hearing, the plaintiff filed a motion to make Porter Ward and the members of the Town Council of Burgaw, individually, parties defendant.

Before passing upon the motion to make additional parties defendant, the court proceeded to hear and pass upon the demurrer.

After considering the complaint, the demurrer, and the argument of counsel for the respective parties, the court sustained the demurrer, dismissed the action and denied the motion to make additional parties.

Judgment was entered accordingly and the plaintiff appeals, assigning error.

Lonnie B. Williams and Otto K. Pridgen, II, for plaintiff appellant.
Corbett & Fisler; Summersill & Browning, for defendant appellee.

PER CURIAM. It has been uniformly held by this Court that a municipality while acting in its governmental capacity, pursuant to legislative authority conferred by its charter, or in discharging a duty imposed for the public benefit, such corporation is not liable for the torts of its officers, unless there is a statute which subjects it to liability therefor.

A police officer duly appointed by a municipality is not an agent or servant of the city or town in the sense that the doctrine of *respondeat superior* applies. A municipality is not liable in tort for the wrongful acts of its police officers committed in connection with the performance of their duties as such officers. *McIlhenney v. Wilmington*, 127 N.C. 146, 37 S.E. 187, 50 L.R.A. 470; *Parks v. Princeton*, 217 N.C. 361, 8 S.E. 2d 217; *Gentry v. Hot Springs*, 227 N.C. 665, 44 S.E. 2d 85.

The judgment of the court below is
Affirmed.

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

W. W. CANDLER, ELOISE CANDLER WILLIS, COKE CANDLER, MABRYE G. BRENTON AND LUCINDA C. BELL, PETITIONERS V. WILLIE MAE SLUDER, WIDOW OF L. L. SLUDER, AND VANCE S. BYRD AND WIFE, GRACE C. BYRD, MRS. CARLEE LEDFORD, ALICE LEDFORD WATKINS SOPER, LEE LEDFORD TREXLER, LENA GUDGER AND MARY LOU GUDGER, RESPONDENTS.

(Filed 20 March 1963.)

1. Highways § 12—

The statutory right to have a cartway laid off across the lands of others is in derogation of the free and unrestricted use and enjoyment of the realty by the owners, and the statute must be strictly construed, so as to permit the establishment of a cartway only for those uses specified in the statute. G.S. 136-68, G.S. 136-69.

2. Same—

"Cultivation" is used in G.S. 136-69 in its broad sense and embraces the use of land for raising all kinds of crops and agricultural products, including orchards and the raising of cattle, and while hunting is not one of the specified uses, the fact that the land is used for hunting in addition to uses embraced within the statute does not preclude the owner from his right to a cartway.

3. Same—

The taking of action preparatory to the cutting and removing of timber within the purview of G.S. 136-69 does not require that the owner stand ready to cut and remove timber the moment a cartway is granted, but it is sufficient if there is merchantable timber growing upon his land which he plans to make arrangements to have cut as soon as a way to transport it is afforded.

4. Highways § 13— Evidence held for jury in this proceeding to establish right to cartway.

Petitioners' evidence that there was no access to a public road from their lands, that there was an apple orchard of some 40 to 50 trees on the land, that part of the land was suitable for summer grazing for cattle, that there was merchantable timber on the lands which one of the petitioners was ready to cut as soon as he had a way to transport it, *is held* sufficient to overrule nonsuit in an action to establish a cartway, notwithstanding evidence that petitioners gave away rather than

sold most of the apples and that on one occasion one of the respondents permitted one of the petitioners to take cattle across his land after the road had been closed by a locked gate, since whether petitioners had a way "affording necessary and proper means of ingress and egress" is for the determination of the jury upon the evidence.

5. Same—

In a proceeding to establish a cartway under G.S. 136-69, the issue before the clerk and before the Superior Court on appeal from the clerk is solely petitioners' right to the establishment of the cartway and not its location across the lands of the several respondents, the mechanics of actually locating the cartway being for the jury of view with right of appeal from the findings of the jury of view by any respondent adversely affected, even though he may not have appealed from the determination of petitioners' right to the establishment of the cartway.

6. Highways § 12—

In order to be entitled to a cartway over the lands of others, it is not sufficient merely that petitioners have no access to a public road but they must also show that a cartway is "necessary, reasonable, and just," but an instruction requiring petitioners to show that they have no adequate means of transportation affording "necessary and proper means of ingress and egress" is tantamount to requiring them to show that the cartway was "necessary, reasonable, and just," and therefore such instruction does not constitute prejudicial error.

APPEAL by defendant, Willie Mae Sluder, from *Martin, S. J.*, August 1962 Term of BUNCOMBE.

This is a special proceeding for establishment of a cartway. G.S. 136-68 and G.S. 136-69.

The amended petition in substance alleges: Plaintiffs own a 45-acre tract of mountainside land from which there is no means of access to a public road. Defendants' lands (three tracts) lie between plaintiffs' land and the only public road in the vicinity. Defendants refuse to permit plaintiffs a way over their lands. On plaintiffs' land there is an apple orchard which has about 500 bushels of apples ready to gather. A portion is grassland suitable for grazing cattle and which plaintiffs are desirous of using for this purpose. There are many walnut trees and plaintiffs desire to gather and market the nuts therefrom. Plaintiffs are ready to cut and remove merchantable timber from the land. There is a cabin on the land and plaintiffs lease the cabin and hunting rights to hunters. It is necessary, reasonable and just that petitioners have a cartway over and across defendants' lands.

Defendants Byrd and Sluder entered general denials, and Sluder affirmatively avers that plaintiffs have a permissive way over the Byrd lands. The other defendants, owners of the Ledford land, admit the allegations of the petition.

The cause was heard before the clerk who found facts and concluded "that it is necessary, reasonable and just that plaintiffs have a private way from their said lands to the public road." An order was entered appointing a jury of view to go upon the premises, lay off a cartway not less than 14 feet in width "across the lands, or some of the lands, of the defendants," assess damages, and report their proceedings to the court in writing.

Defendant Sluder excepted and appealed. The cause was tried *de novo* in Superior Court by the judge and jury. The verdict was in favor of plaintiffs. Judgment was entered accordingly, and defendant Sluder appeals.

Don C. Young for Petitioners.

Van Winkle, Walton, Buck and Wall, and Herbert L. Hyde for Respondent Sluder.

MOORE, J. Appellant assigns as error the denial of her motion for nonsuit.

Plaintiffs' evidence is summarized in the following numbered paragraphs:

(1) The public road, "Billy Cove Road," dead-ends at the northern boundary of the Byrd tract (80.2 acres). Byrds' land does not adjoin plaintiffs' tract. The Sluder land (116.35 acres) does not abut the public road but is 140 feet therefrom and has access to the public road by a private way over the Byrd land. The Sluder and Ledford lands adjoin plaintiffs' land. The Ledford land (49 acres) does not extend to the public road. For about 50 years there was a road across the Byrd and Sluder lands to plaintiffs' land, but it was closed by a locked gate and a rock 12 to 18 years before this suit was instituted. After this road was closed plaintiffs had permission to use a road over the Byrd and Ledford lands. About two years prior to the filing of this action Byrd withdrew permission, closed the road by means of a locked steel gate, and posted "No Trespassing" signs.

(2) On plaintiffs' land there is an apple orchard of 40 to 50 trees. The trees annually produce 6 to 10 bushels per tree. Plaintiffs, when they had access, gathered the apples, used some and gave the rest to their neighbors. They sold some "way back."

(3) About a third of the land is in grass suitable for pasture. It was used as summer range for cattle. On one occasion after the road was closed defendant Byrd permitted one of the plaintiffs to take cattle to the land, and offered him a key to the gate and permission to use

the road if he would grade it, but did not offer the others this permission.

(4) There is merchantable timber on the land. There are locust trees, suitable for fence posts, and poplars and oaks 2 to 3 feet in diameter. The trees are deteriorating and need to be cut, and plaintiffs plan to cut and remove them as soon as a road is available.

(5) There is a cabin on the land. Hunters occasionally lease the cabin and the hunting rights to the land. Appellant contends nonsuit should have been granted because (a) plaintiffs' principal purpose is to provide a road for the use of hunters, (b) plaintiffs have made no preparations for removing timber, (c) they have never sold apples and walnuts commercially, and (d) there is "no evidence they had failed to get their cattle in and out by permission of respondent Byrd."

The pertinent portion of G.S. 136-69 provides: "If any person . . . shall be engaged in the cultivation of any land or the cutting and removing of any standing timber . . . or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom, such person . . . may institute a special proceeding as set out in the preceding section, and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road . . . over the lands of other persons, the court shall appoint a jury of view. . . ."

G.S. 136-68 and G.S. 136-69 are in derogation of the free and unrestricted use and enjoyment of realty by the owner of the land over which it is sought to establish a cartway, and must be strictly construed. *Brown v. Glass*, 229 N.C. 657, 50 S.E. 2d 912; *Warlick v. Lowman*, 103 N.C. 122, 9 S.E. 458. The use to which petitioner for a cartway is putting or preparing to put his land must comply with statutory specifications. Hunting is not a use contemplated by G.S. 136-69. But the fact that hunting is one of the principal uses does not necessarily defeat petitioners' right to a cartway, where there are other uses which do conform. The rule of strict construction does not limit the uses to those specified in the statute if in fact there are uses which do meet statutory requirements. We think the presence of an apple orchard of forty or more trees, which had annually produced large quantities of apples and were so producing at the time of the trial, is sufficient compliance with the statute to withstand nonsuit on the question of enterprises. In its narrow sense "engaged in the cultivation of land" means breaking the soil as with a plow, but in its broad sense it means use of the land

for raising crops, whether of apples or cattle. See "cultivate," Webster's Third New International Dictionary unabridged (1961). The fact that crops are gathered and used by the owners and given to neighbors and not sold commercially is not a disqualification on motion to nonsuit. It is suggested that there is no evidence of preparations to cut and remove timber. One of the petitioners testified: "Yes, I have made preparations to take it (the timber) off. I am right now waiting to cut some timber up there and take it off and market a bunch of it. I am going to make preparations if I get a road up there." To make preparations to cut timber, under the situation here presented, it is not necessary that petitioner take his implements to a gate he is forbidden to enter and wait there until he has established his right to enter by court action. Petitioner testified he was ready to cut the timber as soon as he has a way over which to transport it. Defendant Byrd on one occasion permitted one of the petitioners to take cattle to the land after the road had been closed, and offered *this particular petitioner* a key to the gate lock on condition petitioner would grade the road. The limited permission offered does not establish as a matter of law that petitioners have a way "affording necessary and proper means" of ingress and egress. The questions raised by appellant on her motion for nonsuit are more properly for jury consideration. *Garris v. Byrd,* 229 N.C. 343, 49 S.E. 2d 625; *Barber v. Griffin,* 158 N.C. 348, 74 S.E. 110. The motion for nonsuit was properly overruled.

The court submitted one issue and the jury answered it in the affirmative. It is: "Are petitioners entitled to have a cartway established under G.S. 136-69 across the lands of respondents?" Appellant excepted to the issue submitted and tendered an issue relating to the Sluder land only. In short, appellant contends that the inquiry is whether petitioners are entitled to a cartway over the Sluder land.

The defendants, other than Sluder, did not except to or appeal from the clerk's order. The order was a final determination as to them of plaintiffs' right to a cartway. The jury of view has taken no action and no cartway has been laid off. Carried to its logical conclusion, appellant's contention seems to be that, if an adequate and proper road can be established over the Byrd and Ledford lands, plaintiffs are not entitled to a cartway across the Sluder land.

An order of a clerk of superior court adjudging the right to a cartway is a final judgment and an appeal lies therefrom. A defendant is not required to wait until a roadway is laid off before availing himself of the right to appeal, though he may, if he so elects, except to the order and defer his appeal until after the cartway has been located. *Pritchard v. Scott,* 254 N.C. 277, 118 S.E. 2d 890; *Dailey v. Bay,* 215

N.C. 652, 3 S.E. 2d 14. Once the right to a cartway has been determined, the mechanics of locating and laying it off is for the jury of view—it is for them to determine the location, its termini, and the land to be burdened thereby. G.S. 136-69. *Triplett v. Lail,* 227 N.C. 274, 41 S.E. 2d 755. The acts and findings of the jury of view are reviewable. *Tucker v. Transou,* 242 N.C. 498, 88 S.E. 2d 131. Any defendant, even if he does not except to or appeal from the order for a cartway and appointment of a jury of view, may except to and have reviewed the report of the jury of view. *Garris v. Byrd, supra.*

Upon appeal from the clerk the trial in superior court is *de novo. McDowell v. Insane Asylum,* 101 N.C. 656, 8 S.E. 118; *Warlick v. Lowman,* 101 N.C. 548, 8 S.E. 120. The issue to be tried in superior court is the same as before the clerk — whether petitioners are entitled to a cartway over some lands. It involves only the elements set out in G. S. 136-69. It does not involve the actual location of the road, or, as between defendants, whose lands shall be burdened thereby. These matters are for the jury of view, and it is error for the court to undertake to dispose of them. *Garris v. Byrd, supra; Triplett v. Lail, supra.* The pleadings involve more than the rights of Sluder, and issues arise upon the pleadings. *Rubber Co. v. Distributors,* 253 N.C. 459, 466, 117 S.E. 2d 479. Adoption of appellant's view of the matter would nullify the statute with respect to the manner of locating cartways. The court did not err in submitting the issue.

Appellant excepts to the following portion of the charge:

> ". . . Members of the Jury, if the Petitioners have satisfied you from the evidence and by its greater weight that they, or some of them, are engaged in the cultivation of the petitioners' 45 acre tract by using it for the production of apples, walnuts, grassland, or a part thereof, or are engaged in the removing of any standing timber on said tract, or a part thereof, or taking action preparatory to the operation of such enterprises, and that there is no public road or other adequate means of transportation affording necessary and proper means of ingress and egress to said 45 acre tract of the Petitioners, it would be your duty to answer the issue 'Yes.'
>
> "On the other hand, if you are not so satisfied by the evidence it would be your duty to answer the issue 'No.' "

Appellant contends that the instruction is erroneous in that it does not require plaintiffs to show that it is "necessary, reasonable and just" that a cartway be established. G.S. 136-69, after stating the factual requisites for instituting and maintaining such proceeding,

provides that "if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road over the lands of other persons, the court shall appoint a jury of view. . . ." We have held that a petitioner's evidence must show that the proposed cartway is "necessary, reasonable and just." *Rhodes v. Shelton,* 187 N.C. 716, 122 S.E. 761; *Warlick v. Lowman,* 103 N.C. 122, 9 S.E. 458. The following excerpt from *Burwell v. Sneed,* 104 N.C. 118, 121, 10 S.E. 152, is self-explanatory: "The plaintiff seems to have thought that, inasmuch as the jury found by their verdict that there was no public road leading to the smaller tract of land, on which the tenant resided, they should have found further, as a consequence, that the proposed cart-way was 'necessary, reasonable and just.' This is a misapprehension of the law applicable. The petitioner is not entitled to have a cart-way simply upon the ground that no public road leads to his land, or because it will be more convenient for him to have it; it must appear, further, that it is 'necessary, reasonable and just' that he shall have it. . . ."

The learned trial judge in the instant case was undoubtedly influenced by the following language in *Garris v. Byrd, supra*: "The statute grants the right to a cartway only in the event the land of petitioner is not adjacent to a public road and has no 'other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom.' If he has such means available to him at the time, the petitioner is not entitled to the relief provided by G.S. 136-69." The cartway statute has been often amended. The provisions of the statute at the time the Garris case was decided (1948) were essentially the same as when the instant case was instituted. The present statute should be compared with that set out in the second *Warlick* case (1889).

We do not suggest that under the present statute it is not required that petitioners satisfy the jury by the greater weight of the evidence that the proposed cartway is necessary, reasonable and just. There is no material difference, however, in requiring petitioners to show they have no "adequate means of transportation affording *necessary* and *proper* means of ingress and egress" and in requiring them to show that a cartway is "necessary, reasonable and just." The difference is only in the approach to the question — the former has a negative and the latter an affirmative approach. The word "proper" embraces "reasonable and just." "Proper" is defined: "Sanctioned as according with equity, justice, ethics or rationale." Webster's Third New International Dictionary unabridged (1961). In law the words "proper" and "reasonable" are often used interchangeably. For cases involving

similar questions, see *Barber v. Griffin, supra; Mayo v. Thigpen,* 107 N.C. 63, 11 S.E. 1052.

The charge could have been more detailed and comprehensive in applying the law to the facts, but considered as a whole we think it presents the material phases of the case fairly, and such errors as appear therein are not sufficiently prejudicial to overthrow the verdict. There was no request for special instructions.

No error.

INTERSTATE TEXTILE EQUIPMENT COMPANY, PLAINTIFF v. HARRY S. SWIMMER AND SWIMMER-GREENBERG INSURANCE AGENCY, INC., ORIGINAL DEFENDANTS AND AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, ADDITIONAL DEFENDANT.

(Filed 20 March 1963.)

1. Insurance § 2—

An insurance broker may not maintain that the insurer was negligent in failing to renew insurance binders on the property of one of their customers, in accordance with the custom and course of dealings between the broker and insurer, when the evidence discloses that the broker wrote insurer that if coverage should be needed after a specified date the broker would notify insurer and that the broker did not notify the insurer.

2. Insurance § 67—

Where an insurance broker undertakes to provide continuous insurance coverage on property of a customer and fails to do so, the customer may elect to sue either for breach of the contract or for negligent failure to perform the duty imposed by the contract.

3. Same—Instruction on liability of broker for negligent failure to provide insurance coverage held not prejudicial.

In an action against an insurance broker for negligent failure of the broker to provide insurance coverage in accordance with the broker's undertaking, a charge to the effect that the burden was upon the plaintiff to establish first that there was a failure on the part of the broker to perform a legal duty owed to plaintiff and secondly that such breach of duty was the proximate cause or one of the proximate causes of injury, *held* not prejudicial in imposing upon the broker the absolute contractual standard of conduct instead of the standard of ordinary care, when prior to the instruction complained of the court instructed the jury categorically that the action was based on negligence and that defendant would be liable only for the failure to exercise ordinary care in the performance of some legal duty owed to plaintiff.

APPEAL by the original defendants from *Patton, J.*, December 3, 1962 Regular "B" Civil Term of MECKLENBURG.

This is a civil action to recover for a loss by fire on 8 March 1961 of textile machinery destroyed or damaged by said fire, which machinery had been stored in a warehouse at 339 Main Street in the City of Wheeling, West Virginia.

The pertinent facts are as follows:

The plaintiff, Interstate Textile Equipment Company (hereinafter called plaintiff), a corporation organized and existing pursuant to the laws of the State of North Carolina, with its principal office located in Charlotte, is engaged in buying and selling used textile machinery.

Defendant Swimmer-Greenberg Insurance Agency, Inc. (hereinafter called Swimmer-Greenberg), is an insurance agency located in Charlotte, North Carolina, which acts as local agent for various fire, casualty and other insurance companies, one of which is the additional defendant American Manufacturers Mutual Insurance Company (hereinafter called American Manufacturers). Defendant Harry S. Swimmer is president of Swimmer-Greenberg and is a licensed insurance agent in North Carolina.

Swimmer-Greenberg and Harry S. Swimmer have been handling plaintiff's insurance coverage for approximately five years and have placed coverage for plaintiff's equipment with American Manufacturers. Harry S. Swimmer, individually and as agent for Swimmer-Greenberg, supervised the handling of insurance coverage at Wheeling, West Virginia, by thirty-day binders. Mr. Swimmer selected this method of binders in his own discretion and the plaintiff did not suggest how to handle this insurance coverage.

On or about 20 September 1960 the plaintiff requested defendant Swimmer to cover its equipment in Wheeling, West Virginia, with fire and extended coverage insurance in the sum of $50,000. Mr. Swimmer placed this coverage with American Manufacturers and a thirty-day binder effective 20 September 1960 was issued. When the original coverage was requested, American Manufacturers was told the coverage would run for approximately four months. Thereafter, at the request of Mr. Swimmer, additional binders were issued for the same amount of coverage and for thirty-day periods, the last one expiring 20 December 1960.

In the meantime, letters pertaining to the coverage were written by the original defendants to American Manufacturers and by the additional defendant to the original defendants. On 14 November 1960 American Manufacturers wrote to the original defendants with reference to the plaintiff's West Virginia coverage as follows:

"The binder in the amount of $50,000. on Machines and Equipment at the above location expired on October 20, 1960.

"Since I have received no word from you concerning the renewal of this Binder, I assume that you have either made arrangements to place this coverage elsewhere or that the property has been sold making it unnecessary to provide coverage. Therefore, I am closing my file and am having the charge for this binder entered on your account."

On 22 November 1960 the original defendants replied to the foregoing letter as follows:

"I refer to your letter of November 14, in regard to the above binder coverage. Please accept our apoligies for not having contacted you sooner.

"We wish this binder to remain in effect for another month in the amount of $50,000. If coverage is needed after the 20th of December, we will notify you."

On 2 December 1960 the original defendants wrote to the office of the additional defendant with respect to plaintiff's coverage at Fall River, Massachusetts, and the Wheeling, West Virginia coverage as follows:

"If this has not already been done, please discontinue the coverage for the above insured at the Fall River Massachusetts location and reduce the amount to $25,000 at the West Virginia location."

Mr. Swimmer, an adverse witness for the plaintiff, *inter alia*, testified: "Normally we could issue policies of insurance and binders from our office. In this instance we could not issue policies or binders from our office since this was out of State property in West Virginia.

"Interstate Textile Equipment Company did not tell me or direct me to handle this insurance coverage with binders. They left it up to me to handle it as I saw fit. I handle generally their entire insurance picture, and this is left pretty much in my discretion.

"As I stated, the plaintiff's representatives requested that I reduce the coverage to $25,000. They did not ask me to terminate the coverage completely. I never received any communication to do anything other than reduce this to $25,000 and allow it to continue in existence until they inform me otherwise. This was the general way I did business with them because of their buying and selling of textile equipment. When they bought anything like that it was just a temporary situation, this is the way we handled it. When they sold a part or sold all of it, they would notify me either to reduce or to terminate the binders."

The original defendants were invoiced for the binder which terminated on 20 December 1960, the invoice being received about 1 Febru-

ary 1961. Upon receipt of the invoice for the December binder, defendant Swimmer-Greenberg invoiced the plaintiff and the bill was paid. The original defendants attempted in no way to verify whether or not a binder was in effect or to obtain a binder from the additional defendant on plaintiff's equipment after 20 December 1960, and directed no correspondence pertaining to this coverage after 20 December 1960 until 8 March 1961, after the fire had occurred. The value of the equipment destroyed or damaged was in excess of $25,000.

At the conclusion of the original defendants' evidence the additional defendant demurred to the evidence and moved for judgment as of nonsuit on the cross action. The trial court reserved ruling on the motion until the conclusion of all the evidence, at which time it allowed the additional defendant's motion and granted judgment of involuntary nonsuit on the cross action against American Manufacturers.

The plaintiff's action against the original defendants was submitted to the jury and the jury returned a verdict for the plaintiff in the sum of $25,000.

The original defendants appealed to this Court from the judgment of nonsuit on the cross action and from the judgment entered for the plaintiff on the verdict, assigning error.

Weinstein, Muilenburg, Waggoner & Bledsoe for plaintiff appellee.

Helms, Mulliss, McMillan & Johnston; Powers, Kaplan & Berger for additional defendant appellee.

Kennedy, Covington, Lobdell & Hickman for original defendant appellants.

DENNY, C.J. The appellants assign as error the ruling of the court below in allowing the additional defendant's motion for judgment as of nonsuit on the appellants' cross action against the additional defendant American Manufacturers.

The appellants in their brief state that they do not contest the fact that, as between them and the plaintiff, they agreed to maintain the insurance on the plaintiff's West Virginia property in effect; nor do they contest the fact that American Manufacturers had no binder in effect at the time plaintiff's property was destroyed or damaged by fire. However, they do contend that in light of their prior dealings with American Manufacturers in almost identical circumstances, these appellants were not negligent in handling this insurance coverage; but if they were negligent, then in light of the course of past dealings between the original defendants and American Manufacturers, American Manufacturers was jointly and concurrently negligent.

In view of the fact that on 22 November 1960 the original defendants wrote the additional defendant American Manufacturers that *"If coverage is needed after the 20th of December, we will notify you,"* and since the evidence further shows that the original defendants never requested American Manufacturers to extend coverage beyond 20 December 1960, this assignment of error is without merit and is overruled. (Emphasis added.)

The appellants assign as error the following portions of the charge:

"Now, in order for the plaintiff to prevail in an action for negligence, such person must establish; that is, the plaintiff must establish two things: First, that there was a failure on the part of the defendant to perform some legal duty which the defendant owed the plaintiff, and secondly, that such breach of duty; that is, such negligence, must be the proximate cause or one of the proximate causes of the plaintiff's injury. * * *

"The court instructs you that in every case involving negligence and, again, I emphasize to you that this is an action based on negligence, there are three elements which are essential to the existence of negligence. First, there must be the existence of the duty on the part of the defendant to protect the plaintiff from injury; second, the failure of the defendant to perform that duty; and third, the injury to the plaintiff must have arisen from such failure of the defendants; that is, as to the three elements, that the injury to the plaintiff must have been directly, that is, proximately caused by the neglect of the defendant. * * *

"(T)hen if you so find from the evidence and by its greater weight, then the defendants would, under the law, be guilty of what I have instructed you to be actionable negligence, composed of two elements, first, the failure to perform the duty which the defendants owed the plaintiff by the agreement, if you find by the greater weight of the evidence there was an agreement, and secondly, that such failure, such breach of duty was the proximate cause; that is, the producing cause or one of the producing causes of the plaintiff's injury; if you so find from the evidence and by its greater weight, then it would be your duty to answer the first issue 'yes'; that is, that the plaintiff has been damaged by the actionable negligence of the defendants."

The appellants contend that the foregoing instructions imposed on them an absolute contractural standard of conduct instead of the standard of ordinary care; that by omitting from the major portions of the charge any reference to the necessity of a failure to exercise

ordinary care, the trial court, in effect, converted this action into one for breach of contract.

We do not concur in this view. Immediately preceding the first portion of the charge assigned as error, the court gave the jury this instruction:

> "Ladies and Gentlemen, this first issue is based on the legal principle of negligence. Now, it is therefore my duty to instruct you as to what negligence means as applicable to this particular case. Negligence is the failure to exercise proper care in the performance of some legal duty which the defendants owed the plaintiff, growing out of the circumstances in which they were placed. It is the absence of that care which under the circumstances should be exercised as a duty to another; that is, a duty which the defendants might owe the plaintiff under the rule of the ordinary prudent person. As applicable to this case, again, means the failure to observe ordinary care for the protection of the interest of another person to whom that person owes an obligation."

In the case of *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632, 18 A.L.R. 1210, the failure of an insurance agent or broker to obtain the coverage requested and which he agreed to procure was involved. The action was for breach of contract, and the Court, *inter alia*, said: "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default. * * * It is ordinarily true that for breaches of duty involved in the contract of agency the principal may sue either for breach of contract for faithfulness or in tort for a breach of the duty imposed by the same." *Case v. Ewbanks*, 194 N.C. 775, 140 S.E. 709; *Meiselman v. Wicker*, 224 N.C. 417, 30 S.E. 2d 317; *Bank v. Bryan*, 240 N.C. 610, 83 S.E. 2d 485; 29 Am. Jur., Insurance, sections 163, 164, 165, page 561, *et seq;* 44 C.J.S., Insurance, section 172 (a), page 860, *et seq.*; Anno: Insurance Broker or Agent — Liability, 29 A.L.R. 2d 171.

In our opinion, the assignments of error to the foregoing portions of the charge present no prejudicial error. Hence, they are overruled.

Other assignments of error have been carefully examined and considered. However, we hold they are without merit and are therefore overruled.

This case was carefully tried by able counsel and before an excellent and competent judge whose charge to the jury when considered contextually is free from prejudicial error.

In the trial below, we find

No error.

CLEO HUFF v. NORTHAMPTON COUNTY BOARD OF EDUCATION AND NORTH CAROLINA BOARD OF EDUCATION.

(Filed 20 March 1963.)

1. State § 5a—

A county or city board of education may be held liable under the Tort Claims Act for negligence of the driver of a school bus employed by such units, but may not be held liable for negligence of a school principal or of the county or city board of education. G.S. 143-300.1.

2. Same—

The State Board of Education has been relieved of all responsibility in connection with the operation and control of school buses, and therefore may not be held liable for any negligence in connection with the operation thereof. G.S. 115-180, *et seq.*

3. State § 5d—

Evidence that two girls on a school bus engaged in a fight while the bus was being driven by its regular driver and that more than seven months thereafter they engaged in another fight while the bus was being driven by the monitor who had been appointed substitute driver, *held* insufficient to establish negligence on the part of the driver which could constitute a proximate cause of the serious injury sustained by one of the girls in the second fight, even though the first driver failed to report the incident as required by regulations, since the second fight and resulting injuries some seven months after the first could not have been reasonably foreseen.

4. Same—

The act of a pupil in voluntarily entering into a fight with another on a school bus constitutes contributory negligence barring recovery against the county board of education under the Tort Claims Act for injury received in such fight. G.S. 143-291.

5. Same—

The failure to have a monitor in addition to the driver on a school bus cannot be held for negligence since the appointment of a monitor is a matter of discretion of the school board.

6. State § 4—

A county board of education is subject to suit in tort only insofar as it has waived its governmental immunity, and may be held liable for negligent injury to a pupil on a school bus only if it has procured liability insurance, G.S. 115-53, or to the extent it may be held liable under the State Tort Claims Act.

PARKER, J., concurring in result.

APPEAL by plaintiff from *Cowper, J.*, October Civil Term 1962 of NORTHAMPTON.

This is a proceeding brought pursuant to the provisions of the North Carolina Tort Claims Act to recover damages for injuries sustained when the plaintiff, Cleo Huff, age 17, while riding on a school bus operated by the County Board of Education of Northampton County, on 25 May 1960, was seriously injured in her upper right arm, left wrist and right hand, by cuts inflicted with a knife by Odessie Sykes, a fellow student passenger.

The evidence tends to show that James Broadnax was employed during the school year 1959-60 as a bus driver for Gumberry High School in Northampton County; that, according to the testimony of the school principal, George Vincent was appointed monitor for the bus driven by Broadnax; that Broadnax drove school bus No. 45, and among the regular passengers on that bus were Cleo Huff and Odessie Sykes. That on or about 15 October 1959 these girls had an argument and got into a fight. Broadnax stopped the bus and stopped the fight. On that occasion Odessie Sykes cut the left arm of Cleo Huff. The driver did not report the incident to the principal of the school although he had been instructed to report any misconduct to the school principal. At the time of the fight only five or six students remained on the bus. George Vincent, the monitor, had already left the bus. In fact, the driver of the bus did not know that Vincent had been appointed a monitor for the bus.

When the fight occurred on 25 May 1960, George Vincent, the monitor, had been instructed to drive the bus in the absence of the regular driver.

The evidence further tends to show that there was no misconduct on the bus between 15 October 1959 and 25 May 1960.

Cleo Huff testified: " * * * (T)he day before school ended, we were going home that afternoon, and I was up there so me and her we hit at each other about the same time, and Thurman Paytiller stood in between us and then she cut me. That is all I know. She stabbed me, right here, and here."

George Vincent testified that he was the substitute driver of the bus on 25 May 1960; that he had no prior knowledge of any ill will between Cleo Huff and Odessie Sykes; that he didn't see the fight and knew nothing about it until it was over; that prior to the fight Odessie Sykes was sitting near the front of the bus on the right-hand side, in the third or fourth seat from the front. "When I saw the Huff girl, she was coming up the aisle. * * * (S)he was coming from the rear of the bus. After the cutting occurred, I tried to help her as far as I could." This witness rendered first aid, left the Huff girl at a store and she was carried by ambulance to the hospital.

On the facts found the deputy commissioner held that the plaintiff did not suffer damages by any negligent act or omission of the defendant County Board of Education, nor were the damages suffered by the plaintiff reasonably foreseeable by the said Board of Education. The plaintiff's claim for damages was denied.

On appeal to the full Commission, the Commission adopted as its own the findings and result reached by the deputy commissioner.

On appeal to the Superior Court the order of the full Commission was affirmed.

The plaintiff appeals, assigning error.

Gilliland & Clayton for plaintiff appellant.

E. B. Grant for defendant appellee County Board of Education.

DENNY, C.J. The appellant assigns as error the finding of fact to the effect that the attack and injuries inflicted on Cleo Huff by Odessie Sykes were not reasonably foreseeable by either the principal or the Board of Education operating the bus in question nor were the damages suffered by the plaintiff on the occasion in question proximately caused by any negligent act or omission of the principal or Board of Education.

An award against a county board of education under the provisions of the Tort Claims Act may not be predicated on the negligent act or omission of a school principal or the county board of education, but if an award is made it must be based on the negligent act or omission of the driver of a public school bus who was employed at the time by the county or city administrative unit of which such board was the governing body. G.S. 143-300.1.

The General Assembly of North Carolina relieved the State Board of Education from all responsibility in connection with the operation and control of school buses in this State by the enactment of Chapter 1372 of the North Carolina Session Laws of 1955, which Act authorizes

county and city boards of education to operate buses for the transportation of pupils enrolled in the public schools of such county or city administrative units. This chapter is now codified as G.S. 115-180, *et seq.*

It it provided in G.S. 143-300.1, 1961 cummulative supplement, *inter alia*: "Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles. — (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged negligent act or omission of the driver of a public school bus or school transportation service vehicle when the salary of such driver is paid from the State Nine Months School Fund who is an employee of the county or city administrative unit of which such board is the governing board, and which driver was at the time of such alleged negligent act or omission operating a public school bus or school transportation service vehicle in the course of his employment by such administrative unit or such board."

The evidence on this record is insufficient to establish that any negligent act or omission in the operation of the school bus by the driver thereof was the proximate cause or one of the proximate causes of plaintiff's injuries. The evidence does not disclose any misconduct on the part of any student riding the bus driven by James Broadnax after 15 October 1959, until 25 May 1960 while the bus was being driven by George Vincent, more than seven months after the first occurrence, that would give any one any reason to suspect a second fight between the parties involved. Moreover, there is no evidence tending to show any negligent act or omission on the part of the driver of the bus on 25 May 1960 that could by any stretch of the imagination be construed as a proximate cause of plaintiff's injuries.

On the other hand, the Tort Claims Act does not authorize recovery unless the claimant is free from contributory negligence. G.S. 143-291. We think the plaintiff's evidence tends to show that she moved from the rear of the bus immediately before the fight occurred and while the bus was in motion and voluntarily entered into the fight that resulted in her injuries.

In the case of *Smith v. Board of Education*, 241 N.C. 305, 84 S.E. 2d 903, a 14-year-old pupil on a school bus was assaulted by another pupil. The 14-year-old pupil rushed to the front of the bus, jerked the door open and jumped to her death. The driver did not see anything that happened until she was going out of the door of the bus. The hearing commissioner held that it was the duty of the bus driver to

prevent students from leaving the bus while it was in motion; that in failing to discover the assault and prevent the child from jumping from the bus the driver was guilty of negligence which was the proximate cause of her death. An award for $5,000 was entered in favor of the plaintiff. The full Commission affirmed by majority vote. On appeal to the Superior Court, the court sustained the defendant's exception to the failure of the hearing commissioner and the full Commission to find that the defendant was guilty of contributory negligence, and set aside the award. On appeal to this Court we affirmed on the ground that the evidence was insufficient to support a finding that the driver of the bus was negligent rather than upon the conclusion that the decedent was guilty of contributory negligence.

The appellant herein assigns as error the failure of the court below to find that the school principal was negligent in not having a monitor on said bus at the time the plaintiff sustained her injuries.

As a matter of fact, according to the evidence, the driver of the bus at the time complained of was the regular monitor. However, he had been assigned on 25 May 1960 as a substitute driver for James Broadnax, the regular bus driver. Furthermore, whether or not the principal should have appointed a monitor as a substitute for Vincent since he was driving the bus, was a matter in the discretion of the principal.

G.S. 115-185 (d) provides: "The principal of a school, to which a school bus has been assigned, may in his discretion, appoint a monitor for any bus so assigned to such school. It shall be the duty of such monitor, subject to the direction of the driver of the bus, to preserve order upon the bus and do such other things as may be appropriate for the safety of the pupils and employees assigned to such bus while boarding such bus, alighting therefrom or being transported thereon, and to require such pupils and employees to conform to the rules and regulations established by the county or city board of education for the safety of pupils and employees upon school buses."

However, as heretofore pointed out, the Tort Claims Act does not authorize a recovery against a county board of education for the negligent act or omissions of its agents, servants and employees except for a claim based upon a negligent act or omission of a driver of a school bus employed by the board from which recovery is sought.

A county board of education, "unless it has duly waived immunity from tort liability, as authorized in G.S. 115-53, is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act. G.S. 143-291 through 143-300.1 * * *." *Fields v. Board of Education,* 251 N.C. 699, 111 S.E. 2d 910.

It appears from the record in this case that the County Board of Education of Northampton County has not waived its immunity and does not carry liability insurance as authorized by G.S. 115-53.

In our opinion, the evidence in this proceeding is insufficient to support a finding that the negligent acts or omissions of James Broadnax or George Vincent, the drivers of the school bus involved, on the occasions complained of, were the proximate cause of the plaintiff's injuries. Therefore, the result reached by the Industrial Commission and affirmed by the Superior Court will be upheld for the reasons set out in this opinion.

Affirmed.

PARKER, J., concurring in the result. The claimant, Cleo Huff, testified before the deputy hearing commissioner as follows:

> "On the day in question, October 15, 1959, that afternoon we were almost at the church, me and Brenda, we were talking. So this Molly Sykes she said something. . .That is Odessie's sister. We weren't far from the church so I got off at the church. The next morning when I got on the bus she came up and told me that she was fussing at Brenda. By then, the bus hadn't even gotten to Brenda. After then she left and she and Brenda started fighting and then Odessie Sykes, she was arguing at me and said she was going to make some rules to go by on the bus. So Molly started fighting and we fought until James stopped the bus, and came back and stopped us. That afternoon, after we got to Brenda's turn, the bus stopped to put Brenda off, Brenda got to the door and I heard Odessie say, "Ain't you going to do something?" Then Molly came over to where I was. She jumped on me and started fighting. Yes, this was in the bus when she jumped on me and started fighting. I saw Odessie up and she cut me. This was on or about the 15th of October 1959. On the way home in the afternoon, the occasion I was cut. I was cut right here on the left arm. Brenda told James, the driver of the bus, that she had a knife. When he got back there she had cut me then. There was never any monitor on the bus at all during the year that I know of.
>
> "Later in the school year, the day before school ended, we were going home that afternoon, and I was up there so me and her we hit at each other about the same time, and Thurman Paytiller stood in between us and then she cut me. That is all I know. She stabbed me, right here, and here."

In my opinion, the injuries received on 25 May 1960 by the claimant, Cleo Huff, could have been reasonably foreseeable by the Nort-

hampton County Board of Education, if Broadnax, the driver of the school bus on 15 October 1959, had not negligently failed to report to the Northampton County Board of Education what had taken place on the school bus on 15 October 1959, and the findings of fact of the deputy hearing commissioner, affirmed by the Full Commission, and the Judge, to the contrary are not supported by competent evidence. As I read the record, claimant on her own testimony was guilty of contributory negligence in voluntarily entering into the fight on 25 May 1960 in which she was cut, and therefore by her own showing she is barred of any recovery under our State Tort Claims Act, General Statutes Chapter 143, Article 31. For that reason I concur in the result.

HANNAH VESTER STRICKLAND AND HUSBAND, BOBBY STRICKLAND; JOHN MILTON VESTER AND WIFE, MADELINE VESTER; AND FRANK LANE VESTER v. H. P. JACKSON AND WIFE, ANNIE S. JACKSON.

(Filed 20 March 1963.)

1. Deeds § 11—

When the language of a deed is clear and unambiguous, the courts are limited to the words chosen by the parties in ascertaining their intent.

2. Deeds § 13—

Where a deed, in its granting clause, habendum, and a paragraph imposing a lien states in effect that the land was conveyed to the named husband and wife with remainder to their children born of the marriage which should survive them, *held* the deed conveys only a life estate with contingent remainder over to those children living at the time of death of the surviving life tenant.

3. Same—

The distinction between a vested and a contingent remainder is whether those who are to take upon termination of the preceding estate can be ascertained at the time of the effective date of the instrument, or whether they can be ascertained only upon the happening of a future event.

4. Same—

Where a contingent remainderman dies prior to the death of the life tenant, the event specified, the issue of such contingent remainderman can take nothing under the instrument.

5. Same—

Where a deed conveys only a life estate to the grantee with remainder to the children of the life tenant, the life tenant does not take an estate of inheritance and therefore the contention that the deed conveyed an estate tail, converted into a fee simple by the statute is inapposite.

6. Estoppel § 4—

A party may be estopped by a misrepresentation only if the other party has been led to change his position to his detriment on the strength of such misrepresentation.

7. Wills § 63—

Where it does not appear that testator, in disposing of his lands by will, intended to include in such disposition lands in which he owned a mere life estate, the devise cannot be put to an election.

8. Executors and Administrators § 34—

A personal representative may not be sued in his individual capacity to recover alleged excessive fees and compensation, the sole remedy in such instance being by motion to vacate the order of the clerk fixing the fee and for an order fixing a reasonable allowance. G.S. 28-170.

9. Executors and Administrators § 36—

A personal representative may not be sued in his individual capacity for failure to account for monies received by him or for alleged failure to perform his duties in other respects, the sole remedy being against the personal representative in his representative capacity and the surety on his bond.

APPEAL by plaintiffs from *Mintz, J.*, September 1962 Term of PITT.

The following is a summary of the facts stated in the complaint: Plaintiffs Hannah, John, and Frank are the children and heirs at law of Thelma Jackson Vester, a daughter of M. H. Jackson and wife, Maggie Jackson. She was born 23 August 1902 and died 26 June 1957. She had two brothers born prior to 11 September 1905 and two brothers born subsequent to that date. On 11 September 1905 Joel Tyson and wife, Louisa, uncle and aunt of Maggie Jackson, executed and delivered a deed for land in Pitt County. This deed by reference with copy attached is made a part of the complaint. The deed conveys, subject to life estates reserved to grantors, "unto the said M. H. Jackson and wife, Louisa (sic) Jackson, for and during the term of their natural lives and after their death to the children of the said M. H. Jackson and Maggie Jackson that shall be born to their intermarriage as shall survive them to them and their heirs and assigns in fee simple forever. . ." M. H. Jackson, a resident of Nash County, died testate 10 September 1958. His will, probated in Nash County, gives a life estate in his properties to his widow and subject thereto gives "all of my real estate located in the counties of Pitt and Washington, North Carolina. . ." to be equally divided between his children after taking account of advancements. Defendant qualified as executor of the will. He has filed his final account. He did not distribute the estate as directed in the bill, but has charged and been allowed excessive commissions and fees. Defendant has taken advantage of his

brothers and induced them to sell their share of the lands conveyed by Joel Tyson and wife to M. H. Jackson and others for less than the fair value of said shares.

The prayer of the complaint is that plaintiffs be declared tenants in common with defendant in the lands described in the Tyson deed, that in determining plaintiffs' share defendant be required to account for the advancements made him by M. H. Jackson and for the sums not properly accounted for in the settlement of the M. H. Jackson estate.

Defendant demurred to the complaint for (a) misjoinder of causes of action, (b) failure to state a cause of action, and (c) want of jurisdiction in the Superior Court of Pitt County to challenge the accounting made by defendant as executor of the will of M. H. Jackson and the effect of such accounting on the rights of the parties to lands in Washington and Nash Counties.

The court sustained the demurrer but allowed plaintiffs thirty days in which to amend. Plaintiffs appealed.

Sam B. Underwood, Jr., for plaintiff appellants.
James & Hite by Kenneth G. Hite for defendant appellees.

RODMAN, J. The first question for decision is: What estate did the grantees named in the Tyson deed of 1905 take? Plaintiffs assert the children of M. H. Jackson and wife, Maggie, took vested remainders and upon the death of their mother, her one-fifth descended to her children, the plaintiffs. Defendants contend the estate which the children of M. H. Jackson and wife, Maggie, took was a contingent remainder vesting only in those who survived their parents.

When the rights of parties are determined by a written instrument, courts seek to determine the intent of the parties by the language they use. Where the language selected is clear and unambiguous, courts are limited to the words chosen to ascertain intent. To do otherwise would create rights and liabilities contrary to the agreement of the parties. *Parks v. Oil Co.*, 255 N.C. 498, 121 S.E. 2d 850; *Muncie v. Ins. Co.*, 253 N.C. 74, 116 S.E. 2d 474; *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330; *Lewis v. Lumber Co.*, 199 N.C. 718, 155 S.E. 726; *Hinton v. Vinson*, 180 N.C. 393, 104 S.E. 897.

The estates or rights which grantees take are stated in three parts of the deed: first in the granting clause, next, in the habendum, and finally, in a paragraph imposing a lien for $700 in favor of a third party. In all three of these provisions the estate given M. H. Jackson and wife is for the term of their natural lives. These words require no interpretation.

The words used with respect to those who take in remainder vary slightly in each of the three parts of the deed. In the granting clause the remainder is given "to the children of the said M. H. Jackson and Maggie Jackson that shall be born to their inter-marriage as shall survive them. . ." In the habendum the language is "to such children as shall be born of the inter-marriage of the said M. H. Jackson and wife, Maggie Jackson, and which shall survive the said M. H. Jackson and wife, Maggie Jackson." The language in the final provision is "to such children as shall be born of the inter-marriage of said M. H. Jackson and wife, Maggie Jackson and who shall survive the said M. H. Jackson and Maggie Jackson." It is, we think, manifest that there is no conflict in the three quoted provisions. All mean those and only those who survive their parents would take an interest in the property.

The distinction between a vested and a contingent remainder is the capacity to take upon the termination of the preceding estate. Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted. *Wimberly v. Parrish,* 253 N.C. 536, 117 S.E. 2d 472; *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *Pinnell v. Dowtin,* 224 N.C. 493, 31 S.E. 2d 467; *Power Co. v. Haywood,* 186 N.C. 313, 119 S.E. 500; *Richardson v. Richardson,* 152 N.C. 705, 68 S.E. 217.

Here the estate in remainder was not given to the children of M. H. Jackson and Maggie Jackson, but by clear and express language to those children and only those who survived their parents. Since Mrs. Vester did not survive her parents, there was nothing for her children, plaintiffs, to inherit. *Trust Co. v. Henderson,* 225 N.C. 567, 35 S.E. 2d 694; *Rigsbee v. Rigsbee,* 215 N.C. 757, 3 S.E. 2d 331; *Jessup v. Nixon,* 193 N.C. 640, 137 S.E. 810; *Fulton v. Waddell,* 191 N.C. 688, 132 S.E. 669; *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575; *Whitesides v. Cooper,* 115 N.C. 570.

It affirmatively appears from the complaint that plaintiffs acquired no interest in the land by virtue of the deed from Tyson and wife to M. H. Jackson and others.

Plaintiffs contend if they are mistaken with respect to the estate which their mother took that the deed from Tyson to Jackson and wife conveyed an estate tail converted by statute into an estate in fee simple and they take a one-fifth interest by inheritance from their grandfather and grandmother. The deed does not purport to convey an

estate of inheritance to Jackson and his wife. The estate of inheritance is given to the remaindermen. An estate tail is defined in 19 Am. Jur. 507 as "an estate of inheritance which is to pass by lineal descent. The regular and general succession of heirs at law is cut off. It has been held that inasmuch as an estate tail is an estate of inheritance which descends to particular heirs, it is distinguishable from a life estate with remainder." This distinction is noted in *Millsaps v. Estes,* 134 N.C. 486; *Story v. First Nat. Bank & Trust Co.,* 156 So. 101; *Bodine's Administrator v. Arthur,* 34 Am. St. Rep. 162.

The allegations that defendant misrepresented to his brothers their share or interest in the lands conveyed by the Tysons, leading them to believe that their respective shares were one-fifth rather than a fourth, creates no right of action in the plaintiffs. Only those who were led to part with their title by reason of false and fraudulent representation would be aggrieved parties having a right of action.

It does not appear from the will of M. H. Jackson that he attempted to deal with the lands described in the Tyson deed. True he does direct in section 7 of his will a division among his children of his real estate "located in the counties of Pitt and Washington, North Carolina." We find nothing in the will of defendant's father nor in the complaint which required defendant to elect whether he would assert his rights to the properties conveyed by the Tyson will or abandon that right and take the properties devised to him by his father. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479.

The clerk of the Superior Court where the personal representative qualifies has authority to fix the amount of fees to which an executor or administrator is entitled. G.S. 28-170. The present action is not against defendant in his representative capacity but as an individual. If he has been allowed more compensation than is reasonable and proper, plaintiffs' remedy is to move to vacate the order fixing the fees and for an order fixing a reasonable allowance. If defendant has failed to account for monies received by him or has otherwise neglected to perform his duties, plaintiffs have their remedy by an action against defendant and the surety on his bond.

The court was correct in sustaining the demurrer. The judgment is Affirmed.

CHARLES H. JENKINS & COMPANY, INC. v. THOMAS H. LEWIS.

(Filed 20 March 1963.)

1. Appeal and Error § 3—

An order overruling a demurrer is not immediately reviewable except by *certiorari*, and a purported appeal therefrom will be dismissed as premature. Rule of Practice in the Supreme Court No. 4(a).

2. Same—

Where plaintiff's motion to strike is addressed to an entire defense set up in the answer, it amounts to a demurrer to such defense, and an appeal will lie from the order allowing the motion to strike.

3. Army and Navy—

50 U.S.C.A. 531(1) does not apply to a chattel mortgage executed by a serviceman after he has been inducted into the service.

APPEAL by defendant from *Cowper, J.*, November 1962 Term of BERTIE.

The hearing below was on plaintiff's motion to strike portions of defendant's amended answer, including all of the further answer and defense, and on defendant's demurrer to the complaint.

The action was instituted July 10, 1962, to recover a deficiency judgment in the amount of $477.79 with interest thereon from February 8, 1961.

Plaintiff alleges *it* sold and delivered to defendant on May 18, 1960, under conditional sales contract, a described 1959 Ford; that defendant agreed to pay as part purchase price therefor the sum of $1,950.72 in twenty-four installments of $81.28 beginning June 18, 1960; that, on account of defendant's failure to pay as provided, the car was repossessed, advertised for sale and sold; and that, after crediting the proceeds derived from said foreclosure, there remains unpaid and due plaintiff the balance for which this action is brought.

According to copy attached to and made a part of the complaint, the conditional sales contract executed by defendant provided for the payment of said installments to Marsh Chevrolet Co., Inc., Aulander, N.C., for acceleration of maturity upon default in the payment of any installment, and for repossession, foreclosure and application of proceeds of sale. Under the heading, "PURCHASER'S STATEMENT," defendant, there designated "Sgt. T. H. Lewis," "(f)or the purpose of obtaining credit and the purchase of a motor vehicle from Marsh Chevrolet Co., Inc.," made certain representations, including the following: He is and had been for seventeen years a member of the U. S. Marine Corps. His income is $510.00 per month. He had previously purchased a car on time from a dealer in Rich Square and had paid

therefor in full. The name of Atlantic Discount, Ahoskie, N. C., is given as a reference. There appears on said copy of said conditional sales contract the following endorsement: "Transferred without recourse to Chas. H. Jenkins & Company, Inc. Marsh Chevrolet Co. By: Wayland L. Jenkins, Jr."

In the amended answer, "it is admitted that while a service man and while in the Marine Corps, the defendant did make a purchase and contract with the plaintiff." As to plaintiff's allegations with reference to repossession, advertisement, sale and application of proceeds, defendant asserts he "has no personal knowledge of the matters . . . and therefore denies same except as herein stated." Defendant alleges plaintiff, "without notice to or knowledge of the defendant and without consent or authority from the defendant and while the defendant was overseas by assignment of the U. S. Marine Corps, did take possession of an automobile belonging to the defendant and did attempt to dispose of same."

In the allegations to which plaintiff's motion to strike is directed and also as ground for demurrer, defendant asserts the repossession of said car by plaintiff was in violation of the Soldiers' and Sailors' Civil Relief Act. The court allowed plaintiff's said motion to strike and overruled defendant's demurrer. Defendant excepted to each of these rulings and appealed.

Pritchett & Cooke for plaintiff appellee.

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

BOBBITT, J. The order overruling defendant's demurrer for failure to state a cause of action was subject to immediate review only by writ of *certiorari.* The purported appeal therefrom is premature. Rule 4(a), Rules of Practice in the Supreme Court, 254 N.C. 783, 785; *Guinn v. Kincaid,* 253 N.C. 228, 116 S.E. 2d 380. However, the question presented by defendant's demurrer is also presented by plaintiff's motion to strike.

Plaintiff's motion to strike, although directed in part to designated allegations in the answer proper, is addressed to defendant's further answer and defense *in its entirety.* The sole ground of the motion is that the facts alleged by defendant do not constitute a legal defense to plaintiff's action. In substance, if not in form, plaintiff's motion (primarily) is a demurrer to defendant's further answer and defense. The court, in allowing plaintiff's motion to strike, in effect sustained a demurrer to defendant's alleged further answer and defense.

Williams v. Hunter, 257 N.C. 754, 127 S.E. 2d 546; *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E. 2d 554, and cases cited.

In the consideration of plaintiff's motion to strike, the facts alleged by defendant are deemed admitted. In substance, these facts are that the Ford car was not repossessed "by action in a court of competent jurisdiction"; and that, when the Ford car was repossessed, defendant was a member of the U. S. Marine Corps on overseas assignment and that such repossession was without his knowledge or consent.

The amended answer contains no denial of plaintiff's allegations that defendant executed the conditional sales contract (as per copy attached to the complaint) on which this action is based. Defendant alleges he was "in the Marine Corps" when he made "a purchase and contract with the plaintiff."

The statutory provision on which defendant bases his further answer and defense, codified as § 531(1), 50 U.S.C.A. Appendix, provides: "(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person *who, after the date of payment of such deposit or installment, has entered military service*, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction." (Our italics)

The quoted code provision is Section 301(1) of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 1182, (hereafter referred to as the Act) as amended by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, 56 Stat. 769, 771. Originally, the section read: "No person who *prior to the date of approval of this Act* has received, or whose assignor has received," etc. (Our italics) It was amended in 1942 by striking out the words: "prior to the date of approval of this Act."

Prior to the 1942 Amendment, it was held the Act "was intended to protect those, in the armed service of our country, who were obligated when the Act was approved and all those who were so obligated when the Act was approved and thereafter entered the said service of their country." *Commercial Credit Corporation v. Brown* (Tex. Civ. App.), 166 S.W. 2d 153, where Brown, J., adds: "We do not believe that it was ever intended to assist any man who obligated himself *after the*

Act became effective, whether he were *then* in the service, or *thereafter inducted* into the armed forces of our country." (Our italics)

It would seem that, by reason of the 1942 Amendment, Section 301(1) of the Act is now applicable to those who become obligated *after* "the date of approval" of the Act but *before* entry into military service. This view finds support in other provisions of the Act.

Section 302(1) of the Act as amended in 1942 is now codified as § 532(1), 50 U.S.C.A. Appendix. Originally, Section 302(1) read: "The provisions of this section shall apply only to obligations *originating prior to the date of approval of this Act and* secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of military service and still so owned by him." (Our italics) This was amended in 1942 by striking out the words "originating prior to the date of approval of this Act and," and by inserting after the word "him" the following: "which obligations originated prior to such person's period of military service."

Section 107 of the Act as amended in 1942 is now codified as § 517, 50 U.S.C.A. Appendix. In part it provides: "Nothing contained in this Act shall prevent . . . (b) the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property which is security for any obligation or which has been purchased or received under a contract, lease or bailment, pursuant to a written agreement of the parties thereto (including the person in military service concerned, or the person to whom section 106 is applicable, whether or not such person is a party to the obligation) or their assignees, *executed during or after the period of military service of the person concerned* or during the period specified in section 106." (Our italics)

In *Jim's Trailer Sales v. Shutok* (D.C. Pa.), 153 F. Supp. 274, the plaintiff's action was for repossession of a house trailer. In the opinion of Marsh, District Judge, this statement appears: "Since the vehicle was purchased by defendant after he entered military service, it was conceded that the Soldiers' and Sailors' Civil Relief Act of 1940, Title 50 U.S.C.A. Appendix § 501 et seq., did not protect him."

In *Twitchell v. Home Owners' Loan Corporation* (Ariz.), 122 P. 2d 210, Lockwood, C.J., referring to the Act, said: "It was meant to protect the interests of those who were called to the defense of their country and who for that reason, were unable to keep up the payments *upon obligations which they had incurred previous to their being called into service.*" (Our italics)

In *S & C Motors v. Carden* (Ark.), 264 S.W. 2d 627, cited by defendant, the plaintiff's action was for repossession of an automobile on

which it held a conditional sales contract executed by the defendant. The defendant made one installment payment and *thereafter* entered the U. S. military service. While in military service, a new agreement providing for smaller monthly payments was entered into between the defendant and the plaintiff, but the defendant failed to make payments in accordance with the new schedule. The significant fact is that the defendant's obligation in its entirety originated before he entered military service.

Being of opinion that § 531, 50 U.S.C.A. Appendix, does not apply where a person then in the military service purchases an automobile and executes a conditional sales contract as security for payment of part of the purchase price, the orders (1) allowing plaintiff's motion to strike, and (2) overruling defendant's demurrer to the complaint, are affirmed.

Affirmed.

GRADY ROOSEVELT DELLINGER v. HAROLD VAUGHN BRIDGES AND PIEDMONT MOTORS, INC., DEFENDANTS, AND AARON HAMPTON COOKE AND GASTONIA TRANSIT COMPANY, ADDITIONAL DEFENDANTS.

(Filed 20 March 1963.)

1. Bailment § 1—

Delivery of possession of an automobile by an owner to a garage for repairs creates a bailment for mutual benefit.

2. Bailment § 3—

A bailee for hire is not an insurer but is liable for his failure to return the property in good condition only when such failure is due to ordinary negligence.

3. Same—

Proof of delivery of property to a bailee for hire and failure of the bailee to return it in good condition makes out a *prima facie* case of actionable negligence against the bailee, but does not shift the burden of proof on the issue of negligence, which remains on the bailor throughout the trial.

4. Same; Automobiles § 41g— Evidence of negligence in entering intersection in front of approaching vehicle held for jury.

Evidence tending to show that bailee's driver, in entering an intersection to make a left turn, was struck by a bus approaching along the intersecting street from his left and making a left turn, *held* sufficient to be submitted to the jury on the issue of the individual driver's negli-

gence in failing to keep an adequate lookout and in driving into the intersection so nearly in front of the approaching bus that a collision could not be avoided, and *held* further, not to rebut the *prima facie* showing of negligence on the part of the bailee in failing to return the car in good condition, even though the evidence showed that the bus, in turning left, encroached some three or four feet on its left side of the street.

APPEAL by plaintiff from *Riddle, S.J.*, 13 August 1962 Jury Term of GASTON.

Civil action to recover damages for injury to an automobile, for loss of its use, for expenses incurred for other transportation, and for finance charges due on the automobile to Universal C.I.T.

Plaintiff brought his action against Piedmont Motors, Inc. — hereafter called Piedmont—and Harold Vaughn Bridges alleging that his automobile was damaged by the negligence of Bridges acting as an employee and agent of Piedmont within the scope of his employment.

Piedmont and Bridges filed a joint answer admitting that at all times complained of Bridges was an employee and agent of Piedmont acting within the scope of his employment, and denying any negligence on their part. In their answer they alleged a cross action against Gastonia Transit Company and Aaron Hampton Cooke, by virtue of the provisions of G.S. 1-240, wherein they averred that the damage to plaintiff's automobile was caused solely by the negligence of Cooke, an agent and employee of Gastonia Transit Company acting within the scope of his employment, but if they were negligent, then the damage to plaintiff's automobile was caused by the joint and concurring negligence of Gastonia Transit Company, Cooke and themselves, and Gastonia Transit Company and Cooke should be made parties defendant as joint tort-feasors and required to contribute to any damages plaintiff may recover against them.

The record contains no order making Gastonia Transit Company and Cooke parties defendant, but the record does contain a written motion by them to dismiss the cross action, and an order signed by a special superior court judge on 15 January 1962 denying the motion. The record also contains a joint answer by Gastonia Transit Company and Cooke denying any negligence on their part.

Plaintiff introduced evidence, Piedmont and Bridges introduced evidence, and Gastonia Transit Company and Cooke did not introduce evidence. From a judgment of involuntary nonsuit entered at the close of all the evidence, on motion of Piedmont and Bridges, plaintiff appeals.

Horace M. DuBose, III, for plaintiff appellant.

Mullen, Holland & Cooke by Philip V. Harrell for Harold Vaughn Bridges and Piedmont Motors, Inc., original defendants, appellees.

No counsel for Aaron Hampton Cooke and Gastonia Transit Company, additional defendants, appellees.

PARKER, J. Plaintiff's only assignment of error is the judgment of involuntary nonsuit.

Plaintiff's evidence shows:

A few days prior to 9 September 1960 he delivered his 1960 Mercury automobile to Piedmont for a six months checkup and to have a broken rear window replaced. Before the work was done someone in plaintiff's family called up Piedmont and asked that the automobile be returned as it was needed. When Piedmont was returning the automobile to plaintiff's home as requested, it was wrecked on its left front. After the wreck it was returned to Piedmont. He could have gotten his automobile back in its wrecked condition, but he did not want it. It would seem that the wrecked automobile was taken by Universal C.I.T. in a court proceeding.

The original defendants introduced evidence. This is a summary, except when quoted, of the testimony of Harold Vaughn Bridges, one of the original defendants, as to a collision between plaintiff's Mercury and a bus of Gastonia Transit Company driven by Aaron Hampton Cooke:

On direct examination: About 5:15 o'clock p.m. on 9 September 1960 he, an automobile mechanic working for Piedmont, was driving plaintiff's Mercury east on East Davidson Street in the city of Gastonia on his way to deliver the automobile to plaintiff's home. When he came up to the intersection of East Davidson Street with Broad Street, he stopped on his right side of the street 15 to 18 feet from the edge of Broad Street, looked south on Broad Street, and saw a bus of Gastonia Transit Company about 200 to 300 feet away down Broad Street approaching the intersection at a speed of about 15 to 20 miles an hour. He then looked north up Broad Street to see if it was clear, and when he looked back the bus was right on his side, and then there was a collision between the bus and the Mercury. After the collision the bus was straight in the street about three to five feet over on his side of the street. After the collision Cooke, the driver of the bus, told him at the scene, he didn't see him, the post between the windshield and the mirror blocked his view. In the collision the left front bumper, grille, fender, hood, and radiator of the Mercury were mashed: there was no damage to its right side or rear. There was a "yield right of way" sign on North Broad Street.

Cross examination by plaintiff: He doesn't know whether or not the bus had a left turn signal on. He didn't look to see whether the bus was going to turn left. When he saw the bus 200 to 300 feet away from the intersection, he didn't bother to look at it anymore until a few seconds before the collision.

Cross examination by the additional defendants: He was planning to turn left to go up Broad Street. East Davidson Street is about 30 feet wide from ditch to ditch—the pavement about 20 feet wide. "I can't explain how it damaged the left front of the car I was driving and the left front of the bus if it was headed directly into my lane.* * * I don't remember testifying to anything about my saying that I had started off. Now, I believe I did say I wouldn't deny it— that I told somebody that."

Recross examination by plaintiff: "I did say it was shorter to make a left turn, and that is the reason I stopped 20 feet back. No, sir, my car was not pointed in a northeasterly direction. That's right, I was going the shortest way around the intersection.* * *I said he was some 3 to 5 feet over on my side of the road. If I had been watching the bus all the time, I could have gotten over on the side of the road. I wouldn't be sure that the bus cleared the intersection before the collision occurred. The front of the bus had gotten through the intersection at the time of the collision. I don't know about the back."

Willis Cantrell, a city policeman and a witness for the original defendants, arrived at the scene of the wreck about 15 minutes after it occurred. At that time the front end of the bus was about 50 feet from the intersecting line of North Broad Street and on the Mercury's side of the traveled portion of East Davidson Street. The Mercury was about 60 feet from the same intersecting line. He saw glass, dirt, and debris about three feet on the south side of the center of East Davidson Street. The left front of the Mercury was damaged. The left front of the bus, the paneling, and all under the windshield were pushed back. Cantrell, without objection, testified on cross examination by the additional defendants: "The driver of the bus told me that the driver of the Mercury was making a left turn* * *he was also making a left turn and they collided there in the intersection."

According to the evidence, Piedmont's possession and control of plaintiff's automobile was that of bailee, under a bailment for the mutual benefit of plaintiff, the bailor, and itself, the bailee. Consequently, Piedmont's duty was to exercise due care—it is not an insurer—and its liability for the safe return of plaintiff's automobile turns upon the presence or absence of ordinary negligence. *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416; *Hutchins v. Taylor-*

Buick Company, 198 N.C. 777, 153 S.E. 397; *Beck v. Wilkins-Ricks Company,* 179 N.C. 231, 102 S.E. 313; *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33.

Plaintiff's evidence tends to show that he delivered his automobile to Piedmont, that Piedmont accepted it, and thereafter had possession and control of it, and that it failed to return the automobile and had it in its possession and control in a damaged condition. This made out a *prima facie* case of actionable negligence against Piedmont. *Insurance Co. v. Motors, Inc., supra; Hutchins v. Taylor-Buick Company, supra; Beck v. Wilkins-Ricks Company, supra; Hanes v. Shapiro, supra.*

While plaintiff's evidence makes out a *prima facie* case of negligence against Piedmont, the ultimate burden of establishing negligence is on plaintiff, the bailor, and remains on him throughout the trial. *Insurance Co. v. Motors, Inc., supra; Beck v. Wilkins-Ricks Company, supra; Hanes v. Shapiro, supra.*

The original defendants concede that plaintiff's evidence presents a *prima facie* case, but contend that the judgment of involuntary nonsuit is correct, and should be sustained, for the reason that their evidence clearly rebuts plaintiff's *prima facie* case. With that contention we do not agree.

Interpreting the evidence with that degree of liberality required in motions for judgment of involuntary nonsuit, it is our opinion that plaintiff's *prima facie* showing of negligence against Piedmont is not rebutted and overcome by the evidence of the original defendants so as to warrant the sustaining of the judgment of involuntary nonsuit, because the evidence of the original defendants is not clear, plain and unambiguous to the effect that the damage to plaintiff's automobile was proximately caused by the sole negligence of the additional defendants, but permits, although it does not compel, a reasonable inference that Bridges, who was the agent and employee of Piedmont acting within the scope of his employment, did not keep an adequate lookout and drove the Mercury automobile into the intersection of East Davidson and Broad Streets so nearly in front of the approaching bus that a collision could not be avoided, and as a direct result of such negligence the collision between the Mercury and the bus occurred, and further, the nonsuit cannot be sustained as to Bridges because every person is individually responsible for his own acts of actionable negligence. This negligence is alleged by plaintiff against both of the original defendants.

We think the case is controlled by the decisions in *Insurance Co. v. Motors, Inc., supra; Hutchins v. Taylor-Buick Company, supra; Beck*

v. Wilkins-Ricks Company, supra, and that the facts here do not bring it within the principle announced in *Morgan v. Bank,* 190 N.C. 209, 129 S.E. 585; *Swain v. Motor Co.,* 207 N.C. 755, 178 S.E. 560.

The judgment of involuntary nonsuit entered below is

Reversed.

MRS. IRENE L. VINSON v. ANNE LEE SMITH.

(Filed 20 March 1963.)

1. Deeds § 7—

The intentional delivery of a deed to the grantee is essential to its effectiveness.

2. Pleadings § 29—

The issues arise upon the pleadings, and where a fact alleged by one party is admitted in the pleading of the other, no issue arises thereon, and both parties are bound thereby.

3. Trusts § 13—

Where one party pays the purchase price for a conveyance made to another, for whom the first party has no obligation or duty to support, the transaction creates a resulting trust, provided the consideration for the conveyance is advanced at or before the time the deed is executed.

4. Trusts § 17—

The burden of proof in an action to impress a resulting trust upon a deed absolute in form is by clear, strong, and convincing proof.

5. Trusts § 20—

In an action to establish a resulting trust upon conflicting evidence as to whether plaintiff or defendant furnished the consideration for the deed in question, the burden is upon the party seeking to establish the trust to prove his payment of the consideration by clear, strong, and convincing proof, and an instruction placing the burden upon such party to prove the issue by the greater weight of the evidence is prejudicial error.

6. Appeal and Error § 44—

Where instructions requested by defendant, embodying the correct intensity of proof required of plaintiff, are erroneously understood by the court to relate to a subordinate issue, without fault on the part of defendant, whereupon the court gives incorrect instructions as to the burden of proof on the crucial issue, the doctrine of invited error does not apply.

APPEAL by defendant from *Froneberger, J.,* 7 January 1963 Regular Schedule "B" Term of MECKLENBURG.

Civil action to impose a resulting trust on five lots of land to which defendant holds a legal title by virtue of a deed recorded in the public registry of Mecklenburg County.

Plaintiff's evidence is as follows:

On 11 February 1955 plaintiff alone went to the office of Dr. Ralph Reid, and purchased from him five lots of land. She then and there paid him $1,000.00 for these lots in one dollar bills, and he gave her a receipt for the payment. In February 1955 he had his lawyer, John P. Kennedy, Jr., to prepare a deed for these lots to her. Dr. Reid and his wife executed this deed in February 1955. However, there is no evidence in the record that this deed was ever delivered by the grantors, or either one of them, to plaintiff or to anyone. No such deed is recorded in the public registry of Mecklenburg County. Shortly thereafter plaintiff and her husband were having "a little family argument," and she told Dr. Reid she wanted to change the deed to someone else. Dr. Reid called his lawyer, John P. Kennedy, Jr., who said it was all right. John P. Kennedy, Jr. in February 1955 prepared another deed from Dr. Reid and his wife conveying the same five lots as those described in the former deed to the defendant, a half-sister of plaintiff. Dr. Reid and his wife executed a second deed in September 1955, and it is recorded in the public registry of Mecklenburg County. Kennedy billed plaintiff for the writing of the second deed. At the time of the preparation of the second deed, Kennedy prepared a power of attorney from defendant to plaintiff, giving plaintiff the authority to convey any or all of the property described in the second deed. Defendant executed and acknowledged this power of attorney in September 1955. No deeds are in the record. Plaintiff has frequently requested defendant to convey these five lots to her, and she has refused to do so. In 1960 plaintiff had an operation for a ruptured blood vessel in her head. Two weeks later another blood vessel in her head ruptured. resulting in paralysis on her right side and in impairment of speech. Plaintiff did not testify in the case.

Defendant's evidence is as follows:

She has worked for years, and saved her money. She lives with her mother, and her mother kept the money for her in the house. In September 1955 plaintiff told her Dr. Reid had property for sale on the Pineville Road, which was a good investment. In consequence, a few days later plaintiff carried her to see Dr. Reid. A few days later plaintiff, her mother and she went back to Dr. Reid's, and she bought the five lots from Dr. Reid then and there paying him for them $1,000.00 in five, ten, and twenty dollar bills. Dr. Reid gave her a receipt for the purchase price, and later Dr. Reid and his wife con-

veyed these lots to her by deed. Her mother was 83 years old. She talked to plaintiff about a power of attorney. She told her: "This is all that I have that is paid for that is in my name.* * *The home is not paid for and my mother is old.* * *I want things fixed and so that you, I can depend on you if anything happens to me that you will take care of my mother." Plaintiff agreed to do so. She then contacted her lawyers, Craighill and Rendleman, she recalls no Mr. Kennedy, and had the power of attorney drawn. She revoked the power of attorney on 5 March 1962, three days after this suit was instituted.

The following issues were submitted to the jury, and answered as shown:

"1. Did the plaintiff pay to said Dr. Ralph C. Reid the purchase price for the land conveyed to the defendant, as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, is the plaintiff the owner of and entitled to a deed to the property described in the Complaint?

"ANSWER: Yes."

From a judgment entered upon the verdict decreeing that this judgment shall operate and be a deed conveying the title and ownership to the five lots, which are described with particularity in the judgment, to the plaintiff, and shall be recorded in the public registry of Mecklenburg County in the same manner prescribed by law for deeds, defendant appeals.

Plumides & Plumides by Warren D. Blair for defendant appellant.
James J. Caldwell for plaintiff appellee.

PARKER, J. The case was tried below on the theory of a resulting trust. Plaintiff's evidence tends to show that Dr. Ralph Reid and his wife executed a deed to these lots to plaintiff, but there is no evidence in the record that this deed was ever delivered. No such deed is recorded. "Delivery is essential to the validity of a deed of conveyance. Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title." *Elliott v. Goss*, 250 N.C. 185, 108 S.E. 2d 475.

Plaintiff alleges in paragraph four of her complaint: "4. That although the purchase price for said lots of land was fully paid, as aforesaid, no deed or other conveyance of said lots was ever made to the plaintiff." In replying to this paragraph of the complaint defendant states in paragraph four of her answer: "4. That it is admitted

that no deed or other conveyance of said lots was ever made to the plaintiff but it is denied that the purchase price for said lots of land was paid for by the plaintiff." "It is an elementary rule that issues arise upon the pleadings, and, if a fact is alleged by one party and admitted by the other, no issue arises therefrom, but both parties are bound by the allegation so made, and evidence offered in relation thereto is irrelevant." *State ex rel. R. H. Lee v. Martin,* 191 N.C. 401, 132 S.E. 14.

This Court said in *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642:

> "The overwhelming weight of authority recognizes the general rule that in the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises, by operation of law and attaches to the subject of the purchase. *Harris v. Harris,* 178 N.C. 8, 100 S.E. 125; *Avery v. Stewart,* 136 N.C. 426; 48 S.E. 775; *Summers v. Moore,* 113 N.C. 394, 18 S.E. 712; 26 R. C. L., 1219, s. 64, note 1; 65 C.J., p. 382, s. 154 (5), note 14. The presumption is regarded as so powerful that the payment of the purchase price under such circumstances draws the equitable title to the payor 'as if by irresistible magnetic attraction.' *Ricks v. Wilson,* 154 N.C. 282, 286, 70 S.E. 476. And a resulting trust in favor of the party paying the consideration will arise, although the conveyance is made to another with the knowledge and consent of the payor. *Summers v. Moore, supra.*"

To the same effect see *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289; 89 C.J.S., Trusts, section 116.

In *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265, it is said:

> "It is elemental that a resulting trust arises, if at all, in the same transaction in which the legal title passes, and by virtue of consideration advanced before or at the time the legal title passes, and not from consideration thereafter paid."

A resulting trust arises, if at all here, from the payment of the purchase money, and accordingly it is essential to the creation of such a trust that the money or assets furnished by or for the person claiming the benefit of the trust should enter into the purchase price of the property at or before the time of purchase. *Hodges v. Hodges,* 256 N.C. 536, 124 S.E. 2d 524; s. c., 257 N.C. 774, 127 S.E. 2d 567; *Hoffman v. Mozeley,* 247 N.C. 121, 100 S.E. 2d 243; *Rhodes v. Raxter,*

supra; Wilson v. Williams, 215 N.C. 407, 2 S.E. 2d 19; *Summers v. Moore,* 113 N.C. 394, 18 S.E. 712; *Young v. Greer,* 250 Ala. 641, 35 So. 2d 619; *Elliott v. Wood,* 95 Cal. App. 2d 314, 212 P. 2d 906; *Davis v. Roberts,* 365 Mo. 1195, 295 S.W. 2d 152; *Patrick v. McGaha,* Tex. Civ. App., 164 S.W. 2d 236; 89 C.J.S., Trusts, section 121, page 975.

On the first issue, "Did the plaintiff pay to said Dr. Ralph C. Reid the purchase price for the land conveyed to the defendant, as alleged in the complaint?", the burden of proof was on plaintiff to satisfy the jury by clear, strong, and convincing evidence of her contentions in respect thereto, and if she did not, the jury should answer that issue, No. A mere preponderance of the evidence does not suffice. *Hodges v. Hodges,* 256 N.C. 536, 124 S.E. 2d 524; *Bowen v. Darden, supra; McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Summers v. Moore, supra;* Stansbury, North Carolina Evidence, section 213.

Prior to the beginning of the judge's charge to the jury, defendant's counsel gave to the court the following prayers for special instructions:

> "1. The burden of proof was on the plaintiff and the law gives a peculiar force and solemnity to deeds and will not allow them to be overthrown by mere words, but only by facts and that these facts must be strong, convincing and unequivocal. (*SUMMERS v. MOORE,* 113 N.C., at bottom 403).
>
> "2. A deed absolute upon its face, cannot be corrected so as to convert it into a trust, upon a mere preponderance of evidence or without some facts dehors the deed inconsistent with the idea of absolute ownership, but only upon such proof as is clear, strong and convincing and not by merely a preponderance and weight of the evidence. (*HEMPHILL v. HEMPHILL,* 99 N.C. 436)."

The court in its charge to the jury read to them the first issue, and then charged, "Now, the burden of proving that issues (sic) is on the plaintiff, ladies and gentlemen, by the rule that I have heretofore given you: By the evidence and by its greater weight."

Defendant assigns this part of the charge as error. For the reasons stated above, the assignment of error is good. It was highly prejudicial to defendant, and entitles her to a new trial, because which person paid the purchase price for these lots was the most crucial question in the case, with each party testifying that she paid it.

The record states the judge understood "that the request for instructions was applicable to the second issue." However, there is nothing in the record to indicate that defendant or her counsel caused

the judge to form such an opinion, so as to bring the case within the principle of invited error.

For error in the charge there must be a

New trial.

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 MURCEIL P. LINDSLEY, L. P. LINDSLEY AND WIFE MARGUERITE G. LINDSLEY.

(Filed 20 March 1963.)

1. Appeal and Error § 41—

The exclusion of evidence tending to show the authority of a commissioner to execute a deed constituting a link in plaintiffs' chain of title cannot be prejudicial when plaintiffs do not claim to have shown good paper title, and, as to color of title, have failed to show that the land in controversy was embraced within the descriptions in their deeds or that plaintiffs had been in adverse possession thereof.

2. Reference § 11—

Where plaintiff's evidence is insufficient to support recovery on the issue raised by the pleadings, the court, on appeal from the referee, properly refuses to submit an issue tendered by plaintiffs, and properly enters judgment dismissing the action.

3. Appeal and Error § 21—

An exception to the signing of the judgment will not be sustained when the unchallenged findings made by the court support the conclusions of law and the judgment based thereon.

APPEAL by plaintiffs from *Fountain, S.J.*, November 1962 Term of MARTIN.

Plaintiffs allege they are the owners of a tract of land in Martin County containing 87.79 acres. They ask to be adjudged the owners and to recover the value of the timber cut and removed therefrom by defendants Blackman and Timber Corporation, who acted pursuant to a deed from defendants Oates and Wells to Timber Corporation. Oates and Wells claim the timber by deed from defendants Lindsley.

Defendants, other than defendants Lindsley, denied plaintiffs were the owners of the land in controversy.

The cause was, at the January 1959 Term, referred. All parties excepted to the order of reference and demanded a jury trial.

Hearings were had by the referee on 11 and 12 July 1960. Plaintiffs were allowed to amend the complaint so as to correctly describe the land in controversy.

The referee filed his report 22 November 1961. He made 34 factual findings including a finding that plaintiffs claim title "(1) by possession under known and visible lines and boundaries under colorable title for more than seven years next preceding the commencement of this action adverse at all times to all other persons, and (2) by possession under known and visible lines and boundaries adversely to all other persons for more than twenty years next preceding the commencement of this action." In the findings the referee set out part of the testimony of the witnesses as it related to the location of the boundaries of the several deeds on which the parties relied. Following the evidentiary findings he concluded: "The evidence, considered in the light most favorable to plaintiffs, fails to show color of title to the 87.79 acres described on Court Map, and fails to show open, notorious, continuous and adverse possession for seven years under known and visible lines, next preceding the institution of this suit.

"III. That plaintiffs also relied on establishing their title by proof of twenty years' possession by known and visible lines, openly, continuously and adversely. The evidence, considered in the light most favorable to plaintiffs, fails to show that plaintiffs or either of them were in possession of the 87.79-acre tract of land openly, notoriously, continuously and adversely, and under known and visible lines for twenty years next preceding the institution of this suit."

Based on these conclusions the referee recommended: "That judgment be entered denying plaintiffs' prayer for relief herein, vacating and dismissing the injunction heretofore issued, and taxing the costs against plaintiffs."

Plaintiffs in apt time filed exceptions to the findings and factual conclusions made by the referee. Based on their exceptions they demanded a jury trial and tendered issues reading as follows:

"1. Is the line shown on the court map filed herein from A to B the true boundary line between the lands of the plaintiffs and the lands of the defendant Murceil P. Lindsley?

"2. Have the defendants Roanoke Land and Timber Corporation, Coastal Lumber Company and L. B. Blackman trespassed upon the lands of the plaintiffs lying on the north side of the line from A to B on the court map, and wrongfully cut and removed timber therefrom, as alleged in the Complaint?

"3. What amount of damages, if any, are the plaintiffs entitled to recover of said defendants?"

Judge Fountain, hearing plaintiffs' exceptions, concluded "the issues tendered by plaintiffs do not present the issues raised by the pleadings and evidence in this cause, and plaintiffs' motion for jury trial is overruled." The court thereupon reviewed the evidence taken by the referee and the exceptions filed by plaintiffs. He overruled each of plaintiffs' exceptions and approved and adopted as his own the findings of fact made by the referee. He expressly found: "That the plaintiff has failed to offer sufficient evidence of title and possession to the tract of land containing 87.79 acres shown on the map of the court surveyor and claimed by plaintiffs under their amendment to their complaint so that the description conforms to the lines shown on the map made by the court surveyor, either by record title, or adverse possession under color of title for seven years under known and visible lines continuously, notoriously and adversely or by adverse possession under known and visible lines for twenty years, openly, continuously and adversely."

Based on the findings so made the court concluded and adjudged that plaintiffs were not entitled to recover.

Plaintiffs excepted and appealed.

R. L. Coburn and Griffin & Martin by R. L. Coburn for plaintiff appellants.

Pritchett & Cooke for J. W. Wells, Ruth Wells, B. H. Oates and Ruth Oates.

Peel & Peel and Bourne & Bourne by Henry C. Bourne for Roanoke Land and Timber Corporation, Coastal Lumber Company and L. B. Blackmore.

RODMAN, J. Among the deeds on which plaintiffs relied to support their claim of title was a deed executed in May 1879 by James E. Moore, commissioner, to John D. Biggs and Dennis Simmons. This deed recites that it was made pursuant to a decree of the Superior Court of Martin County in an action entitled *John D. Biggs and Company v. A. F. Dupree.* Plaintiffs in a hearing before the referee offered no evidence to support the recitals in the deed executed by Moore as commissioner. When the cause was called for hearing at the November Term 1962 on plaintiffs' exceptions to the report of the referee and defendants' motion to confirm the referee's report, plaintiffs asked leave to file an affidavit to the effect that Martin County Courthouse was burned in 1883, that a search had been made in the present clerk's office for the proceeding recited in the Moore deed, but no record of such proceeding could be found. The court declined to reopen the case for the purpose of taking further evidence. Plaintiffs assign this ruling as error.

The assignment cannot be sustained for two reasons: (1) Plaintiffs do not claim they have shown a good paper title. It was therefore immaterial whether Moore as commissioner had authority to convey. His deed would, if it described the land in controversy, constitute color of title; and possession thereunder for the requisite period would have sufficed to give title; but the referee found and the court approved that there was neither description nor possession of the land in controversy. (2) The right to offer evidence after a party has rested is a matter in the discretion of the trial court. *Builders Supply Co. v. Dixon,* 246 N.C. 136, 97 S.E. 2d 767; *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708; *Russell v. Koonce,* 104 N.C. 237.

Plaintiffs' second exception and assignment of error "is to the order allowing appellees' motion for confirmation of the report of the Referee." While plaintiffs made specific exceptions to the findings by the referee, they did not except to the findings of fact made by the court.

The pleadings put in issue the question of title to the 87.79 acres. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 540. The issues tendered by plaintiffs as to the location of the boundary separating the lands of plaintiffs from the lands of defendants Lindsley were not determinative of the controversy. If plaintiffs were not the owners of the lands described in the amended complaint, they were not entitled to recover. The court therefore properly declined to submit the question of boundary to the jury. *Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484.

Plaintiffs' third and final exception and assignment of error is "to the signing of the judgment set out in the record." The unchallenged findings made by the court on its own review of the evidence supports the conclusion reached by the court and the judgment based thereon. It was proper, therefore, for it to sign the judgment.

No error.

SAVANNAH SUGAR REFINING COMPANY, CHATTANOOGA GLASS COMPANY, OWENS-ILLINOIS GLASS COMPANY, DIAMOND NATIONAL CORPORATION AND CONSOLIDATED CORK CORPORATION v. ROYAL CROWN BOTTLING COMPANY OF WILMINGTON, INC. AND WILMINGTON R. C. COLA, INC.

(Filed 20 March 1963.)

Fraudulent Conveyances § 2—

Creditors having unconnected claims against a common debtor may join in suing the common debtor and his transferee to have the debtor's

conveyance of property set aside as fraudulent and to recover judgment against the debtor on their claims, and the fact that some of plaintiffs have reduced their claims to judgment is immaterial.

APPEAL by defendants from *Bone, J.*, October 1962 Civil Term of NEW HANOVER.

Summarized, the complaint states these facts: Plaintiffs are corporations created by the laws of states other than North Carolina. Defendants were created pursuant to the laws of North Carolina. They have their principal places of business in New Hanover County. On 18 October 1960 plaintiff Sugar Refining Company instituted suit against defendant Bottling Company to recover the sum of $4,500 owing and evidenced by Bottling Company's notes. On 23 March 1961 judgment was rendered for plaintiff in said action for the sum demanded. Execution issued on the judgment. It was returned "nothing to be found." Defendant Bottling Company is indebted (a) to plaintiff National Corporation in the sum of $789.84 for goods purchased between 22 September 1960 and 31 December 1960, (b) to plaintiff Chattanooga Glass Company in the sum of $4,416.67 for goods purchased between 1 April 1959 and 2 July 1959. (c) to plaintiff Owens-Illinois Glass Company in the sum of $2,750 for goods purchased between 2 February 1960 and 10 October 1960, and (d) to Consolidated Cork Corporation in the sum of $1,135.30 for goods purchased between 3 October 1960 and 24 January 1961. Defendant Bottling Company, on 31 December 1960, executed a chattel mortgage to J. H. Ferguson to secure a recited indebtedness of $23,552.35 due Sarah Y. Noffsinger. This mortgage, conveying all of the personal property of defendant Bottling Company, has been recorded in New Hanover County. Bottling Company did not retain sufficient assets to pay its debts. The chattel mortgage "was executed without consideration and made with actual intent upon the part of the grantor to defraud its creditors." The mortgage violates the provisions of G.S. 39-15, 16, and 17. On 1 February 1961 defendant Bottling Company transferred all its assets to defendant Cola. Defendants Bottling Company and Cola are owned by the same persons, i.e., Hugh G. Noffsinger, Jr. and his wife, Sarah Y. Noffsinger. The other incorporators and stockholders "were merely proforma stockholders, officers and directors with no substantial or real interest in the said corporation." Defendant Bottling Company is insolvent and has ceased to do business. Defendant Cola now holds all the assets of defendant Bottling Company.

The prayer of the complaint is: (1) that the chattel mortgage to Ferguson "be declared utterly void and of no effect; (2) that the convayance of the assets by Bottling Company to Cola "be declared utter-

ly void and of no effect"; (3) that plaintiffs other than Refining Company have judgments for the debts owing them by Bottling Company, that Refining Company's judgment against Bottling Company be affirmed and any assets recovered "be divided pro rata between the plaintiffs."

Defendants demurred for that: (1) it appeared from the complaint Refining Company had obtained a judgment for the debt due it, and because of said judgment was not entitled to further relief, and (2) for misjoinder of parties and causes of action, because the debts alleged to be owing by Bottling Company were debts to individual plaintiffs, and no plaintiff was interested in the debt owing by Bottling Company to the other plaintiffs.

The demurrer was overruled. Defendants excepted and appealed.

John C. Wessell and Carr and Swails by James B. Swails for plaintiff appellees.

J. H. Ferguson and Stevens, Burgwin, McGhee & Ryals by John A. Stevens for defendant appellants.

RODMAN, J. The primary relief which plaintiffs seek is an adjudication that the property conveyed by Bottling Company is chargeable with the payment of the debts owing plaintiffs because conveyed in fraud of their rights. Does this common interest give plaintiffs the right to bring this action? The answer is yes.

In *Wall v. Fairley,* 73 N.C. 464, a judgment creditor and an unsecured creditor sought to have a conveyance made at the instance of defendant Fairley to his codefendant declared void because fraudulent as to them. There as here defendants demurred for misjoinder. The Court, in rejecting that contention, said: "We are of the opinion that although the plaintiffs might have sued severally, yet, as their interests are to a certain extent common, and they seek a common relief, they were at liberty to join. The joinder does not prejudice the defendants, and the complaint is not multifarious."

In *Mebane v. Layton,* 86 N.C. 571, several creditors joined in a single suit to vacate fraudulent conveyances. There defendants demurred "For misjoinder—in that the plaintiffs have separate and distinct interests, and sue upon distinct claims, which should not be united in the same action." In rejecting defendants' contention the court said: "In Story's Eq. Plead., sec. 285, it is said that an exception to the general doctrine of misjoinder is made, when the parties have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests; and as an

illustration, in the next section it is said that two or more creditors may join in one bill against a common debtor and his grantees to remove an impediment created by his fraudulent conveyance of his property.

"In *Brinkerhof v. Brown,* 6 John., ch. 139, *Chancellor Kent* ruled that different creditors might unite in one bill, the object of which was to set aside a fraudulent conveyance of their common debtor. It was so held also, in *McDurmut v. Strong,* 4 John., ch. 687; *Emerton v. Lyde,* 1 Paige, 637, and *Conro v. Iron Co.,* 12 Barb. 27, and by this Court in *Wall v. Fairley,* 73 N.C. 464.

"Indeed in all these cases the rights of the creditors, affected by the fraud, to join in one action, seems to have been taken for granted, and the only question mooted was as to the right of a single creditor, by suing alone, to acquire priority for himself."

The conclusion reached in the *Wall* and *Mebane* cases has been consistently followed. *Steel Corp v. Brinkley* 255 N.C. 162, 120 S.E. 2d 529; *Bank v. Moseley,* 202 N.C. 836, 162 S.E. 923; *Robinson v. Williams,* 189 N.C. 256, 126 S.E. 621.

Nor is the fact that some of the plaintiffs are judgment creditors while other plaintiffs have not reduced their claims to judgment a cause for demurrer. *Bank v. Harris,* 84 N.C. 206; *Silk Co. v. Spinning Co.,* 154 N.C. 421, 70 S.E. 820.

Neither the addition nor the omission in the caption of the phrase "in behalf of all other creditors who desire to make themselves parties" can determine the nature of the cause of action or the right of the parties to relief. *Monroe v. Lewald,* 107 N.C. 655; 30 C.J.S. 1018.

The demurrer does not raise any question respecting the rights of other creditors, if any, to participate in the distribution of any assets which may be recovered. So far as appears, plaintiffs are the only creditors of defendants. If in fact there are other creditors who may desire to participate in the action and benefit by the recovery, their rights can and should be determined when they seek to intervene. The alleged insolvency of Bottling Company would warrant the appointment of a receiver. G.S. 1-507.1.

The demurrer does not raise the question of whether J. H. Ferguson and Sarah Y. Noffsinger are necessary parties, and because the question is not raised, we do not feel called upon to decide it.

The judgment overruling the demurrer is

Affirmed.

J. N. BRYAN, JR., ERCELL S. WEBB AND WIFE, SARAH C. WEBB; GILBERT PEEL, J. S. JENKINS, ED PARKENSON, JR., M. K. BLOUNT AND WIFE, FLORENCE T. BLOUNT, AND ALL OTHER CITIZENS AND RESIDENTS OF GREENVILLE SIMILARLY SITUATED WHO WOULD JOIN IN THIS PROCEEDING, PROTESTORS V. J. W. WILSON, BUILDING INSPECTOR OF THE CITY OF GREENVILLE; THE BOARD OF ADJUSTMENT OF THE CITY OF GREENVILLE, MORRIS BRODY AND VAN C. FLEMING, JR., RESPONDENTS.

(Filed 20 March 1963.)

1. Municipal Corporations § 25—

A municipal board of adjustment has no authority to amend a zoning ordinance but must enforce it as written.

2. Municipal Corporations § 24.1—

A municipal ordinance must be construed to ascertain and effectuate the intention of the municipal legislative body as ascertained from the language of the ordinance.

3. Same—

The doctrine of *ejusdem generis* may be applied in proper instances in the construction of municipal ordinances, but the doctrine applies generally only to instances in which several classes of persons or things are enumerated, followed by a provision for "other" persons or things.

4. Municipal Corporations § 25—

The zoning ordinance in question permitted the erection of "(S)chools, institutions of an educational or philanthropic nature, public buildings." *Held:* The doctrine of *ejusdem generis* does not apply, and the ordinance permits the erection of a building by private owners to be used for a United States Post Office.

APPEAL by protestors from *Mintz, J.*, holding the Courts of the Third Judicial District, at Chambers in PITT on December 20, 1962.

This matter was heard upon the return on *writ of certiorari* directed to the Board of Adjustment of the City of Greenville. The record discloses the following facts:

On November 2, 1962, the building inspector of Greenville, purporting to act under Subsection 4, Section 7 of Appendix B of the zoning ordinance, issued a permit to Morris Brody and Van C. Fleming, Jr. to erect a building at 714 East Tenth Street between Charles and Elm Streets to be leased to the United States Government for use as a post office. Tenth Street divides the north and south campuses of East Carolina College, and the area is zoned as a residential district.

Section 7 of Appendix B of the zoning ordinance of the City of Greenville provides:

"(A) *Use regulations.* In the residence district no building of land shall be used and no building shall be hereafter erected or structurally altered, unless otherwise provided in this ordinance except for the following uses:

"(1) One-family dwellings, two-family dwellings, multiple dwellings.

"(2) Boardinghouses, lodginghouses, hotels not involving the conduct of any business other than for the sole convenience of the guests thereof.

"(3) Clubs, excepting those the chief activity of which is a service customarily carried on as a business.

"(4) Schools, institutions of an educational or philanthropic nature, public buildings.

"(5) Churches, convents.

"(6) Hospitals, clinics.

"(7) Museums, art galleries, libraries, parks, playgrounds not conducted for profit.

"(8) Farming, truck gardening, nurseries; provided, . . . (limitation omitted)

"(9) Accessory buildings including one private garage . . . and also including one private stable when located not less than sixty feet from the front line of the lot and not less than five feet from any other lot line.

"(10) Uses customarily incident to any of the above uses including home occupations such as dressmaking or the office of a physician, surgeon, dentist, musician or artist; provided, . . . (limitations omitted)

"(11) Individual trailers . . . (limitation omitted)

Protestors objected to the issuance of the building permit and appealed to the Board of Adjustment as provided by the City Code. Upon the hearing they contended that the use of a building at 714 East Tenth Street for a post office substation would violate Subsection 4 of the quoted ordinance for that " '*public buildings*' mentioned in said section refer only to the character of public buildings expressly named and set out in said section, to-wit, 'institutions of an educational or philanthropic nature,' and by said reference limits the 'public buildings' to those institutions built and erected for philanthropic and educational purposes." The respondents denied that the wording *public buildings* limited the use of such buildings to educational and philan-

thropic institutions. They contended that the words were used in accordance with the ordinary definition of *public buildings.*

On November 29, 1962, the Board of Adjustment held that "the Greenville City Code provides that the use of the building determines the nature of the building"; that a building, as long as it is used as a post office would be a public building within the meaning of Subsection 4, Section 7, Appendix B, which did not limit public buildings to "(s)chools, institutions of an educational or philanthropic nature." The Board unanimously affirmed the issuance of the building permit.

Protestors applied to the Superior Court for a *writ of certiorari* which was granted. The matter was duly heard, and the judge affirmed all the findings of fact and conclusions of law of the Board of Adjustment upholding the issuance of the permit. Protestors excepted to the judgment and appealed.

Fred T. Mattox, Albion Dunn for protestor, appellants.

James and Speight, W. H. Watson, and R. B. Lee for respondent, appellees.

SHARP, J. To interpret the zoning ordinance which governs this case we must determine whether the words *public buildings* in Subsection 4 are independent term in the series or are *ejusdem generis* with "schools, institutions of an educational or philanthropic nature." If they are the former, the building permit was properly issued; if the latter, it was not. A Board of Adjustment cannot amend an ordinance. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1.

In a narrow sense a public building is one owned and held by national, state, county, or municipal authorities for public use. In a broad sense it has been defined as a building which may be fairly deemed to promote a public purpose or to serve a public use, and the term does not necessarily imply ownership by a governmental unit or agency. 12 C.J.S. Building, p. 385. An acceptable definition appears in a syllabus by the Georgia Court in *Shepherd v. State,* 16 Ga. App. 248, 85 S.E. 83: "All buildings held, used, or controlled exclusively for public purposes by any department or branch of government, state, county or municipal, are public buildings; and this is true without reference to the ownership of the building or of the realty upon which it is situated."

A post office is a building used by the United States Government for the recipt, handling and delivery of mail and the transaction of other business in connection with the postal service. The postal system is for

the benefit of the whole public and a post office is, without any doubt, a public building.

The basic rule for the construction of ordinances is to ascertain and effectuate the intention of the municipal legislative body. This intention must be gleaned primarily from the language of the ordinance. 62 C.J.S., Municipal Corporations, Section 442(f) (1) (2). One of the aids in ascertaining the legislative intent is the doctrine of *ejusdem generis* which this Court applied in *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211, cited in appellants' brief. That case interpreted a Winston-Salem ordinance which required, as a condition for the construction of multi-family dwellings, "garage or other satisfactory automobile storage space" on the premises. This Court said: "It is a well-settled rule of construction, applicable to statutes and ordinances that under the doctrine *ejusdem generis,* when enumerations by specific words or terms are used, and they are followed by general words or terms, the general shall be held to refer to the same classification as the specific. . . . The term 'other automobile storage space,' following 'garage,' refers to something in the nature of a garage or of that classification." Indeed, it would be impossible to define "other satisfactory automobile storage space" without referring to the particular word "garage."

The *Chambers* case provides the perfect example of the application of the rule of *ejusdem generis.* The rule of *ejusdem generis* usually finds its application in a case where several classes of persons or things are enumerated, and then the provision for "other" things or persons follows. *City of Los Angeles v. Superior Court,* 2 Cal. 2d 138, 39 Pac. 2d 401. However, the provision for "other" things does not follow in the ordinance under consideration.

In an effort to ascertain the legislative intent both protestors and respondents have sought the aid of a distinguished grammarian and professor of English — the one at East Carolina College; the other at North Carolina State College. After analysing the punctuation and syntax of Section 7, both agreed that there is in the section "incontrovertible syntactical evidence that the subsection (4) is composed of three separate coordinate, and independent elements in a series." From then on, however, we encounter the not unusual disagreement among the experts. One says, "There is no evidence whatsoever that any one member of the series could in any way be construed as an appositive to any other member or any two other members of the series." The other, basing his opinion upon "grounds of sense and style in writing," says, "The term *public buildings* clearly has the connotation of buildings to be used for educational purposes since the

other members of the series concern buildings of an educational nature."

We note, however, that the first two members of the series of uses which Section 4 permits in a residential area, to-wit, schools, institutions of an educational or philanthropic nature, are not restricted by the adjective "public." Schools are both private and public and ordinarily philanthropic institutions connote private endowments and contributions. The third member of the series, *public buildings*, is a term which has a meaning of its own.

We hold that public buildings as used in the ordinance, is a special term which is not *ejusdem generis* with the first two members of the series, and that the permit to erect a building at 714 East Tenth Street to be used as a United States Post Office was properly issued.

Affirmed.

STATE v. JAMES THOMAS FULLER

(Filed 20 March 1963.)

1. Automobiles § 56; Negligence § 31—

Culpable negligence in the law of crimes is more than a mere want of due care, and is such recklessness or carelessness resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and each case must be determined upon its own particular facts.

2. Automobiles § 59— Evidence held insufficient to be submitted to the jury on the issue of culpable negligence.

The evidence tended to show that defendant was traveling on a three lane highway, the center lane for passing, that defendant traveled at excessive speed in overtaking a preceding car but was able to slow down without striking the preceding vehicle, although in doing so his car wobbled in its lane of travel, that defendant then turned partially into the passing lane to pass the preceding car, and collided head-on with a car, traveling in the opposite direction in the passing lane, which was passing two other cars traveling in its direction. *Held:* Defendant's excessive speed could not be a proximate cause of the accident, and while all of the evidence shows that defendant violated G.S. 20-150(a) in failing to ascertain that the center lane was free of all on-coming traffic before attempting to pass the car preceding him, it is insufficient to be submitted to the jury on the question of defendant's culpable negligence.

APPEAL by defendant from *Bone, J.*, November 1962 Term of PENDER.

STATE *v.* FULLER.

This is a criminal action in which defendant is charged with manslaughter because of the death of Mrs. Audrey Smith Tedder in an automobile accident.

Plea: Not guilty. Verdict: Guilty. Judgment: Active prison sentence.

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

Rountree & Clark and George Rountree, III, for defendant.

MOORE, J. Defendant excepts to the denial of his motion for nonsuit. It is stipulated by the defendant that deceased came to her death as a result of injuries received when the car in which she was riding collided with the automobile defendant was driving.

The evidence, in the light most favorable to the State, is summarized as follows: The accident occurred about 5:00 P.M., 13 October 1962, on U. S. Highway 17 about 1½ miles north of Hampstead in Pender County. The highway is straight and level for at least one-half mile in each direction from the point of accident. It has three lanes, each 11 feet wide — one for north-bound traffic, one for south-bound traffic, and a passing lane. The posted speed limit is 60 miles per hour. The weather was clear and the road dry. Deceased was a passenger in a 1956 Buick owned and being operated by her husband, Burris C. Tedder. They were travelling north and following two cars. Tedder pulled into the center lane to pass, and after he had travelled in the center lane 300 to 600 feet and was abreast the front north-bound car, defendant, who was going south and following another car, pulled into the center lane. At this juncture defendant and Tedder were 50 feet apart. The speed of the Tedder car was 45 to 50 miles per hour. Defendant "never did get all of the way into the lane but approximately 4 to 4½ feet in the middle lane." Tedder attempted to apply brakes but could not avoid collision. The left front of Tedder's car collided with the left front of defendant's car. Defendant was driving a 1955 Ford. He entered the highway at Woodside a short distance north of the point of accident. As he pulled onto the highway he "sort of weaved on the road." A southbound car passed him. He overtook this car, which was going 50 miles per hour. Defendant's car "came up so fast behind the car preceding it that, when he slowed down, the front end dropped, and he came up on the tail of the car in front of him (within 7 or 8 feet of it); and his car started weaving in his own lane." His "left front tire crossed into the center lane when he hit the brakes." He was going in excess of 60 miles "immediately prior to the accident." The debris from the collision was on the west side of the center lane.

Defendant's car travelled 246 feet after the impact, the Tedder car 220 feet. Defendant was sober. There was no physical evidence on the road that either car had applied brakes before the accident.

The evidence supports the inference that the death of Mrs. Tedder was proximately caused by the negligence of defendant. "It is settled law with us that a want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or heedless indifference to the safety and rights of others." *State v. Becker,* 241 N.C. 321, 328, 85 S.E. 2d 327. Our inquiry here is whether the State has made out a *prima facie* case of culpable negligence.

No two cases are factually the same. It is not always an easy task to distinguish between ordinary negligence and reckless conduct. Each case must be decided according to its own peculiar circumstances. There is some evidence of excessive speed on defendant's part. A witness testified that he had an opinion as to defendant's speed immediately prior to the accident, and stated: "I would say in excess of 60 miles per hour; I don't know. I was driving 50 (meeting defendant).... (I)f I knew how fast defendant's automobile was going, I would tell you." This is the only estimate of defendant's speed appearing in the record. The witness did not indicate whether this was defendant's speed in overtaking the vehicle he was following, or his speed while in the center lane. There was testimony that defendant's car was weaving immediately after he came on the highway at Woodside, and was weaving after he reduced speed in overtaking the preceding car. Defendant explained that he had a weak shock absorber and the motion of his car is more aptly described as "rocking." Defendant was sober; there is no evidence to the contrary. There is no permissible inference that his car was at any time out of control, as was the case in *State v. Ward,* 258 N.C. 330, 128 S.E. 2d 673. In our opinion the matter of control is crucial in this case. If defendant's car was weaving, it was "weaving in its own lane." Defendant was able to reduce speed when he overtook the preceding car without leaving brake marks on the road. There is testimony that his left wheel crossed into the center lane when he applied brakes. If so, this was before he turned to the left to pass, for his car was seen to weave and come down in front when he reduced speed, all in his own lane. It is our opinion that, if defendant was guilty of excessive speed at any time, it was not a proximate cause of the collision. When a driver starts to pass a car in front of him he necessarily increases speed. It will be noted also the defend-

ant's car travelled after the collision only slightly farther than Tedder's car.

Defendant was in violation of G.S. 20-150(a). He did not ascertain that the center lane was free of oncoming traffic. His failure to keep a proper lookout was the proximate cause of the collision. The evidence does not warrant a conclusion that defendant intentionally drove into the center lane with actual knowledge of the presence and position therein of the Tedder car. The unintentional violation of a prohibitory statute, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable foreseeability, is not such negligence as imports criminal responsibility. But if it is accompanied by recklessness or probable consequences of a dangerous nature, when tested by the foreseeability rule, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death ensues, is culpable. *State v. Cope,* 204 N.C. 28, 167 S.E. 456. Culpable negligence rests on the assumption that defendant knew the probable consequences of his act but was intentionally, recklessly, or wantonly indifferent to the result. *State v. Stansell,* 203 N.C. 69, 164 S.E. 580.

This is a near borderline case. Defendant was travelling on a highway on which heavy traffic and passing were to be expected. The exercise of careful lookout is especially indicated on a highway having a passing lane. Even so, it is our opinion that the evidence fails to make out a case of culpable negligence. *See State v. Becker, supra.*

The instant case is somewhat factually analogous to *State v. Gurley,* 257 N.C. 270, 125 S.E. 2d 445, in which defendant was attempting to pass a car going in the same direction and collided head-on with a car going in the opposite direction. In the opinion by a divided Court the evidence was held sufficient to withstand nonsuit. But there was some evidence that defendant was under the influence of intoxicants, and it was this feature of the case which finally decided the matter against defendant.

In the following cases, which are similar in many respects to the case at bar, the evidence was adjudged insufficient: *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363; *State v. Roberson,* 240 N.C. 745, 83 S.E. 2d 798; *State v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638.

Reversed.

WILLIAM T. PARKER, JR. v.
STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 20 March 1963.)

1. Appeal and Error § 22—

Where motions to nonsuit are properly preserved, the cause should be dismissed when the evidence is insufficient to make out a case.

2. Insurance § 3—

Where the ultimate and controlling facts are not in dispute, the construction of a policy of insurance becomes a matter of law.

3. Insurance § 36—

Where a policy provides benefits if insured is hospitalized for an injury within 30 days of the accident causing such injury, insured may not recover if he is hospitalized for an injury 51 days after the accident notwithstanding that he should have been treated within the 30 day period, the time limitation being unambiguous.

APPEAL by defendant from *Pittman, S.J.*, October 29, 1962 Special "B" Civil Term, MECKLENBURG Superior Court.

Plaintiff, the insured, instituted this civil action to recover indemnity for hospital expenses and weekly income losses under a policy of insurance issued by the defendant. Both the hospital expenses and the income losses, to be compensable, must result directly and independently of all other causes from injury by accident. These claims arise under the "SPECIAL INDEMNITIES" provisions of the policy. Part 3 provides: "HOSPITAL INDEMNITY. If such injuries sustained by the Insured shall, within 30 days from the date of the accident, necessitate his removal to and continuous confinement within an incorporated hospital, . . . the company will pay indemnity for the period of such confinement at the rate of $10.00 per day up to a maximum of $300.00. * * * Part 6. WEEKLY INCOME WHILE IN HOSPITAL. If such injuries sustained by the Insured shall, within 30 days from the date of the accident, necessitate his removal to and continuous confinement within an incorporated hospital . . . the company will pay indemnity for the period of such confinement, at the rate of $50.00 per week, up to a maximum of $200.00." The form of the policy and the amount of the premium were approved by the North Carolina Insurance Commissioner.

The evidence was sufficient to establish the following: On October 1, 1961, the plaintiff, while attempting to extinguish a fire in the back of his truck, fell over backwards, striking a drink cooler on the ground. He suffered burns to his hands and injury to his back. The following day he consulted Dr. Charles D. Williams, Jr., who referred him to

Dr. Arrendell for treatment of the burns. Three days later he again consulted Dr. Williams, complaining of his back, and gave a history of having been injured in the fall from his truck. Although he did some work, nevertheless his back and right side continued to cause increasing pain. On November 20, 1961, he consulted Dr. Squires, an urologist and surgeon, who found an injured right kidney and on that day placed him in Mercy Hospital. On December 4, Dr. Squires removed the right kidney. The present claims grew out of this hospital confinement.

Dr. Squires had treated the plaintiff in 1956 for a stone in the left kidney and in 1960 during a checkup examination found the plaintiff's right kidney to be "nonfunctioning," although not giving him any trouble. Dr. Squires gave as his opinion that the fall on October 1, 1961, aggravated the kidney condition, requiring the operation, and that plaintiff should have been hospitalized soon after the injury and well within 30 days following the injury.

The trial judge, sitting without a jury, in the small claims division of the superior court, made findings of fact, among which are these crucial ones:

> "(5) That the traumatic injury to the right kidney of plaintiff sustained on the 1st day of October, 1961, necessitated within a period of thirty days of the date of the accident his removal to an incorporated hospital and continuous confinement therein, although the plaintiff was not confined in the hospital, to wit, Mercy Hospital, Inc., Charlotte, North Carolina, until November 21, 1961, by Dr. Claud Squires who, on December 4, 1961, removed the right kidney of plaintiff by surgical operation in said Mercy Hospital, Inc.;
>
> "(6) That the traumatic injury to the right kidney of plaintiff was the sole and independent cause for removal of the right kidney of plaintiff, and necessitated his removal to an incorporated hospital and continuous confinement therein within a period of thirty days from October 1, 1961; that plaintiff was treated by Dr. C. D. Williams, Jr. of Charlotte, North Carolina after he was given emergency treatment at Monroe General Hospital, Inc. on the 1st day of October, 1961, and later in said day brought to Charlotte to his home; said Dr. Williams is not an urologist";

On the basis of findings, the judge concluded the plaintiff was entitled to recover both for hospital indemnity and loss of wages, and rendered judgment accordingly, from which the defendant appealed.

Elbert E. Foster for plaintiff appellee.

Berry & Browne, Allen and Steed by Thomas W. Steed, Jr., for defendant appellant.

HIGGINS, J. The essential facts are not in dispute. The plaintiff contends the court's finding No. 6, unexcepted to, is conclusive, and establishes his right to recover under the policy. However, the defendant, at the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence, moved for judgment of nonsuit. Exceptions to the refusal to nonsuit were taken and are assigned as error. Consequently, the question whether No. 6 is a finding of fact, a conclusion of law, or a combination of both, is immaterial. The sufficiency of all the evidence to support the judgment is challenged by the assignment of error. The ultimate and controlling facts not being in dispute, the construction of the policy becomes a matter of law.

The parties admit the plaintiff received an injury by accident on October 1, 1961. He received first aid treatment for burns on that date. Within two or three days thereafter he developed pain over the kidney area. However, he did some work in his regular occupation as driver of the fire truck. The pain became more and more intense until on November 21, under his doctor's orders, he entered Mercy Hospital in Charlotte where, on December 4, Dr. Squires removed his right kidney.

Claims are provided for under "SPECIAL INDEMNITY" provisions of the policy. The main coverage is for loss of life, one or both hands, one or both feet, the sight of one or both eyes, amputation of certain fingers on one or both hands. No. 3 provides for the indemnity for the expenses of hospital confinement. No. 6 provides for weekly income while in hospital for the period of such confinement. Both provisions require that the loss shall occur within 30 days from the date of the accident, and that the confinement must be continuous. Within 30 days from the time it happened, the accident must necessitate removal to and continuous confinement within an incorporated hospital. Actually the terms cover only what the victim of the accident does — not what he might have done.

All the evidence indicated, and the court found, the plaintiff did not enter the hospital until 51 days after the accident. Notwithstanding the doctor's testimony that claimant should have entered the hospital for treatment of his injury within the period of 30 days after he sustained his injury, nevertheless he delayed for 51 days. The insurance policy, by its plain and unambiguous terms, insures against

what actually happens to the patient — not what some doctor may conclude afterwards should have happened to him.

The policy upon which the plaintiff seeks to recover was approved both as to form and premium rate by the North Carolina Commissioner of Insurance. In order to determine a reasonable premium rate for accidental injury, the insurer, by the contract, must set out the specific types of loss which are covered and also the time limit within which the loss must actually occur. The time limitations fixed by the policy within which the loss must occur is based on the theory that the longer the time between the accident and the time the loss is incurred, the greater the chances are that facts not attributable to the injury do contribute to the loss. *Clark v. Ins. Co.*, 193 N.C. 166, 136 S.E. 291; *Continental Casualty Co. v. Ogburn*, 175 Ala. 375, 57 So. 852; *Mullis v. National Casualty Co.*, 273 Ky. 686, 117 S.W. 2d 928; 29A Am. Jur., Insurance, 1163; 118 A.L.R. 335. " . . . (P)olicies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties." *Powers v. Ins. Co.*, 186 N.C. 336, 119 S.E. 481; 14 R.C.L. 931.

The beginning of the time period in which the loss must occur is fixed at 30 days from the date of the accident. The fact that plaintiff chose to purchase a policy with insufficient time limit to cover this particular loss neither justifies nor permits the court to rewrite the policy to cover the loss. Judgment of nonsuit should have been entered at the close of the evidence. The judgment in favor of the plaintiff in the court below is

Reversed.

GENE'S, INC., PLAINTIFF v. CITY OF CHARLOTTE, DEFENDANT.

(Filed 20 March 1963.)

1. Injunctions § 14—

Failure of defendant to appeal from the continuance of a temporary restraining order does not entitle plaintiff to judgment at the hearing on the merits, since the preliminary determination not only does not constitute *res judicata* but may not even be considered at the final hearing.

2. Municipal Corporations § 29—

The owner of a drive-in restaurant abutting a street at an intersection is not entitled to restrain the municipality from constructing a median preventing the left turning of traffic into or from the intersecting street, even though the median is not constructed across an intersection some four

miles distant at which a competitor maintaines its business, since the municipality is vested with police power to regulate or divert vehicular traffic upon the streets. G.S. 160-200(11), (31).

3. Appeal and Error § 19—

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

APPEAL by plaintiff from *Pless, J.*, January 7, 1963 Special "A" Term of MECKLENBURG.

Plaintiff instituted this action to restrain the City of Charlotte from constructing a median strip in front of its property on Independence Boulevard.

For the purpose of this appeal, the admissions in the pleadings and the plaintiff's evidence establish the following facts:

On December 4, 1961, the City Council of Charlotte adopted the recommendation of its Traffic Engineering Department that a raised median be constructed along the center of Independence Boulevard from Caldwell Street to Sharon Amity Road in the City. Independence Boulevard between East Fourth Street and Elizabeth Avenue is included within this area. Plaintiff owns and operates Jerry's Drive-In Restaurant which is located in the northwest corner of the intersection of Independence Boulevard and Fourth Street about fifteen feet from Fourth Street. The restaurant has three driveways into Independence Boulevard and one into East Fourth Street. On December 4, 1961, there was a median in the Boulevard in front of plaintiff's restaurant. However, it contained an opening which permitted vehicles leaving the restaurant to turn left in order to go north on the Boulevard and permitted vehicles traveling north to turn left into the restaurant driveway. The City now proposes to construct an unbroken median strip which would separate opposing traffic lanes. It would not affect the access of traffic proceeding south on the Boulevard and west on Fourth Street to the restaurant, but northbound traffic on the Boulevard would have to go past the restaurant to the end of the block, turn left and come back south to reach it. Cars leaving the restaurant, in order to go north, would have to turn right, or south, on the Boulevard and make a left turn at the next block or leave the restaurant from the Fourth Street entrance and go aound the block. The latter mode of exit would greatly increase the congestion of plaintiff's lot because of the lack of space between the building and Fourth Street. During rush hours, when plaintiff's business is heaviest, Fourth Street has three lanes for eastbound traffic and a left turn across these lanes, as a practical matter, is impossible. About four miles from the plaintiff's restaurant is a drive-in restaurant, called South 21, which the pro-

posed median "in no way obstructs any driveway access." Plaintiff expects to lose from sixty to seventy dollars a day, seven days a week, if the median is perfected.

None of the maps or exhibits referred to in the evidence were sent up with the case on appeal and this omission handicaps the opinion. For the sake of clarity we have treated Independence Boulevard between Fourth Street and Elizabeth Avenue as running north and south; Fourth Street, east and west.

Plaintiff alleges that the construction of an unbroken median strip in front of its place of business will cause it irreparable damage from the loss of business; that it is unnecessary, unreasonable, and discriminatory as to it in that customers of other drive-in restaurants in the City of Charlotte have access to them by means of left turns across the street.

On February 27, 1962, Judge W. K. McLean signed a temporary injunction restraining the City from constructing the median; on March 29, 1962, Judge Hal H. Walker continued the injunction until the trial which was had on January 17, 1963 before Judge J. Will Pless. At the close of plaintiff's evidence the defendant's motion for judgment of nonsuit was allowed but Judge Pless, in his discretion, continued the restraining order pending the outcome of this appeal. The judgment recites that by consent the judge heard the case without a jury. No objection or exception to this recital appears in the record.

Plumides & Plumides for plaintiff appellant.
John T. Morrisey, Sr., for defendant appellee.

SHARP, J. Every municipal corporation has specific statutory authority to adopt such ordinances for the regulation and use of its streets as it deems best for the public welfare of its citizens and to provide for the regulation and diversion of vehicular traffic upon its streets. G.S. 160-200(11), (31). It is the exercise of the police power vested in the City of Charlotte by this statute which the plaintiff has had restrained for over a year and which it seeks to restrain permanently.

When this case was called for trial, the plaintiff made a motion for judgment on the pleadings and that the temporary restraining order be made permanent "upon the theory that the City not having appealed from said order, that the matter has now been adjudicated. . ." The denial of this motion is the subject of plaintiff's first assignment of error. It is overruled. Plaintiff was not entitled to a judgment on the pleadings, and the granting of the temporary injunction was no determination of the case upon its merits.

"The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing." *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116.

In the recent case of *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732, decided since the preliminary injunction was issued in this case, *Justice Bobbitt* thoroughly explored the rights of an abutting landowner when a median strip, separating the flow of traffic, is placed in the highway. In the *Barnes* case, as in this, plaintiff did not contend that the public safety was not served by the median strip. He sought compensation for an alleged diminution in the value of his property which fronted on U. S. Highway No. 401 when the north and south-bound traffic lanes were separated by a median strip. The Court said: "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."

When an ordinance is within the grant of power to the municipality, the presumption is that it is reasonable. *State v. Hundley,* 195 N.C. 377, 142 S.E. 330. Independence Boulevard is a four-lane street in Charlotte, the State's largest city. A median strip, completely separating traffic moving in opposite directions on it, and preventing left turns except at intersections, is an obvious safety device clearly calculated to reduce traffic hazards. Plaintiff still has free and unhampered ingress and egress to its property. It has no property right in having the flow of traffic past its drive-in restaurant remain unchanged from December 4, 1961.

As noted in the opinion in *Barnes, supra,* in an annotation entitled "Power to Restrict or Interfere with Access of Aubutter by Traffic Regulations," 73 A.L.R. 2d 689, 692, 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." Certainly there is nothing in this record to suggest that the ordinance under consideration is either unreasonable or oppressive. It was a proper exercise of the City's police power. The testimony by plaintiff's president that there is a left-turn lane in front of South 21 on Independence Boulevard, four miles away from Jerry's

Drive-In, does not tend to show that the ordinance confers upon the City Council a power to discriminate arbitrarily as between drive-in restaurants. The motion for nonsuit was properly allowed.

For the first time, in its assignments of error, plaintiff complains that it was denied a jury trial. Even if there were issues of fact in this case, it would not be necessary to consider this assignment since it is not supported by any exception in the record. "Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal." *Vance v. Hampton,* 256 N.C. 557, 561, 124 S.E. 2d 527; *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487.

The judgment below is

Affirmed.

ROBERT F. CLEMENT v. FRANCES GENEVA HART KOCH.

(Filed 20 March 1963.)

1. Libel and Slander § 12—

Allegations that defendant filed with the clerk of the Superior Court a certain writing and by written application caused said writing to be recorded, *held* sufficient to support the inference that defendant was the author of the writing and caused its publication or republication.

2. Same—

Allegation that defendant published libelous matter referring to "Robert F. Clemmons" and that the matter was written about and injured plaintiff, Robert F. Clement, *held* sufficient under the doctrine of *idem sonans.*

3. Libel and Slander § 2—

Accusation that plaintiff came into defendant's home and took specified items of personal property constitutes a libel, since if the words do not charge larceny, they tend to subject plaintiff to disgrace, ridicule, odium or contempt.

4. Libel and Slander § 7—

Allegation that defendant filed a libelous matter with the clerk of the Superior Court does not render the complaint demurrable on the ground of privilege when it does not appear from the complaint that defendant was acting other than in an individual capacity or that the words were uttered in a judicial proceeding.

APPEAL by plaintiff from *Patton, J.,* October 1962 Civil Term of BUNCOMBE.

Civil action for damages for libel, heard below on demurrer to complaint.

Plaintiff alleged defendant, on or about January 15, 1962, filed in the office of the Clerk of the Superior Court of Buncombe County a certain writing, to wit: "November 25th Robert F. Clemmons and wife, Frances, came into my home while I was at work and took all of my bed coverings, knives, cooking utensils, sheets, pillow cases, the feather bed left to me by my mother, two watches left me by my father and most of the household furnishing in general in the house . . . Brent Phillips and his mother can testify to this fact."

Plaintiff alleged further: Defendant, by written application and express request, caused said writing to be recorded in the office of said clerk in the public records concerning Last Wills and Testaments in Book of Wills No. YY, page 585. The accusatory statements in said writing are false and malicious. These false and malicious statements were written of and concerning plaintiff and constitute a charge against plaintiff "to the effect that he broke into and entered the home of one, Louis Cox, and therein committed the crime of larceny by taking from said home the personal property named therein." Defendant filed and caused said writing to be recorded and publicized with knowledge that the accusations made therein against plaintiff "were untrue and false" and "with the wicked and malicious intent on the part of the said defendant to injure and damage the good name, fame, and character of the plaintiff in this community, and among his neighbors and friends."

The demurrer specifies the following grounds of objection to the complaint:

"1. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that the defendant did not utter or publish any libelous or defamatory matter against the plaintiff; and that the words alleged to have been uttered and published by the said defendant, which words are set out at length in paragraph 3 of the plaintiff's Complaint, do not constitute in law a libel, nor are they in any manner defamatory.

"2. That this defendant, in an individual capacity, is not a proper or necessary party defendant, which fact likewise appears from the face of plaintiff's Complaint.

"3. That the plaintiff herein was not referred to in the words alleged to be libelous.

"4. That, as appears upon the face of the Complaint, the matters alleged to have been uttered and published by the defendant occurred in a judicial proceeding and are privileged."

Judgment sustaining the demurrer and dismissing the action was entered. Plaintiff excepted and appealed.

Don C. Young for plaintiff appellant.
Bruce J. Brown for defendant appellee.

BOBBITT, J. The only reasonable inference to be drawn from plaintiff's allegations is that Louis Cox was the author of the writing and that plaintiff's cause of action is for the publication or republication thereof. 33 Am. Jur., Libel and Slander § 95; 53 C.J.S., Libel and Slander § 86; Restatement, Torts, Vol. III, § 578; *Johnston v. Lance,* 29 N.C. 448; *Hamilton v. Nance,* 159 N.C. 56, 74 S.E. 627; *Lewis v. Carr,* 178 N.C. 578, 101 S.E. 97.

Notwithstanding the writing refers to "Robert F. Clemmons" rather than "Robert F. Clement," this difference in spelling is insufficient to impair plaintiff's allegation that the accusatory statements were written of and concerning *plaintiff* and that *plaintiff* suffered injury and damage on account of the publication thereof by defendant. The names are so nearly alike as to bring them within the rule of *idem sonans. S. v. Sawyer,* 233 N.C. 76, 78, 62 S.E. 2d 515, and cases cited.

The accusatory statements in said writing, if false, are libelous. If they do not charge the crime of larceny they certainly tend to subject plaintiff to disgrace, ridicule, odium or contempt. *Simmons v. Morse,* 51 N.C. 6; *Hedgepeth v. Coleman,* 183 N.C. 309, 111 S.E. 517; *Davis v. Retail Stores, Inc.,* 211 N.C. 551, 191 S.E. 33; *Kindley v. Privette,* 241 N.C. 140, 84 S.E. 2d 660.

Notwithstanding defendant's assertion to the contrary, it does not appear upon the face of the complaint that defendant "is not a proper or necessary party defendant." She, the sole defendant, is sued "in an individual capacity." It does not appear upon the face of the complaint that defendant is related to the matters alleged therein in any capacity other than as an individual.

Notwithstanding defendant's assertion to the contrary, it does not appear upon the face of the complaint that "the matters alleged to have been uttered and published by the defendant occurred in a judicial proceeding and are privileged." Plaintiff's allegations are silent as to the nature of the writing and as to why and under what circumstances defendant caused it to be recorded.

The conclusion reached is that the grounds of objection to the complaint asserted by defendant are without merit and that the court should have overruled the demurrer. Hence, the judgment sustaining the demurrer and dismissing the action is reversed.

However, it should be stated that, in our view, the complaint does no more than meet minimum requirements. *Gillispie v. Service Stores,* 258 N.C. 487, 128 S.E. 2d 762, and cases cited. It would seem appropriate for defendant to move in the superior court that plaintiff be required to make his complaint more definite and certain to the end that defendant and the court may be advised of the precise nature of the cause of action on which plaintiff seeks to recover. G.S. 1-153.

Reversed.

ELIZABETH S. BOGER v.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 20 March 1963.)

1. Insurance § 13—

The fact that a policy with premium payable monthly is issued on the 15th of the month does not make the 15th of each succeeding month its premium date when the unambiguous terms of the policy provide that the initial payment should pay the premium only until the first of the succeeding month and requires each succeeding premium to be paid on the first of the month.

2. Same; Insurance § 21—

When the employer fails to pay the premium on a group policy within the grace period provided therein, insurer's liability upon a certificate issued under the group policy terminates notwithstanding the employer may have deducted from the employee's wages his *pro rata* share of the premium.

APPEAL by plaintiff from *Pless, J.,* November 1962 Term, GASTON Superior Court.

The plaintiff, beneficiary, instituted this civil action against the defendant, insurer, to recover death benefits under its group employees security insurance policy issued to Davis & Sons Construction Company, the employer. The insurer issued a certificate of coverage to the plaintiff's husband, Floyd A. Boger, showing the effective date both of the policy and of the certificate to be June 15, 1960. The certificate provided that all benefits are subject to the group policy which alone constitutes the agreement under which payments are made.

The parties stipulated: The group policy issued on June 15, 1960, provided that Davis & Sons Construction Company would pay to the insurer a stipulated monthly premium on the first of each month.

"Under the terms of said policy, a grace period of 31 days was provided for the payment of monthly premiums, and it was further provided that the policy would automatically terminate if any monthly premium was not paid within the grace period. . . . Each premium was paid monthly . . . from June 15, 1960 through March 1, 1961."

For the premium due April 1, 1961, Davis & Sons Construction Company issued a check which was returned by the bank unpaid for lack of funds. On May 25, 1961, another check was issued to cover the April 1 premium. This check likewise was returned unpaid for lack of funds. Davis & Sons Construction Company did not pay any premium after March 1, 1961, although it continued to deduct a specified amount from the salary of Floyd A. Boger which was to be applied toward the payment of premium. Floyd A. Boger died by accidental means on May 12, 1961. He had no notice that his employer had defaulted in the payment of any premium due on the group policy.

The parties waived jury trial, stipulated the facts, upon which Judge Pless concluded as a matter of law the policy terminated on May 2, 1961, for failure of Davis & Sons Construction Company to pay the premium due April 1, 1961. Having concluded the premium had not been paid within the 31-day grace period provided in the policy, the court entered judgment dismissing the action. The plaintiff appealed.

O. A. Warren, Whitener & Mitchem by Basil L. Whitener, Wade W. Mitchem, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by R. C. Carmichael, Jr., for defendant appellee.

HIGGINS J. The plaintiff insists the policy, having been issued on June 15, 1960, each premium date thereafter is the 15th of each month rather than the first, and consequently the grace period did not expire until May 16, 1961. The contention contravenes the plain and unambiguous terms of the policy. The initial payment of premium only carried the policy to July 1, 1960. On that date and on the first of each month thereafter, a premium was due. *Rivers v. Ins. Co.*, 245 N.C. 461, 96 S.E. 2d 431; *Johnson v. Casualty Co.*, 234 N.C. 25, 65 S.E. 2d 347.

The plaintiff further contends that her husband having paid to his employer (by deduction from his wages) his quota of the required premium, the policy was in force as to him. The group policy terminated on May 2, 1961, on which date the grace period for payment of the April 1st period came to an end. The certificate of coverage termi-

nated with the group policy. By plain terms of both, payment to the insurer was necessary to keep the policy in force. Deduction of the employee's wages by the employer was not payment to the insurer. *Newman v. Ins. Co.*, 255 N.C. 722, 122 S.E. 2d 701; *Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372; *Dewease v. Ins. Co.*, 208 N.C. 732, 182 S.E. 447. "When procuring the policy, obtaining application of employees, taking payment deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves." *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196, 81 L. ed 1036.

The plaintiff has failed to make allegations or to offer proof the defendant waived its right to the payment of the premium due April 1, 1961. The insured's death did not occur within the grace period for the payment of that premium. The defendant's liability terminated on May 2, 1961. . . The death of the insured occurred after that date. Consequently the judgment dismissing the action is

Affirmed.

LOCAL FINANCE COMPANY OF SHELBY v. DELBERT N. JORDAN.

(Filed 20 March 1963.)

Injunctions § 13—

In a suit to restrain the threatened breach of a written contract, order continuing the temporary restraining order to the hearing upon the filing of bond by plaintiff will ordinarily be affirmed on appeal, even though defendant challenges the validity of the contract, since the refusal to continue the temporary order would virtually determine the case upon its merits.

BOBBITT, J., concurs in result.

APPEAL by defendant from *Pless, J.*, October 1962 Term, CLEVELAND Superior Court.

The plaintiff instituted this civil action to restrain the defendant from violating his written contract not to accept employment from a competitor within one year after leaving plaintiff's employment. The contract, dated September 12, 1961, provided:

"13. That for a period of one year after the termination of my employment for any reason I will not engage in any way, directly

or indirectly, in any business competitive with the Employer's business, nor solicit or in any other way or manner work for or assist any competitive business, in any city or the environs or trade territory thereof in which I shall have been located or employed within one year prior to such termination."

The contract further provided:

"2. That the services to be rendered by me require special training, skill and experience, and that this contract is made to obtain such skilled services for the Employer."

The plaintiff's verified complaint alleged that defendant voluntarily left plaintiff's employment as manager of its Shelby, North Carolina, small loan office and immediately accepted employment by a competitor in the same business in Shelby. By verified answer, the defendant admitted (1) that he executed the contract, (2) that he left plaintiff's employment in Shelby and accepted similar employment by a competitor.

He defended upon two grounds: (1) He was required to execute the contract after the employment began, hence it was without consideration. (2) The contract is void for indefiniteness and is an unlawful restraint of trade.

After hearing, Judge Pless continued the restraining order, requiring the plaintiff to execute a bond in the sum of $5,000.00. The defendant appealed.

Joyner & Howison, by Walton K. Joyner, for plaintiff, appellee.

Mullen, Holland & Cooke, by Frank P. Cooke, for defendant appellant.

HIGGINS, J. The plaintiff seeks to restrain the breach of a written contract the parties executed. True, the validity of that contract is in dispute. Ordinarily, a court of equity should not resolve a serious dispute without a full hearing on the merits. "It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37;

Boone v. Boone, 217 N.C. 722, 9 S.E. 2d 383; *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80.

Under the circumstances, Judge Pless was justified in continuing the restraining order to the final hearing. Consequently the order is

Affirmed.

BOBBITT, J. concurs in result.

JULIA MAE PARKS v. RUBY D. JACOBS AND JOSEPH JACOBS.

(Filed 20 March 1963.)

Vendor and Purchaser § 2—

The fact that the purchaser has the specified cash payment at the office of his attorney and requests the vendor to come there to close the deal does not constitute tender, since it is incumbent upon the purchaser to tender payment to the vendor, who is not required to go to a place designated by the purchaser.

APPEAL by plaintiff from *Fountain, S.J.,* October 1962 Civil Term of ONSLOW.

This is an action to recover a deposit made for an option to purchase two lots owned by *feme* defendant. Plaintiff alleges she exercised her option by notice to the owner accompanied by a tender of cash and securities within the time required by the option and defendant, owner, refused to comply as required by the contract. The amount paid for the option was $1,000, but plaintiff collected from a tenant of the property the sum of $100. This suit is to recover $900.

Defendants admitted the execution of the option to sell for $37,500, of which $12,750, including the $1,000 deposit, was to be paid in cash when the option was exercised, the balance to be in notes secured by purchase money deed of trust. Defendants denied plaintiff exercised the option by paying or tendering payment of the cash within the ten-day period required by the option.

Defendants, at the conclusion of plaintiffs' evidence, moved for nonsuit. The motion was allowed. Plaintiff appealed.

E. R. Temple for plaintiff appellant.

No counsel contra.

PER CURIAM. The written option given by defendants to plaintiff was not offered in evidence. The parties are, however, in agreement as to its terms. Defendants' obligation to convey was conditioned upon plaintiff's payment of $12,750 to Ruby Jacobs on or prior to 19 August 1955 and the execution of purchase money notes for the balance secured by deed of trust on the property to be conveyed. The contract delineated by the testimony was not, as plaintiff alleges, a bilateral contract to buy and sell, but a unilateral contract or option which could be converted into a bilateral contract when, and only when, the optionee had complied with the terms of the option. *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687.

The evidence shows H. C. Westbrook secured the option for plaintiff and was her agent charged with responsibility of consummating the purchase. He testified plaintiff executed purchase money notes and deed of trust and provided him with funds necessary to make the cash payment. The fact that plaintiff was able to pay, standing alone, was not sufficient to bind defendants. The option also required a monetary payment. Plaintiff had the burden of showing payment or a tender and refusal to accept. *Trust Co. v. Medford,* 258 N.C. 146; *Winders v. Kenan, supra.*

Westbrook, plaintiff's witness to establish acceptance of the option by plaintiff, was asked specifically if he tendered the money to Mrs. Jacobs. His reply was he took the money out of the bank and carried it to the office of Mr. Sommersill, his attorney. He sought to get defendants to come to Sommersill's office to consummate the sale. *Feme* defendant, owner of the land, refused to go. This evidence was insufficient to establish a tender, for a "tender imports not merely the readiness and the ability to pay or perform, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the tender is to be made." *Bane v. R.R.,* 171 N.C. 328, 88 S.E. 477; *Hall v. Jones,* 164 N.C. 199, 80 S.E. 228; *Anderson v. Stewart,* 3 A.L.R. 2d 250; 86 C.J.S. 567-8.

The option did not require defendants to go to the office of plaintiff's attorney. Plaintiff had the deed prepared by her attorney. She was entitled to require execution contemporaneously with a tender; but defendant was not required to go to plaintiff or her attorney so that a tender could be made.

Plaintiff makes no contention that she personally made a tender to defendants. Her statement was: "Within the ten-day period, Mr. Westbrook, my agent, made a tender of the money to Mrs. Jacobs." Immediately following that statement she said: "It was made in Mr. Sommersill's office where the papers were all drawn up and waiting

for her signature and of course she wasn't to get the money until she signed the deed."

It is not suggested that plaintiff was in Sommersill's office. All the testimony negatives the idea that *feme* defendant, owner of the property, ever went to Sommersill's office. Hence plaintiff's statement that Westbrook made a tender within the ten-day period in Sommersill's office is a mere conclusion which she drew from what Sommersill told her. It is an erroneous conclusion, one impossible under the physical facts, hence without probative value. *Jones v. Schaffer*, 252 N.C. 368, 114 S.E. 2d 105.

Affirmed.

PLEATERS, INCORPORATED, PLAINTIFF v. GEORGE A. KOSTAKES AND WIFE, ANGELEKE G. KOSTAKES, DEFENDANTS.

(Filed 20 March 1963.)

1. Injunctions § 13—

Where the court is not requested to find facts upon the hearing of an order to show cause, the continuance of the temporary restraining order without making specific findings will not be disturbed when the allegations of the verified complaint and affidavit are sufficient to warrant the relief.

2. Same—

In an action for permanent injunction to restrain a breach of a written contract upon controversy as to whether the proper construction of the contract precluded the action threatened by defendant, the cause is properly continued to the hearing upon a *prima facie* showing by plaintiff.

APPEAL by defendants from *Brock J.*, January 21, 1963 Special "B" Civil Term of Mecklenburg.

Action to restrain the construction of a building. The complaint and affidavit of the plaintiff tend to show the following facts:

Defendants are the owners of a series of connected store buildings, known as Westover Shopping Center, located between West Boulevard and Remount Road in the City of Charlotte. Store No. "F" is located on the northwestern end of the series and is 171 feet from Remount Road. On March 29, 1961, C. E. Waters, who later became the vice-president of plaintiff corporation, negotiated a lease with defendants for store No. "F." A written memorandum, signed by the defendant,

contained the following provision: "1. No other buildings will be built on the west side." On April 7, 1961, a formal lease was executed whereby defendants leased Store No. "F" to Pleaters Company for five years beginning July 1, 1961 at a monthly rental of $350.00 with an option to renew for another five years at $400.00 a month. The lessors agreed to pave the parking area between the building and Remount Road, to paint the parking spaces therein, and to permit lessees to install an electric sign on the Remount Road side near the center entrance and sidewalk sign. Paragraph 15 of the lease is as follows:

> "The above building will be used for dry cleaning and shirt laundry only. And no coca-cola machines or other drinking machines will be placed in this store for public use. Also the lessors will grant exclusive Dry Cleaning and finished laundry rights to the lessees and no other dry-cleaning or finished laundry *or other building will be added to Westover Shopping Center.*" (Emphasis ours)

This lease provided that it was to be surrendered for an identical lease if lessee was incorporated by September 15, 1961.

Thereafter on June 30, 1961 a substantially identical lease, containing paragraph 15 as quoted above, was executed by the defendants to Pleaters, Inc. which duly recorded it.

The location of the leased building provides an unobstructed view and easy access from Remount Road to the drive-in service window on the west side of plaintiff's building. These conditions were the primary factors which caused plaintiff to lease the premises. It has erected a large neon sign on the west side of the roof and another such sign on the western edge of the shopping center.

Thereafter defendants began the construction of another building between plaintiff's premises and the western edge of the shopping center. On January 17, 1963, plaintiff instituted this action to restrain the construction, and secured a preliminary injunction. Upon the hearing, defendants' affidavit tended to show that the building they proposed to construct would be located sixty-six feet from the west side of plaintiff's premises and sixty feet from the western line of the shopping center; that it would be forty-five feet wide and one hundred and thirty feet long; and that defendants have agreed to lease it to a drug store for ten years for a total rental of $88,000.00.

Defendants contend that paragraph 15 of the plaintiff's lease is ambiguous, but that it was only intended to prevent another dry-cleaning or finished-laundry building being added to Westover Shopping Center.

The judge continued the preliminary injunction until the final determination of the action. Defendants appealed.

Charles B. Caudle, James B. Ledford for plaintiff appellee.
Osborne & Griffin for defendant appellants.

PER CURIAM. The judge below was not requested to find the facts and he found none. However, the allegations of the verified complaint and affidavit are sufficient to warrant the temporary restraining order and no findings were required. *Owen v. DeBruhl Agency, Inc.,* 241 N.C. 597, 86 S.E. 2d 197.

Ordinarily a temporary restraining order will be continued to the trial if there is probable cause to believe that "plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force," or if it appears reasonably necessary to protect the plaintiff's right until the controversy can be determined. *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80.

In this case plaintiff has made a *prima facie* showing of its right to the final relief it seeks. In the meantime, defendants should not be permitted to construct the building, the erection of which is the subject of the controversy. *Local Finance Company v. Jordan, ante,* 127. The order continuing the preliminary injunction is

Affirmed.

MELVIN A. SHORT v. CENTRAL BUS SALES CORPORATION, A CORPORATION, AND OLYMPIC BUS SALES, INC., A CORPORATION.

(Filed 20 March 1963.)

1. Pleadings § 15—

A demurrer *ore tenus* which fails to specify the grounds of objection may be disregarded. G.S. 1-128.

2. Pleadings § 13—

The filing of answer waives all grounds for demurrer except want of jurisdiction or failure of the complaint to state a cause of action.

3. Trial § 20—

Where motion to nonsuit is not renewed after the introduction of evidence by defendant, defendant waives the matter. G.S. 1-183.

APPEAL by defendants from *Froneberger, J.,* 7 January 1963 Schedule B Civil Term of MECKLENBURG.

Civil action to recover $880.00 allegedly due as salary from defendants, and also $250.00 allegedly due from defendants as a commission in the sale of a 1948 G.M.C. bus, in which an ancillary order of attachment was issued.

The jury found by its verdict that the defendants are indebted to the plaintiff in the sum of $1,130.00 with interest from 28 July 1960.

The judgment entered recites that it appears to the court that Fidelity and Deposit Company of Maryland has executed and filed in the case a bond agreeing to pay any judgment up to $1,250.00. This bond is not in the record.

From the judgment entered that plaintiff have and recover from the defendants and from Fidelity and Deposit Company of Maryland, jointly and severally, the sum of $1,130.00, with interest, together with the costs of the action, except that the liability of Fidelity and Deposit Company of Maryland shall be discharged upon the payment of $1,250.00 upon this judgment, defendants appeal.

Plumides & Plumides by Michael G. Plumides for defendant appellants.

Myers & Rush by Charles T. Myers for plaintiff appellee.

PER CURIAM. Defendants filed a joint answer. Defendants assign as error the court's overruling their demurrer *ore tenus* made at the trial prior to the introduction of evidence. The demurrer *ore tenus* did not specify, so far as the record shows, any ground of objection to the complaint, and consequently it "may be disregarded." G.S. 1-128; *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809. Regardless of that, the record shows that the court had jurisdiction over the subject matter of the action and of the parties, and a study of the complaint shows that it states facts sufficient to constitute a cause of action. Consequently, the complaint cannot be overthrown by a demurrer *ore tenus* after answer by defendants has been filed. G.S. 1-134; *Cherry v. R.R.,* 185 N.C. 90, 116 S.E. 192; *Roberts v. Grogan,* 222 N.C. 30, 21 S.E. 2d 829. This assignment of error is overruled.

Defendants assign as error the overruling of their motion for judgment of nonsuit made at the close of plaintiff's evidence. Defendants then introduced evidence, but did not renew their motion for judgment of nonsuit. By introducing evidence, they waived their motion for judgment of nonsuit made at the close of plaintiff's evidence. G.S. 1-183; *Hollowell v. Archbell,* 250 N.C. 716, 110 S.E. 2d 262. However, plaintiff's evidence was sufficient to carry the case to the jury, even if

defendants had renewed their motion for judgment of nonsuit at the close of all the evidence.

Defendants' other assignments of error are without merit, deserve no discussion, and all are overruled.

After the answer had been filed, defendants' present counsel of record were permitted by an order of the court to withdraw as counsel of record for the defendants because the defendants had not paid them any fee at all. At the 5 February 1962 Schedule B Civil Term there was a trial of this case and the jury found by its verdict that the defendants were indebted to the plaintiff in the sum of $1,130.00, with interest from 28 July 1960, and judgment at that term was entered upon the verdict. At the 14 May 1962 Special Civil Term the judge presiding entered an order setting this verdict and judgment aside on the ground that the clerk of Mecklenburg County did not inform the defendants that their case was pending for trial after counsel for defendants were relieved of their responsibility, and that the defendants did not have an opportunity to employ other counsel or have their day in court before it was tried at the 5 February 1962 Schedule B Civil Term. The record is in a very unsatisfactory condition. For instance, it does not have the summons issued in the case, the organization of the court, etc.

In the trial below we find

No error.

LARAINE D. KIRKMAN v. JESS L. WILLARD.

(Filed 20 March 1963.)

APPEAL by defendant from *Bone, J.*, October 1962 Term of NEW HANOVER.

Civil action to recover for personal injury and property damage occasioned by a collision of automobiles at a street intersection in the city of Wilmington.

About 1:15 P.M., 13 March 1958, plaintiff was driving northwardly on North Fifteenth Street, and defendant was driving eastwardly on Chestnut Street. At the intersection of these streets each is 25 to 30 feet wide. There were "Yield Right of Way" signs facing traffic on Fifteenth. A light rain was falling and the street was wet.

Plaintiff's version of the accident: Plaintiff stopped before entering the intersection and had a clear view one and a half blocks to her left

on Chestnut. She saw no moving vehicle. She started through the intersection at a speed of 2 to 5 miles per hour. She heard brakes squeal. Defendant, about three car-lengths away, was approaching at a speed estimated to be 45 to 50 miles per hour. The front of defendant's car struck plaintiff's car about the left rear door and fender. At the time of impact the rear of plaintiff's car was about the center of Chestnut Street. The force of the impact turned her car around so that it faced West and stopped about half a car-length north of the intersection. Defendant's car stopped at the point of impact. Plaintiff was injured and her automobile was damaged.

Defendant's version: Defendant was travelling eastwardly on Chestnut Street at about 20 to 25 miles per hour. When about 60 feet from the intersection he saw plaintiff's car which was about 25 feet south of the intersection. Her speed was 25 to 30 miles per hour. She appeared to slacken speed as if to stop and then increased speed and attempted to cross the intersection in front of defendant. At the time of impact her speed was about 35 miles per hour. Defendant applied brakes, swerved slightly to the left, and skidded about 10 feet before striking plaintiff's car. Defendant's car stopped upon impact. It was barely moving at the time of the collision.

The jury answered issues of negligence, contributory negligence and damages in favor of plaintiff. From judgment in accordance with the verdict defendant appeals.

J. H. Ferguson and W. G. Smith for plaintiff.

Poisson, Marshall, Barnhill & Williams, and L. Bradford Tillery for defendant.

PER CURIAM. The court properly overruled defendant's motion for nonsuit. When considered in the light most favorable to plaintiff the evidence presented issues of fact for jury determination. The assignments of error based on exceptions to the admission and exclusion of evidence do not disclose error sufficiently prejudicial to warrant a new trial.

No error.

STATE v. CHARLES HENRY BRILEY.

(Filed 20 March 1963.)

APPEAL by defendant from *Morris, J.*, October-November 1962 Criminal Term of WILSON.

Criminal prosecution on warrant charging that defendant, on Saturday, May 5, 1962, at 9:05 p.m., in Wilson County, unlawfully and wilfully operated a motor vehicle upon the public highway after his operator's license had been permanently revoked. Upon trial *de novo* in the 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 imposing a prison sentence of one year was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Assistant Attorneys General Barham and Bullock for the State.

Robert A. Farris and Allen G. Thomas for defendant appellant.

PER CURIAM. The State offered evidence tending to show that defendant was operating a motor vehicle on a public highway in Wilson County (U. S. Highway 264) shortly after 9:00 p.m. on Saturday, May 5, 1962.

The State offered in evidence a certified copy of the official record (Form DL 49) of the North Carolina Department of Motor Vehicles, Drivers License Division, of defendant's convictions for violations of the motor vehicle laws and of the Department's actions on account thereof. According to this record, defendant's operator's license was permanently revoked on March 12, 1957. Defendant objected "to the portion that is not germane to this inquiry" and excepted to the admission of said record over his said objection. Nothing appears in the record indicating defendant designated what portion(s) of said record he considered "not germane to this inquiry." Hence, for reasons stated in *S. v. Corl*, 250 N.C. 252, 108 S.E. 2d 608, the assignment of error based on said exception is overruled. It is noteworthy that the more serious violations shown on said record constitute the grounds for said permanent revocation on March 12, 1957, to wit, three convictions for operating a motor vehicle on a public highway while under the influence of intoxicating liquor.

Each of defendant's remaining assignments of error has received careful consideration. Particular discussion thereof is deemed unnecessary. They do not disclose prejudicial error and are overruled.

No error.

STATE OF NORTH CAROLINA v. JEWEL DAVIS.

(Filed 20 March 1963.)

1. Homicide § 18—

Defendant is not entitled to introduce evidence that deceased at different times assaulted specifically named persons in order to establish the dangerous and violent character of deceased as relating to the issue of self-defense.

2. Criminal Law § 161—

The charge of the court will be construed contextually as a whole.

APPEAL by defendant from *Farthing, J.*, October 1962 Term of JACKSON.

Defendant was charged in a bill of indictment with the murder of Lester Green. The jury returned a verdict of manslaughter.

The facts to support the verdict and necessary to understand the challenge to the conviction are, briefly stated, these: Defendant went to the store of one Ferguson about 5:55 p.m. on 23 June 1962. He purchased a bag of flour, which he put on his left shoulder. Green came in the store about two or three minutes later than defendant. Green came up to defendant and said: "Jewel, I hear you are carrying a gun for me." Deceased put his right hand on defendant's left arm. Defendant said: "Get this man away from me." He made a move with his right hand in the direction of his right hip. Deceased grasped defendant and encircled defendant's arms. In the ensuing struggle defendant succeeded in getting his pistol. He shot deceased three times. One shot was in the chest, one in the back, and one in the hip. The last two shots were fired when the bodies were some five or six feet apart.

Defendant admitted he shot deceased, a man he knew to bear the reputation of being dangerous and violent. He claimed self-defense, justifying him in shooting and killing deceased.

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

W. R. Francis, M. Buchanan III, and T. D. Bryson, Jr., for defendant appellant.

PER CURIAM. Defendant offered evidence of deceased's reputation for violence. Additionally he sought to elicit by cross-examination of the State's witnesses the fact that deceased had committed specific violent assaults on persons other than defendant. The evidence was, on objection by the State, excluded. Defendant assigns as error the

court's refusal to permit him to show that deceased had at different times assaulted specifically named persons. The ruling was correct. It is in accord with prior decisions of this Court. *S. v. Morgan,* 245 N.C. 215, 95 S.E. 2d 507, and cases there cited.

Defendant assigns as error a portion of the court's charge, contending the court unduly limited his right of self-defense. When the charge is read as a whole, as it must be, we are of the opinion and hold that the law given the jury for its guidance in determining the merits of defendant's claim of self-defense was as declared in *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427, quoted with approval in *S. v. Fowler,* 250 N. C. 595, 108 S.E. 2d 892.

Our review of the record fails to disclose error of which defendant can justly complain.

No error.

COTTIE N. WITHERS AND HUSBAND, ULYSEES WITHERS, SARAH NORFLEET, WILLIE BARNES AND WIFE, COSEANNA TILLERY BARNES, ESTHER BARNES PLATT, AND ANNIE BARNES v. LONG MANUFACTURING COMPANY.

(Filed 20 March 1963.)

APPEAL by plaintiffs from *Morris, J.,* November, 1962 Civil Term, EDGECOMBE Superior Court.

The plaintiffs instituted this civil action to have the court adjudge that they, their heirs and assigns, have a perpetual right of way, "56.5 feet wide by approximately 324.5 feet long," for purposes of ingress and egress over a certain specifically described tract of land acquired by the defendant from the Atlantic Coast Line Railroad by deed dated August 29, 1960. The plaintiffs alleged they have acquired the right of way by adverse and hostile user for more than 20 years next preceding the institution of the action.

The plaintiffs' evidence failed to show any hostile or adverse use or occupation of the right of way now claimed. They did offer evidence that the defendant had closed by fence a part of what they had used for said purposes. From a judgment of nonsuit, the plaintiffs appealed.

Earl Whitted, Jr., for plaintiffs, appellants.

Bourne & Bourne, by Henry C. Bourne for defendant appellee.

PER CURIAM. The plaintiffs' allegations and evidence show the defendant acquired the land by deed from the Atlantic Coast Line Railroad which in turn had acquired it in fee and held it for railroad purposes. The evidence failed to show any dedication by the owner, or the exercise or assumption of any control over it by any city, county, or State authority. Prior to the deed to the defendant, the Atlantic Coast Line Railroad had held and used the property in its public transportation business. The land so held was protected against loss by adverse possession. G.S. 1-44. At most, the plaintiffs were permissive licensees. The erection of the fence was a revocation of the license.

The judgment of nonsuit is

Affirmed.

STATE v. BOBBY HUBERT.

(Filed 20 March 1963.)

Constitutional Law § 31—

The act of the court in recapitulating the testimony of a witness which the jury could not hear, *held* prejudicial on authority of *S. v. Payton*, 255 N.C. 420.

APPEAL by defendant from *Burgwyn, Emergency Judge,* Regular October 1, 1962 Schedule B Criminal Term of MECKLENBURG.

This is a criminal action in which the defendant was tried on a bill of indictment charging him with armed robbery of one Ernest McCoy, Jr.

After the State's witness McCoy had testified for sometime, a juror spoke up and said: "Mr. Solicitor, we can't hear a word he says, see if you can clarify his speech, we can't hear a word he says." The court then said: "I was afraid of that." Whereupon, the court proceeded to summarize the testimony the witness had given up to that time, after which the Solicitor continued his direct examination of the witness.

After additional evidence had been introduced by the State and the defendant, the court charged the jury and the jury returned a verdict of guilty of armed robbery.

From the judgment imposed the defendant appeals, assigning error.

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

John H. Cutter for defendant.

PER CURIAM. The defendant assigns as error the action of the court in summarizing for the jury the testimony the witness had given instead of leaving it to the Solicitor to re-question the witness.

In view of our recent decision in the case of *S. v. Payton*, 255 N.C. 420, 121 S.E. 2d 608, we hold that this assignment of error is well taken and should be upheld.

Other assignments of error need not be considered since they may not recur on another trial.

The defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. CARVUS A. BYRD, JR.

(Filed 27 March 1963.)

1. Municipal Corporations § 4—

Municipal corporations have only those powers expressly conferred upon them by the General Assembly and those necessarily implied from those expressly conferred.

2. Same; Municipal Corporations § 28— Municipality held without authority to prohibit sale of ice cream products from mobile units on streets.

The statutory delegation of power upon municipalities to regulate traffic upon their streets and sidewalks, G.S. 160-200(11), G.S. 160-200(13), and to prohibit nuisances detrimental to the health, morals, comfort, safety, convenience, and welfare, G.S. 160-200(6), *held* not to empower a city to prohibit the sale and offering for sale of merchandise upon its streets from mobile units by persons licensed by the State to carry on the lawful business of peddling, G.S. 105-53 (a), (c), (d), although a city may have authority to regulate such sales, and therefore a municipal ordinance proscribing the sale or offering for sale at any time to any person of any ice cream products from any mobile unit on any street or alley of the municipality is invalid.

APPEAL by the State from *Fountain, J.*, May Criminal Term 1962 of WAKE, docketed and argued as No. 436 at Fall Term 1962.

Criminal prosecution on warrant charging that defendant on April 25, 1962, unlawfully and wilfully offered for sale and sold ice cream

from a mobile ice cream unit truck on Newbold Street, a public street of Raleigh, North Carolina, in violation of an ordinance adopted February 26, 1962, by the City Council of the City of Raleigh entitled "An Ordinance to Regulate the Sales of Ice Cream and Ice Cream Products in the City of Raleigh."

The operative provisions of the ordinance are as follows:

"Section 1. It shall be unlawful for any person, firm or corporation to sell or offer to sell on the streets or alleys of the City of Raleigh any ice cream products from mobile ice cream units.

"Section 2. It shall be unlawful for any person, firm or corporation to sell or offer to sell on the streets, sidewalks or alleys of the City of Raleigh any ice cream products in any manner.

"Section 3. The term ice cream products shall apply to ice cream, frozen custards, sherbets, ice milk, water ices or similar frozen or semi-frozen articles.

"Section 4. The provisions of this ordinance shall not be construed to prohibit the sale of ice cream from door to door or in any other manner permitted by law if no sale or delivery is made on a public street, alley or sidewalk.

"Section 5. If any section, subsection, sentence, clause, phrase, or part of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion will be deemed a separate, distinct independent provision and such holding shall not affect the validity of the remaining portions hereof.

"Section 6. All ordinances and clauses of ordinances in conflict with this ordinance are repealed.

"Section 7. This ordinance shall become effective twenty days after its publication as provided by law."

In the City Court of Raleigh, defendant's motion to quash the warrant was overruled. Thereafter, upon trial, defendant was adjudged guilty and ordered to pay a fine and costs. Defendant appealed.

In the superior court, defendant in apt time moved to quash the warrant on the ground the ordinance on which it is based is invalid for reasons set forth with particularity in said motion.

The court, being of opinion defendant's motion should be allowed, "ORDERED that the warrant be and the same is hereby quashed." The State (G.S. 15-179(3)) excepted and appealed.

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

Blanchard & Farmer for defendant appellee.

BOBBITT, J. In *Tastee-Freez, Inc. v. Raleigh,* 256 N.C. 208, 123 S.E. 2d 632, filed January 12, 1962, the ordinance provision then considered provided: "No ice cream shall be peddled along the streets and/or sidewalks of the city from push carts or other vehicles or in any other manner." This ordinance provision was held in conflict with general State law and therefore invalid.

The ordinance now under consideration was adopted February 26, 1962, at the conclusion of a public hearing conducted by the City Council. The preamble contains extensive recitals as to the substance of *comments* and *contentions* made at such public hearing by (unidentified) persons favoring or opposing the adoption of an ordinance "regulating the sales of ice cream and ice cream products in the City of Raleigh." Thereafter the preamble continues:

"Upon the evidence presented, the Council finds the following facts:

"1. The sale of ice cream and ice cream products from mobile ice cream units upon street rights of way attracts children on and across those streets and into the area of the street which has been set aside primarily for the use of vehicles and constitutes a serious hazard to the safety of children. The sale of ice cream products in any other manner on the street rights of way without the use of chimes, bells or music to attract notice tends to a lesser but to a real degree to attract children into the streets and jeopardizes their safety.

"2. That the attraction of children through the sale of ice cream and ice cream products on the streets, alleys and sidewalks constitutes or tends to constitute an obstruction to traffic and tends to prevent its free and safe flow on a part of the street reserved primarily for such traffic.

"3. That the ringing of bells and chimes upon the approach of a mobile ice cream unit and the continued ringing of the bells or chimes while the mobile unit is parked for the purpose of dispensing its product constitutes a nuisance to the peace and quiet of the neighborhood and unnecessarily disturbs the residents of the neighborhood.

"4. That the very nature of the business of selling ice cream products from mobile units on the public streets is such that its success depends in large measure upon the number of customers it can attract to its dispensing unit and the ringing of bells or chimes and the playing of music is directed to this end.

"5. That no such business has a right to demand that the public streets be made available to private business for personal profit at the expense of the safety and peace and tranquillity of the citizens of a municipality.

"6. That it does not appear from the evidence presented or from the personal observation of the members of the City Council that peddling coal, farm produce, bottled drinks, ladies ready-to-wear or other similar articles has an appeal to children or presents any hazard to their safety.

"Upon the facts found, the Council concludes that in the interest of public safety and particularly the safety of children and in the interest of the general welfare that it should adopt an ordinance regulating the sale of ice cream within the City of Raleigh by prohibiting such sale on the streets, sidewalks and alleys of the City of Raleigh but that such ordinance should not prohibit the sale of such products by peddling from door to door provided no sales or deliveries are made upon the public streets, sidewalks or alleys of the City."

Since the conduct alleged in the warrant constitutes a violation of Section 1 of the ordinance of February 26, 1962, decision depends upon the validity of this ordinance provision.

G.S. 105-33(a) provides that State license taxes are imposed "for the privilege of carrying on the business, exercising the privilege, or doing the act named." G.S. 105-33(d) provides that the State license issued under G.S. 105-53, that is, on "(a)ny person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise and offer to sell or barter the same, or actually sells or barters the same," (the statutory definition of peddler), *"shall be and constitute a personal privilege to conduct the profession or business named in the State license,* shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule." (Our italics) A State license issued under G.S. 105-53 authorizes the licensee (G.S. 105-33(d)) to engage in the business of peddling. Hence, under general State law, "peddling," as defined in G.S. 105-53, is a lawful business or occupation. Moreover, the statutory provisions contemplate the use of motor vehicles by peddlers in the prosecution of their business or occupation. See G.S. 105-53(a) and (c), also G.S. 105-53(d).

Municipal corporations have no inherent powers but can exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied from those expressly conferred. *Tastee-Freez, Inc. v. Raleigh, supra,* and cases cited. Whether a municipal corporation has the power to regulate or prohibit the sale of articles of merchandise on its streets and sidewalks depends upon the

legislative power delegated to it by the state legislature. 105 A.L.R. 1052; 163 A.L.R. 1335; *Commonwealth c. Rivkin,* (Mass.), 109 N.E. 2d 838; *N. J. Good Humor v. Board of Com'rs* (N.J.), 11 A. 2d 113.

In addition to the State license prescribed by G.S. 105-53, the authority to levy a license tax on peddling is conferred on cities by G.S. 105-53(g). However, G.S. 160-200, which sets forth express powers conferred on municipal corporations, contains no provision relating to the prohibition or regulation of the business or occupation of peddling .

The City of Raleigh under G.S. 160-200(11) had express authority to "adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city"; and under G.S. 160-200(31) the City of Raleigh had express authority "(t)o provide for the regulation, diversion, and limitation of pedestrians and vehicular traffic upon public streets, highways, and sidewalks of the city and to regulate and limit vehicular parking on streets and highways in congested areas"; and under G.S. 160-200(6) the City of Raleigh had express authority "to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof."

The crucial question is this: Is the ordinance adopted February 26, 1962, within the powers conferred upon the City of Raleigh by the General Assembly?

The pertinence of decisions in other jurisdictions depends largely upon what statutory powers were delegated by the legislature to municipal corporations. In *City of Chicago v. Rhine* (Ill.), 2 N.E. 2d 905, 105 A.L.R. 1045, the court held valid an ordinance of the City of Chicago prohibiting the sale or offering for sale of *any article,* daily newspapers excepted, on any street, alley, or public place *in two defined and restricted areas where street traffic was congested.* The validity of the ordinance was challenged by a dealer in magazines. In Illinois, the Legislature had delegated to municipal corporations, *inter alia,* the authority (1) to regulate traffic and sales upon the streets, sidewalks, and public places, and (2) to license, tax, regulate, suppress, and prohibit hawkers and peddlers.

In Ohio, where statutes enacted by the General Assembly recognized peddling as a lawful business or occupation, ordinances similar to that now under consideration have been held invalid as unwarranted and arbitrary interference with such lawful business or occupation. *Frecker v. City of Zanesville,* 72 N.E. 2d 477; *Schul v. King,* 70 N.E. 2d 378;

Frost Bar v. City of Shaker Heights, 141 N.E. 2d 245*; contra, X-Cel Dairy, Inc. v. City of Akron,* 25 N.E. 2d 700. In *Frecker v. City of Dayton,* 90 N.E. 2d 851, the Supreme Court of Ohio, in a four to three decision held invalid an ordinance prohibiting the sale on streets of ice cream products, soft drinks, candy, sandwiches, peanuts, popcorn, and similar products.

In *Trio Distributor Corp. v. City of Albany,* 143 N.E. 2d 329, the Court of Appeals of New York, in a four to three decision, held invalid an ordinance providing: "§ 2. When any person shall vend or peddle from a vehicle in the public streets and places in the City of Albany, and, in the pursuit of such business or activity, children shall collect, assemble or gather about such vehicle for the purpose of making purchases, such person so vending and peddling, and the pursuit of such occupation, shall be accompanied by an attendant whose sole duty and occupation shall be to protect and safeguard the children from injury and the hazards of street vehicle traffic and he shall maintain a constant look-out for approaching vehicles and shall warn the children and guard them from injury." The ordinance was held unconstitutional as an attempt to prohibit a legitimate business under the guise of regulation. The opinion cites a prior decision of said court, to wit, *Good Humor Corporation v. City of New York,* 49 N.E. 2d 153, where the ordinance under consideration was held invalid, in which Lehman, Chief Judge, said: "The fundamental question remains whether prohibition rather than regulation in this case is reasonable."

The decision of the Court of Appeals in *Trio Distributor Corp. v. City of Albany, supra,* reversed *Trio Distributor Corporation v. City of Albany,* 156 N.Y.S. 2d 906, where the ordinance had been upheld as *a reasonable regulation.* But, while upholding the ordinance as a reasonable regulation, this statement, supported by numerous citations, appears in the opinion of Taylor, J.: "It is settled that a municipality may not *entirely prohibit* the business of vending ice cream or ice cream products on its public streets." (Our italics)

In *N. J. Good Humor v. Board of Com'rs, supra,* the Court of Errors and Appeals of New Jersey held invalid an ordinance prohibiting peddling within the boundaries of the municipality. New Jersey statutes conferred upon municipalities the power, *inter alia,* to "make, amend, repeal and enforce ordinances to license and regulate . . . hawkers, peddlers, . . . itinerant vendors of merchandise." The court, in opinion by Heher, J., said: "The power to 'regulate' is ordinarily confined to such reasonable restraints upon the trade or business made the subject thereof as may be demanded by the public interest. It will

not usually be construed as including the absolute prohibition of a legitimate business that may be pursued as of common right." In accord: *Germano v. Keenan* (N.J.), 95 A. 2d 439. In *Harrington Park v. Hogenbirk* (N.J.), 145 A. 2d 161, a municipal ordinance was upheld as a reasonable regulation (not a prohibition) of peddling. The ordinance provided: "No person shall park a vehicle upon a public roadway or street for the purpose of or during the process of soliciting sales or business, displaying goods for sale or selling, or offering to sell, for delivery of goods or merchandise to buyers, consumers or other persons who are occupants of vehicles, standing or moving on the public streets or highways."

Notwithstanding the discussion and findings recited in the preamble, violation of the operative provisions of the Raleigh Ordinance does not depend upon whether the mobile ice cream unit rings bells or chimes or plays music when it approaches or when it is parked or whether it parks upon a street or streets in an area of congested traffic. The conduct proscribed by Section 1 of the Ordinance is the sale or offering for sale at any time to any person of any age of any ice cream product from any mobile unit on any street or alley of Raleigh under any circumstances.

Nothing appears to indicate the ordinance was adopted on account of injury to children or other condition resulting from the sale or offering for sale of ice cream products or other merchandise on the streets of Raleigh from mobile units. In the discussion at the public hearing preceding the adoption of the ordinance, both the proponents and the opponents based their contentions on what had occurred in other localities. The preamble indicates the city council considered the sale and offering for sale of ice cream products upon the streets of Raleigh from mobile units would or might increase the hazards to which children and other pedestrians are exposed when crossing or otherwise using the public streets. It seems quite possible this laudable objective of the city council might be achieved wholly or substantially by a regulatory ordinance.

We reach these conclusions: Under a license issued in accordance with general State law, the sale and offering for sale of ice cream products on public streets in the area covered by such license is a lawful business or occupation. No express power has been conferred by the General Assembly on municipal corporations to prohibit or to regulate the business or occupation of peddling otherwise than by imposing license taxes thereon. In the exercise of express powers conferred upon municipal corporations by the General Assembly, including those referred to above, a municipal corporation has the implied power to

adopt an ordinance providing for the reasonable regulation, but not for the prohibition, of the sale and offering for sale of merchandise upon its streets from mobile units.

We express no opinion as to whether a regulatory ordinance, otherwise reasonable in all respects, would be invalid if it applied only to the sale or offering for sale of *ice cream products* from mobile units.

Having reached the conclusion the challenged prohibitory ordinance exceeded the power conferred upon the City of Raleigh by the General Assembly and therefore is invalid, the judgment allowing defendant's motion to quash the warrant charging a violation of Section 1 thereof is affirmed.

Affirmed.

MADGE CHERRY DAVIS v. SADIE CHERRY SINGLETON.

(Filed 27 March 1963.)

1. Courts § 9—

Where one Superior Court judge sustains a demurrer another Superior Court judge is without authority to overrule the demurrer even after the complaint has been amended when the amendment, though adding evidentiary details, adds nothing to the basic statement of plaintiff's cause of action.

2. Wills § 67; Executors and Administrators § 36— Action held one to surcharge and falsify account of executrix.

A suit alleging that testator left his personal property one-half to plaintiff and one-half to defendant, that defendant was named executrix, that defendant's final account omitted funds from a certain bank account, and that defendant had converted the funds in the account to her own use, without paying plaintiff her one-half share of such funds, *is held* to state a cause of action to surcharge and falsify the account of the executrix, and demurrer was properly sustained in an action against the executrix in her individual capacity.

3. Appeal and Error § 2—

The Supreme Court will take notice *ex mero motu* of the failure of the complaint to state a cause of action.

PARKER, J., dissenting.
HIGGINS, J., joins in dissent.

APPEAL by defendant from *Fountain, S.J.*, August 1962 Term of NASH, docketed and argued as Case No. 255 at the Fall Term 1962.

Civil action to recover a legacy. Defendant appeals from the order overruling her motion for a change of venue and demurrer *ore tenus* to the amended complaint. This case was before the Court at the Spring Term of 1962 upon defendant's appeal from the denial of her motion, made pursuant to G.S. 1-83 and 1-78, to remove the case to Beaufort County for trial. The opinion in the first appeal appears in 256 N.C. 596, 124 S.E. 2d 563, where the original complaint is set out in full. Briefly it alleged the following facts:

Plaintiff and defendant are the half-sisters of C. T. Cherry, deceased. In his last will, probated in Beaufort County, Cherry named defendant as his executrix. He gave one-half of his entire estate to plaintiff and one-half to the defendant for the term of their natural lives with remainder "to the descendants of the body" of said sisters. If either sister should die without leaving such descendants, the property which "would have gone to the descendants of said half-sister, shall go absolutely in fee simple to the heirs of said half-sister. . . ." At the time of his death on August 17, 1959, C. T. Cherry had on deposit in the Bank of Washington at Washington, North Carolina, the sum of $9,280.74. The account was carried in the name of C. T. Cherry or Sadie Cherry Singleton, but it was the sole property of Cherry. Following the death of Cherry and the administration of his estate by the defendant as executrix, the defendant appropriated all the funds in said bank account to her own use and refused to pay over to the plaintiff one-half of the account to which plaintiff contends she is entitled under the will. Plaintiff prayed that she "recover of the defendant the sum of $4,640.37, with interest thereon" from the date of the filing of her final account as "Administratrix of the Estate of Claud T. Cherry."

The former appeal involved only a question of venue. It was held that plaintiff had sued defendant only as an individual and the order of the Superior Court denying the motion of the defendant to remove the case to Beaufort County was affirmed. The Court, speaking through *Bobbitt, J.*, said: "Plaintiff's action is to recover as beneficiary under Claud T. Cherry's will. Unquestionably, if she had instituted such action against defendant as executrix or as administratrix of the estate of Claud T. Cherry, such action, whether maintainable or not, would have been an action against executrix or administratrix in her official capacity. . .Suffice it to say, plaintiff, in this action, has not sued such personal representative." That decision eliminates any question of venue on this appeal. However, the opinion specifically pointed out: "Whether the complaint alleges facts sufficient to consti-

tute a cause of action against defendant, individually, is not presented by this appeal."

When the case was returned to the Superior Court the defendant demurred to the complaint on the ground that the personal representative is the only person entitled to maintain an action to recover assets of the estate of Claud T. Cherry. At the May Term 1962, Judge M. C. Paul sustained the demurrer but allowed plaintiff to amend her complaint as provided by G.S. 1-131. Thereafter plaintiff filed an amended complaint in which she added the following allegations to those previously set out in the original complaint:

At the time of his death, C. T. Cherry owned seventeen acres of land in Beaufort County. Neither this land nor the bank account in the Bank of Washington was listed as an asset in the final account which defendant filed as executrix on October 14, 1960. All debts and claims against the estate, as well as the costs of administration, have been paid in full. Defendant's final account showed that her disbursements exceeded receipts by $562.50 which she paid from the bank account in the joint names of the defendant and the deceased. The costs of administration amounted to $225.00. Deducting this amount, there remains in the hands of the defendant a net balance of $9,055.74. (It would seem that $562.50 should have been the amount deducted.) Defendant has wrongfully converted to her own use plaintiff's one-half of this sum to which plaintiff is entitled under the will of C. T. Cherry. Plaintiff is entitled to judgment in the amount of $4,527.87 with interest from October 14, 1960.

After the filing of the amended complaint defendant again moved for a change of venue on the ground that, if the complaint stated a cause of action, it was against the defendant in her representative capacity as executrix of C. T. Cherry and should be moved to Beaufort County under the provisions of G.S. 1-78 and 1-83; and, if not, that Judge Paul's order sustaining the demurrer should stand.

At the August Term 1962, Judge Fountain overruled defendant's motion. The defendant then demurred *ore tenus* to the amended complaint on the same ground set forth in the demurrer before Judge Paul. Judge Fountain overruled the demurrer *ore tenus*. Defendant appealed, assigning as error the denial of her motion for a change of venue and the overruling of her demurrer *ore tenus* to the amended complaint. In this Court the defendant renewed the demurrer *ore tenus* made before Judge Fountain.

Spruill, Thorp, Trotter & Biggs for plaintiff appellee.
Rodman and Rodman for defendant appellant.

SHARP, J. For the purpose of testing the sufficiency of the complaint, the demurrer to the original complaint and the demurrer *ore tenus* to the amended complaint admitted the following facts:

C. T. Cherry devised and bequeathed his entire estate to plaintiff and defendant in equal shares for life and named defendant his executrix. At the time of his death Cherry was the sole owner of a bank deposit in the amount of $9,280.74 which was carried in the name of C. T. Cherry or Sadie Cherry Singleton, and the funds in this account passed under his will at his death. Following the filing of her final account as executrix, defendant appropriated all of the net funds in the bank deposit to her own use and refused to deliver over to the plaintiff her share.

On these allegations Judge Paul sustained the demurrer; Judge Fountain overruled it. The amended complaint, while amplifying these allegations with evidenciary details, dates, and figures, added nothing to the basic statement of plaintiff's cause of action.

Judge Fountain was, therefore, without authority to overrule the demurrer; he was bound by Judge Paul's prior ruling. *Wall v. England,* 243 N.C. 36, 89 S.E. 2d 785; *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82. However, since this case has been here once before, we deem it proper to discuss it further.

The question raised by the demurrers is not the determinative question in this case. Here, the individual who has allegedly converted an asset of the estate which rightfully belongs to the plaintiff is the executrix who did not list it in her final account. However, plaintiff has not sued her in her official capacity but, only as an individual.

If the bank still retained the money, plaintiff could not maintain an action for it; such an action could only be maintained by Cherry's personal representative. *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253. *Mayo v. Dawson,* 160 N.C. 76, 76 S.E. 241. This would be true even though the executrix had filed her final account. The fact that an administrator or executor has filed his final account does not deprive him of his right to receive or to recover an asset of the estate thereafter discovered. *Foil v. Drainage Com'rs.,* 192 N.C. 652, 135 S.E. 781; *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562; *Best v. Best,* 161 N.C. 513, 77 S.E. 762. It is likewise well settled that the filing of a final account does not discharge a personal representative of his trust as to property of the estate remaining in his hands. *King v. Richardson,* 136 F. 2d 849.

The purpose of this action, in its final analysis, is to secure a proper accounting and settlement of the estate of C. T. Cherry. It is in the nature of a bill in equity to surcharge and falsify the final account

of the executrix, and it may be brought by an heir or legatee. *State v. McCanless,* 193 N.C. 200, 136 S.E. 371; *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145; *Thigpen v. Trust Co.,* 203 N.C. 291, 165 S.E. 720. Obviously the executrix is the party defendant to such an action. *Vollers Co. v. Todd,* 212 N.C. 677, 194 S.E. 84; *Davis v. Davis,* 246 N.C. 307, 98 S.E. 2d 318.

The query presented by this case is: When an executor has filed his final account which omits a legacy, must the legatee, in an action to recover it from the executor, first surcharge his final account? The answer is YES.

"To surcharge is to allege an omission; to falsify is to deny the correctness of certain of the items rendered." *Warner Robins Sun v. Clary,* 98 Ga. App. 500. We find a further and more complete definition in 2 Story's Equity Jurisprudence, (14th Ed.) sec. 701, where it is said:

> "These terms, 'surcharge' and 'falsify', have a distinct sense in the vocabulary of Courts of Equity a little removed from that which they bear in the ordinary language of common life. In the language of common life we understand 'surcharge' to import an overcharge in quantity, or price, or value, beyond what is just, correct, and reasonable. In this sense it is nearly equivalent to 'falsify'; for every item which is not truly charged as it should be is false, and by establishing such overcharge it is falsified. But in the sense of Courts of Equity these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to be omitted which ought to be allowed. A falsification applies to some item in the debits, and supposes that the item is wholly false, or in some part erroneous. This distinction is taken notice of by Lord Hardwicke, and the words used by him are so clear that they supersede all necessity for further commentary. 'Upon a liberty to the plaintiff to surcharge and falsify,' says he, 'the onus probandi is always on the party having that liberty; for the court takes it as a stated account and establishes it. But if any of the parties can show an omission for which credit ought to be, that is a *surcharge*; or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a falsification. But that must be by proof on his side. . .' "

It would be impossible for plaintiff to recover in this action without, in effect, surcharging the final account of the executrix which is *prima facie* correct. *Bean v. Bean,* 135 N.C. 92, 47 S.E. 232. Plaintiff's

claim to one-half of the bank deposit for which she has sued is based solely upon the provision in the will of Cherry which makes her one of his two legatees. Obviously she cannot recover any part of the fund unless the deposit is an asset of his estate.

This action calls into account defendant's distribution of the estate and therefore involves her official acts as executrix. *Montford v. Simmons,* 193 N.C. 323, 136 S.E. 875. This cannot be done in an action to which the executrix is not a party and making the *individual* who also happens to be the personal representative a party will not suffice.

In *Clark v. Schindler,* 43 Ind. App. 269, 87 N.E. 44, the auditor of Marion County, alleging that the property of S had not been listed for taxes from 1893 through 1900, brought an action to set aside the final account of M (Margret Schindler) executrix of S. M. had distributed the estate to the heirs of whom she was one. The statute authorized such a proceeding but required that the executor or administrator of the estate must be made a party defendant. M as executrix was not made a party. In dismissing the action on this, and other grounds, the court said: "Margaret Schindler, as executrix, is not made a party. Margaret Schindler, as heir, may be the same person, but they are not sued in the same right and for the purposes of this action are different persons . . . In the failure to make the executrix a party there was a nonjoinder of parties."

Of course, an action against an executor or administrator for failure to perform his official duties or for a conversion of estate funds is also a claim against him personally and, if sustained, a personal judgment should be entered against him. "A judgment against an administrator ascertaining and directing the payment of a final balance against him in a suit for an accounting and settlement of the estate is a judgment against him personally." 21 Am. Jur., Executors and Administrators, Sec. 966.

The complaint affirmatively discloses that the plaintiff has no cause of action against the defendant in her individual capacity. This is a defect upon the face of the record proper of which the Supreme Court on appeal will take notice and *ex mero motu* dismiss the action. *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774; *Skinner v. Transformadora,* S. A., 252 N.C. 320, 113 S.E. 2d 717. The action is dismissed for failure of the complaint to state a cause of action.

Reversed.

PARKER J., dissenting. This is the second appeal in this case. The opinion in the first appeal appears in 256 N.C. 596, 124 S.E. 2d 563. In that opinion, the original complaint is set forth verbatim. It would

be supererogatory to repeat it here. The opinion on the former appeal was filed 28 March 1962. On 18 April 1962 defendant filed a written demurrer to the original complaint averring that it does not state facts sufficient to constitute a cause of action. At May 1962 Term Judge Paul sustained the demurrer, without assigning any basis for his ruling, and allowed plaintiff to amend her complaint. On 30 June 1962 plaintiff filed an amended complaint as follows—we omit the first three paragraphs because they are identical with the first three paragraphs of the original complaint:

"4. Under the terms of his said last will, Claud T. Cherry left his entire estate to his half-sisters, Madge Belle Davis (the plaintiff herein) and Sadie Dott Singleton (the defendant herein) in equal shares for the terms of their natural life 'with remainder to the descendants of their respective bodies;' providing, further, that: 'If either of my said half-sisters should die without leaving descendants of her body, then. . .such property as would have gone to the descendants of said half-sister. . .(to) go absolutely and in fee simple to the heirs of said half-sister.'

"5. The plaintiff, who is the half-sister of said Claud T. Cherry, named in his will as Madge Belle Davis, is entitled to the possession, use and enjoyment of one-half of the estate of said Claud T. Cherry remaining after the payment of all debts, taxes, funeral expenses and costs of administration owed and incurred by said estate.

"6. At the time of his death, Claud T. Cherry was seized of certain real estate situate in Beaufort County, North Carolina, consisting of 17 acres of land described as tract number 2 in deed recorded in Book 227, page 408, Beaufort County Registry.

"7. At the time of his death, Claud T. Cherry was the owner of the entire amount of funds on deposit in a savings account in the Bank of Washington carried in the name of 'C. T. Cherry or Sadie Cherry Singleton,' the balance of which said account totaled $9,280.74 at the time of his death.

"8. After the death of Claud T. Cherry, the defendant qualified as Executrix of his estate and when she thereafter filed her Final Account as such Executrix, on the 14th day of October 1960, the disbursements made by her were shown to have exceeded the receipts by $562.50. The above described real estate and bank account were not listed in said Final Account as assets of the estate. With respect to said deficiency said Final Account provided as follows: 'The above deficiency, together with all costs and ex-

penses of administration, have been paid by the Executrix from the proceeds of a bank account in the joint names of the Executrix and the deceased, which account was paid to the Executrix individually as survivor.

"9. The costs of administering said estate, including $15.50 paid to the Clerk of Superior Court, $9.50 paid to the North Carolina Department of Motor Vehicles, and the sum of $200.00 paid to attorneys for the estate, amounted to $225.00, and after deducting said costs from the original amount of the said savings account, there remained a net balance of $9,055.74.

"10. As the plaintiff is informed and believes, all of the debts of and claims against the estate have been fully satisfied and the estate has been fully settled; and the only persons having any right, title, interest or claim in or against the remaining estate of said Claud T. Cherry are the plaintiff and the defendant.

"11. By reason of the foregoing matters and things the defendant personally and individually has wrongfully appropriated and converted to her own use, and has received and now has, the plaintiff's share of the net funds derived from the aforesaid account.

"12. Under the terms of the Will of Claud T. Cherry, as aforesaid, the plaintiff is entitled to have the possession, use and enjoyment of one-half of the net proceeds of said bank account, namely $4,527.87, which said sum the plaintiff has demanded of the defendant but which the defendant has refused and now refuses to deliver over to the plaintiff.

"13. The defendant now has in her possession the funds representing the plaintiff's one-half of said account in the amount of $4,527.87, which belongs to the plaintiff and which funds in equity and good conscience she ought to pay to the plaintiff, and the plaintiff is entitled to recover said sum with interest thereon from the 14th day of October 1960, which is the date said sum was wrongfully appropriated by the defendant.

"WHEREFORE, the plaintiff prays that she have and recover of the defendant the sum of $4,527.87 together with interest thereon from the 14th day of October 1960, and the costs of this action; and that she have and recover such other and further relief as to the Court may seem just and proper."

The majority opinion states in substance the basic statement of plaintiff's cause of action is the same in the original complaint and

in the amended complaint, and "Judge Fountain was, therefore, without authority to overrule the demurrer; he was bound by Judge Paul's prior ruling." With that statement I do not agree.

The amended complaint alleges, which the original complaint does not, that defendant in her final account filed as executrix stated that the amount of this savings account in the Bank of Washington was paid to her individually as survivor, and in her final account she does not list this savings account as an asset of the Claud T. Cherry estate, and it further alleges, on information and belief, that all the debts of and claims against the estate have been fully satisfied and the estate has been fully settled. The amended complaint further alleges, which the original complaint did not:

> "11. By reason of the foregoing matters and things the defendant personally and individually has wrongfully appropriated and converted to her own use, and has received and now has, the plaintiff's share of the net funds derived from the aforesaid account."

The amended complaint alleges additional facts than appear in the original complaint which Judge Paul passed on, and the question before us is: Does the amended complaint state facts sufficient to constitute a cause of action against defendant as an individual? This does not involve an appeal from one superior court judge to another. *Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278; *Bumgarner v. Bumgarner,* 231 N.C. 600, 58 S.E. 2d 360.

The demurrer *ore tenus* to the amended complaint admits for the purpose of testing its sufficiency the truth of the following facts alleged in the amended complaint: One. Claud T. Cherry by his will left his entire estate to plaintiff and defendant in equal shares and the will of Claud T. Cherry contains the provisions set forth in the amended complaint. Two. Claud T. Cherry at the time of his death was the entire owner of $9,280.74 on deposit in a savings account in the Bank of Washington, which was carried in the name of "C. T. Cherry or Sadie Cherry Singleton." Three. After Claud T. Cherry's death, defendant qualified as executrix of his estate. Four. Defendant in her final account as executrix did not list this savings account as an asset of Claud T. Cherry's estate. Five. The proceeds of this savings account were paid to defendant individually as survivor. Six. Defendant used part of the proceeds from this savings account to pay costs of administration, but now has in her possession $9,055.74 of this savings account. Seven. All debts of, and claims against, the estate of Claud T. Cherry have been fully paid and the estate has been fully

settled. Eight. Defendant refuses to pay one-half of the $9,055.74 to plaintiff, and has wrongfully converted it to her own use. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *Cathey v. Construction Co.,* 218 N.C. 525, 11 S.E. 2d 571.

The admissions inherent in a demurrer are not absolute, because the conditional admissions made by a demurrer forthwith end if the demurrer is overruled. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

In *Brown v. Estates Corp.,* 239 N.C. 595, 603, 80 S.E. 2d 645, 652, the Court said: "An administrator or an executor is personally liable for his own torts even though they are committed in the administration of the estate. [Citing authority.]"

In *Lightner v. Boone,* 222 N.C. 421, 23 S.E. 2d 313, the Court said: "In the absence of unreasonable delay, diversion of funds, or other wrong doing, an executor or administrator is not personally liable for interest. [Citing authority.]" It would seem that the opposite of this statement that where there is unreasonable delay, diversion of funds, or other wrong doing, an executor or administrator is personally liable for interest.

In 33 C.J.S., Executors and Administrators, sec. 242, it is said: "An executor or administrator is personally liable to those who are interested in the estate as heirs, distributees, creditors, or otherwise, for waste, or for conversion, misapplication, or embezzlement of the assets of the estate. In addition to their remedy against the representative personally for waste or conversion, the beneficiaries of the estate may also maintain an action on his official bond* * *." To the same effect see 21 Am. Jur., Executors and Administrators, sec. 303.

An executor or administrator acts in a fiduciary capacity. *In re Will of Covington,* 252 N.C. 551, 114 S.E. 2d 261. "It is a fundamental principle in reference to both executors and administrators that they cannot be permitted to convert trust funds to their own use, or to make a profit from the use of trust money. In all cases they are personally liable for any misapplication of the assets of the estate." 21 Am. Jur., Executors and Administrators, sec. 310. See also *ibid,* sec. 311.

In *Hurlbut v. Durant,* 21 Hun. 481, the Court held that the mere failure of an executor to pay to a legatee the full amount of his legacy will not, in the absence of proof that he has become personally liable for the residue thereof by reason of some illegal or improper conduct, or that he himself claims to be entitled thereto, authorize an action to be brought against him individually to recover the same. In its opinion the Court said: "The defendant was sued in his individual capacity. In that capacity he was not liable without proof that he had become

individually responsible by reason of some illegal or improper conduct, for retaining the moneys and refusing to pay the same over."

The majority opinion at its beginning states: "Civil action to recover a legacy." In the opinion of the majority this is stated: "The purpose of this action, in its final analysis, is to secure a proper accounting and settlement of the estate of C. T. Cherry. It is in the nature of a bill in equity to surcharge and falsify the final account of the executrix* * *." With this statement in the majority opinion I do not agree. This is an attempt by mere nomenclature to convert plaintiff's action—the alleged facts in the amended complaint are admitted as true by the demurrer *ore tenus*—which is in fact and in law an action for wrongful conversion by an executrix of assets of an estate, into a bill to surcharge and falsify the final account of the executrix when the executrix has settled the estate and filed a final account therein, and has never reported the fund in controversy as an asset of the estate, but has been paid this fund individually as survivor of the savings account in the Bank of Washington and manifestly holds it as such survivor in her individual capacity claiming it as her own, and disclaiming that it is any part of the estate of her testate. In my opinion, the facts alleged in the amended complaint and admitted as true here by the demurrer *ore tenus* do not make it an action involving official capacity of an executrix according to the tests stated in *Montford v. Simmons*, 193 N.C. 323, 136 S.E. 875. Not a case cited in the majority opinion holds that an administrator or an executor is not personally liable to those who are interested in the estate as heirs or distributees for conversion, or misapplication, or embezzlement of the assets of the estate. Not a case cited in the majority opinion, as I read these cases, holds that an heir or distributee cannot maintain a suit against the executor or administrator individually for his waste or conversion of the assets of the estate.

In my opinion, plaintiff has made the choice of suing defendant as an individual for her wrongful conversion of assets of the estate, as she had a right to do, and she has a right to a trial in the county of her residence. The majority opinion is to the effect that she cannot do this, but must proceed for her remedy in the county of the residence of defendant where she qualified as executrix. I know of no law to support such a decision.

We are concerned in the instant case with pleadings. The entire will of Claud T. Cherry is not in the record. The precise character of the estate devised and bequeathed to plaintiff and defendant by Claud T. Cherry's will is not before us.

The demurrer *ore tenus* does not, and cannot, raise the question of a defect of parties, and therefore it is not necessary for that to be decided on this appeal. *Short v. Central Bus Sales Corporation,* 259 N.C. 133, 130 S.E. 2d 10.

In my opinion, plaintiff in her amended complaint has alleged facts sufficient to constitute a cause of action to hold defendant personally liable for a wrongful conversion of assets of the estate of Claud T. Cherry allegedly belonging to her, and she has a right to maintain her action in the county of her residence. I think Judge Fountain properly overruled the demurrer *ore tenus,* and the same demurrer *ore tenus* filed in this Court should be overruled. "If the complaint, in any portion of it, or to any extent, presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, it will survive the challenge of a demurrer based on the ground that it does not allege a cause of action. It is sufficient if the facts alleged entitle plaintiff to some relief, even though they are insufficient to entitle plaintiff to the relief prayed, or to relief upon another theory of liability." Strong's N. C. Index, Vol. 3, Pleadings, sec. 19.

I vote to overrule all assignments of error on this appeal, and to affirm Judge Fountain's order.

I am authorized to state that *Justice Higgins* joins in this dissenting opinion.

JOHN McMILLAN v. ELLA JOAN HORNE.

(Filed 27 March 1963.)

1. Negligence § 10—

The doctrine of last clear chance is applicable when both plaintiff and defendant have been negligent and the defendant has time, after the respective negligences have created the hazard, to avoid the injury.

2. Automobiles §§ 33, 45—

Evidence that plaintiff was attempting to cross a municipal street in heavy traffic, that the three southern lanes were for east-bound traffic and the one northern lane for west-bound traffic, and that plaintiff crossed the two southernmost lanes and stepped into the side of defendant's car which was traveling east in the third lane, *held* insufficient to support the submission of the issue of last clear chance to the jury, since the evidence fails to disclose that defendant had time after she could or should have discovered plaintiff's position of peril to have avoided the injury.

3. Negligence § 30—

Where the jury answers the issues of negligence, contributory negligence, and last clear chance in the affirmative, but it is determined on appeal that there is insufficient evidence to support the submission of the third issue to the jury, the third issue must be stricken and the cause remanded for judgment denying recovery.

APPEAL by defendant from *Clarkson, J.*, October 15, 1962, Schedule "B" Civil Term, MECKLENBURG Superior Court.

Civil action for damages allegedly caused by defendant's negligent operation of her automobile which ran over plaintiff, a pedestrian, as he attempted to cross East Fourth Street at its intersection with South Myers Street in the City of Charlotte.

The defendant, by answer, denied negligence and conditionally pleaded the contributory negligence of the plaintiff as one of the proximate causes of his injury. The plaintiff, by reply, denied any contributory negligence, but conditionally pleaded that the defendant had the last clear chance to avoid the injury after having discovered the perilous position he occupied in attempting to cross the intersection.

After both parties introduced evidence, the court submitted issues of (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages. The defendant duly excepted to the issue of last clear chance upon the ground the evidence was insufficient to support it. The jury returned affirmative answers to the first three issues and fixed plaintiff's damages at $8,000.00. From the judgment in accordance with the verdict, the defendant appealed.

Cansler & Lockhart by Eugene C. Hicks, III, for plaintiff, appellee.

Kennedy, Covington, Lobdell & Hickman, by Hugh L. Lobdell, Charles V. Tompkins, for defendant, appellant.

HIGGINS, J. The record in this case presents one vital and controlling question: Was the evidence sufficient to go to the jury on the third issue? Ordinarily the last clear chance involves the conduct of a defendant after his negligence and the plaintiff's contributory negligence have had their play, still leaving the defendant time and opportunity to avoid the injury notwithstanding what both parties have previously done, or failed to do. In essence, the issue is one of proximate cause.

In passing on the question here presented, Justice Ervin, in *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150, stated the rules by which the conduct of the parties must be judged: "Where an injured pedestrian who has been guilty of contributory negligence invokes

the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him." (citing 26 cases as authority.)

The evidence in the case, with a few inconsequential variations, is remarkably free from conflict. The accident occurred August 16, 1961, at approximately 5:20 p.m., at the intersection of East Fourth Street and South Myers street in the City of Charlotte. The weather was clear. The streets were dry. East Fourth Street was marked for four lanes of vehicular traffic—each lane ten feet in width. The north lane was designated always for traffic moving west. The south lane was designated always for traffic moving east. The Myers Street intersection is east of the main downtown business district and west of a thickly populated residential area. Consequently, in order to carry the volume of traffic to and from work, in the morning the two middle lanes of East Fourth Street carry only west-bound traffic. Likewise, in reverse order, the two middle lanes in the afternoon carry only east-bound taffic. Electric signals over the two middle lanes give notice of the directions in which they are open to traffic. At the time of the accident here involved, the three south lanes were open to east-bound traffic.

The plaintiff attempted to cross Fourth Street at its intersection. He stopped at the southwest corner of the intersection. "I looked twice to the left and twice to the right. I stepped down, the first time I looked to the right. And then I looked to the left. I had stepped off of the sidewalk and started into Fourth Street when I looked to the left. Then I came on out and looked to the right and saw one car coming from the right. I then looked again to the left the second time. When I looked to my left the second time, I was about at the middle line. . . . I still didn't see anything. Then I took a step or two and then I got

hit. I never did see the car at all. I don't know what part of the car and what part of me came together."

In assessing the value of the plaintiff's testimony, it must be observed that he looked twice in each direction and saw only a vehicle in the north lane going west. He did not see any vehicle approach from the left—not even the one that struck him. Numerous eye-witnesses, however, testified that traffic was heavy in all lanes. The defendant, at the time, was in the north lane for east-bound traffic. There was traffic in both lanes to the south also going east, and there was evidence of traffic both in front and behind her. There was no evidence of excessive speed. The actual point of impact was in the north lane for east-bound traffic near the crosswalk. After the impact the vehicle stopped before it cleared the intersection of Myers Street which was 20 or 25 feet wide.

Mrs. Robinson testified that she was riding in her husband's car in the lane east-bound. The defendant was in the lane to her left. "I recall there were cars in our lane in front . . . about the time of the accident . . . I saw the man hit the right side towards the back." Another witness testified the plaintiff stepped into the right side of defendant's vehicle. The only damage was a dent in the right fender near the middle and a dent in the hood near the windshield.

Mr. Hamlin Wade, an attorney, a witness for defendant, was attempting to enter the west-bound lane from a private drive just east of the intersection. He testified. "We were waiting to go into Fourth Street, . . . I glanced up . . . and saw this man come out from the south side of Fourth Street . . . I saw him step off the curb and walk out into the street. He had his head down. He didn't look . . . in either direction, and he was walking unsteadily. I saw cars pass by this man as he walked across the street. There was a heavy stream of traffic at the time. . . . I was particularly interested because I just didn't see how he got out there with cars passing by. . . . I observed the defenddant's automobile come to a stop. The rear end was still slightly in the intersection."

Mr. James O. Cobb, another attorney in the car with Mr. Wade, testified: "I saw him for a few seconds before the collision, and during those few seconds he was staggering or walking unsteadily and that he had his head down. . . . was looking down at the ground or at his feet. . . . I never at any time saw him look to his right or to his left."

The evidence of the plaintiff and other witnesses, explanatory of and not in conflict with it, depicts this situation: The plaintiff looked in both directions twice. He only saw one vehicle. It was in the north lane, moving west. He saw nothing moving east. Mr. Wade and Mr. Cobb

testified to the stream of traffic in all lanes; and that the plaintiff kept his head down and did not look up. The defendant was in the third marked lane going east. It was her duty to keep her vehicle in that lane. She said she was especially attentive to conditions in her lane because she knew, that except in the after-work hours, that lane was for west-bound traffic only. She feared some motorist would be ignorant of that fact and meet her head-on in the lane. She did not see the plaintiff until he was in the act of colliding with her vehicle. This is understandable. The plaintiff approached from the south side of the street. The traffic in the two lanes to the south evidently cut off her view. There was positive evidence she did not actually see the plaintiff in time to avoid the accident. There is no evidence from which it may be inferred that by the exercise of ordinary care she could have discovered him in a place of danger with time and opportunity to avoid the injury. Negligence and contributory negligence were present in the case, as the jury found. Both continued to the moment of the impact, leaving neither time nor opportunity for the defendant to avoid the injury. She was boxed in not only by the adjoining lanes and their traffic, but also by the traffic front and back in her lane. The burden of the third issue was on the plaintiff. *Miller v. Motor Freight Corp.*, 218 N.C. 464, 11 S.E. 2d 300.

Barnhill, J., later C.J., said in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337: "Its application (last clear chance) is invoked only in the event it is made to appear that there was an appreciable interval of time between plaintiff's negligence and his injury during which the defendant by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." (citing cases)

The trial court committed error in submitting the third issue. It will be stricken, leaving the issue of damages without support. The answer to that issue also will be stricken. The case is remanded to the Superior Court of Mecklenburg County where judgment will be entered denying recovery and dismissing the action.

Error and remanded.

MARY W. NEAL v. LAWRENCE ROCHELLE CLARY, SR.

(Filed 27 March 1963.)

1. Master and Servant § 84—

Where the findings show that the employer-employee relationship existed with respect to plaintiff's injury and the evidence discloses that both

plaintiff and defendant were co-employees and the injury arose out of and in the course of plaintiff's employment, action at common law instituted by plaintiff is properly dismissed for want of jurisdiction.

2. Same; Master and Servant § 67—

An agreement for the payment of compensation is binding on the parties when approved by the Industrial Commission, G.S. 97-84, and therefore where such agreement has been signed and approved by the Commission and an award entered thereon, and the Commission has entered an order setting aside the award alone without disturbing the Commission's approval or the agreement of the parties, such agreement precludes action at common law.

APPEAL by plaintiff from *Riddle, Special Judge,* August Civil Term 1962 of GASTON.

This is a civil action in which the plaintiff seeks to recover damages for personal injuries sustained by her while riding in an automobile which was involved in a collision at the intersection of Highway 150 and Salem Church Road in Gaston County on Saturday, 4 February 1961, at approximately 6:30 a.m. The defendant was driving the car in which plaintiff was riding and is alleged to have driven the same negligently. No controversy arises with respect to negligence on this appeal.

In the answer to the complaint, the defendant alleged and the plaintiff admitted in her reply that at the time of the collision referred to in the complaint, the plaintiff and defendant were employees of Harden Manufacturing Company of Gaston County, North Carolina, and that at such time the Harden Manufacturing Company had more than five employees regularly employed by it. The defendant further alleged that at the time of the collision both the plaintiff and defendant were in the course of their employment with the Harden Manufacturing Company; that the plaintiff was riding in defendant's vehicle by reason of their relationship with their employer; that the injuries sustained by plaintiff arose out of her employment; and that the plaintiff and the defendant and their employer at the time of the collision were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act.

Upon the foregoing, the defendant specifically pleaded the Workmen's Compensation Act in bar of this action, and further pleaded that plaintiff had filed a claim for benefits under the Act with the North Carolina Industrial Commission and had entered into an agreement for compensation and medical expenses and that these items had been paid.

In the course of the trial the plaintiff admitted signing an "Agreement for Compensation for Disability," being North Carolina In-

dustrial Commission Form No. 21, which form was also signed by her employer, its workmen's compensation carrier, and which agreement was approved on 7 March 1961 by the North Carolina Industrial Commission.

Plaintiff's remaining evidence adduced in the trial below is omitted since we do not deem it essential to a proper disposition of the appeal.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit and also moved the court to dismiss the action for lack of jurisdiction in the Superior Court. The court allowed the motion to dismiss for lack of jurisdiction.

The plaintiff appeals, assigning error.

Henry M. Whitesides for plaintiff appellant.
Carpenter, Webb & Golding, John A. Mraz for defendant appellee.

DENNY, C.J. The only assignment of error is to the ruling of the court below in dismissing the action for want of jurisdiction.

Ordinarily, when the pleadings in a common law tort action disclose that the parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act with respect to the injury involved, dismissal is proper for the Industrial Commission has exclusive jurisdiction in such cases.

In the instant case, at the time of the hearing below, not only the pleadings tended to show that the employer-employee relationship existed with respect to plaintiff's injury, but the evidence tended to show that all parties, including the defendant, were subject to and bound by the North Carolina Workmen's Compensation Act and that plaintiff employee's injury arose out of and in the course of her employment with the Harden Manufacturing Company.

In light of the pleadings and the evidence adduced in the trial below, we think his Honor properly dismissed this action for want of jurisdiction. *Cox v. Transportation Co.*, 259 N.C. 38, 129 S.E. 2d 589; *Powers v. Memorial Hospital*, 242 N.C. 290, 87 S.E. 2d 510; *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623.

When this appeal was argued in this Court, the plaintiff, through her counsel, moved to amend her pleadings to allege "That it is admitted that a form signed by the plaintiff was filed with the North Carolina Industrial Commission, said form purporting to be for benefits under the Workmen's Compensation Act; however, plaintiff expressly denies that the paper writing was signed for such purpose and further alleges that her signature on said paper writing was obtained by mutual mistake, misrepresentation, and fraudulent statements on

the part of the person obtaining said signature; further that a contested hearing was held before Gene C. Smith Deputy Commissioner of the North Carolina Industrial Commission, on October 31, 1962, in Gastonia, North Carolina, wherein both plaintiff and employer were represented by attorneys and presented evidence, that by the opinion and award of Gene C. Smith, Deputy Commissioner of the North Carolina Industrial Commission, filed November 27, 1962, in said matter, from which no appeal has been taken, the Commission's approval of Industrial Commission Form No. 21 Agreement dated February 13, 1961, between the plaintiff, the defendant employer (Harden Manufacturing Company) and Lumbermens Mutual Casualty Company, approved by the Commission on March 7, 1961, was set aside; said opinion reciting in the conclusion of law of the Commissioner, that the accident did not arise out of and in the course of the plaintiff's employment, nor did the employer-employee relationship exist at the time of the accident, and therefore, the Industrial Commission has no jurisdiction over the claim."

A certified copy of the opinion and award of the Deputy Commissioner, filed 27 November 1962, was attached to plaintiff's motion to amend her pleadings, and the award reads as follows: "The motion of the plaintiff that the award of the North Carolina Industrial Commission, evidenced by the Commission's approval of Industrial Commission Form 21 agreement, dated February 13, 1961, between the plaintiff, the defendant employer and Lumbermens Mutual Casualty Company, approved by the Commission on March 7, 1961, is hereby granted, and said award is hereby set aside."

We do not construe the award filed by the Deputy Commissioner on 27 November 1962, to set aside the agreement of the parties contained in Form No. 21, filed with the Industrial Commission on 13 February 1961 and approved by the Commission on 7 March 1961, on the grounds of mutual mistake, fraud or otherwise, or to expressly withdraw the approval of the Commission thereto, but merely purports to set aside the award theretofore entered. "An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed on appeal. G.S. 97-84." *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109; *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559.

The motion to amend filed in this Court is denied without prejudice to move before the Industrial Commission, after notice to all interested parties, to set aside the agreement contained in Form No. 21, dated 13 February 1961, as well as the award made pursuant there-

to, on the grounds of mutual mistake, misrepresentation and fraudulent statements. *Nance v. Winston-Salem,* 229 N.C. 732, 51 S.E. 2d 185. If such agreement is set aside by the Industrial Commission on the aforesaid grounds, the plaintiff may, if so advised, institute a new action and allege the facts with respect to jurisdiction as they may then exist.

It will be noted that no ruling adverse to the plaintiff was made in the court below on the merits of plaintiff's cause of action, but only as to jurisdiction.

Affirmed.

RAYMOND A. SCOTT v. WILLIAM T. DARDEN.

(Filed 27 March 1963.)

1. Automobiles § 41g—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's negligence in entering an intersection with a dominant highway without bringing his vehicle to a stop and colliding with plaintiff's truck which was traveling along the dominant highway at a lawful speed. G.S. 120-158(a).

2. Automobiles § 17—

The driver of a vehicle along a dominant highway does not have the absolute right of way in the sense that he is relieved of the duty to exercise due care, but he is not under duty to anticipate that the operator of a vehicle approaching along the servient highway will fail to stop as required by law, and in the absence of notice or anything which should give notice to the contrary, is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the other vehicle will stop before entering the intersection.

3. Automobiles § 42g—

Evidence tending to show that the driver of the vehicle along the dominant highway saw defendant's vehicle approaching the intersection along the servient highway from his left, that the driver along the dominant highway slowed his vehicle and saw the driver along the servient highway also reduce his speed, and that he acted on the assumption that the driver along the servient highway would stop before entering the intersection, until too late to avoid collision, *is held* insufficient to establish contributory negligence as a matter of law on the part of the driver along the dominant highway.

4. Negligence § 10—

The doctrine of last clear chance is essentially one of proximate cause and relates to defendant's negligence constituting a new proximate cause

after defendant's negligence and plaintiff's negligence have created the hazard.

5. Automobiles § 45—

Evidence held not to disclose that there was sufficient time, after the situation of peril was or should have been discovered, in which to have avoided the injury, and therefore the doctrine of last clear chance cannot bar recovery.

6. Trial § 21—

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

APPEAL by plaintiff from *Morris, J.*, January Civil Term 1963 of WAYNE.

Civil action to recover $400.00 for damage to a 1953 GMC truck allegedly caused by the defendant's negligence.

Defendant in his answer denied negligence on his part, conditionally pleaded contributory negligence as a bar to recovery, and further pleaded that if the defendant were negligent, plaintiff had the last clear chance to avoid the collision.

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

Braswell & Strickland by Thomas E. Strickland for plaintiff appellant.

Dees, Dees and Smith by William W. Smith for defendant appellee.

PARKER, J. Plaintiff's evidence is as follows:

About 9:30 a.m. on 13 November 1961 Larry Shields, an employee of plaintiff, in furtherance of his employer's business was driving a 1953 GMC truck loaded with about thirteen tons of pulpwood south on U. S. Highway #117, and approaching a point where this highway is intersected by a paved road coming out of the town of Calypso. (The complaint alleges the time was 9:30 p.m. It is so stated in plaintiff's brief. Larry Shields, a witness for plaintiff, testified it was in the morning, about 9:30 a.m., and the time is so stated in defendant's brief.) U. S. Highway #117 is a paved four-lane highway, with two lanes for traffic going south and two lanes for traffic going north. Defendant's answer admits this allegation of paragraph five of the complaint:

"5. That pursuant to the laws of this State, a stop sign had prior to November 13, 1961, been placed at the intersection here-

inabove referred to which required all traffic proceeding East and West on the road coming out of Calypso, North Carolina, to stop before entering out onto U.S. Highway #117; that on November 13, 1961, said sign was in its proper place and in full view of all traffic proceeding upon said street."

The weather was clear. There was no other traffic on the highway. Two days before 13 November 1961 the brakes on plaintiff's truck had been repaired, and his truck was in good mechanical condition. When Shields approached the intersection he was driving the truck on the outside lane at a speed of about 40 to 45 miles an hour, and saw defendant driving a 1958 Ford pickup truck in a westerly direction on the road coming out of the town of Calypso and approaching the intersection.

Shields testified as follows on direct examination:

"As I was going south on U. S. Highway #117 I was coming down and this fellow was coming out to the intersection. He slowed down, I thought he was going to stop, and I reduced my speed too; I was running about 40 to 45. I thought he was going to stop and he kept on going and by that time I ran into him. When I first ascertained he was not going to stop, he was so close I didn't hardly have time to apply my brakes. The front end of my vehicle was damaged and the pick-up truck being driven by Mr. Darden was damaged next to the cab on the right hand side.* * *I remained in my right hand lane going south. When the two vehicles came to a stop after the wreck, I was sitting at the edge as you start up the path and he was turned over.* * *At the time the vehicle I was driving and that one being driven by Mr. Darden came in contact with one another I had broke my speed down to about 30 or 35 miles per hour."

Shields testified on cross-examination:

"I thought Mr. Darden was going to make it. I was still in the outside lane. I didn't turn to the inside lane.* * *I didn't hardly have time to mash my brakes before it hit him, but at the time I hit him I stopped. I wasn't quite a truck-length away when I mashed my brakes."

Shields further testified on redirect examination: "After these two vehicles came together my truck didn't even go as far as from here to that table."

Plaintiff's evidence, and defendant's admissions in his answer, would permit a jury to find that plaintiff's truck was traveling on a

dominant highway, and defendant's pickup truck was traveling on a servient highway, at whose entrance into the dominant highway a Stop sign had been erected pursuant to the provisions of G.S. 20-158 (a); that in the daytime with an unobstructed view defendant failed to bring his pickup truck to a full stop before entering and proceeding to cross the dominant highway, and without stopping entered and was proceeding to cross the dominant highway when plaintiff's truck approaching the intersection was only a few feet away, and that this evidence considered with the other facts in the case would further permit a jury to find that defendant was guilty of negligence which proximately caused the damage to plaintiff's truck. *Johnson v. Bass,* 256 N.C. 716, 125 S.E. 2d 19; *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223; *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539. Plaintiff alleges defendant's violation of G.S. 20-158 (a) proximately caused damage to his truck.

Plaintiff's evidence would also permit a jury to find that defendant was operating his pickup truck in violation of the reckless-driving statute, G.S. 20-140, proximately causing damage to plaintiff's truck, as alleged in his complaint.

The driver of plaintiff's truck on the dominant highway protected by a statutory Stop sign did not have the absolute right of way, in the sense he was not bound to exercise care toward defendant's pickup truck approaching on the intersecting servient road. *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373. However, as said in *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17, quoted with approval in *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265:

> ". . .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 highway."

Considering all the facts here, particularly defendant's slowing down as he approached the intersection, it cannot be said as a matter of law that plaintiff's driver failed to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, so as to bar a recovery by plaintiff on account of the contributory

negligence of his employee-driver. Plaintiff has not proved himself out of court so as to nonsuit him on the ground of contributory negligence. *Lincoln v. R.R.*, 207 N.C. 787, 178 S.E. 601.

Defendant alleges in his answer that plaintiff cannot recover, because his employee-driver had the last clear chance to avoid the collision. In essence, the doctrine of last clear chance is one of proximate cause, *McMillan v. Horne*, 259 N.C. 159, 130 S.E. 2d 52, or as it is differently stated, "the doctrine relates chiefly to, and is a phase of, the law of proximate cause in the sense that, where all the elements are present, defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between plaintiff's negligence and the injury and becomes the direct and proximate cause." 65 C.J.S., Negligence, p. 761. See *Combs v. United States*, 122 F. Supp. 280. It is manifest that plaintiff's evidence does not show as a matter of law that his employee-driver had the last clear chance to avoid the collision so as to hold plaintiff and his employee-driver solely responsible for the collision, and bar any recovery by plaintiff here.

In passing on the motion for judgment of nonsuit we have, as we are required to do, taken plaintiff's evidence as true, considered it in the light most favorable to him, and given him the benefit of every legitimate inference to be drawn therefrom. *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184. Plaintiff's *allegata et probata*, so considered, make out a case for the twelve.

The judgment of involuntary nonsuit was improvidently entered, and is

Reversed.

BULAH RICE AND WIFE, ELIZABETH RICE v. EDNEY RICE AND WIFE, FUSHIA RICE, AND MARGARET RICE.

(Filed 27 March 1963.)

1. Appeal and Error § 19—

Exceptions which appear nowhere in the record except under the purported assignments of error are ineffectual.

2. Boundaries § 7—

Where there is a *bona fide* dispute as to the boundary between the lands of plaintiffs and the lands of defendants, nonsuit is inapposite.

APPEAL by defendants from *Campbell, J.*, Regular October Term 1962 of MADISON.

This is a processioning proceeding instituted for the purpose of establishing the true boundary line between the adjoining lands of the plaintiffs and the defendants.

The plaintiffs and the defendants introduced voluminous evidence.

The jury found the true and correct boundary line between the lands of plaintiffs and the lands of defendants to be the line from A to B as shown on the official court map, prepared by James W. Moore, Registered Land Surveyor, and dated 27 October 1962.

Judgment was entered on the verdict. The defendants appeal, assigning error.

A. E. Leake for plaintiff appellees.
Clyde M. Roberts for defendant appellants.

PER CURIAM. The appellants undertake to set out five assignments of error based on a like number of exceptions. However, the exceptions appear nowhere in the record except under the purported assignments of error. Such exceptions are feckless and will not be considered on appeal. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

Furthermore, if exceptions to the failure of the court to nonsuit the plaintiffs at the close of plaintiffs' evidence and renewed at the close of all the evidence, had been properly entered and assigned, they would have been without merit.

This Court has repeatedly held that when it is made to appear that there is a bona fide dispute between landowners as to the true location of the boundary line between adjoining tracts of land, the cause may not be dismissed as in case of nonsuit. *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633; *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74; *Brown v. Hodges,* 230 N.C. 746, 55 S.E. 2d 498; *Welborn v. Lumber Co.,* 238 N.C. 238, 77 S.E. 2d 612.

In the trial below, we find

No error

STATE v. MARK EDWARD WELLS.

(Filed 10 April 1963.)

1. Arrest and Bail § 6; Automobiles § 65—

A warrant form having the name of defendant and averment of the time of the commission of the offense typewritten, followed by the printed words, "did unlawfully and willfully operate a motor vehicle upon the public streets or highways," with the words "Resist Arrest" written in ink in the space provided for written descriptions of charges not included in the printed list of offenses against the motor vehicle laws, *held* fatally defective.

2. Indictment and Warrant § 9—

A statutory offense may be charged substantially in the language of the statute if its language charges the offense with sufficient definiteness to apprise the accused of the specific offense charged, enable him to prepare his defense, and to appeal his conviction or acquittal as a bar to a subsequent prosecution, otherwise the language of the statute must be implemented so as to supply the requisite definiteness.

3. Criminal Law § 121—

Judgment on a count in a warrant must be arrested when the record discloses that the court in its instructions to the jury did not refer to the count or to the evidence or contentions pertinent thereto, and thus did not submit the count for the determination of the jury.

4. Intoxicating Liquor § 9—

The printed form of the warrant for motor vehicle violations in this case had typewritten words naming defendant and specifying the date and place, followed by the printed words, "did unlawfully and willfully operate a motor vehicle upon the public streets or highways," followed by words written in ink, "(T)ransporting and possession of a quantity of nontaxpaid whiskey for the purpose of sale. . ." *Held:* The warrant is sufficient to charge defendant with the unlawful transportation of nontaxpaid whiskey, and under the circumstances the reference to "possession" and "for the purpose of sale" were non-prejudicial surplusage, there being no motion to quash for duplicity.

5. Indictment and Warrant § 14—

Duplicity in an indictment or warrant is waived by failure to move to quash.

6. Criminal Law § 107—

Where there is plenary evidence that defendant transported nontaxpaid whiskey in the trunk of his car, and it is apparent from the warrant and evidence that the court submitted to the jury the sole question of defendant's guilt of the one offense of unlawful transportation of nontaxpaid whiskey, with correct instructions thereon that the transportation of any quantity of nontaxpaid whiskey is unlawful, further reference in the charge to possession and transportation of taxpaid whiskey, *held* not prejudicial.

7. Criminal Law § 121—

The arrest of judgment for fatal defects in the warrant does not bar subsequent prosecution on a valid warrant.

MOORE, J. dissenting in part and concurring in part.

HIGGINS and RODMAN, JJ., join in dissent.

APPEAL by defendant from *Burgwyn, Emergency Judge,* September 1962 Special Criminal Term of WAYNE.

Criminal prosecution on three warrants each charging that defendant, on Saturday, February 24, 1962, at 12:10 a.m., "did unlawfully and willfully operate a motor vehicle upon the public streets or highways," and thereafter indicating (in the manner and to the extent set forth below) the nature of the alleged criminal conduct of defendant.

Immediately below the (printed) words quoted above, there appears on the form a list of printed statements describing briefly certain violations of the motor vehicle laws. Opposite each such statement is a box in which the affiant may indicate by a check mark the listed violation, if any, for which the warrant is issued. Immediately below these (printed) statements space is available in which the affiant may *write* a description of a violation not included in the printed list. Thereafter, these (printed) words appear: "in violation of and contrary to the form of the statute(s) in such case(s) made and provided and against the peace and dignity of the State."

Each warrant bears the captions "Uniform Traffic Violation Record," and "Affidavit and Warrant," and each bears a "Serial No."

The warrant bearing "Serial No. 149412" does not purport to charge any listed violation. In the space below said list, the violation it purports to charge is written in ink in these words: "Transporting and possession of a quantity of nontaxpaid whiskey for the purpose of sale, to wit, 30 gallons of nontaxpaid whiskey."

The warrant bearing "Serial No. 149413" does not purport to charge any listed violation. In the space below said list, the violations it purports to charge are written in ink in these words: "Resist Arrest" and "Assault on officer J. F. Allsbrook in performance of his duty by striking him in the face with his fist, hand and elbow."

The warrant bearing "Serial No. 149411" purports to charge these violations: One (the first) listed violation is checked, to wit: "By speeding (over limit) 80 miles per hour in a 55 miles per hour zone." (Note: The figures 80 and 55 are written in ink.) In the space below said list, the violations it purports to charge are written in ink in these

words: "Careless and Reckless Driving (20-140)" and "Fail to Stop for Red Light and Siren."

The said warrants were issued February 28, 1962. Upon trial thereon in the Recorder's Court of Wayne County, defendant was adjudged guilty and judgments imposing prison sentences were pronounced. Defendant appealed. Upon trial *de novo* in the superior court, the cases (there designated Cases Nos. 7142, 7141, and 7143, respectively) were consolidated for trial. Consolidated for trial with them was a case designated in superior court as Case No. 7140 in which defendant was found *not guilty* of the charge of an assault with a deadly weapon, to wit, an automobile, with intent to kill.

The trial in superior court resulted in verdicts and judgments as follows:

With reference to the charge(s) in Case No. 7142, based on warrant bearing Serial No. 149412, the jury returned a verdict of guilty; and judgment imposing an active sentence of two years was pronounced.

With reference to the charge(s) in Case No. 7141, based on warrant bearing Serial No. 149413, the jury returned a verdict of guilty of "resisting arrest." The jury was unable to reach a verdict as to the assault charge in said warrant and, as to this charge, the State took a nol. pros. with leave. Upon the verdict of guilty of "resisting arrest," judgment imposing an active sentence of two years, to begin at the expiration of the sentence imposed in Case No. 7142, was pronounced.

With reference to the charge(s) in Case No. 7143, based on warrant bearing Serial No. 149411, the case on appeal states defendant was found guilty "of all of these charges." For "Careless and Reckless Driving," judgment imposing an active sentence of one year, to begin at the expiration of the sentence imposed in Case No. 7141, was pronounced. For "Fail to Stop for Red Light and Siren," judgment imposing an active sentence of one year was pronounced; but it was provided this sentence was to run concurrently with the sentence imposed for "Careless and Reckless Driving." For "speeding (over limit) 80 miles per hour in a 55 miles per hour zone," the judgment pronounced was identical with that pronounced for "Fail to Stop for Red Light and Siren."

Defendant excepted to said judgments and appealed.

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

Braswell & Strickland for defendant appellant.

BOBBITT, J. With reference to Case No. 7141, based on warrant bearing Serial No. 149413, the verdict and judgment relate solely

to the count in this warrant charging "Resist Arrest." This count, which presumably was intended to charge a violation of G.S. 14-223, is fatally defective; and, with reference thereto, defendant's motion in arrest of judgment is allowed. *S. v. Eason,* 242 N.C. 59, 62, 86 S.E. 2d 774, and cases cited; *S. v. Harvey,* 242 N.C. 111, 112, 86 S.E. 2d 793.

". . . while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements." *S. v. Cox,* 244 N.C. 57, 59, 92 S.E. 2d 413.

With reference to Case No. 7143, based on warrant bearing Serial No. 149411:

1. The count in this warrant purporting to charge a violation of G.S. 20-140 describes the offense in these words: "Careless and Reckless Driving (20-140)." This count is fatally defective and, with reference thereto, defendant's motion in arrest of judgment is allowed. As indicated above, *the minimum* requirement of a warrant or indictment for a statutory offense is that such offense be charged substantially in the language of the statute. *S. v. Barnes,* 253 N.C. 711, 717, 117 S.E. 2d 849, and cases cited; *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654, and cases cited. (Note: As to punishment for violation of G.S. 20-140(a) and G.S. 20-140(b), see G.S. 20-140(c).)

2. The count in this warrant charging "Fail to Stop for Red Light and Siren," contains no reference to the statute(s) on which it is based. Without reference to whether this count sufficiently charges a violation of G.S. 20-158(c) or a violation of G.S. 20-157(a), the judgment imposing sentence thereon must be and is arrested. The court's instructions to the jury contain no reference to this count or to evidence or contentions pertinent thereto. Hence, it appears plainly the court did not submit this count for jury determination.

3. The count in this warrant charging that defendant unlawfully and wilfully operated a motor vehicle upon the public highway at a speed of 80 miles per hour in a 55-mile per hour speed zone sufficiently charges a violation of G.S. 20-141. However, the judgment imposing sentence on this count must be and is arrested. The court's instructions to the jury contain no reference to this count or to evidence or con-

tentions pertinent thereto. Hence, it appears plainly that the court did not submit this count for jury determination.

With reference to Case No. 7142, based on warrant bearing Serial No. 149412, the only count in this warrant charges that defendant "(o)n Sat. the 24 day of Feb. 1962 at 12:10 A.M. in Wayne County in the vicinity of N.C. 581 . . . did unlawfully and willfully operate a motor vehicle upon the public streets or highways: . . . Transporting and possession of a quantity of nontaxpaid whiskey for the purpose of sale, to wit, 30 gallons of nontaxpaid whiskey," etc.

Conceding the possession of nontaxpaid whiskey for the purpose of sale is a separate and distinct criminal offense, the portion of this warrant written in ink must be considered in relation to the preceding portion, namely, the accusation that the defendant unlawfully and wilfully operated a motor vehicle upon the public highway, etc. While inexpertly drawn, the warrant charges the unlawful transportation by defendant of 30 gallons of nontaxpaid whiskey, a violation of the Turlington Act, G.S. 18-2, and also a violation of the Alcoholic Beverage Control Act of 1937, G.S. 18-49.1, G.S. 18-49.2 and G.S. 18-49.3. Whether the transportation of the nontaxpaid whiskey was unlawful did not depend upon whether it was being transported for the purpose of sale. Moreover, only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof. Thus, in the circumstances here considered, we think the references to "possession" and "for the purpose of sale" were superfluous but did not mislead or prejudice defendant.

Defendant made no motion to quash the warrant and thereby waived any duplicity therein. *S. v. Merritt,* 244 N.C. 687, 688, 94 S.E. 2d 825, and cases cited. As to this warrant, defendant's motion in arrest of judgment (first made in this Court) is without merit and is denied.

When this warrant and the evidence and the charge relating thereto are considered, it appears clearly the court submitted for jury determination whether defendant was guilty or not guilty of one criminal offense, namely, the unlawful transportation of nontaxpaid whiskey, a misdemeanor. See *S. v. Thompson,* 257 N.C. 452, 457, 126 S.E. 2d 58, and cases cited.

Referring to this warrant, the court charged the jury in part as follows: "It is against the law . . . for any person in North Carolina to transport any amount of non-tax paid whisky; it is against the law in North Carolina for any person to transport more than one gallon of tax-paid whisky, at any time, unless he be a duly authorized

person of the state to transport it for ABC purposes, from place to place; (and the possession of any person in such a quantity as thirty gallons would carry with it the implication that the person had it for unlawful disposition or for sale.)" Defendant assigns as error the portion of the foregoing instruction enclosed by parentheses.

The context shows the court, in the excerpt challenged by defendant, was referring to law applicable to the transportation of taxpaid whiskey. There is no evidence or suggestion that the whiskey transported by defendant was taxpaid whiskey. As indicated, the court had instructed the jury correctly (and did so in further instructions) that the transportation of any quantity of nontaxpaid whiskey was unlawful. The reference to the possession and transportation of taxpaid whiskey was unnecessary. Even so, we do not perceive the court's comments with reference thereto were prejudicial to defendant.

There was plenary evidence nontaxpaid whiskey (30 gallons) was being transported in the trunk of defendant's car and that defendant tried (but failed) to outrun the State highway patrolmen and thereby avoid search of the trunk and discovery of the whiskey.

As to the charge of unlawful transportation of nontaxpaid whiskey, *defendant's testimony* is interesting. Summarized, except when quoted, defendant's testimony was as follows:

Until approximately two years prior to February 24, 1962, defendant had "hauled liquor for about a couple of years" for a man in Johnston County but "stopped for a while." Prior to February 24, 1962, defendant "had gotten behind on (his) bills" and "had to do something." A man "had been calling (him), telling (him) to come back," and as a result defendant made the following agreement:

Defendant was to go to Johnston County *three* times a week and on *one* of his trips back he "was supposed to have whiskey on the automobile." Defendant would drive his car to an agreed location in Johnston County and there be met by a man who would take his key and car and leave. Defendant would wait until the man brought his car back and returned his key. Defendant had no key or other means of opening the trunk or boot of his own car. When defendant's car and key were delivered to him, "the man" would drive off in his car after first telling defendant where he was to park his car on his next trip to Johnston County. Defendant would then drive to Goldsboro, "go down on Carolina Street, pass these buildings and pull in and park it (his car) on the lot." Defendant would leave his car on the lot and after about thirty minutes would come back and pick it up. Defendant was not present at any time "when the liquor was loaded on (his) car" or "when the liquor was taken off (his) car." The trip he was making

when stopped by a State highway patrolman was the third trip he had made that week. He "didn't think" there was any liquor on the car on this trip because "it was not sitting down." "Usually at the times it was ever on there, you could almost tell because usually it would set heavy." Defendant did not know the man with whom he made the foregoing arrangement, had had no contact with him, "not as far as personally meeting him." He did not know the name of the man in Johnston County to whom he delivered his car on February 23, 1962. This man "was a colored man who was driving a 1957 Ford . . ." This man "was always clean shaven and 'just ordinary' every time that (defendant) saw him. He would call (defendant) and tell (defendant) when it was time to go."

The foregoing testimony is a notable commentary upon the devious and ingenious ways in which those engaged in the business of violating the criminal law with reference to the transportation of whiskey seek to avoid detection and successful prosecution.

While there were errors in other respects, we find no prejudicial error with reference to defendant's conviction in Case No. 7142, based on warrant bearing Serial No. 149412, charging the unlawful transportation of nontaxpaid whiskey. It is noted that the sentence imposed by the judgment pronounced in Case No. 7142 did not depend upon or follow any other sentence but was to go into effect immediately.

It is noted: The arrest of judgment on the ground a warrant is fatally defective does not bar further prosecution on a valid warrant. *S. v. Barnes, supra,* and cases cited.

The warrants involved on this appeal emphasize again the necessity and importance of drafting criminal pleadings in accordance with well established legal requirements.

Case No. 7142, no error.

Case No. 7141, judgment arrested.

Case No. 7143, judgments arrested.

MOORE, J. dissenting in part and concurring in part:

I agree with the majority opinion that judgment should be arrested in cases 7141 and 7143. But in my opinion there should be a new trial in 7142.

In addition to the fatal defects in the warrants in cases 7141 and 7143, discussed in the majority opinion, these warrants are bad for duplicity. In a warrant or indictment consisting of several counts, each count should be complete in itself and the defendant should be named in each count. *State v. McCollum,* 181 N.C. 584, 107 S.E. 309.

In case 7142 the warrant charges "transporting and possession of a quantity of non-tax paid whisky for the purpose of sale. . ." Thus the warrant charges in one count two offenses, transporting (G.S. 18-2) and possession for the purpose of sale (G.S. 14-32). *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854. An indictment or warrant which charges more than one offense in the same count is bad for duplicity. *State v. Cooper,* 101 N.C. 684, 8 S.E. 134.

A motion to quash for duplicity should be made before pleading to the charge, and if made after plea it is addressed to the sound discretion of the court and is not allowable as a matter of right. *State v. Beal,* 199 N.C. 278, 154 S.E. 604. If the motion is made after verdict it comes too late. *State v. Avery,* 236 N.C. 276, 72 S.E. 2d 670; *State v. Mundy,* 182 N.C. 907, 110 S.E. 93.

There was no motion to quash for duplicity in the instant case, and the point is not raised on appeal. The matter of duplicity is discussed here because it emphasizes the error in the court's instructions to the jury.

The majority opinion points out that the warrant deals generally with the operation of a motor vehicle on a street or highway and concludes therefrom the reference to possession of whiskey for the purpose of sale is mere surplusage, that the warrant only charges unlawful transportation. But it should be borne in mind that it is unlawful to possess whiskey for sale, under the statutory prohibitions, at any place, even in a moving motor vehicle.

The trial judge instructed the jury:

"He (defendant) is charged first of all with transportation of non-tax paid whisky and possession of non-tax paid whisky for the purpose of sale.

"It is against the law . . . for any person in North Carolina to transport any amount of non-tax paid whisky. . . .

"(and the possession of any person in such a quantity as thirty gallons would carry with it the implication that the person had it for unlawful disposition or for sale.)"

Later in the charge, the court stated to the jury:

". . . (y)ou will proceed to consider whether or not you find him guilty of transportation of and possession of non-tax paid whisky." (Defendant was not charged with "possession," but was charged with "possession for the purpose of sale." *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355.)

Thereafter, the instructions as to the warrant in case 7142 deal only with the contentions of the State and defendant with respect to transportation of intoxicating liquor.

I agree that the court correctly charged the law respecting transportation of liquor. But the charge was both erroneous and incomplete as to possession for the purpose of sale. As a literary matter, I agree that it is a possible, though not a necessary, construction of the court's charge on possession and possession for sale that it is merely explanatory of the instruction as to transportation. But nowhere does the court expressly inform the jury that it is to disregard "possession for the purpose of sale" and consider only whether the defendant is guilty of transporting intoxicating liquor. Moreover, at no place in the charge is the jury informed what possible verdicts it may render.

In case 7142 the jury returned a general verdict of guilty. We do not know whether it intended to return a verdict of guilty of transporting intoxicating liquor, a verdict of guilty only of possession of intoxicating liquor for the purpose of sale, or a verdict of guilty of both. If it intended either of the two latter verdicts, the verdict is based on an incomplete and incorrect charge. In my opinion the jury did not have proper legal direction and guidance in case 7142 and was left to its own devices in arriving at a verdict. I vote for a new trial in case 7142.

HIGGINS AND RODMAN, JJ., join in this opinion.

JAMES H. BAYSDON v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, AND HOME INSURANCE COMPANY.

(Filed 10 April 1963.)

1. Insurance §§ 76, 81—

Under a policy of fire insurance issued for a five-year term with provision for payment of the balance of premium in three yearly installments, with further provision that if insurer elects to cancel the policy for default in any payment it should give insured five days written notice of intention to cancel, *held* insurer may not cancel for delay in payment of the premium installments unless it gives notice to insured of its election to do so in accordance with the terms of the policy, there being no waiver by insured.

2. Insurance § 81—

Insured procured a fire insurance policy for a five-year term and thereafter procured two other policies with intention of canceling the first, but did not so advise the first insurer until after loss. *Held:* Insured's

uncommunicated intention to cancel the policy is insufficient to effect a cancellation by insured, and further does not constitute a waiver by insured of notice by insurer of insurer's election to cancel the policy for default in the payment of premium installments, mutual consent or agreement being essential to the cancellation of a policy by substitution.

3. Waiver § 2—

There can be no waiver unless so intended by one party and so understood by the other, or unless one party has acted so as to mislead the other.

4. Insurance §§ 76, 84—

Where insurance policies provide that each insurer should not be liable for a greater portion of the loss than the amount its policy bears to the whole insurance on the property, each insurer has the right to maintain that another policy on the property had not been cancelled because of the failure of the insurer therein to give insured notice of cancellation as required by the policy, since the general rule that only insured may complain of want of notice may not be invoked to deprive an interested party of a legal right.

5. Insurance § 81—

Where insured finances the balance of the premium on a five-year term policy through a bank under an agreement providing that failure of insured to pay an installment when due should constitute an election upon the part of insured to cancel the insurance, *held*, failure to pay installments when due does not work an automatic cancellation of the policy and there is no cancellation unless the bank, pursuant to authorization, requests insurer to cancel the policy, a communicated request by insured or insured's authorized agent being necessary to a valid cancellation at the request of insured.

6. Appeal and Error § 49—

A holding by the court that the policy of insurance in question was not in force at the time of the loss in suit is a conclusion of law and not a finding of fact, and when such conclusion is not supported by the actual findings, the cause must be remanded.

APPEAL by defendant Nationwide Mutual Fire Insurance Company from *Parker, J.*, November 1962 Civil Term of ONSLOW.

This is an action to recover upon fire insurance policies for loss suffered by plaintiff.

The complaint alleges in substance (numbering ours):

(1). Plaintiff's property in Onslow County, a business building and contents, was destroyed by fire on 12 February 1962. The amount of the loss: building $9,276. 33, contents $5,135.00.

(2). Plaintiff had procured fire insurance policies, each for a term of 5 years, as follows: (a) Great American Insurance Company (Great

American), on building $6,000, contents $1,000, effective 11 January 1960, expiration 11 January 1965; (b) Home Insurance Company (Home), building $6,000, contents $2,000, effective 16 December 1960, expiration 16 December 1965; and (c) Nationwide Mutual Fire Insurance Company (Nationwide), on building $15,000, contents $5,000, effective 11 January 1962, expiration 11 January 1967. Copies of the policies are attached to the complaint as exhibits.

(3). The premium for each of the three policies was payable in installments, the first installment to be paid at the inception of the policy, and subsequent installments annually thereafter. Plaintiff paid the inception installments on all of the polices, and the installment on the Great American policy which was due 11 January 1961. Plaintiff was in default on premium installments due Great American and Home at the time of the fire, 12 February 1962.

(4). Plaintiff fully intended to cancel the Great American and Home policies when he obtained the Nationwide policy, but did not so advise Great American and Home or their agents until after the fire.

(5). Nationwide has paid plaintiff $5,153.00 and $3,409.38 on account of the building and contents losses respectively, being the pro rata amounts its coverage bears to the totals of the three policies.

(6). Great American and Home refuse to pay any amount, and contend that their polices were not in force.

(7). Plaintiff is entitled to recover of Nationwide or Great American and Home the unpaid portion of his loss.

Nationwide admits the material allegations of the complaint, and avers that it was liable only for the amounts paid by it and that the Great American and Home policies were in force at the time of the loss.

Great American and Home, in separate answers, admit generally the allegations of the complaint, and allege (a) that plaintiff did not pay premium installments when due, and did not ask, or intend to ask, for the extension and renewals of their policies, (b) that plaintiff agreed with Nationwide's agent to have Nationwide issue its policy in substitution for the policies of Great American and Home, and (c) that plantiff financed the policies of Great American and Home under a "Premium Budget Plan" through the Chase Manhattan Bank, which Plan provides "that failure to pay any installment . . . when due, constitutes an election on the part of . . . insured to cancel this (sic) insurance."

Each of the three policies contains the following standard provisions:

(1). "This policy shall be cancelled at any time at the request of the insured. . . . This policy may be cancelled at any time by this Company by giving the insured a five days' written notice of cancellation. . . ."

(2). "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing and added hereto."

(3). "This Company shall not be liable for a greater portion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved. . . ."

The Great American and Home policies contain endorsements entitled "Installment Premium Payment Plan," which provide *inter alia*: "If the insured is in default of any payment shown in this policy and the Company elects to cancel the policy, notice of cancellation shall be in accordance with the policy conditions. . . ."

The parties waived trial by jury and agreed that the judge find the facts, make conclusions of law, and enter judgment. The record does not show that there were any facts stipulated or any oral evidence offered or received. The court apparently proceeded upon the admissions in the pleadings, the terms of the policies and the arguments of counsel.

In addition to matters clearly not in dispute, the court found facts substantially as follows: (1) Plaintiff did not intend to continue in force the Great American and Home policies, but intended to replace them with the Nationwide policy; (2) Nationwide has agreed to pay the balance of plaintiff's loss if it is finally determined by a court of competent jurisdiction that it is liable therefor; and (3) the Great American and Home policies were not in force at the time of the loss.

The court concluded that plaintiff is entitled to recover of Nationwide the balance of his loss — $5,913.95 with interest. Judgment was entered accordingly. Nationwide excepts and appeals.

Ellis, Hooper & Warlick for plaintiff, appellee.

Summersill & Browning for defendant Nationwide Mutual Fire Insurance Company, appellant.

Poisson, Marshall, Barnhill & Williams for defendants Great American Insurance Company and Home Insurance Company, appellees.

MOORE, J. Appellant Nationwide's assignments of error require us to decide whether the findings of fact support and justify the con-

clusion of the trial court that the Great American and Home policies "were not in force at the time of the loss."

Nationwide admits that its policy was in force. The Great American and Home policies were issued for five year terms which had not expired at the time of the loss. The premium installment on the Great American policy was thirty-two days past due, and on the Home policy fifty-eight days past due. But there is no automatic suspension or forfeiture of insurance for nonpayment of premiums or assessments, where insurer remains liable following such nonpayment unless it takes the necessary steps to avoid the policy. 45 C.J.S., Insurance, s. 542, p. 280; *Farmers Mut. Fire Ins. Co. of Greene County v. Maloney*, 117 S.W. 2d 757 (Tenn. 1938); *Federal Land Bank of Omaha v. Farmers' Mut. Ins. Ass'n.*, 253 N.W. 52 (Iowa 1934); *Lobdell v. Broome County Farmers' Fire Relief Ass'n.*, 271 N.Y.S. 272 (1934). All of the policies in the instant case are standard policies containing the provisions required by G.S. 58-176(c). They do not provide for automatic termination of the insurance upon default in the payment of premium installments. Indeed, they provide to the contrary — that "If the insured is in default of any payment shown in this policy and the Company elects to cancel the policy, notice of cancellation shall be in accordance with the policy provisions." The policy provisions with respect to cancellation are that the policy may be cancelled at any time at the request of insured or by the insurer giving the insured a five days' written notice of intention to cancel.

Appellees suggest that on each premium installment date there is in substance a renewal or extension of insurance coverage upon payment of the installment, and default automatically prevents further coverage. The rules applicable to renewals are inapposite here, for the Great American and Home policies were for five year terms, and the terms were current at the time of the loss. Appellees also urge that payment of premium installments was a condition precedent to continued coverage, and failure to pay terminated coverage. We find nothing in the insurance contracts to support this view. As we have already noted, the contracts provide that to cancel upon default of installment payments insurer is required to give five days' written notice.

There is no finding, or even suggestion, that insured requested cancellation or that Great American or Home gave any written notice of cancellation. Insured intended to cancel these policies when he acquired the Nationwide policy, but did not so advise Great American or Home until after the loss. To effect a cancellation by insured there must be communicated to the insurer a definite and unconditional request therefor by insured or his authorized agent. A mere intention

to cancel, not communicated to insurer, is not sufficient to effect a cancellation by the insured. *Manufacturing Co. v. Assurance Co.,* 161 N.C. 88, 76 S.E. 865; *Dyche v. Bostian,* 229 S.W. 2d 25, aff'd 233 S.W. 721 (Mo. 1950); 6 Appleman, Insurance Law and Practice (1942), s. 4226, p. 793; 3 Richards, Insurance (5th Ed.), s. 532, p. 1765. To effect a cancellation by insurer the five days' notice provision must be strictly complied with. Unless the requirement is waived by insured, an insurer must comply with the terms of the policy or statute that it give notice of its intention to cancel. *Dawson v. Insurance Co.,* 192 N.C. 312, 135 S.E. 34; 45 C.J.S., Insurance, s. 450, p. 84.

To sustain the court's conclusion that the Great American and Home policies were not in force at the time of the loss, appellees rely mainly upon the finding that insured did not intend to continue these policies in force, but intended to replace them with the Nationwide policy.

Some writers on the subject have pronounced a rule that generally the procurement of new insurance on property for a term commencing before the expiration of existing insurance thereon, and with intent to have the new insurance replace the existing insurance and without intent to acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, despite the physical possession by insured of the original policy. 45 C.J.S., Insurance, s. 458, p. 118; 6 Appleman, Insurance Law and Practice (1942), ss. 4196 and 4225; 27 California Jurisprudence 2d, Insurance, s. 293. We hereinafter refer to this as the "substitution rule."

The case most often cited in support of the rule is *Bache v. Great Lakes Ins. Co.,* 276 P. 549 (Wash. 1929). In our opinion this case is not directly in point. The property there in question was mortgaged and the mortgage contained an insurance clause requiring the insurance policy to remain in possession of the mortgagee and authorizing mortgagee to procure and maintain insurance if the owners failed to do so. The original insurer, desiring to be relieved of the risk, gave mortgagee, but not the owners, a five days' written notice of its intention to cancel. Mortgagee, on the day it received the notice, procured a substitute policy from another company. A fire loss occurred before the expiration of the five days. The owners knew nothing of the cancellation notice or the substitute insurance until after the loss. It was held that the original policy, and not the substitute policy, was in force, as to the owners, for the reason that the mortgagee had no authority to agree to a cancellation of the original insurance or to procure substitute insurance. The case turned on the question of agency. The court proceeded on a stipulation by counsel that the acquisition

of substitute insurance by the owners or their agent would effect a cancellation. The court did not reach the point of applying the substitution rule to the facts, and did not concern itself with any discussion of the rationale or essential elements of the rule.

Glens Falls Insurance Co. v. Founders' Insurance Co., 25 Cal. Rptr. 753 (1962), is in all material aspects analagous to the case at bar. Insured had a Glens Falls policy — the cancellation provisions were the same as in standard North Carolina policies. She had a disagreement with Glens Falls concerning a loss on other property covered by another Glens Falls policy. She called the insurance broker having the Glens Falls business in that locality and told him she would cancel all her policies and place her business with another broker if her claim was not settled. She later had another broker intervene in her behalf, but he was unable to bring about a settlement. She then told him to see that her Glens Falls policies were cancelled and to obtain replacement policies with some other company. He talked with the original broker but did not cancel the Glens Falls policies; he procured insurance from Founders' in the same amount as the Glens Falls policies. Glens Falls continued to carry the insurance as in force and gave no notice of cancellation. Insured intended the Founders' policy as a replacement of the Glens Falls insurance, and did not intend to carry the former as additional insurance; she did not so notify Glens Falls and did not request cancellation. Five months after Founders' policy was acquired she suffered a fire loss. It was adjudged that Glens Falls and Founders' share the loss pro rata. The court observed that neither insured nor Glens Falls complied with policy provisions for cancellation, and stated: "An intention to cancel a policy does not *ex proprio vigore* cancel it." It then discussed the substitution rule and reviewed in considerable detail the leading cases from other jurisdictions involving this principle, and concluded that in all cases in which the substitution rule was applied there was what amounted to a cancellation by mutual consent and that cancellation by substitution of a policy may not be unilaterally effected. The following excerpts from the opinion seem to us to be sound statements of pertinent legal principles:

"It would appear, therefore, that unless another method of cancellation has been evolved by decisional law as contended by respondent, *i.e.*, cancellation by substituted insurance arising out of the unilateral intent of the insured uncommunicated to the company, an insurance contract cannot be terminated or extinguished except as provided by its terms or pursuant to the provisions of law which govern contracts generally and as implemented by other provisions of law.

"In our opinion, except for the remedial rights of rescission afforded one of the parties to a contract such as in the instances of fraud, deceit, mistake, etc., . . . an insurance contract can only be cancelled pursuant to its terms or by mutual consent. . . . (T)he mere procuring of substituted insurance with the intent to replace existing insurance and without the intent to thereby acquire additional insurance does not *per se* work a cancelling of the existing insurance. . . . (I)n order for cancellation to take place by the substitution of one policy for another it must be done by mutual consent or agreement."

The opinion in the *Glens Falls* case either reviews or cites the leading cases throughout the country and no useful purpose can be served by listing them here.

It comes to this — an insurance policy is a contract; a contract may be rescinded for fraud or mutual mistake, it may be terminated in accordance with the provisions thereof or by *mutual consent,* a meeting of the minds, but one of the parties may not terminate it without the assent of the other unless the contract so provides.

Great American and Home carried the insurance as in force. They had no knowledge of the existence of the Nationwide policy until after the loss, and they did not assent to the substitution of this policy for theirs until after the loss. Procuring additional insurance without requesting the original insurer to cancel its policy does not terminate the policy. 6 Appleman, s. 4226, p. 797; *Scheel v. German-American Ins. Co.,* 76 A. 507 (Pa. 1910); *Glens Falls Insurance Co. v. Founders' Insurance Co., supra.*

A party may waive a provision of a contract. A provision in a policy that insurer must give notice to insured as a condition precedent to cancellation is for insured's benefit and may be waived by him. *Wilson v. Insurance Co.,* 206 N.C. 635, 174 S.E. 745; *Dawson v. Insurance Co., supra.* The burden is on insurer to show a waiver by the insured, and it must appear clearly that the insured expressly or impliedly waived notice if he is to be held bound by such waiver. 29 Am. Jur., Insurance, s. 392, p. 744. There appears on the present record no facts from which a waiver of notice may be inferred, and the court made no finding that notice was waived. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other. *Manufacturing Co. v. Lefkowitz,* 204 N.C. 449, 453, 168 S.E. 517. In a sense, waiver and mutual consent are one and the same thing.

Appellees contend that Nationwide has no standing to assert lack of notice to insured by Great American and Home since the five days' written notice provision is for the benefit of insured. And it has been

stated that "none except the insured can take advantage of the want of notice." 29 Am. Jur., Insurance, s. 382, p. 733. But this rule has no application in the situation presently presented; Nationwide may certainly assert its rights under its contract. When a loss occurs the rights of the parties to a fire insurance policy become fixed. 45 C.J.S., Insurance, s. 444(b), p. 72. Nationwide's contract with insured provides that Nationwide "shall not be liable for a greater portion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved." This gives it the right to have determined in this action whether there was at the time of the loss other coverage, what its liability is, and to insist that other coverage be not extinguished after the loss by acts of the insured which will cast the entire loss on it. Insured may, of course, release any of his debtors at any time if he desires, but if he releases, waives or otherwise terminates insurance coverage after loss, the loss falls upon him *pro tanto*.

Great American and Home allege in their answers that plaintiff financed the policies issued by them under a "Premium Budget Plan" through the Chase Manhattan Bank, which plan provides that failure to pay an installment when due constitutes an election on the part of insured to cancel the insurance. These allegations are deemed denied, and the court made no findings with respect thereto. These provisions standing alone would not work an automatic cancellation of the policy upon failure to pay. It would seem that at the trial below some of the facts were not fully developed. The questions, whether Chase Manhattan bank had authority to request cancellation upon default, and what action, if any, the Bank took when plaintiff failed to pay, remain unanswered. See *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314. It may be there are other facts which should be brought to light in order that the correct determination may be made.

The purported finding of fact by the court that the Great American and Home policies were not in force at the time of the loss is but a conclusion of law. It is not supported by the actual findings of fact. The case is remanded for rehearing.

Error and remanded.

IN RE ABERNATHY.

IN THE MATTER OF: J. K. ABERNATHY, SS No. 244-42-7854, EMPLOYEE, ET AL EASTERN AIR LINES, INC., EMPLOYER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA.

(Filed 10 April 1963.)

1. Master and Servant § 108—

The findings of fact of the Employment Security Commission are conclusive on appeal when the findings are supported by competent evidence. G.S. 96-15(i).

2. Statutes § 5—

The purposes sought to be accomplished by the legislative branch in the enactment of a statute will be given due consideration by the courts in construing the statute.

3. Master and Servant § 97—

The Employment Security Act will be construed in the light of the legislative purposes of providing aid to those out of work through no fault of their own, and to provide for the accumulation of funds necessary to this end by a tax on employers, supplemented by Federal grant, and it was not contemplated that such funds should be depleted by, or used to encourage, work stoppages.

4. Master and Servant § 106—

Under the 1961 Amendment to the Employment Security Act, G.S. 96-14(4), where there is a strike of a group of employees which forces the employer to shut down his operations in this State, employees in this State, members of a separate union and different classification who are not on strike but who are out of work because of the strike, are not entitled to unemployment compensation benefits, notwithstanding that the striking employees are not based in this State when they perform, at terminals in this State, duties essential to the operation of the employer's business.

5. Master and Servant § 97; Constitutional Law § 11—

The 1961 Amendment to the Employment Security Act, G.S. 96-14(4), which imposes a further disqualification on the right of employees to unemployment benefits upon the stoppage of work because of a strike, differs only in degree and not in principle to disqualifications theretofore provided, and the amendment is uniform in its applicaton to the class specified and is therefore a constitutional exercise of the police power, the wisdom of the enactment being solely a legislative question.

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

APPEAL by the Employment Security Commission of North Carolina from *Riddle, S.J.*, October, 1962 Special "B" Term, MECKLENBURG Superior Court.

This proceeding was instituted before the Employment Security Commission of North Carolina, hereafter called the Commission, by

IN RE ABERNATHY.

J. K. Abernathy and others, employees of Eastern Air Lines, Inc., (hereafter called Eastern) who filed claims for unemployment insurance benefits during the time they were out of work or furloughed from their jobs as a result of a labor dispute between the flight engineers and Eastern. In due course the Chairman of the Commission ordered the claims referred to R. B. Overton, Special Appeals Deputy, for hearing and disposition. After due notice, the interested parties appeared before Mr. Overton on July 12, 1962. After concluding the hearing on July 18, 1962, the Appeals Commissioner made detailed findings of fact, stated conclusions of law, and ordered that "all those individuals whose names appear on 'Exhibit A' shall be and the same are disqualified from receiving unemployment insurance benefits beginning June 23, 1962, through July 12, 1962, and continuing as long as the labor dispute between Eastern Air Lines, Inc. and the flight engineers remain in active progress and their unemployment is caused thereby."

The parties adversely affected by the finding, conclusion, and order of the Special Appeals Deputy, including the Director, Unemployment Insurance Division, petitioned for and were granted a review by the full Commission. Hearing on review by the Commission began on August 10, 1962. At the conclusion of the hearing the Commission (among other things not deemed essential to the dispute) made these findings:

"1. Eastern Air Lines, Inc. hereafter referred to as the employer, is a corporation engaged in the business of commercial air transportation, transporting passengers, U. S. mail, and cargo in interstate commerce by means of airplanes, serving twenty-six states in the eastern half of the United States and one hundred and twenty cities, and in addition thereto, serving Mexico City, Puerto Rico, Bermuda and Canada.

"2. The employer normally employs seventeen thousand nine hundred and six employees throughout its system with between six hundred and fifty and seven hundred being based in North Carolina working at or out of the airports and/or cities served in this State.

"3. The classification of the employees utilized by the employer consists of various skills and vocations, among which are mechanics and related skills, pilots, stewards, stewardesses, flight engineers, communiction workers, dispatchers, and various clerical workers, and others, including some nonunion personnel.

"4. The employees of Eastern Air Lines, Inc. are represented through its system by the following unions or associations according to their skills and vocations: (1) International Association of Machinists; (2) Airline Pilots Association; (3) Airline Stewards and Stewardesses Association; (4) Flight Engineers International Association; (5) Communication Workers of America Union; and (6) Airline Dispatchers Association. Such unions or associations have been duly certified under the Federal Statutes as the bargaining agents for their members and all other personnel performing similar or related duties, and such bargaining is on a system-wide basis.

"5. In its system the employer employs five hundred and seventy-five flight engineers whose services are utilized on four-engine aircraft throughout its system. Some of such four-engine aircraft land and take off with passengers and cargo at all airports in the system located in North Carolina; namely, Charlotte, Raleigh-Durham and Greensboro-High Point, taking on passengers and cargo at each airport as the necessity arises. Jet planes belonging to the employer also land and take off from the airport in Charlotte taking passengers and cargo to and from that airport as the necessity arises. Flight engineers are employed and used on all four-engine and jet aircraft landing and taking off in North Carolina. None of the flight engineers are based in North Carolina although they fly in and out of the various airports on schedules of four-motored piston driven planes and all jet planes serving North Carolina. The flight engineers perform services at each of the company's facilities in North Carolina and elsewhere throughout its entire system. When the four-engine piston driven planes and jet planes land at the North Carolina airports, the flight engineers inspect the planes for safety airworthiness and determine the distribution of gasoline.

"6. Approximately thirty-five per cent of the planes used by the employer in its system are two-engine aircraft and on all two-engine aircraft the services of flight engineers are not used. Approximately sixty-five per cent of the planes used by the employer in its system consist of four-engine piston planes and jets, all of which utilize the services of flight engineers.

"7. On June 23, 1962, the five hundred and seventy-five flight engineers went on strike and refused to carry out their work assignments. This strike and refusal to work was in protest of the failure of the employer and the bargaining agent representing the

flight engineers to reach an agreement as to the qualifications of the flight engineers, there being a difference of opinion between such parties as to whether the flight engineers should also be qualified as pilots. Beginning on June 23, 1962, and continuing through the date of the hearing by the Special Appeals Deputy on July 12, 1962, the flight engineers failed and refused to perform their services in bringing planes in and out of the facilities of the employer in North Carolina, and elsewhere.

"8. In consequence of the strike of the flight engineers, the employer cancelled all flights and furloughed several thousand employees, including its employees in North Carolina, a list of which is hereto attached and marked 'Exhibit A.' Those individuals whose names appear on 'Exhibit A' hereto attached were unemployed beginning June 24, 1962, through July 12, 1962, the date of the hearing before the Special Appeals Deputy, and their unemployment is due to the dispute or controversy in existence between the flight engineers and the employer; that the controversy between the flight engineers and the employer was still in existence as of the date of the hearing before the Special Appeals Deputy on July 12, 1962." * * *

"From the findings of fact . . . it is concluded that a labor dispute was in active progress between Eastern Air Lines, Inc., and the flight engineers on June 23, 1962, at the time of the strike or walkout of the flight engineers, and that such labor dispute was still in active progress as of July 12, 1962." The Commission, by Decision No. 3301, denied the claims upon the ground that G.S. 96-14(4) disqualified the laid-off employees for insurance benefits. Upon appeal and after hearing, the Superior Court entered the following order:

"AND THE COURT being of the opinion that the Employment Security Commission is in error in finding and concluding that the claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G.S. 96-14(4) upon facts and circumstances revealed by the evidence in the record, and that its decision is therefore in error and should be set aside; AND THE COURT being of the further opinion that if, upon the record before the Commission, the provisions of G.S. 96-14(4) should be construed as imposing a disqualification upon the appealing claimants who are otherwise eligible for employment benefits, then the provisions of G.S. 96-14(4), as so applied under the facts and circumstances of this case established by the record herein, constitute an unlawful discrimination against these claim-

ants in violation of rights guaranteed to them by the Statutes and Constitution of the United States and by the Constitution of the State of North Carolina.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Decision No. 3301 rendered by the Employment Security Commission of North Carolina on August 31, 1962, be and the same is hereby reversed and set aside."

The Employment Security Commission of North Carolina appealed.

W. D. Holoman, R. B. Billings, D. G. Ball, for the Employment Security Commission of North Carolina, appellant.

Gambrell, Harlan, Russell, Moye & Richardson, by E. Smythe Gambrell, William G. Bell, Jr., Harold N. Hill, Jr., Sidney F. Wheeler, for Eastern Air Lines, Inc., appellee.

Blakeney, Alexander & Machen, by Bailey Patrick, Jr., for North Carolina Employees of Eastern Air Lines Inc., Except the 123 captains and Air Line Pilots based in North Carolina appellees.

Warren C. Stack, by James L. Cole, for Charlotte Council, Air Line Pilots Association, Eastern Air Lines, Inc., appellees.

Joyner & Howison, by William T. Joyner, for Harriet Cotton Mills and Henderson Cotton Mills, amicus curiae.

HIGGINS, J. Here for review is the Superior Court judgment that the Employment Security Commission committed error (1) "In finding and concluding that claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G.S. 96-14(4) upon the facts and circumstances revealed by the evidence in the record, . . ." and (2) If the 1961 amendment should be construed as a disqualification, then it constitutes an unlawful discrimination in violation of the State and Federal Constitutions. From this judgment the Commission appealed. The right to appeal is given by G.S. 96-15.

In their appeal to the Superior Court from the Commission, the claimants, by exceptions, challenged the sufficiency of the evidence to support the Commission's findings of fact. The trial court did not pass on these exceptions. It seems from the wording of the judgment the court did not attempt to set aside any of the findings. However, to eliminate any uncertainty in this respect, we have reviewed all the evidence and conclude that it furnishes support for the Commission's findings of fact. Findings, supported by competent evidence, are conclusive on appeal. *Employment Security Comm. v. Freight Lines,* 248 N.C. 496, 103 S.E. 2d 829; *In Re Stutts,* 245 N.C. 405, 95 S.E. 2d 919;

Employment Security Commission v. Simpson, 238 N.C. 296, 77 S.E. 2d 718; G.S. 96-15(i). The pivotal question, therefore, is whether the claimants are disqualified by the 1961 amendment to G.S. 96-14.

In the judicial process of construing legislation the courts take a long look at the purposes to be accomplished. The Congress, using the English Act of 1911 as a pattern, passed the Federal Social Security Act on August 14, 1935. One of its major purposes was to give aid, to be administered through State agencies, to those out of work through no fault of their own. To be eligible for Federal contributions, a State agency was required to levy an unemployment compensation tax on employers to supplement the Federal contribution. In its extra session in 1936 the North Carolina General Assembly enacted its Unemployment Compensation Law to take advantage of the Federal grant. One of its major purposes was to provide a fund by systematic accumulations during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own.

Both the State and Federal Acts were passed at a time when the country appeared to be in the initial stages of recovery from a disastrous depression. The lessons learned in the early thirties were both fresh and poignant. The intent was to accumulate, by Federal grant and by an employer's tax, an insurance fund which in a time of need would tide over workers temporarily laid off because work was not available. Employers in all probability did not contemplate their tax money would be used to encourage any work stoppage resulting from a labor dispute. In discussing this background, the Nebraska Law Review, Vol. 37, No. 4, of June, 1958, contained the following:

> "(1). (I)t was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience, it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to 'fluctuations in trade.'"

It is doubtful whether in 1935-36 legislators — Federal or State — had in contemplation a time when a few specialists out on strike could force a shutdown of a flourishing business employing nearly 18,000 persons in 26 states, the District of Columbia, Canada, Mexico, and Puerto Rico. Neither was it contemplated that the insurance fund could be depleted by workers who were not actually participating in the strike but who were out of work because of it. The depletion of the insurance fund required further employer taxes.

As the years passed the original objects lost some of their clear outlines. Rules and regulations were relaxed permitting depletion of the fund for purposes not in contemplation when provision was made for it. However, in North Carolina the amendment of 1961 reversed the trend. Prior to July 1, 1961, G.S. 96-14 provided:

> "An individual shall be disqualified for benefits . . . (4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that—(a) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> (b) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subdivision (4), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises."

Effective July 1, 1961, the General Assembly, by Chapter 454, Session Laws of 1961, struck out all of Section 4 above quoted and substituted the following:

> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place,

either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit."

The effect of the amendment was to eliminate from Section 4 the means therein provided by which an employee might escape disqualification. Likwise, the amendment removed the provision that separate branches of work commonly conducted in separate premises or in separate departments of the same premises shall be deemed to be separate factories, establishments, or other premises. Instead the amendment extended the disqualification if the unemployment is caused by labor dispute in progress at the factory at which the worker was employed or at another place, either within or without this State, if owned or operated by the same employing unit and which supplies materials or services necessary to continue the operation where he was employed.

In this case planes carrying practically two-thirds of Eastern Air Line's transportation business were grounded because flight engineers refused to operate or to service the planes. Only two-motor craft could operate without the flight engineers. These small planes were engaged in feeder operations on short flights. The heart of Eastern's business was the four-motor and jet planes. As a result of the labor dispute between Eastern and its flight engineers, Eastern was forced to shut down its operations and to close its terminals in North Carolina where claimants had been at work. So far as the results are concerned, it was immaterial where the flight engineers lived, or where their flights originated. When they left the planes, transportation stopped. Eastern's employees at the terminals in North Carolina were furloughed because Eastern was forced out of business by the strike.

Without force is the argument that flight engineers were not based in North Carolina and hence the terminals in this State constituted other plants, factories, establishments, and premises of the employing unit. It must be remembered that new Section 4, in effect at the time

the work stopped, extends the disqualification to workers at a factory, establishment, or other premise which supplies necessary materials or services to the plant where the claimants were last employed. The striking flight engineers refused to help man the planes to or from the terminals in North Carolina. This failure to perform this service caused the shutdown at the terminals where claimants were employed.

The many cases cited by the Air Line Pilots Association are not in point. Their brief states: "Since no statute has been found in any jurisdiction written in the discriminatory language of G.S. 96-14(4), as amended, all cases reviewed reveal situations arising under Unemployment Security Acts which are similar to the North Carolina Unemployment Security Act prior to 1961." The Commission was bound by the disqualifying terms of the 1961 amendment. Its duty was to protect the integrity of the insurance fund and to be neutral between the management and the workers.

The disqualification resulted from the labor dispute between the flight engineers and Eastern. All flight engineers in the system were out on strike. Their duties were so integrated into Eastern's entire operation that the big planes were grounded because of their refusal to work. *Cameron v. DeBoard,* 230 Or. 411, 370 P. 2d 709; *Depaoli v. Ernst,* 73 Nev. 79, 309 P. 2d 363; *Adamski v. State, Bureau of Unemployment Comp.,* 108 Ohio App. 198, 161 N.E. 2d 907; *Spielmann v. Industrial Commission,* 236 Wis. 240, 295 N.W. 1; *Ford Motor Co. v. Abercrombie,* 207 Ga. 464, 62 S.E. 209; *Park v. Appeal Board of Michigan Employ. Sec. Com'n.,* 255 Mich. 103, 394 N.W. 2d 407; *Magner v. Kinney,* 141 Neb. 122, 2 N.W. 2d 689.

The cases here discussed, and many more therein cited, would seem sufficient to convince all but the highly skeptical that in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Sproles v. Binford,* 286 U.S. 374, 52 S. Ct. 581, 76 L. ed. 1167; *In re Stevenson,* 237 N.C. 528, 75 S.E. 2d 520; *Employment Security Com. v. Jarrell,* 231 N.C. 381, 57 S.E. 2d 403; *In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544. "Legislative bodies may distinguish, select, and classify objects of legislation. . . . They may prescribe different regulations for different classes. . . . The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination." *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198; see also, *Bickett v.*

Tax Commission, 177 N.C. 433, 99 S.E. 415; *Magoin v. Bank,* 170 U.S. 283, 18 S. CT. 594, 42 L. ed. 1037; *City of Springfield v. Smith,* 322 Mo. 1129, 19 S.W. 2d 1; *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S. Ct. 883, 81 L. ed. 1279. The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualification contained in the 1961 amendment involves a question of degree and not of principle.

For the reasons here stated, we hold the judgment of the Superior Court of Mecklenburg County was erroneous and must be

Reversed.

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

MAY BELLE NARRON RAPER v. McCRORY-McLELLAN CORPORATION.

(Filed 10 April 1963.)

1. Negligence § 37f—

No inference of negligence arises from the mere fact of a customer's fall on the floor of a store during business hours, nor does the presence of debris, litter or other substances on the floor of the store establish negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable.

2. Negligence § 37b—

A store proprietor is not an insurer of the safety of its customers but is only under duty to exercise reasonable and ordinary care to keep that part of its premises maintained for use of its customers in a reasonably safe condition for their use and to give warning of any hidden perils or unsafe conditions insofar as they may be ascertained by reasonable inspection and supervision, the rule of care being constant while the degree of care varies with the exigencies of the occasion.

3. Same—

Where a condition on the premises of a store constituting danger to patrons of the store is created by third parties or an independent agency, the store proprietor cannot be held liable for injury to a patron from such danger unless the condition exists for such a length of time that the proprietor knew or by the exercise of reasonable care should have known of

its existence in time to have removed the dangerous condition or given proper warning of its presence.

4. Trial § 21—

On motion to nonsuit, plaintiff must be given the benefit of every fact and every reasonable inference of fact arising upon the evidence, and all conflicts therein must be resolved in his favor.

5. Negligence §§ 37f, 37g— In this action by customer to recover for fall in store, evidence held for jury on issue of negligence and held not to show contributory negligence as matter of law.

The evidence tended to show that plaintiff fell when she stepped into vomit on the landing of a well lighted staircase in defendant's store. The evidence favorable to plaintiff was to the effect that employees of the store had been instructed to call the stock boy to get up any substances they saw on the floor of the store and to put a paper over such substances until the stock boy could remove them, that defendant's clerk or supervisor saw a little girl who looked sick, with her head hanging over the stair rail, at the place where the vomit was, and plaintiff testified that when she descended the stairs no one was on the stairway except herself and her two children, who were behind her. *Held:* Whether the vomit had remained on the landing to the knowledge of defendant's clerk or supervisor for a sufficient length of time for her, in the exercise of ordinary care, to have had it removed or to have given proper warning of its presence prior to plaintiff's injury is for the determination of the jury, and the evidence does not show contributory negligence as a matter of law on the part of plaintiff.

6. Corporations § 26—

A corporation is liable for the torts of its agents or employees committed by them while acting within the scope of their authority or in the course of their employment.

7. Negligence § 37b—

The proprietor of a store will be charged with knowledge of a dangerous condition created by his own negligence or the negligence of his employees acting within the scope of their employment, or a dangerous condition of which the employees have notice, express or implied.

APPEAL by plaintiff from *Carr, J.*, December 1962 Civil Term of WILSON.

Civil action to recover damages for personal injuries sustained in a fall on the landing of the stairway to the basement of defendant's store.

Defendant in its answer denied negligence, and conditionally pleaded contributory negligence as a bar to recovery.

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

Narron, Holdford & Holdford by Talmadge L. Narron for plaintiff appellant.

Gardner, Connor & Lee by Raymond M. Taylor for defendant appellee.

PARKER, J. Plaintiff's evidence is as follows:

Defendant operates a variety store in the town of Wilson, North Carolina. Customers are invited to shop on the ground floor and on the basement floor. The two floors are connected by a stairway. Fifteen or twenty steps down this stairway from the ground floor there is a small landing, and there are two or three steps from the landing to the basement floor. There is a double handrail down the center of the stairway and a handrail next to the wall on the left "as you go down." The steps of the stairway were covered with rubber treads of non-skid type, "dark reddish" or yellow in color.

"Close to night" on Christmas Eve 1960 plaintiff went into defendant's store to shop. She did some shopping on the ground floor and decided to go downstairs to the basement floor. The stairway was lighted with a very bright fluorescent light from the ceiling: it was lighter on the stairway than it would be in the daytime on a clear day. She started down the left aisle of the stairway, and had a handrail on her right and one on her left. She was using both of them. Her two small children were following her. No other person was on the stairway at the time.

Plaintiff testified: "I went down the steps and got to the landing. And when I started to step off I stepped in something, slimy mess and slipped down.* * *There was no one standing on the landing. There was no covering over the slimy substance that I referred to. There was no barricade around the slimy substance.* * *When I slipped on the landing I had taken one step off the bottom step.* * *I did not see any little colored girl or colored lady about the landing as I came down the steps. I did not meet any small colored child or colored lady as I came down the steps."

Plaintiff got up, walked down the steps to the basement floor, and took a seat in the shoe department, a few feet from the stairway. Mrs. Mary Jane Deans works in the shoe department. Plaintiff testified, without objection, that Mrs. Deans "got the alcohol and rubbed my ankle with it and told me she saw a little girl sitting down there sick and vomited on the floor, and a lady, her mother, took and carried her upstairs."

Plaintiff did not see what she stepped in before she slipped down in it. After slipping down she looked at it. The "puddle" was about six

inches across. Plaintiff testified on cross-examination: "Just before I got to the bottom step, I looked at the floor but I didn't see the slimy mess on the floor when I stepped down. The puddle was right near the step, about a foot from the step and about eighteen inches from the wall."

Plaintiff, after her fall, bought a set of curtains in the basement, went upstairs, and returned home. She sustained a broken bone in her ankle as a result of her fall.

Plaintiff offered in evidence the adverse examination by her of Mrs. Mary Jane Deans, who was employed by defendant as saleslady and floor supervisor of the basement floor department of its store. The substance of her testimony, as far as relevant on this appeal, is as follows:

Her duties were to see that customers were waited on, to help customers herself, and to supervise the clerks at the twelve or more counters in the basement. The employees were instructed as a part of their responsibilities that if they saw anything on the floor to call the stock boy to get it up, and to put paper over it until he could get it up. During the Christmas Season there was a clerk at each counter, and she was working the cash register. The cash register was on the counter nearest the steps. When she was at the cash register, she was about six feet from the stairway and facing it. The landing plaintiff fell on is about three steps up from the basement floor. She saw plaintiff fall on the landing. At the time some other people were on the stairway going up, and some coming down.

She did not see anything on the tile of the landing until plaintiff fell. After plaintiff fell, she looked at a substance on the landing, and it looked like vomit; it was a slimy, watery substance. She then notified the stock boy to get it up. She had not notified him earlier, because she did not know it was there.

Mrs. Deans testified on her adverse examination: "I saw a little girl with her head hanging over the stair rail at the landing. That's the place where the vomit was.* * *The little girl and her mother were going up the steps. That's the last I saw. She acted like she was sick. I thought she was sick. Yes, I thought she was sick. She was standing there just a few seconds.* * *I did not see anything falling out of her mouth* * *. When the little colored girl went up the steps was when I was going over to help Mrs. Raper up. No, I had not seen her before I saw Mrs. Raper. I saw them both about the same time.* * *The little colored girl hadn't gone up the steps before Mrs. Raper came down the steps.* * *It all happened all of a sudden. Nobody even had time. Nobody had said one word to me about the child being sick on the

steps.* * *When I saw the vomit I called for him [the stock boy] to get it up.* * *I know that vomit on the landing of that stairway, on that tile of the stairway would make it extremely slippery. And would be dangerous to the customers coming up and down the steps."

No inference of negligence on the part of the defendant arises merely from a showing that plaintiff, a customer in defendant's store during business hours, sustained an injury in the store. *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625; Annotation 61 A.L.R. 2d, page 56.

It seems to be universally held that the *res ipsa loquitur* doctrine is inapplicable in suits against business proprietors to recover for injuries sustained by customers or invitees in falls on floors and passageways located within the business premises and on which there is present litter or debris or other substances. *Powell v. Deifells, Inc.,* 251 N.C. 596, 112 S.E. 2d 56; *Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697, 63 A.L.R. 2d 587; *Fox v. Tea Co.,* 209 N.C. 115, 182 S.E. 662; Annotation 61 A.L.R. 2d, page 59.

That defendant is not under an insurer's liability as to the safety of customers who come upon its premises during business hours is a principle of the law of negligence so familiar and so firmly established as almost to obviate the necessity of citing supporting authority. *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; *Copeland v. Phthisic, supra*; Annotation 61 A.L.R. 2d, page 14.

Equally familiar and firmly established in the law of negligence is the rule that the criterion against which is to be measured the conduct of the defendant on whose premises plaintiff, a customer during business hours, sustained an injury is that of ordinary or reasonable care. It was the duty of the defendant to use ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision. *Waters v. Harris, supra; Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 166, 10 S.E. 2d 623.

"But when an unsafe condition is created by third parties or an independent agency it must be shown that it had existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or given proper warning of its presence." *Powell v. Deifells, Inc., supra.*

The standard is always the conduct of the reasonably prudent man. The rule is constant, while the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion. *Bemont v. Isenhour,* 249 N.C. 106, 105 S.E. 2d 431; *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 358. For instance, what would constitute such care in a country non-service store would seem not to be adequate in a city self-service store through which passes a steady flow of customers who, because of the nature of the business, are constantly handling the merchandise.

It is hornbook law that in considering a motion for judgment of involuntary nonsuit plaintiff must be given the benefit of every fact and of every reasonable inference of fact arising from the evidence, and all conflicts therein must be resolved in his favor. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Plaintiff's evidence considered according to the rule shows: Plaintiff, a customer in defendant's store during business hours, late on Christmas Eve 1960, was going down the well-lighted stairway with handrails leading from the ground floor of the store to its basement floor. No one was on the stairway at the time except herself and her two small children, who were behind her. She descended fifteen or twenty steps, stepped on the small landing into a puddle of vomit, and fell. The small landing was two or three steps above the basement floor. The vomit on the tile of the stairway made it extremely slippery, dangerous to customers coming down the steps, and constituted a hidden peril or unsafe condition known to defendant and not to plaintff. Mrs. Mary Jane Deans, supervisor of the basement floor department of the store, was working at the cash register about six feet from the landing of the stairway and facing it. Shortly after plaintiff fell, Mrs. Deans told her "she saw a little girl sitting down there sick and vomited on the floor, and a lady, her mother, took and carried her upstairs." Plaintiff did not see any little girl or lady about or on the landing as she came down the steps. Mrs. Deans testified on adverse examination: "I saw a little girl with her head hanging over the stair rail at the landing. That's the place where the vomit was.* * *She looked like she was sick." The employees of the store were instructed as a part of their responsibilities that if they saw anything on the floor to call the stock boy to get it up, and to put paper over it until he could get it up. The vomit had no paper or anything over it or near it to indicate its presence.

Considering the size of the store, the nature of its business, the location of the vomit on the landing of the stairway from the ground

floor to the basement floor which made the landing extremely slippery, the number of customers using the stairway on Christmas Eve, the foresight which a person of ordinary care and prudence would be expected to use under the circumstances and the reasonably foreseeable consequences of injuries to customers by reason of the dangerous condition on the landing of the stairway, and that the vomit had existed on the landing for a sufficient length of time after the supervisor of the basement floor knew it was there for the little girl and her mother to go up the fifteen or twenty steps from the landing to the ground floor and be away from the stairway when plaintiff began coming down, and that Mrs. Deans, the supervisor of the basement floor, was charged by defendant as a part of her responsibility that if she saw anything on the floor to call the stock boy to get it up and to put paper over it until he could get it up, it is our opinion that it should be left to a jury to determine whether the vomit remained on the landing of the stairway to the knowledge of the defendant's supervisor, Mrs. Deans, for a sufficient length of time for her in the exercise of ordinary care to have removed it, or to have had it removed, or to have given proper warning of its presence to plaintiff before she stepped in it and fell.

It is elementary knowledge that a corporation in its relations to the public is represented and can act only by and through its duly authorized officers and agents. 19 C.J.S., Corporations, sec. 999. The general rule is well established that a corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employment. *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446; *Hussey v. R.R.*, 98 N.C. 34, 3 S.E. 923, 2 Am. St. Rep. 312; 13 Am. Jur., Corporations, page 1043.

It is said in 65 C.J.S., Negligence, sec. 51, Knowledge of Defect or Danger, page 548: "The inviter will be charged with knowledge of a dangerous condition created by his own negligence or the negligence of his employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice."

Pfeifers of Arkansas v. Rorex, 225 Ark. 840, 286 S.W. 2d 1, 62 A.L.R. 2d 1, is quite similar. The appellee, Mrs. Albert Rorex, a customer in appellant's store stepped on an unidentified slippery substance in the aisle of the store, and fell. About thirty seconds after the accident another customer in the store heard an employee of appellant say the substance should have been removed from the floor before somebody slipped and fell. Several witnesses for appellant testified that shortly before Mrs. Rorex fell another customer had dropped a package on

the floor of the aisle. When the package struck the floor, its contents broke and an unidentified liquid substance seeped through the brown paper sack onto appellant's floor. Most of these witnesses testified that only a short interval elapsed between the time the liquid seeped onto the floor and the time the appellee slipped on the substance and fell. One of appellant's employees heard the bottle break, and immediately proceeded to notify the department manager of the incident so that a porter could be sent to clean up the floor. The Court upheld a verdict and judgment for Mrs. Rorex.

For full discussions, annotations, and citations of cases legally comparable, see 61 A.L.R. 2d 26-27; *ibid,* 182-184; 62 A.L.R. 2d 28-33; *ibid,* 138-144. See also 65 C.J.S., Negligence, sec. 51.

It is our opinion, and we so hold, plaintiff has not proved herself out of court so as to warrant a nonsuit on the ground of contributory negligence. *Lincoln v. R.R.,* 207 N.C. 787, 178 S.E. 601.

Plaintiff's evidence makes out a case for the twelve. The judgment of involuntary nonsuit is

Reversed.

ALLEN LANE JONES v. STATESVILLE ICE AND FUEL COMPANY, INC. VANCE A. MARTIN, AND JOSEPH JOHN VALLETTA.

(Filed 10 April 1963.)

1. Judgments § 22—

A defendant duly served with process is required to give his defense that attention which a man of ordinary prudence usually gives his important business, and his failure to do so is not excusable.

2. Same—

Where a husband is duly served with process in a civil action and turns the suit papers over to his wife, and thereafter makes no inquiry as to whether anything had been done with respect thereto, his wife's neglect to take any action to defend the suit will be imputed to him, and the court's denial of his motion under G.S. 1-220 to set aside the default judgment taken against him will not be disturbed.

3. Same—

The discretionary refusal of a motion to set aside a default judgment on the ground of surprise and excusable neglect will be upheld on appeal in the absence of a showing of abuse of discretion.

JONES *v.* FUEL CO.

APPEAL by defendant Joseph John Valletta from *Clarkson, J.*, at Chambers in Lenoir, North Carolina, 11 December 1962. From CATAWBA.

This is a civil action instituted by the plaintiff against the defendants in the Superior Court of Catawba County on 28 April 1962, by issuance of summons and filing of complaint. The action is one for recovery against the appellant and others for alleged personal injuries sustained in a motor vehicle collision in the City of Statesville, North Carolina, on 20 December 1959, which collision occurred at the intersection of South Center and East Bell Streets.

Summons was served on the appellant and the co-defendants, the summons having been served, according to the return thereon, on the appellant by David Austin, Deputy Sheriff of Gaston County, North Carolina, on 5 May 1962. The appellant filed no answer, and on 6 June 1962 a judgment by default and inquiry was signed by the Clerk of the Superior Court of Catawba County.

Sometime thereafter, the record does not disclose when, the appellant filed a demurrer to the complaint of the plaintiff on the ground that the complaint fails to state a cause of action against him.

It was agreed that Clarkson, J., assigned to hold the courts of the Twenty-fifth Judicial District of North Carolina, could hear and pass upon the demurrer out of the county and out of the district. The matter was heard in Charlotte, North Carolina, and an order was signed by Clarkson, J. on 26 November 1962 at Newton, North Carolina, overruling the demurrer.

On a date not disclosed by the record, the appellant filed a motion to set aside the judgment by default and inquiry on the ground that neither the summons nor complaint was served on him, but that copies of the summons and complaint were served on his wife Jean (Valletta). This motion was likewise heard by agreement by Clarkson, J. at Charlotte, North Carolina, and the court found as fact: "(T)he movant and defendant, Joseph John Valletta, was personally served with summons and complaint in this action by the Sheriff of Gaston County, North Carolina." Whereupon, an order was entered on 26 November 1962 at Newton, North Carolina, denying the motion to set aside the judgment by default and inquiry.

The appellant filed another motion (on 1 December 1962 according to the appellee's brief) to set aside the judgment by default and inquiry "because of his mistake and excusable neglect in that when the defendant Joseph John Valletta learned that the summons and complaint had been delivered to his wife, the said defendant requested and his wife promised him that she would take care of the legal matters

and would relieve him of all responsibility in the matter; that the defendant, Joseph John Valletta, left the said suit papers with his wife and dismissed the matter from his mind and did not think of the matter again until some months later when he was informed that the judgment by default and inquiry had been obtained against him."

The foregoing motion was heard by consent by Clarkson, J. at Lenoir, North Carolina, on 11 December 1962. After considering the motion, the complaint, the affidavits and the summons in this case, his Honor found, *inter alia,* that "Joseph John Valletta is a resident of Gaston County and holds a position in Fayetteville, North Carolina, as Vice President of OSTB Broadcasting, Inc., and that he stays in Fayetteville all week, except when his business requires that he travel to other places, but comes home on week ends almost every week end, and that he did come home sometime on the week end that the suit papers were served on him and that he turned the papers over to his wife and that she promised that she would take care of everything and would relieve him of all responsibility in the matter; that the car which the defendant Joseph John Valletta was operating at the time of the alleged collision belonged to his wife, Jean Brackett Valletta, and that neither she nor her husband, the said defendant, did anything further about the matter. Further, that the wife of the defendant is a school teacher and lives near Gastonia, N. C."

The court thereupon concluded as a matter of law that the defendant Joseph John Valletta was guilty of inexecusable neglect in that he did not take the necessary steps to employ counsel or otherwise attend to the matter and, therefore, his conduct does not constitute excusable neglect in contemplation of the law. An order denying the motion was entered.

The defendant Joseph John Valletta appeals, assigning error.

Corne and Warlick for plaintiff appellee.
McElwee and Hall for defendant appellant.

DENNY, C.J. The question presented for determination on this appeal is whether a judgment by default and inquiry should be set aside for excusable neglect where the defendant turned the entire responsibility of handling the defense of a law suit over to his wife upon her assurance that she would look after it, but neither the defendant nor his wife did anything about the matter until after the judgment by default and inquiry had been entered.

It is provided in G.S. 1-220, in pertinent part, as follows: "The judge shall, upon such terms as may be just, at any time within one

year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. * * *"

It is generally held under the above statute that "(p)arties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable." Strong, North Carolina Index, Judgments, section 22; *Whitley v. Caddell,* 236 N.C. 516, 73 S.E. 2d 162; *Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906.

The evidence in this case tends to show that the defendant, after having been served with summons and a copy of the complaint, turned the defense of the law suit over to his wife who, according to her affidavit, had never been involved in a law suit and therefore had no experience in such matters. According to the appellant's affidavit, when he turned the suit papers over to his wife, he "dismissed the matter from his mind; that the wife of * * * affiant placed the papers in a drawer and they did not cross her mind again until she and this affiant were advised some months later that a judgment by default and inquiry had been obtained against him * * *."

In *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849, it is said: "The rule is established with us that ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890." See *Greitzer v. Eastham,* 254 N.C. 752, 119 S.E. 2d 884, and cited cases.

The appellant contends that he is entitled to have the default judgment entered below set aside on authority of *Abernethy v. Nichols,* 249 N.C. 70, 105 S.E. 2d 211. In the *Abernethy* case the debt out of which the cause of action arose was incurred in the course of business dealings between the plaintiffs and the husband of Mrs. Nichols. Mrs. Nichols did not enter into and had no connection whatever with the

contract sued upon in the action. When process was served on Mrs. Nichols, she inquired of the other defendant, her husband, as to why and for what reason she had been sued; her husband advised her to give the legal papers to him and he would relieve her of responsibility in the matter. The husband allowed a default judgment to be entered. Upon motion to set aside the default judgment the court found that her failure to file answer was excusable in light of the assurance of her husband that he would be responsible and would assume the defense of the action. On appeal we affirmed on authority of *Bank v. Turner,* 202 N.C. 162, 162 S.E. 221; *Sikes v. Weatherly,* 110 N.C. 131, 14 S.E. 511 and *Nicholson v. Cox,* 83 N.C. 48.

The above-cited decisions are to the effect that where a husband and wife are jointly sued, the wife may rely upon her husband's promise to employ counsel and file answer; that her neglect to file an answer to the complaint because of her reliance on her husband to do so, is excusable. Connor, J. pointed out in *Bank v. Turner, supra,* that "C.S., 2507 (now G.S. 52-2), known as the Martin Act, does not affect or purport to affect the relation of husband and wife, or their mutual rights and duties growing out of the marital relation."

We find no case in which it has been held that a husband, when served with process in a civil action, may rely on his wife to assume the responsibility of filing answer and defending the suit.

This Court said in *Nicholson v. Cox, supra*: "Manifestly, it was not expected that the wife, though capable to represent herself in a suit against her, would as a general thing exercise that power, but would commit the management and direction of her defense to the intervention and judgment of her husband. In legal contemplation she would be inclined to trust, and could trust, her interests in any adversary suit to her husband."

In our opinion, when the defendant turned the suit papers over to his wife, and thereafter made no inquiry as to whether or not anything had been done with respect thereto, his wife's neglect was imputable to him, and no excusable neglect has been shown by the appellant. *Moore v. Deal, supra.*

Moreover, the motion to set aside the default judgment was denied in the court's discretion. Such decision will be upheld in the absence of an abuse of discretion.

We think there was plenary evidence to support the decision of the court below and that appellant's motion to set aside the default judgment was properly denied.

Affirmed.

WILLIAM BOYCE PETTUS v.
ELVINE SANDERS AND ROBERT LEE STEWART.

(Filed 10 April 1963.)

1. Automobiles §§ 41l, 42k—

Evidence held for jury on issue of negligence in striking pedestrian crossing street at an intersection, and not to show contributory negligence as a matter of law on the part of the pedestrian.

2. Appeal and Error § 1—

Where the trial court's refusal to nonsuit is upheld on appeal, but a new trial is awarded on other exceptions, the Supreme Court will not discuss the evidence except to the extent necessary to show the conclusions reached.

3. Automobiles § 46; Negligence §§ 7, 28—

Foreseeability is a requisite of proximate cause, even though plaintiff relies upon the violation of a safety statute constituting negligence *per se*, and an instruction which does not submit the element of foreseeability, even though in the other aspects the charge correctly defines proximate cause, must be held for error, and such omission cannot be held mere technical error when the evidence squarely presents the question whether defendant, under the circumstances, could or should have foreseen injurious consequences.

APPEAL by defendants from *McConnell, Special Judge,* September 1962 Civil Term of Gaston.

Personal injury action.

On Saturday, April 1, 1961, about 9:10 p.m., plaintiff, a pedestrian, was injured when struck by a DeSoto automobile owned by defendant Sanders and operated by defendant Stewart. This occurred in Gastonia, N. C., on a paved east-west street known as West Page Avenue at or near its intersection with a paved north-south street known as North York Street. Plaintiff was crossing Page from the north to the south side and the DeSoto was proceeding east thereon. Defendant Stewart was operating the DeSoto as agent of defendant Sanders.

Undisputed facts include the following: Plaintiff had made a purchase at a Dairy Bar located on the north side of Page east of York. In returning to the house of Ernest Lindell, plaintiff's cousin, plaintiff walked west on the sidewalk along the north side of Page, then crossed York, and thereafter proceeded south across Page toward Lindell's house. When struck, plaintiff had reached a point within a few feet of the south curb of Page.

Plaintiff alleged he was crossing Page within an unmarked crosswalk; that Stewart, in violation of G.S. 20-173(a), failed to yield the right of way to plaintiff; that Stewart was also negligent in re-

spect of speed, lookout, and control; and that Stewart's negligence proximately caused plaintiff's injuries.

In a joint answer, defendants denied negligence and, as further defenses, pleaded contributory negligence and unavoidable accident. Defendants alleged, as a basis for their further defenses, the following: As Stewart approached the intersection, an automobile traveling south on York made a right turn into Page and headed west thereon; that plaintiff walked from behind this automobile directly into the path of Stewart; that Stewart "was only a few feet away" when plaintiff suddenly appeared in front of him; and that, while Stewart stopped "almost instantly," he could not avoid colliding with plaintiff.

Evidence was offered by plaintiff and by defendants.

The jury answered the issues of negligence and contributory negligence in favor of plaintiff and awarded damages in the amount of $5,500.00. Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed.

Donald E. Ramseur for plaintiff appellee.
Hollowell & Stott for defendant appellants.

BOBBITT, J. Careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of all issues for jury determination. Hence, defendants' motion for judgment of nonsuit was properly denied.

Since a new trial is awarded, we refrain from discussing the evidence presently before us except to the extent necessary to show the reasons for the conclusion reached. *Mason v. Gillikin*, 256 N.C. 527, 530, 124 S.E. 2d 537, and cases cited.

In the portion of the charge relating to the first issue, the court defined proximate cause as follows: "Proximate cause, being the other element (of actionable negligence), means the real, the dominant, the efficient cause, the cause without which the accident would not have occurred. An act is said to be the proximate cause or a proximate cause of an injury and damage when in a natural and continuous sequence, unbroken by any new and independent cause, it produces the result complained of, and without which the injury and damage would not have occurred and there can be more than one proximate cause of any injury and damage." Defendants excepted to this instruction and assign as error the court's failure to instruct the jury that foreseeability of injury is an essential element of proximate cause.

Under our decisions, foreseeability is *a* requisite of proximate cause. *McNair v. Richardson,* 244 N.C. 65, 67, 92 S.E. 2d 459, and cases cited. This is true notwithstanding the alleged negligence is a violation of a safety statute and therefore negligence *per se. Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Billings v. Renegar,* 241 N.C. 17, 84 S.E. 2d 268; *McNair v. Richardson, supra; White v. Lacey,* 245 N.C. 364, 368, 96 S.E. 2d 1; *Basnight v. Wilson,* 245 N.C. 548, 551, 96 S.E. 2d 699.

The quoted instruction is correct with reference to the element(s) of proximate cause referred to therein. However, the court inadvertently failed to instruct the jury that a proximate cause is *also* a cause "from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." *Adams v. Board of Education,* 248 N.C. 506, 511, 103 S.E. 2d 854, and cases cited; *Ramsbottom v. R.R.,* 138 N.C. 38, 41, 50 S.E. 448.

Under our decisions, the court's failure to instruct the jury that foreseeability of injury is an essential element of proximate cause entitles defendants to a new trial. *McNair v. Richardson, supra; Whitley v. Jones,* 238 N.C. 332, 78 S.E. 2d 147. In *McNair,* a new trial was awarded on the ground the court's instruction "removes foreseeability as an essential element of proximate cause, and in substance told the jury that, in plaintiff's action for damages allegedly resulting from the violation or violations of motor vehicle regulations, the doctrine of foreseeability did not apply." In *Whitley,* a new trial was awarded on the ground "(t)he court in its charge on proximate cause omitted to give the essential element of foreseeability of injury." See *Pittman v. Swanson,* 255 N.C. 681, 685, 122 S.E. 2d 814. In the decisions cited by plaintiff in support of the quoted instruction, whether the court erred for failure to instruct that foreseeability of injury is an essential element of proximate cause was not presented or considered.

Defendants assign as error the asserted failure of the court to relate and apply the law to the variant factual situations having support in the evidence as required by G.S. 1-180. *Westmoreland v. Gregory,* 255 N.C. 172, 177, 120 S.E. 2d 523; *Pittman v. Swanson, supra.* Discussion of these assignments of error is unnecessary. However, in view of plaintiff's contention that error in the charge, if any, was technical and not prejudicial, we deem it appropriate to call attention to the crucial factual controversy involved in the negligence issue.

The evidence as to whether Stewart's view of plaintiff was obstructed was in sharp conflict.

Evidence favorable to plaintiff tended to show he was crossing Page within an unmarked crosswalk at the intersection of Page and York; that Stewart's view was unobstructed as he approached this unmarked crosswalk; and that Stewart saw plaintiff, or by the exercise of due care could have seen him, as he proceeded within the unmarked crosswalk from the north toward the south side of Page.

Evidence favorable to defendants tended to show Page was thirty-two feet wide; that plaintiff when struck had proceeded twenty-four feet toward the south side of Page; that Stewart, proceeding east on Page at a speed of 24-25 miles per hour in a 35-mile per hour speed zone, was blinded momentarily by the lights of an automobile which had proceeded south on York and made a right turn and headed west into Page; that plaintiff, who according to one witness "attempted to rush across," crossed "(j)ust as this vehicle . . . turned to the right from York on to Page to go west on Page"; that plaintiff came from behind this automobile and in view of Stewart when Stewart was "approximately 5 to 7 feet away from him"; and that Stewart, after the impact, "went approximately 5 to 7 feet."

Clearly, if the jury found the facts in accordance with the evidence most favorable to defendants, whether Stewart, by the exercise of due care, could have reasonably foreseen that a pedestrian would or might come from behind the automobile and into his path, is of crucial significance in determining whether Stewart was guilty of actionable negligence. We find no instruction in which the court undertook to relate and apply the law to this factual situation. Under these circumstances, we cannot say the failure to instruct the jury that foreseeability of injury is an essential element of proximate cause is technical rather than prejudicial error.

New trial.

P. C. WILLIAMS v. LOUIS JAMES TUCKER.

AND

MRS. FRANKIE STEWART WILLIAMS v. LOUIS JAMES TUCKER.

(Filed 10 April 1963.)

1. Automobiles § 19—

A motorist driving through fog must exercise care commensurate with the danger, and may be required to come to a complete stop if the fog is so thick as to render visibility practically nonexistent, and therefore

what constitutes due care under varying atmospheric conditions is ordinarily a question for the jury, with regard both to the issue of negligence and the issue of contributory negligence. G.S. 20-141(c).

2. Automobiles § 41—

Evidence that defendant was driving his vehicle some 50 miles per hour in heavy fog and crashed into plaintiff's vehicle which was making a left turn across his lane of travel, *held* to take the issue of defendant's negligence to the jury.

3. Automobiles § 42h—

Evidence that plaintiff, driving in heavy fog, reduced speed to five miles per hour, gave a proper left turn signal, and, after careful lookout, failed to see any vehicle or the lights of any vehicle approaching, and thereupon increased speed and attempted to turn left into a driveway, *held* not to show contributory negligence as a matter of law in an action to recover for injuries in a collision with a vehicle approaching from the opposite direction.

4. Automobiles § 8—

It is not required that conditions on the highway be such as to make a left turn absolutely free from danger before a motorist may undertake such movement, but a motorist is required only to exercise reasonable care under the circumstances to ascertain, before attempting the movement, that the movement can be made in safety to himself and others.

5. Automobiles § 7—

A motorist is not under duty to anticipate negligence on the part of others.

APPEAL by plaintiffs from *Copeland, S.J.*, October 22, 1962, Regular "A" Civil Term of MECKLENBURG.

These are two civil actions consolidated for trial by consent. Plaintiffs seek to recover for personal injury to *feme* plaintiff and property damage sustained by male plaintiff by reason of the alleged actionable negligence of defendant in the operation of an automobile.

Plaintiffs appeal from judgment of nonsuit entered at the close of their evidence.

Ray Rankin for plaintiffs, appellants.

Robinson, Jones & Hewson for defendant, appellee.

MOORE, J. The inquiry is whether the court erred in granting defendant's motion for nonsuit.

Plaintiffs' evidence, considered in the light most favorable to them, shows:

On the morning of 17 February 1962 *feme* plaintiff drove her husband's (male plaintiff's) station wagon eastwardly on Highway 27 to

the Allen Station community to keep an appointment with a cosmetologist. There was a general fog; "it was very foggy; extremely dense; it was foggy all over." She drove at a speed not exceeding 25 miles per hour; the parking lights were on. The beautician's shop was on the north side of the highway, and a wide gravel driveway led from the highway to the shop. In order to get to the shop it was necessary to turn left and cross the north lane of the highway. The highway was straight, the paved portion was 24 feet wide and the centerline was marked. *Feme* plaintiff reduced speed to 5 miles per hour and gave a left turn blinker light signal; she looked carefully forward for meeting traffic and saw neither a vehicle nor the lights of a vehicle approaching. On account of the fog the visibility was only 75 feet. She did not come to a complete stop. Seeing no approaching traffic, she turned left and increased speed "a little bit to get across and in." After her left wheel had gotten into the driveway, the right side of the station wagon was struck by the front of defendant's automobile. The station wagon was extensively damaged, and defendant's automobile came to rest 30 feet away in the center of the highway. Defendant was travelling at a speed of 50 miles per hour. Male plaintiff, who arrived on the scene a few minutes after the accident and talked to defendant, testified that "he believed Mr. Tucker (defendant) stated in his hearing that he was driving on this occasion about 50 miles per hour." The posted speed limit was 60 miles per hour. The accident occurred about 9:00 A. M.

Plaintiffs allege that the collision was proximately caused by the negligence of defendant in that he operated his car at a speed greater than was reasonable and prudent under the circumstances and failed to reduce speed on account of the foggy weather conditions, G.S. 20-141(a),(c), failed to maintain a reasonable lookout, and failed to keep his car under proper control.

Defendant pleads that plaintiffs were contributorily negligent in that *feme* plaintiff made a left turn without keeping a reasonable lookout and without first ascertaining that the movement could be made in safety, G.S. 20-154(a), failed to maintain proper control, and violated the reckless driving statute, G.S. 20-140(a).

It has been held in extreme cases that where by reason of fog or other conditions visibility is practically nonexistent, motorists are under duty to refrain from entering the highway or to stop if already on the highway. 42 A.L.R. 2d, Anno: Automobiles — Atmospheric Conditions, s. 5, p. 41. For cases in this jurisdiction involving almost such extremity of condition see: *Moore v. Plymouth*, 249 N.C. 423, 106 S.E. 2d 695; *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E.

2d 891; *Riggs v. Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254. But ordinarily a motorist is not negligent or contributorily negligent as a matter of law if he drives an automobile in foggy weather when visibility is poor. *Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251; *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793; *Clarke v. Martin*, 215 N.C. 405, 2 S.E. 2d 10; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637; *Meacham v. R.R.*, 213 N.C. 609, 197 S.E. 189.

"Under the well-recognized general rule that a driver of a motor vehicle must exercise reasonable or ordinary care, the surrounding circumstances are important, and one of such circumstances is the existence of fog obscuring visibility. Therefore, it is said that the driver must exercise care commensurate or consistent with the situation." 42 A.L.R. 2d, Anno: Automobiles — Atmospheric Conditions, s. 4, p. 36. "A motorist should exercise reasonable care in keeping a lookout commensurate with the increased danger occasioned by conditions obscuring his view." *Chesson v. Teer Co.*, 236 N.C. 203, 207, 72 S.E. 2d 407. And this rule applies to both plaintiff and defendant. *Bradham v. Trucking Co., supra.* " 'The precise degree or quantum of care properly exercisable by a motorist . . . under varying atmospheric conditions, such as fog, smoke, dust, and the like, is ordinarily a question for the jury. Whether the exercise by a driver of reasonable care required a complete stop, a slowing down, or any other precautions dictated by the standard of ordinary prudence, is generally within the province of the jury to decide, in the light of all the surrounding facts and circumstances.' 5A Am. Jur., Automobiles, s. 1070." *Moore v. Plymouth, supra.*

If, as plaintiffs' evidence tends to show, defendant was operating his automobile at about 50 miles per hour through wide-spread and dense fog which limited visibility to 75 feet, and as a consequence he was unable to see the station wagon turning across his lane of travel in time to get his vehicle under control so that he could stop it or turn aside and avoid collision, these facts present for jury determination the question whether his conduct amounted to negligence proximately causing the collision. It is true that the testimony of male plaintiff as to defendant's speed is of questionable probative value; but when considered in connection with the evidence that plaintiffs' station wagon was so injured by the impact that the right head lights, right front door and right rear fender were crushed, the frame bent on the right joint, the right wheel buckled down, the left front door turned around and buried in the left fender, the windshield broken out, the dash bent up, and the steering wheel broken in half, that *feme* plaintiff was

penned in the car, and that defendant's car went 30 feet before it came to rest, we think there is for jury consideration evidence of excessive speed on the part of defendant. A motorist is under statutory duty to decrease speed when special hazard exists by reason of weather and highway conditions, to the end that others using the highway may not be injured. G.S. 20-141(c).

And if, as plaintiffs' evidence tends to show, *feme* plaintiff reduced speed to five miles per hour, gave a proper signal of her intention to turn, and after careful lookout failed to see any approaching vehicle or the lights of such, and then increased speed as she attempted to turn left and leave the highway, such conduct on her part does not, in our opinion, compel the sole inference that she was contributorily negligent as a matter of law. Whether she was contributorily negligent is a jury question. "In the very nature of things, drivers of motor vehicles act on external appearances. . . . The statutory provision 'that the driver of any vehicle upon the highway before . . . turning from a direct line shall first see that such movement can be made in safety' does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn . . . the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made in safety to himself and others before he actually undertakes it." *Cooley v. Baker,* 231 N.C. 533, 536, 58 S.E. 2d 115; *Lemons v. Vaughn,* 255 N.C. 186, 120 S.E. 2d 527. A motorist is not bound to anticipate negligent acts or omissions on the part of other. *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734. In the case at bar there is not involved the sudden and unexpected envelopment by fog, which would dissipate momentarily (chemical fog), as was the case in *Bradham v. Trucking Co., supra,* upon which defendant relies. What was required of *feme* plaintiff was due care under the circumstances, and whether she exercised such care is for the jury.

Halback v. Robinson Bros., 98 A. 2d 750 (Pa. 1953), and *Bowen v. Manuel,* 144 S. 2d 341 (Fla. 1962), are in all material aspects factually analagous to the instant case. In these cases it was held that the question of contributory negligence was for jury determination.

The judgment below is

Reversed.

VIRGINIA ELECTRIC & POWER COMPANY v.
S. D. KING AND WIFE, BROWNING B. KING.

(Filed 10 April 1963.)

1. Eminent Domain § 1—

Eminent domain is the power of the sovereign, or some agency authorized by it, to take private property for public use, and the exercise of the power must be based upon the failure of condemnor and the owner to agree upon a price after *bona fide* negotiations, G.S. 40-11, and perforce the condemnor cannot seek to condemn any right which it already owns.

2. Same; Eminent Domain § 14—

Where condemnor asserts ownership of an easement over a part of the lands sought to be condemned, but evidence of its easement is excluded over its objection, and an award is entered without appeal therefrom, condemnor may not seek to have the value of its asserted easement paid to it out of the award which it, itself, had paid into court. G.S. 40-23.

APPEAL by petitioner from *Cowper, J.*, December 1962 Term of HALIFAX.

This is a condemnation proceeding instituted by petitioner in September 1961. In addition to allegations with respect to petitioner's right to condemn and the purposes for which it sought to condemn, it alleged: (1) The estate to be acquired in the "lands of Owners. . .is the fee simple title. . .and all Owners' rights, title and interest in and to any private or public ways within said lands. . ."; (2) "The award of the commissioners is to be in full and total payment for the lands. . . of Owners. . .and for all damages, if any, to the residue of Owners' land."; (3) A description by metes and bounds of two tracts, one containing 1.6 acres, the other containing 51.3 acres; (4) Petitioner's inability to acquire by purchase "because the Company and the said Owners have been unable to agree upon the price of the same." (5) "That the names and place of residence of the parties. . .who owns or has, or claims to own or have, estates or interests in the said lands are" defendants.

Attached to the petition was a map showing the boundaries of the two tracts as described in the petition. Within the heavy lines marking the outer boundaries of the larger tract are lighter lines which extend beyond the northern boundary of the area to be acquired. There appears within the lighter lines this legend: "V. E. & P. Co. easement 18.8 acres." Defendants by answer admitted they were the owners of the land described in the petition.

The court appointed commissioners. The evidence taken does not appear in the record, but the record does show that during the hearing

the court instructed the commissioners: "There is no evidence of any easement on the land sought to be condemned and you will erase and dismiss from your mind any reference to any easement. There is no evidence for your consideration that the defendant owns any estate less than the fee simple title to the land sought to be condemned by the petitioner." Petitioner says in its brief: "During the hearing before the commissioners, a copy of the instrument creating the perpetual easement to pond water owned by appellant over a portion of appellees' property sought in this proceeding and other evidence of such easement was excluded by the Clerk. . . . Appellant vigorously objected to these rulings and action of the Clerk. . ."

The commissioners made a report on 23 February 1962 fixing the value of the property taken. Petitioner did not by exception challenge the award. It paid the amount awarded into court to be disbursed to the owners for the rights taken.

On 9 March 1962 petitioner filed with the clerk a petition asking that it be paid from the compensation awarded the value of its asserted easement on the 18.8 acres. It bases its right to claim a part of the award on G.S. 40-23.

Defendants demurred to the petition asserting a claim to a portion of the award. On 4 October 1962 the clerk confirmed the award. At the same time he denied petitioner's right to any portion of the sum awarded. Petitioner excepted to that portion of the order denying its right to claim a part of the sum awarded and appealed to the judge. Judge Cowper affirmed the ruling of the clerk and dismissed petitioner's claim to share in the compensation awarded.

Crew & House by W. Lunsford Crew and J. Albert House, Jr., and Hunton, Williams, Gay, Powell & Gibson by E. Milton Farley, III, for appellant.

Allsbrook, Benton & Knott by Dwight L. Cranford for appellees.

RODMAN, J. The words "eminent domain" mean the power of the sovereign or some agency authorized by it to take private property for public use. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *Yadkin County v. High Point,* 217 N.C. 462, 8 S.E. 2d 470; *Spencer v. R.R.,* 137 N.C. 107. When the right is exercised, a duty is imposed on condemnor to pay just compensation for the property taken. *Mount Olive v. Cowan,* 235 N.C. 259, 69 S.E. 2d 525.

The Legislature has prescribed the manner in which the power of eminent domain may be exercised. Before the agency seeking to acquire can ask the court to condemn, it must make a bona fide effort

to purchase by private negotiation. G.S. 40-11; *Mount Olive v. Cowan, supra; Penn v. Coastal Corp.,* 231 N.C. 481, 57 S.E. 2d 817; *Winston-Salem v. Ashby,* 194 N.C. 388, 139 S.E. 764; *Allen v. R.R.,* 102 N.C. 381. The petition must allege an effort to purchase by private negotiation and the names and residences of the owners. G.S. 40-12.

If the property owned by a corporation having the right of eminent domain is inadequate for its corporate purposes, it may purchase such additional rights as it may need to serve the public. Such purchase may be with the consent of the owner or by condemnation—a purchase without the owner's consent at the value of the property taken. *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. One cannot condemn that which he owns. To hold otherwise would ignore the requirements of G.E. 40-11.

The Legislature conferred on adverse and conflicting claimants to the sum fixed as the fair purchase price of the property taken the right to litigate their respective claims, but the phrase "adverse and conflicting claimants" does not include condemnor. The phrase "adverse and conflicting claimants" is limited to (a) those who assert adverse titles to the property and hence a conflict in interest as to the party entitled to the sum awarded, or (b) those who are in agreement as to their respective titles but are in disagreement as to the value of their respective estates and hence the proportion of the award to which each is entitled.

The language of the Supreme Court of Oklahoma in *Grand River Dam Authority v. Simpson,* 136 P 2d 879, 881, is a concise and accurate statement of the law when applied to the facts of this case. That Court said: "The institution of the proceeding admits the ownership. The condemnor cannot claim the beneficial ownership of the land and at the time assert that the condemnee claims all or some part of that interest; the proceeding in condemnation cannot be employed as a means to quiet title; and the right to exercise the power of eminent domain is dependent entirely upon the ownership being in some one other than the condemnor; the power to condemn negatives ownership in the condemnor." *Colorado M. Ry. Co. v. Croman,* 27 P 256; *Houston North Shore R. Co. v. Tyrrell,* 108 A.L.R. 1508; 29 C.J.S. 1232; 18 Am. Jur. 716.

The record does not disclose the court's reason for excluding evidence offered by petitioner for the purpose of establishing its assertion that it owned an easement on part of the larger tract. It may be the ruling was based upon the sound principle that without amendment the petitioner would not be permitted to offer evidence contrary to its allegation that the defendants were the owners in fee of the property.

The language used in excluding the evidence offered by petitioner is fairly susceptible to the interpretation and we think the court's ruling was predicated upon its conclusion that the evidence did not tend to show that defendants' land was burdened with an easement.

In either event, if the clerk's ruling was erroneous, petitioner's method of protecting itself was to except, as it did. Then, when the award was made, it had the right to object and except to confirmation because the award was based on an erroneous assumption as to the property taken. From an adverse ruling it could appeal as provided by G.S. 40-19. This it elected not to do. Presumably it made its choice after mature deliberation. It is now bound by the award which has been confirmed without objection. It cannot now challenge defendants' right to the compensation which has been awarded for the property taken from them.

Affirmed.

JAMES R. KELLER, EMPLOYEE v. ELECTRIC WIRING COMPANY, INC., EMPLOYER, AND NEW AMSTERDAM CASUALTY COMPANY, CARRIER.

(Filed 10 April 1963.)

1. Master and Servant § 93—

In passing upon exceptions to the findings of the Industrial Commission, the function of the Superior Court is to determine whether there is any evidence of substance which directly or by reasonable inference tends to support the findings, in which event the findings are conclusive, even though the evidence would also support findings to the contrary.

2. Master and Servant § 63—

Evidence that while digging a ditch 12 inches wide by 14 inches deep, claimant came upon a rock some 24 inches long and 12 inches wide, weighing 50 to 100 pounds, that claimant dug around the rock, bent down to pick it up, and, as he twisted to heave it out of the ditch felt a catch in his back, together with expert testimony that the rupture of claimant's spinal disc was caused by the lifting episode and that lifting from such a twisted and cramped position multiplied the intensity of the stress upon the vertebrae, *is held* sufficient to sustain the Commission's findings that the injury resulted from an accident arising out of and in the course of the employment.

3. Master and Servant § 45—

The Compensation Act must be liberally construed to effectuate its purpose to provide compensation for workers injured in industrial accidents.

APPEAL by plaintiff from *Campbell, J.*, February, 1963 Term, CATAWBA Superior Court.

The plaintiff, claimant, instituted this proceeding by filing before the North Carolina Industrial Commission a claim for compensation for injuries suffered while he was at work for Electric Wiring Company, Inc. The parties stipulated the jurisdictional facts. The Hearing Commissioner made findings of fact, stated his conclusions of law, and made an award allowing compensation. Upon review, the full Commission adopted the findings and conclusions of the Hearing Commissioner and affirmed the award.

Upon appeal to the Superior Court, Judge Campbell sustained seriatim defendants' exceptions Nos. 6 through 20, inclusive, set aside the award of compensation, and remanded the proceeding to the Industrial Commission with directions to disallow the claim. The plaintiff appealed.

John H. McMurray, for plaintiff, appellant.

Patrick, Harper & Dixon, by F. G. Harper, Jr., for defendants appellees.

HIGGINS, J. The Superior Court judgment was based on the court's conclusion as a matter of law that the evidence was insufficient to support a finding that the claimant suffered an injury by accident arising out of and in the course of his employment. It is the duty of the court to determine whether, in any reasonable view of the evidence, it is sufficient to support the critical findings necessary to permit an award of compensation. The court does not weigh the evidence. That is the function of the Commission. If there is any evidence of substance which directly, or by reasonable inference, tends to support the findings, the courts are bound by them, "even though there is evidence that would have supported a finding to the contrary." *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175. The rule is simple. The difficulty arises in its application to cases in that twilight zone between what is clearly sufficient and what is clearly insufficient. This is such a case.

The claimant, 40 years of age, weighing 230 pounds, an ex-army heavyweight boxing champion, was employed as an apprentice mechanic and engaged at the time of his injury in digging a ditch for the installation of a wiring conduit. He testified: "On March 17, 1961, I was digging ditches and laying conduits, staying ahead of the cement men. The specifications of the ditch . . . 12" wide by 14" deep. . . . I was injured around 12 o'clock. . . . At this particular time I came to a rock in the ditch . . . the ditch was approximately 14" deep. . . . To loosen

the rock I dug around it with a shovel and pick. . . . At this time I got the rock loose . . . bent down to pick the rock up. As I did I twisted to heave the rock out of the ditch and I had a catch in my back. I pitched over on my back and I guess I laid there approximately five minutes before I could move. . . . I lifted the rock approximately up to my knees, maybe a little bit better. I had to heave it out of the ditch . . . My feet were in the ditch . . . The rock weighed approximately 50 to 100 pounds. . . . At the time I was hurt there were no other employees of Electric Wiring Company on the job."

The claimant reported his injury and thereafter upon advice of the employer consulted a physician who placed him in traction for several days, but later referred him to Dr. Powers, an orthopedic surgeon, who performed an operation which disclosed, "A completely ruptured disc at the fourth interspace." Claimant was Dr. Powers' patient in the Presbyterian Hospital in Charlotte from April 28, 1961, to May 20, 1961, at which time he was discharged from the hospital. Dr. Powers testified: "It was a complete rupture. The material from the disc had broken through the covering and was lying in the interspace pressed against the nerve, . . . My opinion is that the disc symptoms and rupture were caused by the lifting episode which the patient described to me. . . . Twisting or his flex . . . does increase the pressure on the disc, . . . because of the increased leverage against the spine. . . . There was no evidence of pre-existing condition here so far as I know."* * *

"If you are lifting with your back straight and using your legs there isn't near the pressure against the disc that there is if you are bent forward, depending on the back muscles as a counterbalancing agent to do the lifting."

This case falls in a category different from *Bellamy v. Stevedoring Co.*, 258 N.C. 327, 128 S.E. 2d 395; *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109; *Turner v. Hosiery Mills*, 251 N.C. 325, 111 S.E. 2d 185; *Holt v. Mills Co.*, 249 N.C. 215, 105 S.E. 2d 614; and *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289. In *Bellamy* there was no evidence the heart attack grew out of the employment. In *Harding* the claimant was engaged in transporting and delivering groceries. He suffered pain in his back as he picked up a carton containing 12 pounds of coffee and turned and twisted to unload it from the truck. He had been similarly engaged for more than six years. He was not in any abnormal position. In *Turner* the claimant was merely leaning over a knitting machine, adjusting the carriage. This same work he had done from 12 to 15 times daily for four years. He was not in any unusual position. In *Hensley* the claimant developed hernia

while dipping chickens. He had been on the same job at the same place for four years. G.S. 97-2(18) provides what must be shown to justify compensation for hernia.

This case, or at least its material facts, more nearly follows *Davis v. Summitt,* 259 N.C. 57, 129 S.E. 2d 588; *Searcy v. Branson, supra; Faires v. McDevitt & Street Co.,* 251 N.C. 194, 110 S.E. 2d 898; and *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592. In *Edwards* the authorities are cited and reviewed by Devin, J., (later C.J.,) in the Court's opinion, and in the concurring opinion by Seawell, J. Both opinions call attention to the divergent views whether an accident must precede an injury for the latter to be compensable. *Slade v. Hosiery Mills,* 209 N.C. 823, 184 S.E. 844. Such does not seem to be the majority rule. There is authority cited by Seawell indicating that injury by accident and accidental injury are synonymous terms. If so, the injury may be accidental without any requirement that an accident must precede and cause it.

In this case the claimant was standing in a ditch 14" deep and only 12" wide. The rock weighing 50 to 100 pounds was two feet long and the same width as the ditch. Necessarily claimant was required to bend forward in order to pick it up from the bottom of the ditch and deposit it to one side. This necessarily required a twisting movement. The intensity of the stress upon the vertebrae, according to Dr. Powers, was multiplied by lifting from that position. These facts are sufficient to distinguish this case from *Harding, Hensley,* etc.

Obviously, under any view, if the claimant had dropped the rock in the process of lifting and injured his foot, the injury would be compensable. To say that the injury which resulted from lifting and heaving the rock from a twisted and cramped position would be non-compensable does not commend itself as either very sound reasoning or very good law. The Compensation Act requires that it be liberally construed to effectuate the objects for which it was passed — to provide compensation for workers injured in industrial accidents.

We hold that the evidence before the Commission was sufficient to support its findings, conclusions, and to sustain the award. The judgment of the Superior Court is set aside. The proceeding will be remanded to the North Carolina Industrial Commission for disposition in accordance with this opinion.

Reversed.

HAZEL BOONE, JUDY CARTER, MAGGIE PARKER, FLOSSIE PARKER, EULAH PHILLIPS, EDDIE WALTON, PEARLIE WATSON, HEIRS AT LAW OF THE ESTATE OF DEMPSEY WALTON, APPELLANTS v. J. A. PRITCHETT, COMMISSIONER, B. U. GRIFFIN AND CHARLES GRIFFIN, SONS AND HEIRS AT LAW OF C. B. GRIFFIN AND L. H. GRIFFIN, L. S. MIZELLE, GUARDIAN AD LITEM, APPELLEES.

(Filed 10 April 1963.)

1. Boundaries § 9; Quieting Title § 2—

A description in a deed which fails to set forth even the county in which the land is situate, and stipulates the beginning as a gum on a named branch, thence with the branch to another gum, thence south to a red oak on a named road, thence along said road to a bend, and thence down said road to the beginning, is void on its face for indefiniteness, and a complaint alleging that plaintiffs claim under a deed containing such description is demurrable for failure to state a cause of action.

2. Same—

In an action to quiet title against parties claiming under a commissioner's deed, the commissioner is not a proper party when there is no allegation that he was ever in possession of the land or received any rents or profits from it.

3. Pleadings § 18—

A cause may not be dismissed upon demurrer for mere joinder of parties who are neither necessary nor proper parties.

APPEAL by plaintiff from *Cowper, J.*, at the August 1962 Term of BERTIE.

This action was commenced June 6, 1962. Plaintiffs' prayer for relief is that their title be quieted; that defendants account for rents and profits and surrender possession of a thirty-acre tract of land. Defendants' demurrer to the complaint was sustained.

In summary, the complaint alleges the following facts:

All of the plaintiffs named in the caption of the case are the heirs at law of Dempsey Walton who died in 1902 leaving a widow, Judy Walton, and the following children, none of whom are listed among the plaintiffs: Polly Walton, Delia Walton, Cubia Walton, Oscar Walton, Silas Walton, and Dempsey Walton, Jr. Judy Walton died in 1903 leaving the six named children surviving her. At the time of his death Dempsey Walton was seized of the following described tract of land which he acquired by deed from Hezekiah Griffin in November 1878:

> BEGINNING at a gum on Green Branch; thence up Green Branch to a gum; thence South to a Red Oak on the River Road;

> thence along said Road to the bend; thence down said road to the beginning containing fifty-six acres, more or less.

After the death of the widow, the heirs of Dempsey and Judy Walton occupied the property until sometime in 1937 when Hazel Boone, one of the plaintiffs, left it "on her own accord."

On January 9, 1936, C. B. Griffin, alleging that the estate of Judy Walton owed debts, wrongfully secured his appointment as administrator of the estate of Judy Walton. On March 16, 1937, he instituted a special proceeding in which L. S. Mizelle (listed in the caption as a party defendant to this action) was appointed guardian *ad litem* for all of the unknown heirs of Judy Walton. In the special proceeding, one of the defendants in this action, J. A. Pritchett, was appointed commissioner. "Pursuant to said Special Proceeding" on July 29, 1937, by commissioner's deed, he conveyed to L. H. Griffin (Louise H. Griffin), the wife of C. B. Griffin, administrator, the following described land:

> That certain tract or parcel of land in Woodville Township, Bertie County, North Carolina, adjoining the lands of J. O. Early, William C. Thompson, and others, and containing 30 acres, more or less and being well known as the "Julia Walton Home Place."

By virtue of the deed from Pritchett commissioner, Louise H. Griffin "and her heirs," have erroneously and unlawfully claimed and used the property belonging to the heirs of Dempsey Walton.

The complaint states that the records of this special proceeding are attached, included, and made a part of the complaint. However, no petition is attached.

The last paragraph of the complaint proper alleges that defendants at all times knew or should have known that Dempsey Walton was the record titleholder of the "aforesaid property"; that defendants claimed no debts against his estate and the special proceeding did not purport to bind the heirs of Dempsey Walton; that the defendants "fraudulently and wilfully and wrongfully entered upon the lands of the estate of the said Dempsey Walton under the pretense of debts against the estate of Julia Walton, who had demised some thirty years prior to the claim of the alleged debts of Julia Walton and thus had no interest in the lands of the estate of Dempsey Walton." Presumably Judy Walton and Julia Walton are one and the same person.

The record discloses that C. B. Griffin died in 1948 and L. S. Mizelle died in 1956. J. A. Pritchett, commissioner; B. U. Griffin and Charles

Griffin, denominated in the caption as sons and heirs of C. B. Griffin; and Mrs. L. H. Griffin were served with summons. They demurred to the complaint on the ground that it failed to state a cause of action in that plaintiffs do not "allege ownership of the lands purportedly described" and the complaint does not contain a legally sufficient description of any land. The defendants also demurred for "an improper joinder of parties." The court sustained the demurrer and also ruled that J. A. Pritchett, commissioner, and L. S. Mizelle, guardian *ad litem,* (now deceased) were improper and unnecessary parties.

Conrad O. Pearson, W. G. Pearson, II, and F. B. McKissick for plaintiff appellants.

Pritchett & Cooke for defendant appellees.

SHARP, J. Plaintiffs claim the thirty acres, described in paragraph ten of the complaint as the "Julia Walton Home Place," located in Woodville Township, Bertie County, North Carolina, as heirs of Dempsey Walton. The source of their alleged claim is the deed dated November 6, 1878, by which Hezekiah Griffin purported to convey fifty-six acres of land, more or less, to Dempsey Walton. The description in that instrument, as set out in paragraph three of the complaint, is quoted verbatim in the facts above. It discloses positively that the deed is void for vagueness and uncertainty of description. It contains no courses and distances and no reference to any source by which evidence *aliunde* could identify the land. *Holloman v. Davis,* 238 N.C. 386, 78 S.E. 2d 143; *Carrow v. Davis,* 248 N.C. 740, 105 S.E. 2d 60. There is no allegation that the Dempsey Walton land is in Bertie County but, assuming that it is, Bertie County is bounded on one side by the Roanoke River; on the other, by the Chowan River. It has many miles of river road and myriads of gum and red oak trees. If Green Branch is a known stream, the gum on the bank from which to begin an uncertain trek up the branch to another gum, is not.

If it be conceded that Dempsey Walton owned a tract of land containing approximately fifty-six acres somewhere in Bertie County, the complaint does not justify the inference that the thirty acres which J. A. Pritchett, commissioner, conveyed to L. H. Griffin are a part of it. The demurrer was properly sustained for failure to state a cause of action. *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484.

Since L. S. Mizelle died in 1956, he is not only an improper party but an impossible party. The complaint contains no allegation that J. A. Pritchett, commissioner, was ever in possession of the land or re-

ceived any rents and profits from it. The court correctly ruled that he was an improper party. However, a misjoinder of one who is not a necessary party is surplusage and not grounds for demurrer. *Sullivan v. Field,* 118 N.C. 358, 24 S.E. 735; *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711.

The demurrer admits that all of the plaintiffs listed in the caption of the case are heirs at law of Dempsey Walton. It is not now necessary to decide whether that allegation in the complaint amounted to an averment that plaintiffs are *all* of the heirs of Dempsey Walton. However, it is noted that the plaintiffs' relationship to him is nowhere specifically alleged; no genealogy connects them with either Dempsey Walton or his children named in the complaint.

The judge of the Superior Court allowed the plaintiffs thirty days in which to amend their complaint if so advised. They may still avail themselves of this privilege.

Affirmed.

STATE v. PAUL CARVER.

(Filed 10 April 1963.)

1. Criminal Law § 18—

On an appeal from conviction in a county court of specific misdemeanors, the Superior Court acquires jurisdiction only of the specific misdemeanors charged in the warrant and upon which defendant had been convicted.

2. Intoxicating Liquor § 5—

Constructive possession of nontaxpaid whiskey will support conviction.

3. Intoxicating Liquor § 13c— Evidence of constructive possession of nontaxpaid whiskey held insufficient to raise jury question.

Evidence tending to show that when the sheriff drove up to defendant's premises with search warrants for both defendant's house and the house of defendant's son-in-law, the son-in-law ran from the door of defendant's shop or garage to a sink therein, that the sheriff ran in behind the son-in-law and found a pint bottle, with the top off and a little nontaxpaid whiskey in it, lying in the sink, and the bottom of the sink wet with whiskey, *is held* insufficient to support conviction of defendant on a warrant charging possession of one pint of nontaxpaid whiskey, since the evidence fails to disclose where the bottle of nontaxpaid whiskey was when the sheriff drove up, and whether the son-in-law was in possession of it at that time with defendant's knowledge.

4. Criminal Law § 101—

Evidence which raises no more than a suspicion or conjecture of the fact of guilt is insufficient to carry the case to the jury.

APPEAL by defendant Paul Carver from *Williams, J.*, 10 September 1962 Mixed Term of PERSON.

Criminal prosecution on a warrant containing two counts: The first count charges Paul Carver and Hester Sanders on 27 June 1962 with the unlawful possession of one pint of non-taxpaid whiskey, and the second count charges them on the same day with the possession of the same amount of non-taxpaid whiskey for the purpose of sale. Each defendant was found guilty in the county criminal court and from a judgment against each one, each one appealed to the superior court, where the case was heard *de novo* upon each defendant's plea of not guilty. Verdict as to Paul Carver: "Guilty of illegal possession of non-taxpaid whiskey and not guilty on the count of possessing whiskey for the purpose of sale." Verdict as to Hester Sanders, Not Guilty on both counts.

From a judgment of imprisonment for six months, Paul Carver appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

R. B. Dawes for defendant appellant.

PARKER, J. The State offered one witness, C. C. Holeman, sheriff of Person County. Defendants offered no evidence. Defendant Carver assigns as error the denial of his motion for judgment of nonsuit made at the close of the State's case.

Sheriff Holeman testified in substance:

Paul Carver owns a lot of land located on a hard-surfaced road near the Kitten Hill Community in Person County. He lives in a house on the lot about as far from the road as from the witness stand to the back of the courtroom. Behind his house he has a shop or garage with a number of tools in it where he works on automobiles. In the back of the shop or garage was a sink. Around the shop were a number of old automobiles. Adjoining the shop is an empty house. Hester Sanders, Carver's son-in-law, lives in a house on the back of the lot, about 250 feet from the other buildings.

On 27 June 1962 he went to the home of Carver armed with separate search warrants to search the premises of Carver and Hester Sanders. He testified: "We pulled in front of the house. Mr. Carver was there,

standing by an old car. I don't know whether he was working on it. As I pulled up I noticed Hester Sanders ran from the door [evidently of the garage, it is so stated in defendant's brief]. The building has a door here and a window at this side of it. Hester Sanders ran from the door across [to] the sink. There is a sink in the corner of the garage. I rushed on in and as I got to the door Hester was leaving the sink and picked up a piece of motor, or a piece of car or something there and I went on in and found this bottle laying in the sink with that much whiskey in it and the top was off it and the bottom of the sink was wet with liquor and this bottle was wet, laying there flat with the top off. That's a pint bottle, labelled 'Kentucky Gentlemen.' The liquor in it is called rotgut or bootleg whiskey or non-taxpaid. It is non-taxpaid whiskey."

Under the sink he found about sixty empty pint bottles in a box. Several had in them the fresh odor of whiskey. Outside he found several jugs with a small amount of whiskey in them. In a nearby shed there were a few pint bottles with the odor of whiskey in them. He searched Sanders' house and his smokehouse and found three jugs with a little amount of whiskey in them in the smokehouse. In a little back room of Sanders' house he found "some empties." All the whiskey he found in the jugs and bottles would probably fill about half of a cup. He read the search warrants to both defendants. Neither made any objection to the search.

The warrant here was sworn to by Sheriff Holeman. He testified on cross-examination: "I base my allegation of one pint of whiskey on the size of the sink and its being wet with whiskey in it from fresh whiskey."

The superior court of Person County had jurisdiction on appeal to try the defendant only for the specific misdemeanors charged in the warrant, upon which he had been tried and convicted in the inferior court. *S. v. Mills,* 246 N.C. 237, 98 S.E. 2d 329; *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189.

The warrant charged the defendant in one count with the unlawful possession of one pint of non-taxpaid whiskey on 27 June 1962, and in a second count with the possession on the same date of one pint of non-taxpaid whiskey for the purpose of sale. He was found guilty on both counts in the county criminal court, and appealed to the superior court. In the superior court he was found guilty on the first count in the warrant, and not guilty on the second count in the warrant.

The only evidence for the State as to one pint of non-taxpaid whiskey is that when Sheriff Holeman drove up in front of Carver's

house, Hester Sanders ran from the door of the shop or garage to a sink in the shop or garage, and when the sheriff ran in behind him, Sanders was leaving the sink and he found a pint bottle with the top off lying in the sink with a little non-taxpaid whiskey in it, and the bottom of the sink was wet with whiskey. During that time Carver was outside standing by an old automobile. Sheriff Holeman testified: "I base my allegation of one pint of whiskey on the size of the sink and its being wet with whiskey in it from fresh whiskey."

The State's evidence does not disclose where the pint bottle of non-taxpaid whiskey was when the sheriff drove up. Did Sanders at that time have it on his person? If so, did Carver know that? The State's evidence tends to show Sanders was in the possession of this whiskey, but the jury acquitted him of the charge. There can be a constructive possession of non-taxpaid whiskey, as well as an actual possession. *S. v. Myers,* 190 N.C. 239, 129 S.E. 600. "It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue." *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730. In our opnion, the evidence of the State was insufficient to carry the case to the jury as against Carver on the charges in the warrant. The evidence does no more than raise a suspicion or conjecture, strong perhaps, of defendant's guilt as charged, but that is not sufficient to carry the case to the jury. *S. v. Love,* 236 N.C. 344, 72 S.E. 2d 737; *S. v. Heglar,* 225 N.C. 220, 34 S.E. 2d 76; *S. v Kirkman,* 224 N.C. 778, 32 S.E. 2d 328; *S. v. Carter,* 204 N.C. 304, 168 S.E. 204; *S. v. Johnson, supra.*

There was error in the denial of Carver's motion for judgment of nonsuit. The judgment below is

Reversed.

ROBERT CALVIN WILLIAMS v. ASHEVILLE CONTRACTING COMPANY.

(Filed 10 April 1963.)

1. Appeal and Error § 33—

The pleadings form a necessary part of the record proper, and when the pleadings are not present in the record the appeal must be dismissed, Rule of Practice in the Supreme Court No. 19(1); nor will memoranda of the pleadings suffice, Rule of Practice in the Supreme Court No. 20(1).

2. Judgments § 35—

Unless reversed on appeal, a judgment dismissing an action upon a demurrer for failure of the complaint to state a cause of action is a bar to a subsequent action on substantially identical allegations.

APPEAL by plaintiff from *Burgwyn, Emergency Judge,* December Civil Term 1962 of NASH.

This is plaintiff's second action against defendant to recover damages for injuries sustained in a collision between motor vehicles belonging to the parties occurring in Nash County on March 7, 1960.

This Court held the judgment of voluntary nonsuit entered in plaintiff's first action by the assistant clerk on November 7, 1961, constituted an abandonment by plaintiff of his appeal from a judgment entered in superior court at September Civil Term 1961 in which the court sustained defendant's demurrer on the ground the complaint failed to state facts sufficient to constitute a cause of action and dismissed the action. *Williams v. Contracting Co.,* 257 N.C. 769, 127 S.E. 2d 554.

In this (second) action the following statements appear in the agreed case on appeal: Plaintiff instituted the second action November 7, 1961, immediately after taking the voluntary nonsuit in the first action. The demurrer to complaint in the first action was upon the ground "the complaint showed upon its face that the alleged acts of negligence on the part of the defendant were not the proximate cause of the collision complained of and of the injuries to the plaintiff." Except as to paragraph 7, the complaints in the two actions are identical.

Neither the complaint in this (second) action nor the complaint in the first action is in the record now before us. (Note: The complaint in the first action is not in the record filed in this Court incident to said appeal in the first action.) Paragraph 7 of each complaint is quoted in the agreed case on appeal.

Defendant's original answer is not in the record. The record includes an amendment to answer in which defendant pleads the judgment entered at September Civil Term 1961, in the first action, as *res judicata* and in bar of plaintiff's right to maintain this (second) action. Attached to said "Amendment to Answer" is the demurrer to the complaint in the first action, the judgment thereon, the entries relative to the plaintiff's appeal therefrom, and the judgment of voluntary nonsuit entered on November 7, 1961.

The hearing below was on defendant's said plea in bar and on plaintiff's (oral) demurrer thereto. Judgment overruling plaintiff's said

demurrer, sustaining defendant's said plea in bar and dismissing the action was entered.

Plaintiff excepted to the judgment "sustaining defendant's Plea in Bar" and appealed.

Gilliland & Clayton for plaintiff appellant.
William L. Thorp, Jr., for defendant appellee.

BOBBITT, J. Compliance with the Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*, is mandatory. Rule 19(1) requires that the pleadings shall be a part of the transcript in all cases. Rule 20(1) provides that memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel. "The absence of the complaint from the record makes it necessary to dismiss the appeal." *Thrush v. Thrush,* 245 N.C. 63, 65, 94 S.E. 2d 897, and cases cited.

While the appeal is dismissed for failure to comply with our rules, we deem it appropriate to say: In our view, *the facts* alleged in paragraph 7 of the complaint in this (second) action are substantially the same as those alleged in paragraph 7 of the complaint in the first action. The court below presumably based decision on "the recognized principle that a judgment for defendant on a general demurrer to the merits, where it stands unappealed from and unreversed, is an estoppel as to the cause of action set up in the pleadings, as effective as if the issuable matters arising in the pleadings had been established by a verdict." *Swain v. Goodman,* 183 N.C. 531, 533, 112 S.E. 36; *Jones v. Mathis,* 254 N.C. 421, 425, 119 S.E. 2d 200, and cases cited.

Appeal dismissed.

MARGARET K. SMITH v. OSCAR RAYMOND WHISENHUNT, SR., INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR OSCAR RAYMOND WHISENHUNT, JR., ORIGINAL DEFENDANTS, AND RUBY WALLACE, ADDITIONAL DEFENDANT.

(Filed 10 April 1963.)

1. Torts §§ 4, 6—

Where the original defendants have an additional defendant joined for contribution, the original defendants become plaintiffs in regard to their claim for contribution and have the burden of proof thereon.

2. Same—

When the jury returns judgment for plaintiff against the original defendants in a trial free from prejudicial error, but is unable to agree

upon the issue of whether the additional defendant's negligence contributed to plaintiff's damages as alleged in the original defendants' cross action, the court properly enters judgment for plaintiff against the original defendants and orders the issue of contribution to be tried at a later date.

APPEAL by original defendants from *Gambill, J.*, September 24, 1962 Term, FORSYTH Superior Court.

The plaintiff brought this suit against Oscar Raymond Whisenhunt, Sr., owner, and his minor son, Oscar Raymond Whisenhunt, Jr., driver, of the family purpose Chevrolet sedan which collided with plaintiff's 1955 Ford, parked on the street in front of her home, causing $500.00 property damage.

The original defendants by answer admitted the collision, but alleged the Whisenhunt vehicle was in a prior collision with an automobile driven by Ruby Wallace and as a result the defendants' vehicle was damaged, and continued out of control for a considerable distance before it struck the plaintiff's Ford sedan. The defendants in their answer allege the collision was proximately caused by the negligence of Ruby Wallace who, on their motion, was made an additional party defendant against whom they filed a counterclaim for purposes of contribution if the original defendants were found liable, for $750.00 damages to the Whisenhunt vehicle and $5,000.00 for the personal injury of Whisenhunt, Jr.

The additional defendant filed an answer to the cross action, denied negligence on her part, alleged the collision was caused by the negligence of Whisenhunt, Jr., on account of which she claimed property damage of $300.00 and $2,500.00 punitive damages for causing the wreck. On plaintiff's motion the court struck the counterclaims the defendants filed against each other, except the original defendants' claim for contribution.

All parties introduced evidence. The court submitted, without objection, these issues:

"1. Was the plaintiff, Margaret K. Smith, damaged by negligence of the defendants Oscar Raymond Whisenhunt, Jr., and Oscar Raymond Whisenhunt, Sr.?

"2. What amount, if any, is the plaintiff, Margaret K. Smith, entitled to recover of the defendants Oscar Raymond Whisenhunt, Jr., and Oscar Raymond Whisenhunt, Sr.?

"3. Did Ruby Wallace by her negligence contribute to the plaintiff's damages, as alleged in the cross action?"

The jury, after long deliberation and a number of requests for further instructions, finally reported they were agreed on their answers to the first two issues but were hopelessly deadlocked on the third issue. Whereupon the court accepted the verdict in which the jury answered the first issue, yes, and the second issue, $500.00. The court ordered a mistrial on the third issue, entered judgment that the plaintiffs recover from the original defendant the sum of $500.00. The court ordered the contribution issue continued for trial at a later date. The original defendants appealed.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Norwood Robinson, for original defendants, appellants.

Deal, Hutchins and Minor by Fred S. Hutchins and Edwin T. Pullen for Ruby Wallace defendant appellee.

Elledge and Mast by David P. Mast, Jr., for plaintiff appellee.

HIGGINS, J. The evidence was ample to show the plaintiff's damage. On that issue the record does not disclose error. The evidence of negligence on the part of the original defendants as a proximate cause, or one of the proximate causes, of plaintiff's damage, was likewise ample. On that issue the record fails to disclose error. The jury's findings entitled the plaintiff to judgment against the original defendants.

When the original defendants brought the additional defendant into the plaintiff's case they became plaintiffs with the burden of proving their contribution claim. *Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833. Since the plaintiff had asserted a claim against the Whisenhunts only, she was disinterested in the outcome on the contribution issue. *Pearsall v. Power Co.,* 258 N.C. 639, 129 S.E. 2d 217; *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773.

In the *Pearsall* case the plaintiff obtained judgment against the original defendant. However, the jury found for the additional defendant on the issue of contribution. The original defendant paid the judgment and appealed. This Court, finding error, granted a new trial as to contribution. The plaintiff was not a party to that appeal. In this case the jury, having failed to agree as to contribution, the court ordered the issue retried. The judgment entered in the Superior Court is affirmed.

The motion in the Supreme Court to dismiss the appeal is denied. Motion under G.S. 6-21.1 to tax attorney's fee for the appeal is denied. Attorney's fees are discretionary in the trial court.

Affirmed.

RAY A. CHILDERS AND WIFE, DOROTHY B. CHILDERS v. PARKER'S, INC.

(Filed 10 April 1963.)

Mortgages and Deeds of Trust § 32—

Where the purchaser of land executes a note and a deed of trust to secure the balance of the purchase price, he may recover against the seller for the seller's failure to insert a statement to this effect in the papers, only for loss sustained as a result of being required to pay a deficiency judgment, and he may not maintain an action therefor prior to the rendition of a deficiency judgment against him. G.S. 45-21.38.

APPEAL by plaintiffs from *Johnston, J.*, October 8, 1962 Term of FORSYTH.

Plaintiffs seek to recover the sum they anticipate they may be compelled to pay to a third party because of the asserted failure of defendant to state in a note and deed of trust given by plaintiffs that the instruments were for the purchase of the land described in the deed of trust. Defendant's motion to nonsuit was allowed at the conclusion of plaintiffs' evidence.

White and Crumpler by James G. White, Leslie G. Frye, and Harrell Powell, Jr., for plaintiff appellants.

William H. Boyer and W. Scott Buck for defendant appellee.

RODMAN, J. Plaintiffs' evidence tends to show these facts: They purchased from defendant Lot 58 in Lake Hills Subdivision. The purchase price was $4,000. An agent of defendant made the sale. He was to receive $500 as his commission. He waived his commission. Plaintiffs, to secure funds to make the purchase, executed a note for $3,500 payable in installments to H. Bryce Parker, guardian for George P. Schimmeck. The note recites: "This note is given for a good and valuable consideration, to-wit, a loan of money and is secured by a deed of trust of even date herewith on valuable real estate."

Below the signature of plaintiffs on the note is the statement: "Received March 23, 1961, from Harvey A. Lupton, trustee, the sum of $1751.64 to apply on principal and interest due. /s/ Philip E. Lucas, Guardian of George P. Schimmeck."

Plaintiffs' $3,500 note was secured by deed of trust to Harvey A. Lupton dated 23 March 1959, conveying Lot 58 of Lake Hills. The note and deed of trust were prepared by Mr. Parker. He handled the financing of the sales of lots in Lake Hills.

Plaintiffs alleged and defendant denied: The equity of redemption had been foreclosed by a sale by the trustee, leaving an unpaid balance

on their note of $2,180.96; that Philip E. Lucas had succeeded H. Bryce Parker as guardian. Lucas as guardian had demanded payment of the balance owing on the note and threatened suit unless said sum was paid. Plaintiffs offered no evidence to support these allegations. Plaintiffs also alleged that they had no defense to the claim asserted by Lucas as guardian because of failure to insert a recital in the note and deed of trust that they were purchase money papers.

The statute, G.S. 45-21.38 makes the seller liable for *losses* which the purchaser sustains because of seller's failure to insert a statement that debt is for purchase money in a note and deed of trust prepared by it or under its supervision. Where there has been a foreclosure and the proceeds are insufficient to pay the amount called for in the note, purchaser has not sustained a loss as contemplated by the statute until he has been compelled to pay or judgment has been rendered fixing his liability. *Coach Co. v. Coach Co.*, 229 N.C. 534, 50 S.E. 2d 288; *Lowe v. Fidelity & Casualty Co.*, 170 N.C. 445, 87 S.E. 250.

Plaintiffs offered no evidence of payment or judgment fixing their liability. To the contrary their allegations show no loss has as yet been incurred. At most plaintiffs show a potential loss. This is not sufficient.

The allegation that plaintiffs have no defense in an action which Lucas as guardian may institute is a mere conclusion which the facts when fully developed may demonstrate to be erroneous. Could Parker, who made the loan and prepared the papers with knowledge of all the facts, recover a deficiency judgment because he had failed to insert in the papers a statement that they were for purchase money? If he could not, Lucas cannot recover. G.S. 36-18.

The judgment of nonsuit is

Affirmed.

JOHNNIE LEE TARRANT v. P. C. HULL.

(Filed 10 April 1963.)

Landlord and Tenant § 7—

Evidence held not to show failure of lessor to equip elevator with proper safety devices or that there was any defect in the elevator known to lessor and not to plaintiff, an employee of lessee, and therefore nonsuit was proper in plaintiff's action against the lessor to recover for injuries sustained by plaintiff when the elevator fell, the doctrine of *res ipsa loquitur* not being applicable.

TARRANT *v.* HULL.

APPEAL by plaintiff from *McConnell, J.*, October 1, 1962 Regular Civil B Term of MECKLENBURG.

Plaintiff, an employee of Caskie Paper Company, was injured when a freight elevator in a warehouse owned by defendant and leased to Caskie fell from the third to the ground floor.

Defendant's lease to Caskie provided: ". . .replacement and repair to the building, including water pipes, plumbing, electricity, railroad platform and elevator, except those caused by the Lessees misuse or negligence, shll be made by the Lessor at his expense."

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

Nick J. Miller and Charles M. Welling for plaintiff appellant.

Helms, Mulliss, McMillan & Johnston by Fred B. Helms and E. Osborne Ayscue, Jr., for defendant appellee.

PER CURIAM. Viewed in the light most favorable to plaintiff, the evidence was sufficient for a jury to find these facts: Plaintiff had been working for Caskie about two years when he was injured. He, a coworker, and his superior went to the elevator either to take merchandise to the upper floor, as the supervisor testified, or to take it from the upper floor to the ground floor, as plaintiff testified. In any event they entered the elevator at the ground floor and rode to the third floor. At that point they sought to put a lift fork on the elevator. While trying to load the fork, the elevator fell, "landing" on the ground floor. Plaintiff was injured in the fall.

Movement of the elevator was by a wire cable fastened to the top of the elevator, passing through pulleys at the top of the building, then to a drum below the first floor. The elevator was raised or lowered depending on the direction in which the drum was rotated.

The elevator was in use when defendant purchased the warehouse in 1928. Caskie has occupied the property under lease for seventeen years. Defendant is not a mechanic. He has, since 1947, employed Ace Elevator Company, a concern of good repute engaged in the business of maintaining and servicing elevators, to make "monthly examination of the elevator. . .and. . .necessary minor adjustments." Whenever Ace suggested repairs were needed, defendant approved and paid for the work. In 1955 the North Carolina Department of Labor suggested certain additional safety devices. This work was done.

Employees of Ace who serviced the elevator went to the warehouse when called because of the fall. They found the elevator resting on the ground. Much of the cable had run off the drum, warping the

axle. This condition could result from the elevator's "landing," that is, going below the level of the first floor. If the elevator should not stop at the ground floor, as it was supposed to do, the cable would continue to unwind. When a "landing" occurs and the elevator is subsequently raised, the cable does not follow the proper grooves, but piles one layer on another, ultimately running off the drum. The resultant slack permits the elevator to fall.

One of plaintiff's witnesses expressed the opinion "the elevator sat down in the pit and the cables got slack and piled on top of each other and got slack and slipped off the end of the drum." Another witness expressed the opinion "the cause of the elevator's falling was either the cable piling up or the elevator got stuck. I couldn't say which one it was."

Plaintiff contends the elevator fell because of (a) defendant's failure to repair as he contracted to do, or (b) his failure to install proper safety devices, or (c) defective installation by failing to make the pit deep enough to prevent the cable from getting slack.

The doctrine of *res ipsa loquitur* is not applicable. We find no evidence of defendant's failure to comply with its contractual obligation to lessee; but if there were evidence of such breach, that would not impose liability on defendant for plaintiff's injuries. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911; *Jordan v. Miller*, 179 N.C. 73, 101 S.E. 550.

The testimony negatives the suggestion that the elevator was not equipped with proper safety devices. At most, it merely indicates a failure of these devices for some unknown reason to stop the elevator when it started to fall. There is no evidence of a defect known to defendant and unknown to plaintiff. If it can be said that the failure to make the pit deep enough was a defect notwithstanding more than thirty years' safe use, the evidence is unequivocal that defendant did not know that it was not in fact deep enough; and experts employed to maintain the elevator in a safe operating condition and State inspectors who examined the elevator made no suggestion to defendant that the pit should be deepened. The judgment of nonsuit is

Affirmed.

J. E. COLEMAN v. COLONIAL STORES, INC.

(Filed 10 April 1963.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and evidence tending to contradict or impeach plaintiff's evidence must be disregarded, and all conflicts in the evidence resolved in plaintiff's favor.

2. Negligence § 37b—

The proprietor of a store is not under duty to warn the customer of a condition which is obvious to any ordinarily intelligent person.

3. Negligence § 37f—

Evidence tending to show that defendant, a self-service market, maintained a meshed metal screen, basically in the shape of a right triangle, at a right angle to the exit door when it was closed, that the metal screen could be plainly seen through the glass exit door by a person approaching the door, that plaintiff approached the door holding two sacks of groceries, which partially obstructed his vision, turned left in a hurry after passing through the exit door and fell over the metal screen, *held* insufficient to show negligence on the part of the proprietor and to show failure on the part of plaintiff to exercise ordinary care for his own safety.

APPEAL by plaintiff from *Clarkson, J.*, November Civil Term 1962 of CATAWBA.

Civil action to recover damages for personal injuries sustained in falling over a meshed metal screen constructed on the outside of the exit door of defendant's store.

Defendant in its answer denied negligence, and conditionally pleaded contributory negligence as a bar to recovery.

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

Smith and Benfield by Young M. Smith for plaintiff appellant.

Patrick, Harper & Dixon by F. Gwyn Harper, Jr., for defendant appellee.

PER CURIAM. Plaintiff's evidence shows:

Defendant operates a self-service supermarket in the town of Hickory, and has many customers. It provides parking space for its customers. A large part of the front of the store is of plate-glass construction with metal at the ceiling and at the floor, with some supporting columns in between, holding the glass in place. The "out" or exit door for customers is a single panel of glass with an aluminum frame, and is at the front of the store. Inside in front of the door is a

rubber mat, which, when a customer steps on it, automatically opens the door to the left. On the outside of this exit door to the right, as a person goes out, is a meshed metal screen at a right angle to the door when it is closed, which is securely fastened to the wall of the store and the pavement. This metal screen, dark gray in color, is basically in the shape of a right triangle. It is about four and a half or five feet high, about eight inches wide at the top, and about thirty-four inches wide at the bottom. The metal screen outside the exit door can be plainly seen through the glass of this door.

Between 2:00 and 3:00 p.m. on 8 November 1960 plaintiff, a life insurance salesman living in Hickory, who is six feet tall, parked his automobile at defendant's store and entered it to shop. In the store he purchased two steaks, some Idaho baking potatoes, a loaf of bread, a ten-pound sack of charcoal, and some lighter fluid. When he paid the cashier for these articles, they were placed in two large paper bags. He placed a hand under each bag, resulting in the bags being higher than his shoulders, and started to leave. When he stepped on the rubber mat at the exit door, it automatically opened. He walked through, said hello to someone outside, turned to his right, tripped over the bottom of the metal screen, and fell, fracturing the knee cap of his left leg. He first saw the screen after he fell over it. There was nothing there to call his attention to the metal screen. He had shopped in defendant's store before, and in leaving had turned to his left. In so doing he had not noticed the screen.

A witness for plaintiff, who had worked at this store, testified he had seen a person catch his toe around the screen, he had bumped into it when he was in a hurry, and he had "noticed that maybe a lady, you know, bumping the screen, maybe she would give kind of a squeal sound, something like that, maybe notice it."

Defendant offered evidence to the effect that plaintiff said at the scene and at the hospital that it was his fault, he was in a hurry, he spoke to someone, and did not look where he was going, and also to the effect that he had previously had trouble with one of his legs, and he felt like it gave away causing him to fall.

It is elementary knowledge in passing on a motion for judgment of involuntary nonsuit that the evidence must be considered in the light most favorable to plaintiff, and the court must ignore that which tends to contradict or impeach the evidence presented by plaintiff. All conflicts in the evidence must be resolved in plaintiff's favor. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

The metal screen at the exit door was obvious to any ordinarily intelligent person using his eyes in an ordinary manner. No unusual

conditions existed at the time. As plaintiff approached the exit door, the metal screen outside could be plainly seen through the glass door. At the time and place the metal screen did not constitute a hidden danger or an unsafe condition to plaintiff, an invitee using the premises. Defendant was not under a duty to warn its customers of a condition which was obvious to any ordinarily intelligent person. *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461, 81 A.L.R. 2d 741; *Little v. Oil Corp.*, 249 N.C. 773, 107 S.E. 2d 729; *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365; *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491. There is no evidence that the metal screen was improperly constructed or maintained at the time plaintiff fell.

Viewing plaintiff's evidence according to the rule, it is insufficient to make out a case of actionable negligence against defendant. Plaintiff's evidence plainly shows he failed to exercise ordinary care for his own safety.

The judgment of involuntary nonsuit will be upheld. This is in accord with our decisions in *Garner v. Greyhound Corp., supra; Little v. Oil Corp., supra; Reese v. Piedmont, Inc., supra; Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Benton v. Building Co., supra.*

Affirmed.

STATE v. OSCAR FRANKLIN BROADWAY.

(Filed 10 April 1963.)

1. Criminal Law §§ 125, 173—

A motion to vacate a judgment of conviction on the ground that thirteen jurors served on the jury at the trial is not a motion to vacate the judgment for newly discovered evidence, but is in the nature of a review of the constitutionality of the trial, G.S. 15-217, and the motion is properly denied upon findings, supported by evidence, that only twelve jurors served at the trial.

2. Judgments § 6—

A court of record has inherent power to amend its records and supply defects or omissions or correct mistakes to make its records speak the truth.

APPEAL by defendant from *Burgwyn, E.J.*, October 1962 Term of GREENE.

This is a criminal action. Defendant moved to vacate a judgment of Superior Court entered at a prior term and for a new trial on the ground of newly discovered evidence. The motion was overruled.

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

Charles L. Abernathy, Jr., for defendant.

PER CURIAM. Defendant was tried at the December 1961 Term of the Superior Court of Greene County on a charge of drunken driving. He pleaded not guilty. The jury returned a verdict of guilty and judgment was pronounced. Defendant appealed. The appeal was heard at the Spring Term 1962 of Supreme Court, and the opinion, adjudging "No Error," was filed 28 March 1962. *State v. Broadway,* 256 N.C. 608, 124 S.E. 2d 568.

In preparing the case on appeal, the secretary of defendant's counsel copied the record proper from the minutes in the office of the clerk of Superior Court, and the clerk certified the record as copied. The record, as certified to Supreme Court, shows the names of thirteen jurors, among them, "Leon Letchworth, Lester Letchworth, Lester Hines" — in that order.

In apt time defendant filed in Superior Court a motion to vacate the judgment and for a new trial, alleging that thirteen jurors served on the jury at his trial. The motion came on for hearing at the October 1962 term of Superior Court.

Defendant offered affidavits and the testimony of several witnesses that thirteen jurors sat at the trial and returned the verdict, and that this fact was not called to the attention of counsel or the court during the progress of the trial or during the term for the reasons that affiants did not realize its legal effect.

At the hearing of the motion, the State procured the attendance of the trial jury, twelve persons — "Lester Letchworth" was not present. The clerk testified that only twelve jurors were impanelled and served at the trial. The sheriff testified that he had never heard of a person by the name of Lester Letchworth and no such name appeared on the tax books of the County. The name Lester Letchworth does not appear on the venire for the term at which defendant was tried, and it does not appear in the clerk's minutes of the trial. The names, "Leon Letchworth, Lester Hines," do appear as jurors in the minutes, consecutively and in that order. Leon Letchworth testified that he had no relative named Lester Letchworth and he did not know any such person.

The court found as a fact, among other things, that: ". . . (T)he name (Lester Letchworth) in the record prepared by the secretary of defendant's counsel . . . is placed between the name of Leon Letchworth and Lester Hines; . . . that the insertion of the name of Lester Letchworth . . . in the record that was sent to the Supreme Court . . .

was and is in fact a typographical error, made without any intention to do anything except transcribe the record. . . . Lester Letchworth was not a member of the jury which tried the case. . . . (S)o far as the investigation shows . . . there is no such person in Greene County, in December 1961 or now, as Lester Letchworth. . . ."

The court overruled the motion, and in this we find no error. The findings of fact are supported by competent evidence, and they support the judgment. This motion does not involve newly discovered evidence; it is in the nature of a review of the constitutionality of the trial. G.S. 15-217. That statute, however, is not strictly applicable. It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty. The action of the court in so doing is not subject to review. *State v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339.

Affirmed.

LLOYD SPICER, JR., THROUGH HIS NEXT FRIEND, LLOYD SPICER, SR. v. DAVID MONROE BYRD AND JOHN PRESTON BYRD.

AND

LLOYD SPICER, SR. v. DAVID MONROE BYRD AND JOHN PRESTON BYRD.

(Filed 10 April 1963.)

APPEAL by defendants from *Shaw, J.,* Regular November Civil Term 1962 of YADKIN.

These civil actions were consolidated for trial. They grew out of an automobile collision which occurred on 25 April 1962, shortly after midnight, between the Ford automobile owned by Lloyd Spicer, Sr. and driven by his son, Lloyd Spicer, Jr., and the Pontiac automobile owned by John Preston Byrd and driven by his son, David Monroe Byrd.

The collision occurred on North Carolina Highway No. 268, at or near the point where the Traphill Road intersected said highway from the north and Elk Spur Road intersected it from the south.

SPICER *v.* BYRD.

Lloyd Spicer, Jr. brought his action through a next friend to recover for personal injuries sustained in the collision. Lloyd Spicer, Sr. brought his action to recover for damages to his automobile.

The defendant John Preston Byrd set up a counterclaim or cross action for property damages, and the defendant David Monroe Byrd set up a counterclaim or cross action for personal injuries sustained in the collision.

The evidence tends to show that Lloyd Spicer, Jr. pulled into the West End Grill, which is located at the northeastern intersection of Traphill Road and Highway No. 268; that when this plaintiff left the premises of the West End Grill, at or near the intersection he headed his car south towards Elk Spur Road; that before entering the highway he looked up and down Highway No. 268 and saw no car coming; that he started across the road and reached the center line of Highway No. 268, which runs east and west, when the Pontiac automobile driven by David Monroe Byrd hit the car plaintiff was driving on its left side. The intersection is located on the crest of a hill, and from said intersection one can see along Highway No. 268 to the east for a distance of 350 to 400 feet, then the road takes a considerable drop. The evidence further tends to show that the speed limit in the area was 35 miles per hour; that the Pontiac car which was approaching from the east on Highway No. 268 was traveling in excess of 35 miles per hour and hit the car driven by the plaintiff in the center of the intersection; that the Pontiac car skidded about 106 feet before it reached the point of impact with the Ford car driven by plaintiff Lloyd Spicer, Jr.

The jury gave plaintiff Lloyd Spicer, Jr. a verdict for personal injuries and gave plaintiff Lloyd Spicer, Sr. a verdict for damages to his car. Judgment was entered accordingly.

The defendant appeals, assigning error.

Allen, Henderson & Williams; McElwee & Hall for plaintiff appellees.

Deal, Hutchins & Minor; Ralph Davis for defendant appellants.

PER CURIAM. There was plenary evidence in the trial below to support the verdict. Furthermore, a careful review of the evidence and the charge of the court leaves us with the impression that the defendants' exceptions and assignments of error present insufficient prejudicial error to justify the granting of a new trial.

No error.

WILLIE HONEYCUTT v. SHERRILL STENDER THOMASON AND OTIS R. TROGDEN AND MRS. OTIS R. TROGDEN.

(Filed 10 April 1963.)

APPEAL by plaintiff from *Gambill, J.*, September 24, 1962 Term of FORSYTH.

Civil action to recover damages for personal injury to plaintiff allegedly caused by the actionable negligence of defendants in the operation of an automobile.

About 8:10 P.M. on 13 November 1959 defendant Thomason was driving the family purpose automobile of Otis R. Trogden at the request of and on a mission for Mrs. Otis R. Trogden. The Trogdens were not in the automobile. Defendant Thomason was driving southwardly on Highway 311 in Forsyth County. Plaintiff, who was travelling in the same direction, overtook and attempted to pass the automobile driven by Thomason. Thomason attempted to turn left and enter a private driveway. The cars collided at a point 3 feet from the east edge of the hardsurface and 8 feet north of the entrance to the driveway. It was dark; the weather was fair, and the road dry. The accident occurred on a downgrade. The road was straight for about 500 feet north of the point of collision. The posted speed limit was 55 miles per hour.

Plaintiff's account of the accident: Plaintiff was travelling at a speed of 45 to 50 miles per hour. He came up behind defendants' car which was moving slowly, 15 to 20 miles per hour. He blinked his lights and turned left to pass, and when he was almost abreast defendants' car it pulled to the left and the vehicles collided. Defendant Thomason gave no turn signal and plaintiff did not see a brake light. Plaintiff did not sound his horn or apply brakes. After the collision plaintiff's car ran into the road ditch, continued forward 80 feet, and struck a tree. Plaintiff was injured.

Defendants' version: Thomason was driving at a speed of 35 to 40 miles per hour. When about 200 feet from the driveway she gave a left turn, blinking light signal. She applied brakes and reduced her speed to about 10 miles per hour before beginning her turn. Before turning she looked in her rear-view mirrow and saw a car approaching, but "it was not anywhere near" her. When her left front wheel was almost off the pavement the collision occurred. Her car stopped "right where it was." Plaintiff's lights did not blink and she did not hear a horn sound. There was no other traffic.

Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the negligence issue "No." Judgment was entered denying recovery and dismissing the action.

James J. Booker and Clyde C. Randolph, Jr., for plaintiff.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for defendants.

PER CURIAM. All of plaintiff's assignments of error relate to the charge. They are without merit. The conflicts in the accounts of the accident made a case for the twelve. The court submitted the case to the jury on instructions free of prejudicial error.

No. error.

CHARLIE R. COHEE v. WILLIE HAMPTON SLIGH.

(Filed 10 April 1963.)

1. Automobiles § 52—

Mere ownership of an automobile involved in a collision does not impose liability upon the owner, but the owner's liability must rest upon his personal negligence, or the negligence of his agent or employee, or upon the family purpose doctrine, and a complaint which fails to allege any one of these bases of liability fails to state a cause of action against the owner.

2. Judgments § 13—

A default judgment may not be predicated on a complaint which fails to state a cause of action, and such judgment must be vacated upon defendant's motion notwithstanding the allowance of plaintiff's motion to amend, since the amendment may not relate back so as to deprive defendant of his opportunity to answer.

APPEAL by defendant from *Gambill J.*, November 19, 1962 Term of FORSYTH.

Summons issued 7 September 1961. It, with a verified copy of the complaint, was served 11 September 1961. Plaintiff alleged he sustained personal injuries and property damage in a collision between an automobile owned and operated by him and an automobile owned by defendant; the collision was caused by the negligence of Pauline G. Miller, who "was operating the defendant's automobile with the express permission of the defendant and Pauline G. Miller was operating said automobile for the purposes for which such permission was granted."

Judgment by default and inquiry was entered 17 October 1961. The amount of damage was determined in June 1962. Judgment was rendered on the verdict. Defendant moved to set aside the judgments because based on a complaint which failed to state a cause of action. The court declined to allow defendant's motion but allowed a motion of plaintiff to amend the complaint so as to allege that Pauline G. Miller was operating defendant's car as his agent and in the course and scope of her employment.

Defendant appealed from the court's refusal to allow its motion.

Robert B. Wilson, Jr., and Motsinger & Pfefferkorn by William G. Pfefferkorn for plaintiff appellee.

Deal, Hutchins and Minor by Fred S. Hutchins, Jr., for defendant appellant.

PER CURIAM. If the owner of an automobile is to be held liable for the manner in which it is operated, he must be charged with responsibility for the operation—mere ownership is not sufficient. Responsibility may be imposed because of the personal negligence of the owner or because the owner acts through an agent or under the "family purpose doctrine." *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427; *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765.

A complaint which fails to state a cause of action is not sufficient to support a judgment for plaintiff. *Morton v. Insurance Co.,* 255 N.C. 360, 121 S.E. 2d 716; *Collins v. Simms,* 254 N.C. 148, 118 S.E. 2d 402. The court erred in refusing to allow defendant's motion. It had a discretionary right to allow plaintiff's motion to amend; but any amendment so made could not relate back to the institution of the action and thereby deprive defendant of his opportunity to answer. *Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841.

The default and inquiry judgments will be vacated and defendant allowed time to answer the amended complaint.

Reversed.

STATE OF NORTH CAROLINA v. OSBIE NORWOOD DIXON.

(Filed 10 April 1963.)

1. Criminal Law § 125—

A motion for a new trial for newly discovered evidence is inapposite to evidence that the sample of defendant's blood, the subject of expert testi-

mony at the trial, had been destroyed prior to the trial, defendant having made no inquiry in regard to the blood sample before or at the trial, since defendant's ignorance at the time of the trial that his blood sample would not have been available if he had demanded it, does not constitute newly discovered evidence.

2. Same—

The discretionary refusal of a motion for a new trial for newly discovered evidence is not reviewable in the absence of a showing of abuse of discretion.

APPEAL by defendant from *Paul, J.*, October 1962 Criminal Term of LENOIR.

Motion for a new trial on the grounds of newly discovered evidence.

Defendant was convicted at the October 1961 Term upon an indictment which charged him with operating a motor vehicle upon the public highways of Lenoir County on May 26, 1961 while under the influence of intoxicating liquor. At the time of his arrest, he made a written request that David Lutz, a medical technologist, draw a sample of his blood for the purpose of determining its alcoholic content. The request contained a statement that defendant understood that the results of the test might be used for or against him and that a report would be available for his use. Mr. Lutz made the test and reported an alcoholic content in defendant's blood of .19%. He did not preserve the blood sample after he made the report.

At the trial, Lutz qualified as an expert medical technologist. He testified to his reported findings and also that any person whose blood had an alcoholic content of .19% was under the influence of alcohol. At no time, before or during the trial, did defendant or his counsel inquire whether Mr. Lutz had preserved defendant's blood sample, nor did they make any effort to have another expert examine it. The jury returned a verdict of guilty and from the sentence imposed defendant appealed. At the Spring Term 1962, this Court found no error in the trial. *State v. Dixon,* 256 N.C. 698, 124 S.E. 2d 821. At the next term of the Superior Court after the opinion was certified to it, defendant made a motion for a new trial on the ground that, subsequent to his conviction, he had learned that his blood sample had been destroyed prior to the trial. Judge Paul denied the motion as a matter or right and in the exercise of his discretion. Defendant again appealed to this Court.

Attorney General T. W. Bruton and Assistant Attorney General G. A. Jones, Jr., for the State.

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. There is no thaumaturgy which can transform into newly discovered evidence defendant's ignorance at the time of his trial that the blood sample, about which he did not inquire, would not have been available if he had demanded it. The seven prerequisites to the granting of a new trial for newly discovered evidence are listed seriatim by Stacy, C.J., in *State v. Casey,* 201 N.C. 620, 161 S.E. 81. Defendant meets not one of these requirements. Furthermore, a motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court which is not reviewable in the absence of an abuse. *State v. Williams,* 244 N.C. 459, 94 S.E. 2d 374. Judge Paul's ruling denying defendant's motion both as a matter of right and in his discretion met the requirements of judicial decorum.

Appeal dismissed.

ALEXANDER CLAY, JR. AND CLEM E. CLAY v. ALONZA CLAY.

(Filed 10 April 1963.)

Judgments § 18; Quieting Title § 2—

Plaintiffs, in an action to quiet title, may assert that defendants claim under a tax foreclosure deed and may attack the validity of the tax foreclosure deed as to them on the ground that they held a vested remainder in the lands and were not parties to the tax foreclosure, since a void judgment is subject to collateral attack.

APPEAL by plaintiff Clem E. Clay from *Bundy, J.,* October 1962 Civil Term of PERSON.

Civil action instituted under G.S. 41-10 to quiet title.

The complaint alleges the following facts:

The two plaintffs and the defendant each own a one-twelfth undivided interest in a certain lot of land in Person County which they acquired by the will of their grandfather, Alexander Clay, who devised the land to the father of the parties for life with remainder to his children *per stirpes.* Based on conveyances subsequent to a tax foreclosure proceeding to which the plaintiffs were not parties, the defendant claims the land in fee simple. Plaintiffs pray that the cloud of defendant's adverse claim be removed from their interests in the property.

The defendant demurred to the complaint for that all the parties to the tax foreclosure proceeding are not parties to the present action; that the complaint alleges no fraud or any ground for equitable relief; and that a motion in the tax foreclosure proceeding is the proper method to contest its validity. Judge Bundy sustained the demurrer and dismissed plaintiffs' action. The plaintiff Clem E. Clay appealed.

Burns, Long and Burns for plaintiff appellants.
T. Jule Warren and Blackwell M. Brogden for defendant appellee.

PER CURIAM. For the purpose of testing the sufficiency of the complaint the demurrer admitted that the defendant claims title to the land described in the complaint under a tax foreclosure proceeding to which the plaintiffs, remaindermen who each owned a one-twelfth interest in the land, were not made parties. The defendant demurred, and the demurrer was sustained, on the erroneous assumption that the plaintiffs may not collaterally attack the validity of the judgment in the tax foreclosure proceeding. This proposition was decided adversely to the defendant in *Eason v. Spence*, 232 N.C. 579, 61 S.E. 2d 717, an ejectment action in which plaintiffs claimed land under a tax-sale foreclosure proceeding to which the remaindermen were not parties. This Court said, "The interest of the remaindermen was not affected by the judgment in the tax foreclosure suit, or by any proceeding had under it. . .A judgment void for want of jurisdiction is open to attack in a collateral proceeding."

Under G.S. 41-10 each of the plaintiffs was entitled to maintain this action against the defendant to determine the validity of defendant's adverse claim to his one-twelfth interest. *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16.

The judgment sustaining the demurrer and dismissing the action is

Reversed.

LONG ENGINEERING COMPANY, INC. v. HENNIS FREIGHT LINES, INC.

(Filed 10 April 1963.)

APPEAL by defendant from *Johnston, J.*, October 8, 1962, Term of FORSYTH.

This action for breach of contract, instituted in the Small Claims Division of the Superior Court of Forsyth County, was tried (without a jury) by the presiding judge. G.S. 1-539.3 *et seq.*

At the conclusion of plaintiff's (the only) evidence, defendant moved for judgment of nonsuit and excepted to the denial thereof.

The court based its conclusions of law and judgment on the following findings of fact:

"1. That on or about October 24, 1960, the defendant, Hennis Freight Lines, Inc., owned and operated a business enterprise known as 52 Restaurant, located on U. S. Highway 52, located on property known as Lot Number 26-A of Block 2895 on the Tax Map of Forsyth County.

"2. That defendant had in its employ William B. Holliday, as general manager of said restaurant, and that on the 24th day of October, 1960, the defendant, acting through William B. Holliday as its agent and employee, entered into three (3) separate contracts with the plaintiff, as alleged in the Complaint; that in the early part of 1962, the defendant breached the contracts, and that there was due and owing under the terms of the contracts at the time of the breach thereof the sum of $474.85; and that the plaintiff has suffered a loss of profits on account of the breach in the sum of $500.00."

Defendant made motions "to set the verdict aside" and "for a new trial" and excepted to the denial thereof.

Judgment for plaintiff for $974.85 and costs was entered. Defendant excepted to the judgment and appealed; and it is stated in the appeal entries that defendant excepted "to the findings of fact by the Court."

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for plaintiff appellee.

Harold R. Wilson for defendant appellant.

PER CURIAM. The evidence, when considered in the light most favorable to plaintiff, was sufficient to withstand defendant's motion for judgment of nonsuit. Defendant's exception to "the findings of fact by the Court" is broadside and ineffectual. It does not present for review the sufficiency of the evidence to support any particular finding of fact. Strong, N. C. Index, Vol. 1, Appeal and Error § 22 and cases cited. The judgment is fully supported by the court's findings of fact and defendant's assignments do not disclose prejudicial error.

Affirmed.

MONROE C. CLARK v.
OTIS SHERRILL AND SOUTHERN RAILWAY COMPANY.

(Filed 10 April 1963.)

Railroads § 5—

Evidence tending to show that plaintiff was injured when defendant's train collided with plaintiff's truck on a clear day at a grade crossing where the track was straight for 700 feet in the direction from which the train approached, *is held* to show contributory negligence as a matter of law on the part of plaintiff, notwithstanding evidence that plaintiff's view of the track was obstructed by weeds, there being no evidence from which it might have been inferred that the obstruction along the track was sufficient to hide materially the view of an approaching train.

APPEAL by plaintiff from *Gambill, J.,* November 19, 1962 Term, FORSYTH Superior Court.

Civil action to recover for injuries plaintiff received in a grade crossing collision between his pickup truck, as he drove west on Fork Church Road, and the corporate defendant's south-bound train near the village of Bixby in Davie County. The collision occurred a few minutes after nine o'clock on the morning of February 2, 1959. The weather was clear. The sun was shining. The hard surface of the Fork Church Road at the crossing was 23 feet wide, smooth and level with the rails.

The cause of action was based on negligence in maintaining the right of way and in failure to give notice of the train's approach. The defendant denied negligence and conditionally pleaded contributory negligence as a defense.

At the conclusion of the plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

White & Crumpler, by James G. White, Leslie G. Frye, Harrell Powell, Jr., for plaintiff appellant.

W. T. Joyner and Womble, Carlyle, Sandridge & Rice, by W. P. Sandridge, C. F. Vance, Jr., for defendants appellees.

PER CURIAM. The evidence disclosed the track in the direction from which the train approached was straight for a distance of 700 feet to 1,500 feet, according to which of the plaintiff's witnesses made the estimate. The plaintiff testified the track was concealed by a bank and weeds to within 75 feet of the crossing. However, the evidence disclosed the obstruction above the road and above the rails varied from about two feet near the crossing to four feet near the curve. While the plaintiff's evidence is to the effect that the tracks were obstructed,

there is no evidence from which it may be inferred the obstruction along the tracks interfered with a view of an approaching freight train. According to all the evidence, the plaintiff's failure to see the approaching train in the bright sunlight was his own fault. Contributory negligence appears as a matter of law. The judgment of nonsuit is

Affirmed.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF THE ESTATE OF ADAM J. MELVIN, v. MARIE A. MELVIN; JAMES A. MELVIN, JR.,; ROBERT BRUCE MELVIN; CHRISTINA MELVIN; JAMES A. MELVIN, III; ANNE MELVIN SCHMEISSER; ANDREW SHAW MELVIN, JR., JEAN ISABELLA MELVIN; DONNA MELVIN; DOUGLAS MELVIN; AND DAVID MELVIN.

(Filed 17 April 1963.)

1. Wills § 71; Appeal and Error § 4—

The executor is not a party aggrieved by a judgment directing the distribution of the estate among the beneficiaries, and his attempted appeal therefrom will be dismissed without allowing the cost of its appeal, including attorneys' fees, to be charged against the estate.

2. Wills § 57—

A bequest of a specified business to a named beneficiary is a specific legacy; a bequest of a designated sum of money out of the estate is a general legacy.

3. Wills § 60—

Where testator leaves no lineal descendants or a parent, his dissenting widow is entitled to one-half his net estate without regard to any federal estate tax. G.S. 29-2(3), G.S. 30-3(a).

4. Executors and Administrators § 23—

Under G.S. 30-15 as rewritten by Chapter 749 Session Laws 1961 a dissenting widow is entitled to her year's allowance in addition to her statutory share of the estate.

5. Wills § 60—

When a widow dissents from her husband's will the share of the estate in excess of that devised or bequeathed her by will which must be set aside for her is not to be taken from the residuary estate but is to be taken *pro rata* from the shares of all the beneficiaries, G.S. 30-3(c), unless the will provides otherwise.

6. Wills § 57—

The legatee is entitled to the income from a specific bequest from the date of testator's death.

7. Same; Wills §§ 60, 70—

Income from personalty of the estate which is not the subject of a specific legacy should first be used to pay debts, costs of administration, etc., and then divided one-half to the residuary estate and one-half to the dissenting widow when she is entitled to one-half the net estate, and general legatees are not entitled to income except from the date of distribution.

8. Wills § 60—

Upon the dissent of the widow, her statutory share of the realty vests in her as of the date of testator's death and she is entitled to the income therefrom as from that date. G.S. 29-3 does not affect this rule.

9. Same—

Upon her dissent, the widow is no longer a beneficiary under the will, and can take no benefit from it, and therefore she must pay the North Carolina inheritance tax on her share, G.S. 105-4; G.S. 105-18, notwithstanding the will directs that all inheritance taxes be paid out of the residuary estate.

10. Executors and Administrators § 10—

Where a codicil revokes a trust set up in the will but reaffirms the item of the will enumerating the powers of the executor and trustee and states that the grant of power should be without distinguishing the powers granted it as executor and as trustee, the codicil, though eliminating the trust created by the will, does not delete any of the powers conferred by the will on the personal representative.

APPEAL by plaintiff and the defendants James A. Melvin, Jr., Robert Bruce Melvin, Christina Melvin, Donna Melvin, Douglas Melvin, and David Melvin, from *Pless, J.*, at the December 1962 Civil Term of GASTON.

This action was instituted on September 19, 1962 by the First Union National Bank of North Carolina, executor of the estate of Adam J. Melvin, to determine the effect of his widow's dissent from his will upon the administration and distribution of his estate. The parties waived a jury trial, and the judge found the facts to which no exceptions were taken.

On January 26, 1959, Adam J. Melvin, hereinafter referred to as the testator, duly executed his will. Thereafter he married the defendant, Marie A. Melvin. Subsequently on January 8, 1960 he executed a codicil to his will in which he made a provision for his wife. The codicil rewrote Items III and VII of the earlier will and ratified its other provisions. Item VII of the original will had established an active trust for the benefit of testator's sister and brother. The codicil eliminated this trust but made no change in the other paragraphs of the will which granted powers to the "executor and trustee."

On February 10, 1962, testator died a resident of Gaston County where his will and codicil were probated in solemn form. Testator never had any children. He left surviving him his widow, Marie A. Melvin; a brother, James A. Melvin, Jr.; a sister, Christina Melvin; nieces and nephews; and the children of a deceased nephew, Don Melvin.

Only the provisions of the will which are involved in the questions raised by this appeal will be detailed.

In Items I and II, testator directed the early payment of debts, funeral expenses, and the cost of administering his estate, and provided that all estate and inheritance taxes be paid by the executor out of the principal of his residuary estate without any right of reimbursement from any person receiving the property under his will. In Item III, testator devised his residence in Gastonia to his wife and provided for the payment of the following legacies: $50,000.00 to his widow, Marie A. Melvin; $25,000.00 to his brother, James A. Melvin, Jr.; and $10,000.00 to his sister, Christina Melvin. On May 2, 1962, the plaintiff distributed to James A. Melvin Jr., as a portion of his bequest, the sum of $15,840.00 which he used to purchase from the estate all the capital stock of Gastonia Textile Sheet Metal Works, Inc.

By Item IV, testator gave to his nephew, Bruce Melvin, subject to all the debts against it, the business which he operated under the name of Gastonia Comber Needling Company. This bequest did not include the real estate and automobiles of the business. The executor was authorized to distribute the assets of this business to Bruce Melvin as soon as practical after testator's death, and this distribution was made on May 2, 1962. Item VI gave the "executor or trustee" authority to continue in the operation of all partnerships, corporations, and businesses in which testator owned an interest at the time of his death for such time as the executor deemed it advisable to sell or liquidate. The time, price, and terms of such sales were to be fixed by the executor. In Item VII, testator devised his residuary estate in equal shares to the children of his brothers James, Andrew, and George. If any such child were not living at testator's death the issue of any deceased child would take his share *per stirpes*. The will appointed plaintiff "executor and trustee," suggested its attorney, and granted certain specific powers to the "executor and trustee" which it is not necessary to enumerate.

The only children of James A. Melvin, Jr. are defendants James A. Melvin, III, Jean Isabella Melvin, and Robert Bruce Melvin. The only children of testator's deceased brother Andrew are defendants Anne Melvin Schmeisser and Andrew Shaw Melvin, Jr. Don Melvin,

the only child of testator's deceased brother George, is now dead. He left surviving the three minor defendants, Donna, Douglas, and David Melvin, who are represented in this action by Verne E. Shive, guardian *ad litem*. All the necessary parties were properly before the court, but only James A. Melvin, Jr., Christina Melvin, Robert Bruce Melvin, and the three minor defendants filed an answer.

An exact valuation of testator's estate is not necessary to a proper determination of the questions raised by this action. However, as of the date of the institution of this action the executor tentatively estimated the value of testator's personal estate to be $213,000.00; the real estate, $80,000.00; the annual income from the personal property, $5,000.00; and the annual income from the real property, $4,000.00. The widow, who received less than one-half of testator's net estate under the will dissented from it within the time and in the manner required by G.S. 30-2. The dissent is dated April 6, 1962. This dissent substantially reduced the portion of the estate available for distribution to the other beneficiaries.

The Superior Court answered the questions raised by the widow's dissent and instructed the executor with reference to the administration of the estate as follows:

(1) The widow, defendant Marie A. Melvin, by reason of her dissent from testator's will is entitled to one-half of his net estate as defined by G.S. 29-2(3).

(2) The widow's year's allowance is not to be charged against her share in the estate.

(3) The widow is to receive the property given her by the will, and "any sums or assets necessary to be added to such portion in order to make up the value of her full share shall be taken ratably from the shares of all the beneficiaries under the will, regardless of the class of the bequest or devise, the bequest or devise to each beneficiary to be diminished pro rata so as to contribute to the additional sums or assets necessary to make up the widow's full share in the same proportion as the value of the respective bequest or devise bears to the value of the total net estate exclusive of the portion previously given to the widow by the will of Adam J. Melvin."

(4) The income derived from the personalty prior to its distribution, other than the income from the business specifically bequeathed to Bruce Melvin, is first to be used to pay debts, cost of administration, and other charges against the estate except that charge occasioned by the widow's dissent. Any income from personalty not thus used shall be paid one-half to the widow and one-half to the residuary beneficiaries.

(5) Robert Bruce Melvin, as a specific legatee, is entitled to any income from the Gastonia Comber Needling Company which has accrued from the date of testator's death. Plaintiff, in its discretion, may distribute other assets of the estate prior to final distribution and the recipients will be entitled to any income from such property from the date of its distribution.

(6) The widow owns a one-half undivided interest in all real estate owned by testator at his death and is entitled to one-half of the net income therefrom since the date of his death.

(7) All Federal or State taxes and all North Carolina inheritance taxes on property passing to beneficiaries other than the widow shall be paid from the residuary estate. North Carolina inheritance taxes on the widow's share shall be paid by her and not the estate.

(8) The powers granted by the will to the "executor and trustee" or to the "trustee" only, inured to the plaintiff as executor when the codicil eliminated all trusts.

The plaintiff and each answering defendant excepted to the judgment and appealed.

Garland and Eck for plaintiff appellant.

Mullen, Holland and Cooke for James A. Melvin, Jr., Robert Bruce Melvin and Christina Melvin defendant appellants.

Verne E. Shive, guardian ad litem for Donna Melvin, Douglas Melvin and David Melvin defendant appellants.

SHARP, J. On this appeal each answering defendant makes contentions in accordance with his pecuniary interest. The plaintiff executor contends that the judgment of the Superior Court is correct except as to Ruling No. 3. However, as we have repeatedly held, the executor is not a party aggrieved entitled to appeal when the Superior Court directs a distribution among beneficiaries contrary to his ideas. For an executor to appeal the judgment must be prejudicial to the estate. *Trust Co. v. Bryant,* 258 N.C. 482, 128 S.E. 2d 758; *Ferrell v. Basnight,* 257 N.C. 643, 127 S.E. 2d 219; *Dickey v. Herbin,* 250 N.C. 321, 108 S.E. 2d 632. The plaintiff's appeal will be dismissed and the First Union National Bank of North Carolina will not pay the costs of this appeal, including attorneys' fees, from funds of the estate. *Dickey v. Herbin, supra.*

Bruce Melvin is the only specific legatee in the will of Adam J. Melvin; he is bequeathed the business known as the Gastonia Comber Needling Company. *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 835. Along with the minor defendants, Donna, Douglas, and David Melvin,

he is also a residuary legatee. Defendants James A. Melvin, Christina Melvin, and Marie A. Melvin are general legatees who were bequeathed specific sums. *Bost v. Morris,* 202 N.C. 34, 161 S.E. 710; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. After her dissent, the widow was no longer a beneficiary under the will. Under G.S. 30-3(a), as the dissenting widow of a deceased who was not survived by any lineal descendants or a parent, the judge correctly held in Ruling No. 1 that she became entitled to one-half of the net estate as defined by G.S. 29-2(3). Under the statute, this one-half must be estimated and determined before any federal estate tax is deducted or paid, and is free and clear of such tax.

The other Rulings will be considered seriatim as numbered in the statement of facts.

Ruling No. 2 presents this question: Under G.S. 30-15, as rewritten by Chapter 749 of the Session Laws of 1961, does a widow who has dissented from her husband's will take her year's allowance in addition to, or as a part of, her statutory share in his estate? The answer is that she takes it in addition to her statutory share.

Prior to June 13, 1961, the date on which the rewritten section became effective, G.S. 30-15 provided a year's allowance only for the widow of an intestate or for a testate from whose will she had dissented, and it specifically declared the allowance to be "in addition to her distributive share in her husband's personal estate." The rewritten section, which follows, provides a year's allowance for all widows.

> "Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse to an allowance of the value of one thousand dollars ($1,000.00) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, *and shall, in cases of testacy, be charged against the share of the surviving spouse.*" (Italics ours)

All legatees contend that since Adam J. Melvin died testate the italicized portion of the section requires his widow's year's allowance to be charged against her share of the estate. The trial judge properly rejected this contention. The italicized language refers only to the share of a widow who takes in accordance with the will and has not dissented from it. Upon his widow's dissent in legal effect, testator died intestate as to her, *Worth v. Atkins,* 57 N.C. 272, and G.S. 30-3(a) determined her rights in his estate.

G.S. 29-2(3) provides the formula for determining the net estate:

> "'Net estate' means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate."

It is clear from the statutes quoted above that after deducting the costs of administration, all lawful claims against the estate, and the widow's $1,000.00 year's allowance, the share of the widow in this case will be one-half of the balance remaining.

It will be noted that all the statutes with reference to dissents from a will refer to a *spouse,* a *deceased spouse,* or a *surviving spouse.* However, since this Court held in *Dudley v. Staton,* 257 N.C. 572, 126 S.E. 2d 590, that Article X, Section 6 of the Constitution of North Carolina prohibited a dissent by a husband from his wife's will, the word *spouse,* wherever it appears in a statute with reference to a dissent, applies to a widow. Under rewritten G.S. 30-15, for the first time in our law a husband may be entitled to a year's allowance. If the wife dies intestate he has the same right as a widow. If she dies testate, he may or may not have the right to an allowance depending on what provision is made for him. If she disinherits him in her will, since he cannot dissent, clearly he can have no allowance.

Ruling No. 3 poses this question: When a widow dissents from her husband's will, is the residuary estate first liable for her share or is it to be taken *pro rata* from the shares of all the named beneficiaries?

Prior to the effective date of G.S. 30-3(c) on July 1, 1960, North Carolina was in accord with the majority view that when a widow's dissent made it necessary for other beneficiaries to contribute to her statutory share, the residuary estate was first liable. *Worth v. Atkins, supra; Female University v. Borden,* 132 N.C. 476, 44 S.E. 47; Anno: Who Must Bear Loss Occasioned by Election against Will? 36 A.L.R. 2d 291, 299.

Today, however, the answer to the question must be found in G.S. 30-3(c) which follows:

> "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."

The general legatees bequeathed specific sums contend that this Court has given the word *residue* a legal definition in *Trust Co. v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719, and other cases, and that the legislature so used it in G.S. 30-3(c), thereby indicating an intention to continue in effect the rule which prevailed prior to July 1, 1960. In *Grubb, supra,* the court said:

> "The residue of an estate comprehends all of the estate left by the testator at the time of his death, subject to all deductions required by operation of law or by direction of the testator. Conversely stated, the residue is that part of the *corpus* of the estate left by the testator which remains after the payment of specific legacies, taxes, debts, and costs of administration."

However, we think G.S. 30-3(c) clearly indicates that the legislature did not there use *residue* as defined in *Grubb, supra.* When the dissenting widow, as here, is entitled to one-half of the deceased spouse's net estate as defined in G.S. 29-2(3), G.S. 30-3(c) says that the residue of the testator's net estate *for distribution* to other devisees and legatees is as defined in G.S. 29-2. The only definition of net estate contained in G.S. 29-2 is in subsection (3) referred to in the preceding sentence. Obviously the phrase "all lawful claims against the estate," as there used, does not include either specific legacies or general legacies for specific amounts. If it did, the net estate in many instances would be so depleted by their payment that it would be insufficient to provide the widow with the same share of her husband's real and personal property as if he had died intestate.

In the use of the phrase "lawful claims against the estate" in G.S. 29-2(3), the legislature was not referring to claims of beneficiaries created either by the will or the statute of descents and distributions. Therefore, under the specific requirements of the statute, the balance of this estate remaining after the defendant widow has received the benefits to which G.S. 30-3(a) entitled her, "shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata. . . ." G.S. 30-3(c).

Adam J. Melvin, although charged with notice that his widow might claim her statutory rights in his estate, obviously did not contemplate a dissent. The statutory method of a pro rata contribution by the other beneficiaries named in the will must be employed since the will does not otherwise provide.

The court below unerringly interpreted the statute when it declined first to charge the residuary beneficiaries with the deficit created by the widow's dissent and held that *all* beneficiaries must contribute pro rata.

In Rulings Nos. 4 and 5 the trial court correctly held that the specific legatee, Bruce Melvin, was entitled to the income from Gastonia Comber Needling Company from the date of testator's death; that the income from the personalty not specifically devised should be used first to pay debts, costs of administration, and other charges against the estate not created by the widow's dissent; and that any surplus income should be paid one-half to the dissenting widow and one-half to the residuary beneficiaries.

These Rulings are in accord with the following well-established principles: specific legacies carry with them all accessions by way of dividend entireties, and accretions after the death of the testator unless the will directs otherwise. *Smith v. Smith,* 192 N.C. 687, 135 S.E. 855; *Bost v. Morris, supra;* 57 Am. Jur., Wills, Sec. 1615. When the property from which general legacies must come provides income, it is a general asset of the estate subject to the payment of debts and disposition under the terms of the will and, where a widow dissents, is to be proportionately distributed to her under the applicable statute. *Smith v. Smith, supra;* Anno: Surviving Spouse Who Elects to Take Against Will is Entitled to Increase or Profit of Estate Accruing after Testator's Death, 50 A.L.R. 2d 1253.

It will be noted that the trial court's ruling was with reference to *income from* and not *interest on* legacies. These are related but separate matters. *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334; *Hart v. Williams,* 77 N.C. 426.

In Ruling No. 6, the trial court rightly held that upon her dissent the defendant widow became vested with a one-half undivided interest in all realty owned by testator at his death and was entitled to the income therefrom.

Upon filing her dissent to the will the defendant widow became vested, as of the date of testator's death, with title to that part of his real property allowed her by statute as surviving spouse. While the personal property of an intestate passes directly to his administrator, his real property descends directly to his heirs, subject to be divested only if it becomes necessary to sell land to make assets to pay debts. All rents accruing from the use or occupancy of his realty after the death of an intestate becomes the property of the heirs entitled to the real property. *In re Estate of Galloway,* 229 N.C. 547, 50 S.E. 2d 563; Anno: Accretions to Subject of Legacy, 116 A.L.R. 1129.

In rewriting the statutes on dissents and intestate succession, the Legislature of 1959 did not change the above Rules. G.S. 29-3 abolishes the distinction between real and personal property *only in the determination of those persons who take upon intestate succession,* and G.S.

29-2(6) provides that "the share of a net estate or property which any person is entitled to take, includes both the fractional share of the personal property and the undivided fractional interest in the real property" which he is entitled.

To the extent of her right to one-half of the personal property belonging to the estate and to an allowance for a year's support, the defendant widow, Marie A. Melvin, became and is a claimant against the estate. As dissenting widow she is entitled to one-half of the real property of which her husband was seized during coverture and the income therefrom to the extent of her interest.

Ruling No. 7 relates to the payment of estate and inheritance taxes upon the widow's share of the estate. It is free from error. Item II of the will specifically directed that all estate and inheritance taxes be paid out of the residuary estate. Having dissented from the will, however, the widow can take no benefit from it. Therefore, she must pay the North Carolina inheritance tax on her share. G.S. 105-4; 105-18. Nevertheless, as heretofore pointed out, G.S. 30-3(a) provides that defendant widow's one-half of testator's net estate shall be estimated before any federal estate tax is deducted and is free and clear of such tax.

The codicil eliminated the trusts which testator had provided for his brother and sister in Item VII of the will, but it ratified Items V and VI which authorized the executor to operate testator's business interests until such time as it deemed appropriate to dispose of them. It also reaffirmed Item X which enumerated the powers of the executor and trustee and specifically stated that the grant of powers to the plaintiff was "(w)ithout distinguishing between its. . .powers as executor and as trustee. . . ." Ruling No. 8 effects the testator's intent.

The court below having in each instance correctly instructed the executor, its judgment is

Affirmed.

MRS. VIRGINIA G. REASON v.
SINGER SEWING MACHINE COMPANY.

(Filed 17 April 1963.)

1. Negligence §§ 7, 24a—

Negligence must be the proximate cause of injury in order to be actionable, and therefore nonsuit must be allowed when there is no evidence of a

causal relation between the alleged negligence and the injury complained of.

2. Negligence § 24a— Evidence held insufficient to show causal relation between asserted negligence and injury.

Evidence tending to show that the machine manufactured and installed by defendant had a defect which caused it to spray oil into the face and eyes of plaintiff when she operated the machine, that shortly after operating the machine plaintiff's eyes began to burn, with expert testimony that plaintiff suffered first degree burns to her eyelids and second degree burns of the conjunctiva, and that the spraying of hot oil or of warm oil of certain chemical compositions into plaintiff's eyes could have caused this condition, *held* insufficient to overrule nonsuit in the absence of evidence of the chemical composition of the oil sprayed into plaintiff's eyes by the machine or that such oil was hot.

APPEAL by plaintiff from *Carr, J.,* December 3, 1962 Civil Term of WILSON.

This is a civil action to recover for alleged injuries sustained in the manner hereinafter set out.

Samsons Manufacturing Company purchased thirty Singer sewing machines from the defendant. These machines were delivered and installed by the defendant's representatives at the plant of Samsons Manufacturing Company in Wilson, North Carolina, in what purported to be proper working condition. One of these machines, bearing serial number AM827903, was turned over to Samsons Manufacturing Company and put into operation on 7 October 1958 at approximately 2:30 p.m. The first operator to use this particular machine was the plaintiff, an employee of Samsons Manufacturing Company, who was employed as a sewing machine operator.

The plaintiff's evidence tends to show that when she began to operate the machine, oil immediately began to blow or spray from an opening in the machine, known as the thread take-up slot, into the face and eyes of plaintiff, who was sitting in her usual sewing position with her head approximately three to four inches from such opening. That plaintiff first noticed the oil spraying from the machine as it accumulated on her glasses and plaintiff thereupon reported the condition to her supervisor who in turn reported it to the plant foreman.

The plant machinist examined the machine and after finding excessive amounts of oil, made a few adjustments thereby decreasing the flow of oil in the machine.

Thereafter, plaintiff again attempted to use the machine and found that oil continued to spray from the machine into her face. After operating this machine approximately two hours, plaintiff's eyes began to burn and water and her eyes continued to burn and bother

her the remainder of the day and during the following morning when she returned to work. On the following morning, plaintiff again began to operate the same newly installed Singer sewing machine but found that the machine continued to spray oil into her face and eyes. Plaintiff again reported this condition to her supervisor and to the plant foreman.

When the condition of plaintiff's eyes gradually got worse on 8 October 1958, she reported this condition to her employer and obtained medical attention from Dr. Harry C. Willis. Dr. Willis, a specialist in the field of Ophthalmology, examined the plaintiff and found first-degree burns of the upper and lower eyelids and second-degree burns of the conjunctiva.

Dr. Willis testified that in his opinion first-degree burns of plaintiff's eyelids and second-degree burns of the conjunctiva could have been caused either by hot oil spraying from the sewing machine into the plaintiff's eyes, or by warm oil so spraying, depending upon its chemical composition.

Dr. Willis further testified: "I treated her from the 8th October, 1958, throughout that year and on into 1959. This treatment was for the remnants of the burn. The burn had been taken care of, but there was an inflammation there with a lingering conjunctivitis that circled the eye. Now what caused that I don't know. I don't think anybody outside of the Lord knows, because she's been through many hands and nobody has ever done anything for it. She said she had not had any difficulty of this sort prior to the time the oil got into her eyes. * * *

"I think that when Mrs. Reason came in to see me she told me that she had been burned with hot machine oil. She had been working and something gave way at the machine or something squirted oil in her eyes.

"My diagnosis was not based primarily on the fact that it was my understanding she had been burned with hot oil. My diagnosis was on seeing that they were burned regardless of what caused it. * * *"

The plaintiff testified that "(t)he temperature of the oil when it got on my face could be described as warm. * * * (T)he temperature was about the temperature of warm water in which you washed your face. * * * (T)he force or velocity of the oil was about like rain-spray like fine rain. The force was something like that of an atomizer that you spray your throat with. The oil was on my face and my glasses * * *. I first became aware of the presence of oil on my face because my glasses got foggy and I couldn't see. * * * I did not have occasion to actually remove oil from my eyes. I didn't wipe my eyes. * * * The oil got all around my forehead, up over my eyes, around. Got some

on my lips once or twice. * * * I tasted the oil some, and got some on my tongue. My tongue was not burned. I didn't keep it (the oil) in my mouth long enough for it to burn. My lips didn't get burned. My face didn't get burned. * * * The part of the face away from the eyes, away from the immediate area of the eyes, was unaffected by exposure to the oil."

The plaintiff's testimony further tends to show that the particular machine involved was defective in that the defendant in manufacturing and assembling said machine allowed a burr or sharp place to remain on the needle bar crank which partially cut the oil wick located therein, which defective wick allowed excessive oil to accumulate in the head of said machine and the oil was thrown out of the machine through the thread takeup slot when operated.

At the close of plaintiff's evidence the defendant made a motion for judgment as of nonsuit. The motion was allowed.

Plaintiff appeals, assigning error.

Teague, Johnson & Patterson; Ronald C. Dilthey; Carroll W. Weathers, Jr., for plaintiff appellant.

Lucas, Rand, Rose & Morris; Dockery, Ruff, Perry, Bond & Cobb for defendant appellee.

DENNY, C.J. If it be conceded that the machine furnished by the defendant was defective and that the defendant knew or by the exercise of rasonable care such defect could or should have been ascertained, the question still remains whether or not such alleged negligence was the proximate cause of plaintiff's injuries.

Negligence, in order to be actionable, must be shown to have been the proximate cause or one of the proximate causes of the plaintiff's injuries. There must be some causal relationship between the breach of duty and the injury. *Johnson v. Meyer's Co.*, 246 N.C. 310, 98 S.E. 2d 315.

In *Wall v. Trogdon*, 249 N.C. 747, 107 S.E. 2d 757, the plaintiffs alleged that the defendant, Trogdon Flying Service, Inc., while engaged in dusting and spraying crops by the use of an airplane, flew said airplane over the plaintiffs' lakes, which were stocked with fish, while dispensing a "poisonous rothane insecticide spray," as a result of which the fish belonging to the plaintiffs were killed and the waters rendered unsafe for use in any way or any purpose by either man or animal. On appeal to this Court from a judgment as of nonsuit, we said: " * * * (T)here must be legal evidence of every material fact necessary to support a verdict, and the verdict 'must be grounded on

a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities.' (Citations omitted)

"If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed.

"In the light of these principles applied to the evidence in the case there is no causal connection between the death of the fish in the lakes and the operation of the aircraft.

"In the first place there is no evidence as to elements constituting the spray used in spraying the crops. If there were poison in the spray there is no evidence that it was poisonous to fish. If it were poisonous to fish there is no evidence that the fish died from the poison. Whatever the oily substance seen on the waters of one of the lakes was, there is no evidence as to what it was, or the source from which it came. The testimony of the expert fishery biologist is purely speculative, and founded on possibilities. Indeed the element of proximate cause is missing."

In the case of *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392, the plaintiff alleged she had purchased from the defendant a hair rinse and had used it as directed; that each time she used it her scalp became irritated; that prior to its use she had never had any trouble with her scalp. After using the hair rinse the third time she consulted a physician who found that she had weeping dermatitis of her scalp.

In sustaining a nonsuit, *Parker, J.*, speaking for the Court, said: "It may be there was a poisonous substance in the hair rinse, but there is no evidence to support such a conjecture." See also *Mauney v. Luzier's, Inc.*, 215 N.C. 673, 2 S.E. 2d 888.

In the case of *Watson v. Borg-Warner Corporation*, 190 Tenn. 209, 228 S.W. 2d 1011, a machine operator frequently came in contact with lubricating oil in the operation of her machine. Upon a change of brands of oil by her employer, the plaintiff, operator, developed a rash on her hands and arms which required extensive medical care. The operator sued her employer for negligently failing to protect her from the effects of the oil. In upholding a directed verdict for the defendant, the Court said: "There is no competent testimony or prima facie proof, either of the nature and medical definition of the disease or of its probable cause. In fact, the plaintiff proved nothing except that she noticed the eruption on her skin after the change of oil. The isolated fact that one event occurs after another is not by itself sufficient to warrant an inference that the event which is first in time is the cause of the latter. * * *

"As we view it, the technical medical name of plaintiff's disease was not an essential of plaintiff's proof, but proof that plaintiff's disease was of such character that it could or would probably, in the light of medical clinical experience, be caused by contact with an oil having the chemical components of the oil actually used, was an essential and a missing element of plaintiff's proof."

Likewise, in the case of *Masonite Corp. v. Scruggs,* 201 Miss. 722, 29 So. 2d 262, the plaintiff Scruggs alleged and contended that he was injured by the constant use of water containing acid in his work. It was held that in the absence of a showing that the water contained acid in sufficient quantities to cause such alleged injuries, the acid could not be found to be the proximate cause of the plaintiff's injury.

In the case before us, there was medical testimony that hot oil could have caused the disease or that unheated oil might, depending upon the chemical composition of it. However, there was no evidence that the oil was hot. The plaintiff testified it was warm. Dr. Willis, in his testimony as to what might have caused the burns, said: "I can tell you hot oil or hot water or hot anything could do it — produce the same condition she had. Even baby oil, if it's hot, could do it."

There was no evidence in the trial below tending to show the chemical composition of the oil involved.

In our opinion, the evidence is insufficient to establish actionable negligence on the part of the defendant.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. D. J. COLTER AND W. E. CHAPPELL, T/A WINSTON-SALEM BONDED WAREHOUSE AND TRUCKING TERMINAL.

(Filed 17 April 1963.)

1. Carriers §§ 3, 4—

The approval of the Utilities Commission of the transfer of a carrier's certificate of authority implies the duty on the part of the transferee to render the service called for in the certificate, which it must perform in a substantial manner.

2. Utilities Commission § 9—

Findings of fact of the Utilities Commission are binding on appeal if supported by substantial evidence, and its orders are presumed to be valid.

3. Carriers § 3—

A finding of the Utilities Commission to the effect that the purchaser of operating rights to transport household goods under common carrier certificate did not exercise such rights for more than two years after the approval of the transfer of the certificate by the Commission, *held* to support the Commission's conclusion that, since rights under the certificate had become lost or dormant, the transferee had no rights thereunder which it could sell, regardless of the question of public convenience and necessity.

APPEAL by protestants from *Gambill, J.*, September 24, 1962 Regular Civil Term, FORSYTH Superior Court.

This proceeding originated before the North Carolina Utilities Commission. On February 15, 1962, the Winston-Salem Bonded Warehouse and Trucking Terminal (a partnership) and Myers Lumber and Trucking Company, by petitions, requested the Commission to approve a sale by Myers to the Warehouse of the operating rights to transport household goods under common carrier certificate No. C-716. The agreed price was $2,200.00.

South Atlantic Bonded Warehouse and six other common carriers of household goods intervened and filed protests to the proposed sale and transfer of the operating authority. Five of these protestants are located in Winston-Salem and two in Greensboro. They alleged the operating certificate had become dormant by reason of the utter failure of Myers Lumber Company ever to operate under the authority or to procure any suitable equipment to do so after it received the certificate by transfer from Bumgarner and Hall on February 9, 1960. The protestants alleged Myers was engaged in hauling lumber and not equipped to haul, and not engaged in hauling household goods. The protestants contended the transfer would amount to a new operating authority in a field which was adequately served by the protestants and that no public need existed for such authority.

After hearing, the Commission, among other findings, made the following:

"3. That petitioner Myers has been in the business of hauling lumber for the past several years; that when petitioner Myers acquired the operating rights heretofore referred to from Bumgarner-Hall one of the main reasons for purchasing the same was that Myers could procure licenses for said trucks under the six per cent gross receipts tax and thereby save on the license tags for the equipment it was then operating in the transportation of lumber and other commodities; that another reason for acquiring the certificate was for the purpose of moving household goods.

"4. That from 9 February 1960 to 8 March 1962, the date of the hearing, petitioner Myers had not moved any household goods, had neither purchased, acquired nor leased any truck for the purpose of moving household goods, although Mr. Myers stated that he had one in mind that he could lease if and when it was needed; that Myers never advertised to the public that it was in the business of moving, or in a position to move, household goods; that, although Myers was listed in the telephone directory, this listing did not show that it was a mover of household goods; that the only movement which Mr. Myers contended had been made under this authority, as hereinabove set out, was a set of scales from a quarry below North Wilkesboro to Bryson City, North Carolina; that at the time of the hearing, Myers had leased its hauling equipment to a private carrier and was not hauling anything; that this is his admitted reason for offering these rights for sale; that there are other certificated movers of household goods in North Wilkesboro and one in Wilkesboro, just across the river."

The Commission concluded:

"In view of the facts, as they were made to appear from the evidence, and of the applicable law, the Commission is of the opinion that the proposed vendor, having never begun operation under this authority, having never acquired suitable equipment necessary to conduct the operation, having never advertised that it was offering the service authorized, had nothing to sell, and therefore the motion should be allowed and the proposed sale and transfer should not be approved."

From the Commission's order, Winston-Salem Bonded Warehouse and Trucking Terminal appealed to the Superior Court of Forsyth County. Myers does not appear to have appealed but did appear by attorney in the Superior Court, which, after hearing, entered the following:

"The Court is of the opinion and finds as a fact that: The Commission erred in basing its order in part on the fact that '. . . no public need has been shown for additional service,' (paragraph 6, page 5 of Commission's order) after refusing to permit applicant (appellant here) to show the existence of need (Record of Utilities Commission Proceeding, page 9). The Court finds as a matter of fact and of law that such ruling by the Commission at the hearing and such finding by the Commission in its order entered pursuant to such hearing were in direct conflict and therefore prejudicial to appellants' rights.

"Accordingly, IT IS THEREFORE ORDERED AND ADJUDGED that this case be remanded to the Utilities Commission for further proceedings consistent with these findings, such order of remand being based upon this Court's finding that the error as herein set out was unjust and unreasonable and clearly erroneous."

From the foregoing order, the protestants appealed to this Court.

York, Boyd & Flynn by A. W. Flynn, Jr., for protestants, appellants.

No counsel contra.

HIGGINS, J. The superior Court held the Commission had committed error in refusing to approve the transfer of Certificate No. 716. The alleged error consisted in the refusal to permit the applicants to introduce evidence tending to establish a convenience and necessity for the contemplated service. At the time the Commission observed that the issue of convenience and necessity had been passed on when the certificate was issued. Counsel thereafter did not offer evidence but agreed that issue was not then open. The controversy, therefore, involved the question whether the rights under the certificate had become dormant for failure of Myers to exercise them or to make any preparation to do so.

The evidence diclosed that on February 9, 1960, Myers, with the Commission's approval, purchased from Bumgarner and Hall the active operating authority to transfer household goods as contemplated by common carrier certificate No. C-716. For more than two years thereafter Myers did not attempt to carry any household goods but continued under other authority to carry lumber. However, before the attempt to sell to the Bonded Warehouse, Myers had leased all its lumber hauling equipment and had given up all transportation business. Hence, by transferring an unused certificate of authority which had been gathering dust for more than two years, Myers had opportunity to pick up $2,200.00.

Implicit in the Commission's approval of the transfer from Bumgarner and Hall to Myers was the public duty on the part of the transferee to render the service called for in the certificate. *Hough-Wylie v. Lucas,* 236 N.C. 90, 72 S.E. 2d 11. The Truck Act of 1947 and the amendments placed upon the Commission the responsibility of requiring the holder of the certificate to render the service contemplated. A substantial rather than a simulated performance is required to support a *bona fide* carrier operation. *Utilities Com. v. Motor Express,* 232 N.C. 174, 59 S.E. 2d 578.

The orders of the Utilities Commission are presumed to be valid. Its findings of fact will not be disturbed if supported by substantial evidence. *Utilities Com. v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201; *Utilities Com. v. Coach Co.*, 218 N.C. 233, 10 S.E. 2d 824. Findings so supported are binding on the Superior Court. They are no less binding here. The Commission's findings and conclusions are supported by the record. They fully warrant the Commission in refusing to approve the transfer requested in the petitioners' application. In remanding the cause to the Commission for further hearing the trial court committed error. The judgment is

Reversed.

BEULAH RUSSELL v. JONAH HAMLETT.

AND

MOSES E. RUSSELL, JR. v. JONAH HAMLETT.

(Filed 17 April 1963.)

1. Automobiles § 6—

It is negligence *per se* to operate a motor vehicle on a public highway while under the influence of intoxicating liquor.

2. Same; Automobiles § 64—

It is reckless driving constituting negligence *per se* for the operator of a motor vehicle to drive abreast of a preceding car and fall back twice, running abreast of the proceding car on one of the occasions for a distance of some fourth of a mile, and then to pass the preceding car at a good speed, all for the purpose of "teasing" the driver of the preceding car. G.S. 20-140.

3. Automobiles §§ 41a, 42d— Hazard importing danger to following motorist held foreseeable from defendant's careless and reckless driving.

Evidence that defendant was intoxicated and driving in a reckless manner when he passed plaintiff's car, that the lights of his car were hidden from plaintiff's view when defendant drove over the crest of a hill, that defendant collided with a third car proceeding in the same direction, that the collision extinguished the lights on the cars, so that when plaintiff drove over the crest and was blinded by the lights of a car approaching from the opposite direction, plaintiff did not see defendant's wrecked car in his lane of travel until too late to avoid collision, *is held* to take the issue of defendant's negligence to the jury, since the creation of a hazard importing danger to a motorist following him was foreseeable from defendant's acts of negligence *per se*, and the evidence does

not disclose contributory negligence as a matter of law on the part of plaintiff.

4. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve and do not justify nonsuit.

APPEAL by plaintiffs from *Bundy, J.*, 1 October 1962 Civil Term of PERSON.

Two civil actions consolidated by consent for trial. Plaintiffs seek to recover for personal injuries to *feme* plaintiff and for damage to male plaintiff's automobile sustained by reason of the alleged actionable negligence of defendant in the operation of his automobile. Defendant in his separate answers denies negligence, conditionally pleads contributory negligence as a bar to recovery in both cases, and seeks in a counterclaim in *feme* plaintiff's case to recover for damage to his automobile by reason of the alleged actionable negligence of the *feme* plaintiff in the operation of her husband's automobile. Each plaintiff filed a reply. *Feme* plaintiff in her reply conditionally pleads contributory negligence as a bar to defendant's counterclaim in her case.

Plaintiffs and defendant introduced evidence.

Plaintiffs appeal from separate judgments of involuntary nonsuit entered at the close of all the evidence.

Charles B. Wood for plaintiff appellants.

Haywood and Denny by Egbert L. Haywood and George W. Miller, Jr., for defendant appellee.

PARKER, J. Plaintiffs' evidence considered in the light most favorable to them, and defendant's testimony favorable to them (*Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307), tends to show the following facts:

After supper on 1 December 1961 Mrs. Beulah Russell, with Hugh Williams as a passenger, drove her husband's Ford automobile from Roxboro to Semora. There she saw defendant Jonah Hamlett, Henry, his brother, and Melvin, his nephew. Defendant had a drink at Semora. Mrs. Beulah Russell carried defendant, his brother, his nephew, and Hugh Williams in the automobile to defendant's home located at Four Points, about nine miles from Semora. When they arrived there, all went into defendant's home, except Mrs. Beulah Russell who remained outside in the automobile. In the house defendant made some eggnog, and he and some of the others drank some of it. Defendant was also drinking in the house Four Roses whiskey. Mrs. Beulah

Russell remained outside in the automobile 25 minutes or longer, and then went into the house. They were at defendant's home about an hour. In the home defendant became "pretty highly intoxicated."

Mrs. Beulah Russell drove the automobile, with Melvin Hamlett and Hugh Williams as passengers, away from defendant's home, on the Leesburg Road, headed east towards Roxboro. She was driving 40 miles an hour on her side of the road, and was following an automobile 300 to 400 feet ahead of her.

Melvin Hamlett testified in part for plaintiffs: "After we started down the road, his [defendant's] car pulled behind us, started around, teased along in the road, dropped back, started up again, teased along and the third time come around with pretty good speed. He ran maybe a fourth of a mile abreast of Beulah's car. Beulah was in the right lane and Jonah was in the left. He finally went past and went ahead. At the time he passed he had head and tail lights on. I observed no traffic coming in a westerly direction from Roxboro toward us. I don't know exactly how long it was after he passed before these cars were in collision. I don't have any idea of what distance we might have gone before it happened. After he passed he pulled in between the car I was riding on and the car ahead, they were going around a little curve and a dip in the bottom, as they went over the hill we didn't see any more tail lights until we got too close on the car and couldn't avoid hitting it. There weren't any lights at the scene of the collision. Yes, we were meeting a vehicle at that time, coming up toward Roxboro. His lights were on bright."

When *feme* plaintiff first saw the wreck on the road, it was about 100 feet or more ahead of her. She applied her brakes but she was unable to stop before crashing into the rear of defendant's automobile in the road. In the collision plaintiff was injured and her husband's automobile was demolished.

The wreck occurred about 10:45 p.m. A State patrolman arrived at the scene about 11:00 p.m. He saw defendant there. In his opinion, defendant was under the influence of intoxicating liquor. The automobiles of plaintiffs and defendant "were locked together."

Defendant testifying in his own behalf said on cross-examination: "Yes, I was drinking at the time; yes, I was intoxicated. Yes, I was charged with driving under the influence at the time of this wreck and I entered a plea of guilty."

Plaintiffs' evidence considered in the light most favorable to them, and defendant's testimony favorable to them, would permit, but not compel, a jury to find the following facts and draw these reasonable inferences therefrom: Defendant at night was driving his automobile

on a public highway while under the influence of intoxicating liquor, which was negligence *per se* (*Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1), and at the same time and place was operating his automobile in a reckless manner in violation of G.S. 20-140, which was negligence *per se* (*Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115); that he, driving his automobile in such condition and in such a manner, drove to the left of the automobile driven by the *feme* plaintiff, who was traveling on the highway in the same direction he was, drove beside her about a quarter of a mile, then passed her going around a little curve where there was a dip in the road, went over a hill, and ran into the rear end of an automobile traveling on the highway in front of him, thereby wrecking his automobile, causing the lights on it to go out and blocking the highway, and that when the *feme* plaintiff, meeting an approaching automobile with its lights on bright, saw his wrecked automobile on the highway in front of her, she applied her brakes, but in the exercise of ordinary care could not stop before crashing into the rear end of defendant's automobile; that the negligence *per se* of defendant in the operation of his automobile was the antecedent, efficient and dominant cause which put the other causes in operation thereby proximately resulting in *feme* plaintiff's personal injuries and destruction of male plaintiff's automobile; and that defendant in the exercise of the reasonable care of an ordinarily prudent person should have foreseen that some injury would result from his negligence in driving an automobile at night on a public highway while under the inffuence of intoxicating liquor and in driving it at the same time and place in a reckless manner, or that consequences of a generally injurious nature should have been expected. "Once the negligence of the defendant as to the plaintiff is established, the question of proximate cause rarely presents serious difficulties if the sequence of events is followed from the ultimate result back to that negligent act." *Anderson v. C. E. Hall & Sons,* 131 Conn. 232, 38 A. 2d 787.

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify a nonsuit. *Keaton v. taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

Defendant's contention that there is a fatal variance between plaintiffs' *allegata et probata* is untenable.

A careful reading of the evidence leads us to the conclusion that plaintiffs have not proved themselves out of court so as to be nonsuited on the ground of contributory negligence. *Lincoln v. R.R.,* 207 N.C. 787, 178 S.E. 601.

Plaintiffs have made a sufficient showing to carry their cases to the jury. The judgments of involuntary nonsuit below are

Reversed.

MRS. PEARL WIGGINS v. TULLY GRAHAM PONDER, ORIGINAL DEFENDANT, AND GEORGE B. WIGGINS, ADDITIONAL DEFENDANT.

(Filed 17 April 1963.)

1. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve, and do not justify nonsuit.

2. Automobiles § 8—

Before making a left turn at an intersection, a motorist must first ascertain that he can make such movement in safety and must give a plainly visible signal of his intention to turn, G.S. 20-154(a), G.S. 20-155(b), and the failure to observe either of these two statutory requirements makes out a *prima facie* case of actionable negligence.

3. Same; Automobiles § 17—

Where two mortorists approach an intersection from opposite directions, and one of them attempts to turn left at the intersection G.S. 20-155(b) governs the right to make the left turn, and G.S. 20-155(a) has no application.

4. Automobiles §§ 41h, 43— Evidence held for jury on issue of negligence in making left turn at intersection.

Plaintiff was injured when the automobile in which he was riding as a guest collided with defendant's car at an intersection. The driver of the car in which plaintiff was riding was joined as an additional defendant. Plaintiff's evidence was to the effect that the collision occurred when defendant turned left at the intersection into the path of the car in which plaintiff was riding, and that defendant made the turn without first ascertaining that the movement could be made in safety and without giving the statutory signal. *Held:* The evidence raises a *prima facie* case of negligence against the original defendant and does not show that the negligence, if any, of the driver of the car in which plaintiff was riding, was the sole proximate cause of the collision so as to insulate the negligence of the original defendant.

APPEAL by plaintiff from *Martin, S.J.*, October 1, 1962, Regular Civil "A" Term of MECKLENBURG.

Civil action by plaintiff to recover damages for personal injuries suffered by her when the automobile, owned and operated by her hus-

band and in which she was riding as a passenger, collided with an automobile driven by defendant.

The accident occured at 9:00 P.M. on 17 May 1961 at the intersection of Highway 29 and Cox Road about 1 mile east of Gastonia. Highway 29 runs generally east and west, and has four lanes, two for eastbound and two for westbound traffic. Cox Road runs generally north and south, and has two traffic lanes. Traffic at the intersection is controlled by an automatic light which changes color at intervals from green to yellow to red.

The complaint alleges in substance: The Wiggins car, in which plaintiff was riding, was proceeding eastwardly on Highway 29 and approaching the intersection. Defendant was proceeding westwardly on Highway 29 and was approaching the intersection. The Wiggins car was in the southernmost lane, and defendant's car was in the inside lane for westbound traffic. The two cars entered the intersection as the traffic light was changing from green to yellow. Defendant turned quickly and without warning into the path of the Wiggins car and the vehicles collided. Plaintiff was injured. Defendant was negligent in that he failed to keep a reasonable lookout, turned left without ascertaining that the movement could be made in safety, and turned without giving warning, failed to yield the right of way to the Wiggins car, and violated the reckless driving statute, G.S. 20-140. Such negligence was the proximate cause of plaintiff's injury.

Answering, defendant denies the material allegations of the complaint and sets up a cross-action against George B. Wiggins for contribution. An order was entered making George B. Wiggins an additional defendant.

The answer of the additional defendant denies the material allegations of the cross-action, avers that the collision resulted solely from the negligence of the original defendant, and counterclaims for personal injury and property damage suffered by the additional defendant.

At the close of plaintiff's evidence the court granted the original defendant's motion for nonsuit and entered judgment dismissing the action.

Plaintiff appeals.

Plumides & Plumides and Warren D. Blair for plaintiff.

Kennedy, Covington, Lobdell & Hickman, and R. C. Carmichael, Jr., for original defendant.

MOORE, J. Plaintiff excepts to the allowance of the original defendant's motion for nonsuit of her action. This presents the question

whether the admissions in the pleadings and plaintiff's evidence, taken in the light most favorable to her, permit the inference that the original defendant was negligent and that such negligence was a proximate cause of the accident. The original defendant did not plead contributory negligence on the part of plaintiff; she was a guest passenger; her conduct is not called into question.

Original defendant admits in his answer the allegations of paragraph 4 of the complaint, that immediately before the accident he was operating an automobile owned by him "and was travelling in a generally westerly direction on said Highway #29 at a point immediately east of where the same intersects with Cox Road."

Plaintiff's evidence is in substance as follows:

Plaintiff, Pearl Wiggins, was riding as a passenger in the automobile of her husband, George B. Wiggins; he was driving. They were travelling eastwardly on Highway 29 and approaching the Cox Road intersection. They were travelling in the outside lane for eastbound traffic. The lights on the car were burning. The posted speed limit was 45 miles per hour, and as the Wiggins car approached the intersection its speed was 40 miles per hour, and the traffic light at the intersection was green. The caution light came on just as the Wiggins car entered the intersection, and the car continued forward. At this time there were no vehicles in front of it in the two eastbound lanes. Defendant Ponder's car "made a left-hand turn into" the path of the Wiggins car. Mr. Wiggins testified: "The first time I saw it (Ponder's car), he left his lane of travel and entered into my lane of travel." Plaintiff saw no lights on Ponder's car, and saw no turn signal given. There was no other traffic at the intersection, nothing to obstruct Ponder's view. Wiggins did not have time to apply brakes. The Wiggins car struck the Ponder car as it was moving at an angle across the Wiggins lane of travel. The collision occurred in the Wiggins lane of travel and about the middle of Cox Road. Plaintiff was injured.

There are many inconsistences, discrepancies and contradictions in plaintiff's evidence (not set out herein), but they are for the jury and not the court, and do not justify nonsuit. *Benton v. Montague*, 253 N.C. 695, 117 S.E. 2d 771.

Any person who undertakes to drive a motor vehicle upon a highway must exercise reasonable care to ascertain that such movement can be made in safety before he turns to the right or left from a direct line, and to signal his intention to turn in the prescribed manner whenever the operation of any other vehicle may be affected by such movement. G.S. 20-154(a); *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538. It is incumbent upon a motorist, before making a left turn at an

intersection, to give a plainly visible signal of his intention to turn and to ascertain that the movement can be made in safety. G.S. 20-155(b). This, without regard to which vehicle enters the intersection first. Where motorists are proceeding in opposite directions and meeting at an intersection controlled by automatic traffic lights, G.S.20-155(a) has no application. *Shoe v. Hood,* 251 N.C. 719, 726, 112 S.E. 2d 543. Where it may be inferred from plaintiff's evidence that defendant has failed to observe either of these statutory requirements and injury has been suffered by plaintiff because of such failure, plaintiff has made out a *prima facie* case of actionable negligence. *Farmer v. Alston,* 253 N.C. 575, 117 S.E. 2d 414; *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900.

In the instant case it does not appear, as a matter of law, that the conduct of the additional defendant, if it amounts to actionable negligence, was the sole proximate cause of the collision and insulated the negligence of the original defendant. *Rattley v. Powell,* 223 N.C. 134, 136, 25 S.E. 2d 448.

It appears *prima facie* from plaintiff's evidence that the original defendant turned left at the intersection into the path of the car in which plaintiff was riding, without having ascertained that the movement could be made in safety, and that plaintiff was injured by this conduct on the part of the original defendant. The trial court erred in entering the judgment of nonsuit.

Reversed.

FREMONT CITY BOARD OF EDUCATION v.
WAYNE COUNTY BOARD OF EDUCATION.

(Filed 17 April 1963.)

1. Schools §§ 4, 10—

Allegation of a city board of education that it had assigned the children in question, residents within the unit, to a certain school within the district, and that defendant county board of education had permitted the children to attend a school under its supervision, *held* to state a cause of action entitling plaintiff to relief, G.S. 115-176, and the action was improperly dismissed upon demurrer. Whether plaintiff was entitled to mandamus as prayed in the complaint or only to injunctive relief is not necessary to a decision.

2. Pleadings §§ 4, 19—

The relief to which plaintiff is entitled is determined by the allegations of the complaint and not the prayer for relief, which is not a necessary

part of the complaint, and the fact that plaintiff may have demanded a relief to which he is not entitled is not ground for demurrer. G.S. 1-127.

APPEAL by plaintiff from *Cowper, J.*, in Chambers in KINSTON on 10 November 1962.

This action was begun in Wayne County to prohibit defendant from receiving for instruction in the public schools operated by it children who resided in the Fremont Administrative Area and were assigned by plaintiff to a school operated by it. Plaintiff prayed for a writ of mandamus and a mandatory injunction pending a determination of the rights of the parties.

Defendant demurred for failure to state a cause of action and because it affirmatively appeared that plaintiff was not entitled to the relief sought, to wit, a writ of mandamus. The court, reciting "that mandamus is not the proper remedy for the cause of action alleged in the Complaint," sustained the demurrer and dismissed the action. Plaintiff appealed.

James N. Smith and Lake, Boyce & Lake by I. Beverly Lake for plaintiff appellant.

Bland & Freeman by W. Powell Bland and George K. Freeman, Jr., for defendant appellee.

Attorney General Bruton and Assistant Attorney General Moody, amicus curiae.

RODMAN, J. The Legislature, for the efficient operation of the public school system required by Article IX of our Constitution, has divided the State into administrative areas. G.S. 115-4. School attendance is mandatory between the ages of seven and sixteen, G.S. 115-166, and permissive beyond that age, G.S. 115-1. Education provided by the State is free. Teachers paid with State funds are allocated to administrative units on the basis of average daily attendance. G.S. 115-59. Normally children attend a school in the area in which they reside. Each administrative unit must keep a continuous census of the school population in its area. G.S. 115-161. The several boards of education are required "to provide for the assignment to a public school of each child residing within the administrative unit." G.S. 115-176. A child may, however, be assigned to a school outside his administrative area by agreement of the school boards affected by the change in assignment. The agreement must be reduced to writing and entered on the official records of the respective boards. Except by agreement "(n)o child shall be enrolled in or permitted to attend any

public school other than the public school to which the child has been assigned by the appropriate board of education." G.S. 115-176.

The complaint alleges and the demurrer admits: The parties are corporate entities charged with the operation of public schools in their respective units. Plaintiff assigned for the 1962-63 school year five named children who resided within Fremont Administrative Unit to Fremont High School; notwithstanding such residence and assignment, defendant enrolled said children in and permitted them to attend a school under defendant's supervision. Plaintiff has alleged a violation of statutory law designed and intended to provide for the efficient and economic operation of our public school system, a violation which could easily lead to impairment in the operation of the schools in plaintiff's area.

We read the language used to dismiss the action as holding that plaintiff had stated a cause of action. That holding was correct.

The grounds for demurrer are stated in G.S. 1-127. The fact that a plaintiff seeks relief not warranted by his allegations is not within that enumeration. A prayer for relief is not a necessary part of the complaint. *Lockman v. Lockman,* 220 N.C. 95, 16 S.E. 2d 670. Relief will be granted as warranted by the allegations and proof. *McCampbell v. Building & Loan Assoc.,* 231 N.C. 647, 58 S.E. 2d 617; *Dry v. Drainage Commissioners,* 218 N.C. 356, 11 S.E. 2d 143.

Whether defendant should be required by the legal writ of mandamus to terminate the enrollment of the named children in the schools administered by it or prohibited by the equitable writ of injunction from continuing to admit to its schools residents of another school administrative area need not now be decided. The same result can be accomplished by either writ. See *New Bern v. R.R.,* 159 N.C. 542, 75 S.E. 807; *Durham v. R.R.,* 185 N.C. 240, 117 S.E. 17. The Superior Court has authority to issue either writ. An injured party is not now compelled to ponder whether he should apply to a court of law or a court of equity for relief.

If defendant should by answer challenge the allegation with respect to the residence of the children, the court may, upon a proper showing, grant injunctive relief until the vital question of residence has been determined. It should not issue a writ of mandamus until the controverted factual issues have been determined as provided in actions at law. *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328.

Reversed.

SARAH K. HENRY, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBERT HENRY, DECEASED v. RAYMOND B. WHITE T/A WHITE POULTRY COMPANY.

(Filed 17 April 1963.)

1. Master and Servant § 3—

A specialist employed to overhaul and repair machinery on the owner's premises in the owner's absence and free of any supervision by the owner is an independent contractor.

2. Master and Servant § 17—

The owner employing a specialist to repair machinery on the owner's premises, free from control of the owner in the performance of the work, owes such specialist the duty to warn him of hidden dangers known to the owner and not known to the specialist, but the owner is not under duty to exercise care to provide a reasonably safe place for the specialist to work, the specialist being more cognizant of the dangers incident to the machinery than the owner himself.

APPEAL by plaintiff from *Olive, J.*, December 1962 Civil Term of RICHMOND.

This is an action to recover damages under the provisions of G.S. 28-173 and 174.

Defendant's motion to nonsuit, made at the conclusion of plaintiff's evidence, was allowed. Plaintiff appealed.

C. B. Deane, Jones & Jones, Taylor, Kitchin & Taylor for plaintiff appellant.

Pittman, Pittman & Pittman by William G. Pittman and Leath, Blount & Hinson by Robin L. Hinson for defendant appellee.

PER CURIAM. The evidence is sufficient to establish these facts: Refrigeration is necessary in the operation of defendant's business of processing poultry. Plaintiff's intestate, her husband, was at the time of and for several years prior to his death engaged in the refrigeration business. He designed a building to house and installed therein, according to his own design, defendant's refrigerating machinery consisting of two compressors driven by electric motors. The building was approximately 16 feet long and 5 or 6 feet wide. Each compressor was driven by 5 "V" belts connected to an overhead electric motor. The base of the compressor was about one and one-half feet from the wall of the building and the compressor itself came within a foot or less of the wall. There was no guard covering the pulleys, compressors, motors, or connecting "V" belts. The general and approved practice is to cover "V" belts and pulleys with a guard when a machine is lo-

cated where employees or the public are apt to come in contact with the machine, but this custom does not exist where the machine is accessible only to qualified service and repair men. Defendant's employees were not permitted in the building housing the refrigerating machinery. Only defendant, his son, a business associate, and deceased were permitted to go in that building. Defendant was inexperienced in the maintenance of refrigerating machinery. Deceased had been engaged in that business for many years. He was not on defendant's payroll, but came when called to make whatever repairs or adjustments were needed. He fixed the amount owing for the service rendered. He used his own tools.

On the afternoon of 9 May 1958 deceased came to defendant's establishment in response to a call to make needed adjustments to the refrigerating machinery. He was alone. Some two or three hours later defendant found deceased unconscious on the floor housing the machinery. Deceased had a broken arm and collar bone. There were grease marks and bruises on his left arm. He had head injuries. The bodily marks indicated he had been caught in the "V" belts and thrown against the wall or to the floor. He died 17 May without having recovered consciousness.

The evidence establishes the relationship of deceased to defendant as an independent contractor—not a servant or employee. *Pressley v. Turner,* 249 N.C. 102, 105 S.E. 2d 289; *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

The duty imposed on an employer to exercise care to provide a reasonably safe place for his employees to work, *Muldrow v. Weinstein,* 234 N.C. 587, 68 S.E. 2d 249, does not extend to non-employee "trouble shooters," specialists in their field who respond to owner's call to service and repair a machine not operating properly. The owner must warn of hidden dangers known to the owner but unknown to the other. *Petty v. Print Works,* 243 N.C. 292, 90 S.E. 2d 717; *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561; *Hammond v. El Dorado Springs,* 31 A.L.R. 2d 1367.

Here there is no suggestion of hidden or latent danger. The asserted defect was one that resulted from following the plans and specifications prepared by the deceased. His knowledge of the hazards was at least equal to if not greater than that of defendant. Plaintiff's evidence negatives her allegation that her husband's untimely death was in any manner attributable to the breach of a duty owing by defendant to deceased.

The judgment of nonsuit is

Affirmed.

MAX BANE v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 17 April 1963.)

Easements § 8— Use of easement which places additional burden on land gives owner right to additional compensation but is not a trespass.

A railroad company having a right-of-way over plaintiff's land for its wooden trestle has a right, after the burning of the trestle, to enter upon the right-of-way and replace the trestle, and if the replacement of the trestle with an earth and concrete trestle places a heavier burden upon plaintiff's land by precluding access between plaintiff's lands on either side of the trestle, plaintiff's remedy is by a proceeding under G.S. 40-12, and the railroad company's act in replacing the trestle cannot constitute a trespass nor may the alleged acts of its employees in failing to negotiate in good faith and its failure and refusal to pay damages demanded give rise to a cause of action for conspiracy.

APPEAL by plaintiff from *Phillips, J.*, September 1962 Civil Term of WAKE.

The complaint alleges in substance the following:

On 7 July 1938 plaintiff became the owner of a tract of land in Raleigh Township, Wake County. At that time defendant Railroad Co. had "a railway line across his (plaintiff's) property which included in said land . . . is a parcel of land 130 feet in length and 65 feet in width." There was on this strip a "wooden railway trestle," which permitted "easy access by plaintiff from one portion of his property to another . . . by . . . . passing under the railway trestle." The trestle burned, and in 1954 "defendant entered upon the lands . . . and did erect thereon a complete trestle constructed of dirt and cement to such an extent that the passageway under and over plaintiff's land was completely condemned, acquired and used continuously since 1954 by the defendant" over the objection by plaintiff. Plaintiff demanded the payment of damages for the trespass and defendant through its agents has negotiated with defendant with respect thereto. Defendant has not negotiated in good faith and defendant's agents have "schemed, conspired and deceitfully . . . misrepresented to plaintiff of their actual intentions to pay the plaintiff for the wrongful trespassing upon his lands," and by such conspiracy the plaintiff has been deprived of his property since 1954, and plaintiff has been damaged by the continuing trespass. Defendant agreed in writing to convey to plaintiff in exchange for his land three tracts in Wake County. "The negotiations continued and that the defendant by and through its . . . agents . . . contracted and agreed to make the conveyances . . . up to and through the year 1960 and that the defendant at the present time fails and refuses to go through and carry out the terms and pro-

visions of the contract. . . . (P)laintiff has been ready, willing and able to carry out his part of the contract . . . and that defendant by and through its officials have illegally conspired, schemed and planned never to pay the plaintiff for the illegal trespassing." Plaintiff prays for actual damages, $10,000, and punitive damages, $10,000.

Defendant demurred on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and, in the alternative, that there is a misjoinder of causes of action. The court sustained the demurrer on the first ground and dismissed the action.

Plaintiff appeals.

E. Reamuel Temple for plaintiff appellant.
Simms & Simms for defendant appellee.

PER CURIAM. At the hearing on the demurrer plaintiff "stated in open court that plaintiff does not seek any recovery for any alleged breach of contract, but only for trespass and conspiracy." Even so, the complaint does not allege that plaintiff agreed to an exchange of property within the time limited or ever offered to convey his property in exchange for other lands.

Stripped of conclusions the following facts are alleged: Defendant owned and was using a right of way for railroad purposes over plaintiff's land. Its wooden trestle, under which plaintiff passed from one part of his property to another, was destroyed by fire. Over plaintiff's objection defendant built a trestle of dirt and concrete which prevented plaintiff from passing under the railway. Plaintiff demanded damages and defendant negotiated with respect thereto, but has failed and refused to pay.

The allegations with respect to conspiracy are mere conclusions, and no facts are alleged which either tend to show a conspiracy or any damage to plaintiff from anything done which might have proceeded from a conspiracy. Moreover, it requires more than one individual or corporation to form a conspiracy. *Burns v. Oil Corporation,* 246 N.C. 266, 271, 98 S.E. 2d 339; *McNeill v. Hall,* 220 N.C. 73, 74, 16 S.E. 2d 456.

The facts alleged do not constitute a trespass by defendant on the lands of plaintiff. The railroad company had a right of way over plaintiff's land for its "railway line," had a right to enter upon its right of way and replace the burned trestle. If the construction of an earthen and concrete trestle placed a heavier burden on plaintiff's land than permitted by the terms of defendant's easement, plaintiff's remedy was by a proceeding under G.S. 40-12.

Affirmed.

MAREN ELIZABETH BOND, BENEFICIARY OF CLANTON J. McINNIS v. THE MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.

(Filed 17 April 1963.)

Insurance § 34—

In an action to recover on a policy of insurance providing indemnity for death resulting from accidental bodily injuries, nonsuit is properly entered upon evidence tending to show that prior to his death insured sustained two falls, but with further evidence that the falls inflicted only superficial injuries and that death resulted from hepatic failure due to acute alcoholism.

APPEAL by plaintiff from *MacRae, S.J.*, January, 1963 Assigned Term, WAKE Superior Court.

Civil action by the plaintiff, beneficiary, to recover from the defendant, the Massachusetts Protective Association, Inc., $10,000.00 under its Lexington Policy No. 1120525, providing indemnity in the event the death of the insured, Clanton J. McInnis, should result from accidental bodily injuries. At the close of the evidence the court, upon defendant's motion, entered judgment of involuntary nonsuit from which the plaintiff appealed.

Vaughan S. Winborne, for plaintiff appellant.

Arendell, Albright, Green & Reynolds, by Banks Arendell, for defendant appellee.

PER CURIAM. All facts necessary to decision were stipulated, except the cause of death. The plaintiff offered evidence tending to show the insured was ill on February 2, 1961, at his home. His attending physician, after examination, found him quite ill and recommended immediate hospitalization. Before the arrangements were completed, the insured fell in moving about the house, striking his head against a step. The injury bled profusely. Later, insured pitched and fell against a table, injuring the bridge of his nose. Immediately following the second fall he was found to be dead. There was no other evidence offered by plaintiff as to the cause of death.

The defendant offered the physician who had examined and recommended hospitalization for the insured and who was present during the autopsy. He testified that in his opinion the insured died of acute alcoholic bout with hepatic failure, liver failure.

The pathologist who performed the autopsy testified the head and nose injuries sustained in the fall were superficial and could not have

caused death; that death was caused by hepatic insufficiency which could not result from bodily injury, but did result from disease.

The evidence of death as result of accidental bodily injuries was totally lacking. Nonsuit was required. The judgment is

Affirmed.

STATE v. JAMES VAUGHN TWIGGS.

(Filed 17 April 1963.)

APPEAL by defendant from *Farthing, J.*, December 1962 Regular Criminal Term of HAYWOOD.

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

Evidence was offered by the State and by defendant.

The jury returned a verdict of "GUILTY OF INVOLUNTARY MANSLAUGHTER." Judgment imposing a prison sentence was pronounced.

Defendant excepted and appealed. Upon appeal, all assignments relate to alleged errors of commission and of omission in the charge.

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

Frank D. Ferguson and Ward & Bennett for defendant appellant.

PER CURIAM. The State's evidence tends to show defendant shot Ensley about 2:00 a.m. July 3, 1962, on the Dutch Cove Road, a mile or so south of the corporate limits of Canton; that Ensley was in the driver's seat of the 1940 Ford, which had stopped on said road in front of defendant's residence premises, and defendant was on his own premises when the fatal shot was fired; and that a bullet fired by defendant entered Ensley's right temple and proximately caused his death at 4:40 a.m. in the Haywood County Hospital.

There was plenary evidence that Ensley, accompanied by State's witness Gribble, had followed a car driven by defendant's wife, in

which defendant was riding, from Canton along the Dutch Cove Road until it turned into and went up defendant's private driveway; that shortly thereafter Ensley's 1940 Ford returned and stopped with lights off in front of defendant's premises; and that defendant had reasonable grounds to apprehend Ensley and Gribble intended to rob him or harm his wife or otherwise engage in unlawful conduct.

According to the State's evidence, neither Ensley nor Gribble got out of the 1940 Ford but both remained seated therein until defendant, who was 25-40 feet from the Dutch Cove Road, fired three shots in quick succession. According to defendant's evidence, Gribble or Ensley got out of the 1940 Ford, started up the bank along the front of defendant's premises and failed to respond to defendant's demand, "Go away, don't come up here"; and defendant did not intend to harm Ensley, or anyone, but fired solely for the purpose of scaring off intruders and did so when it reasonably appeared necessary in order to defend himself, his wife and his property.

At the time of the events referred to above, the occupants of the 1940 Ford, later identified as Ensley and Gribble, were complete strangers to defendant and defendant's wife.

The verdict indicates the jury reached the conclusion that defendant fired his pistol, intentionally, in such direction and in such manner that his conduct, under the circumstances then existing, constituted culpable negligence, and that defendant's culpable negligence proximately caused Esley's death.

The evidence has been carefully read and considered. No useful purpose would be served by a review thereof in detail. The jury saw and heard the witnesses; and it was for the jury to resolve the conflicts in the evidence.

Careful consideration of each of defendant's assignments fails to disclose prejudicial error; for the charge, when read as a composite whole, indicates that the applicable principles of law were presented in such manner as to leave no reasonable ground to believe that the jury was misinformed or misled. Hence, defendant's assignments are overruled.

No error.

D. E. WALTON AND WIFE, RUBY V. WALTON v. NORTH CAROLINA STATE HIGHWAY COMMISSION AND RICHMOND SAVINGS & LOAN ASSOCIATION.

(Filed 17 April 1963.)

APPEAL by repondent, North Carolina State Highway Commission, from *Olive, J.*, December 1962 Civil Term of RICHMOND.

Petitioners instituted this proceeding to secure compensation for 1.48 acres of land taken by respondent North Carolina State Highway Commission for highway purposes. Petitioners' property fronts approximately 1,068 feet on the north side of U.S. Highway No. 74. In widening the highway respondent took a curved strip of land approximately 941 feet long and varying in width from 80.88 feet to zero. It included two of petitioners' front doorsteps.

Answering the petition, respondent alleged that on February 26, 1960 petitioners had, by a duly recorded instrument, granted it a right of way over the property taken. Replying, petitioners admitted the execution of the recorded right-of-way agreement but alleged: (1) it was void for uncertainty of description; (2) the instrument had not been legally delivered; and (3) the agent of the respondent had secured their signatures to the instrument by fraudulently misrepresenting the location of the right of way in that he had assured them that ample space remained between the front of their residence and the right of way for a drive; that upon learning that the right of way came to their front porch they immediately demanded the return of the instrument which was still in the possession of the agent, unprobated and unrecorded; that he refused to surrender it and thereafter wrongfully recorded it.

The Clerk of the Superior Court held that the right-of-way agreement was inoperative, overruled the respondent's plea in bar, and appointed commissioners to determine the compensation due petitioner. Thereafter the commissioners made an award, and the clerk approved their report. Respondent appealed to the Superior Court demanding a jury trial upon the issues of fact raised by the pleadings.

When the case came on for trial respondent moved that the issues raised by the plea in bar be tried prior to the issue of damages and that this issue be deferred until a later term. This motion was granted.

Issues were submitted to the jury and answered as follows:

"1. Did the petitioners sign the paper writing entitled Right-of-Way Agreement, Respondent's Exhibit B, as alleged in the Answer?

"ANSWER: Yes

"2. Did the petitioners void delivery of said Right-of-Way Agreement, Respondent's Exhibit B, by repudiating and disaffirming the same before acceptance by the State Highway Commission, as alleged in the Reply?

"ANSWER: Yes

"3. Did the respondent induce the petitioners to sign said Right-of-Way Agreement, Respondent's Exhibit B, by fraud and misrepresentation as alleged in the Reply?

"ANSWER: Yes."

Upon the verdict the judge entered a judgment decreeing the right-of-way agreement null and void. The respondent appealed to this Court assigning as error the failure of the trial judge to nonsuit the plea in bar, the submission of the second issue, and error in the charge relating to the second issue.

T. W. Bruton, Attorney General, Harrison Lewis, Assistant Attorney General, Henry T. Rosser, Trial Attorney for respondent appellants.

Jones and Jones for petitioner appellees.

PER CURIAM. The evidence of the petitioners was ample to withstand respondent's motion for nonsuit. The issues submitted arose upon the pleadings. Respondent assigned no error to the charge on the third issue. Therefore, even if we were to concede error in the charge on the second issue — a question we need not decide — the answer to the third issue required the judgment which the court entered.

No error.

W. R. RAY, EMPLOYEE v. CITY OF RALEIGH FIRE DEPARTMENT, SELF-INSURER, EMPLOYER.

(Filed 17 April 1963.)

APPEAL by defendant from *Copeland, Special Judge*, November Assigned Non-Jury Civil Term 1962 of WAKE.

Proceeding under Workmen's Compensation Act.

The Hearing Commissioner, based on findings of fact and conclusions of law, made an award providing that defendant "pay all

medical bills incurred as a result of" plaintiff's injury by accident arising out of and in the course of his employment by defendant. The Full Commission adopted the Hearing Commissioner's findings of fact and conclusions of law and affirmed the award.

The judgment entered in superior court contains no reference to any of defendant's exceptions to findings of fact and conclusions of law made by the Hearing Commissioner and adopted by the Full Commission. It recites the matter was heard "on the record on appeal from the Industrial Commission" and adjudges "that the opinion and award of the Industrial Commission in this case be and the same is in all respects sustained." Defendant excepted "(t)o the foregoing judgment" and appealed. The only assignment of error is in these words: "The appellant assigns as error the judgment of Judge Copeland for that the same is unsupported by the facts or the law."

Paul F. Smith for defendant appellant.
No counsel contra.

PER CURIAM. Defendant's assignment of error does not present the legal question discussed in defendant's brief. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759. Even so, it seems appropriate to say that, according to uncontradicted evidence, plaintiff was entitled to the award. The evidence indicates the award involves a doctor's bill of one hundred dollars and a hospital bill of one hundred dollars.

Affirmed.

MARY H. RAINES v. DAISY W. BLACK.

(Filed 17 April 1963.)

APPEAL by plaintiff from *Olive, J.*, December Civil Term 1962 of RICHMOND.

This is an action for damages to plaintiff's automobile arising out of an automobile collision which occurred on 27 October 1961, in the daytime, in a congested community about five miles north of Ellerbe, North Carolina.

The collision occurred at the intersection of Highway No. 73 and the Old Ellerbe Road, a short distance north of the intersection of Highway No. 73 and U. S. Highway No. 220.

The evidence tends to show that the plaintiff's agent and driver of her car was proceeding north on Highway No. 73 at an excessive rate of speed in a 35 miles per hour zone. Prior to the collision the defendant had pulled her car to the left of Highway No. 73 and had parked it in front of DeWitt's Store, located slightly to the south of the point where the Old Ellerbe Road deadends into Highway No. 73; that the defendant started her car and drove parallel with the highway in a northerly direction until she reached a point opposite the intersection of Highway No. 73 and the Old Ellerbe Road, when she turned right and was proceeding at a very slow rate of speed in an easterly direction to enter the Old Ellerbe Road, the plaintiff's agent drove her car into the defendant's car, practically demolishing both cars.

The issues of negligence and contributory negligence were answered in the affirmative. Judgment was entered accordingly. Plaintiff appeals, assigning error.

Page & Page for plaintiff appellant.
Bynum & Bynum for defendant appellee.

PER CURIAM. A careful examination of the record, in our opinion, reveals no prejudicial error that would justify a new trial.

Affirmed.

THE DUNES CLUB, INC. v. CHEROKEE INSURANCE COMPANY.
AND
THE DUNES CLUB, INC. v. STATE CAPITAL INSURANCE COMPANY.
AND
THE DUNES CLUB, INC. v.
AMERICAN NATIONAL FIRE INSURANCE COMPANY.
AND
THE DUNES CLUB, INC. v.
MERCHANTS & MANUFACTURERS INSURANCE COMPANY.
AND
THE DUNES CLUB, INC. v.
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD.
AND
THE DUNES CLUB, INC. v.
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD.
AND
THE DUNES CLUB, INC. v. NORTH RIVER INSURANCE COMPANY.
AND

THE DUNES CLUB, INC. v. STANDARD FIRE INSURANCE COMPANY.

AND

THE DUNES CLUB, INC. v.
UNITED STATES FIDELITY & GUARANTY COMPANY.

AND

THE DUNES CLUB, INC. v. THE AMERICAN INSURANCE COMPANY.

(Filed 1 May 1963.)

1. Appeal and Error § 41—

The benefit of an exception to the admission of testimony is ordinarily lost when other witnesses testify to the same import without objection.

2. Evidence § 36—

Admission of testimony of a witness that the winds during the hurricane in question were much stronger than the winds of a prior hurricane in the area will not be held for error when it is apparent that the testimony of the witness was predicated upon his personal experiences in the two hurricanes and amounted to a shorthand statement of fact based upon numerous factors which could not be adequately and clearly reproduced and described to the jury.

3. Appeal and Error § 41—

Admission of testimony over objection will not be held for prejudicial error when it is apparent that the testimony could not have affected the result.

4. Same—

The admission of testimony of a witness in regard to his readings of his wind guage *held* not prejudicial when the testimony was admitted solely to establish that there was a hurricane in the area at the time in question and the fact of the hurricane is abundantly established by other evidence.

5. Evidence § 48—

Testimony of a witness as to readings made by him on his wind guage during the storm in question *held* incompetent in the absence of evidence tending to show that the witness' wind guage was properly made and accurately measured the wind velocity according to scientific principles approved and generally accepted.

6. Evidence § 15—

It is competent for a witness to testify from his personal observation that debris was blown in a whirl, around and around, by the wind at the time in question and that he had seen like phenomena in previous cyclones.

7. Insurance § 92—

Plaintiff's evidence, together with defendant's evidence favorable to plaintiff, *held* sufficient to be submitted to the jury on the issue of whether the damage to plaintiff's property was caused exclusively by wind storm independent of any water damage.

8. Evidence § 24—

It is error to permit a witness to read from a purported official publication of the U. S. Department of Commerce when the publication is identified only by a statement of counsel upon handing the publication to the witness, G.S. 8-35, and when such evidence has a material bearing on the crucial question of whether plaintiff's property was damaged by wind prior to high water incident to the hurricane in question, its admission must be held prejudicial.

APPEAL by all the defendants from *Mintz, J.*, October 1962 Civil Term of CARTERET.

Ten civil actions, consolidated by consent for trial, on an extended coverage endorsement for windstorm damage attached to a standard fire insurance policy in each action on plaintiff's building, and the contents therein, known as The Dunes Club at Atlantic Beach, North Carolina.

The parties stipulated that all ten policies of fire insurance were lost, and that each and every one of the ten policies sued on had an extended coverage endorsement which included direct loss by windstorm and a water exclusion provision providing: "WATER EXCLUSION—This Company shall not be liable for loss caused by, resulting from, contributed to or aggravated by any of the following — (a) flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not* * *." The parties further stipulated that at the time of plaintiff's alleged damage each and every one of the ten policies sued on was in full force and effect, and the premiums thereon had been paid for the coverages therein provided in each policy. The parties also stipulated that The American Insurance Company's policy covered both the building and its contents, the Cherokee and State Capital Insurance Companies' policies covered only the contents in the building, and the other policies covered only the building, and that a further endorsement attached to each policy contained a loss deductible clause in the amount of $100.00. It was also stipulated that the actual cash value of plaintiff's building at the time of the alleged damage and loss was $50,000.00. It is alleged in the complaints and admitted in the answers that the plaintiff gave the defendants notice of its alleged loss and damage is apt time and delivered to the defendants a sworn proof of loss in conformity with provisions of the policy in each case, and that all the insurance companies rejected said proof of loss and refused to make payment to plaintiff.

The complaint and answer in the case against The American Insurance Company are set forth in full. Paragraph three of this complaint sets forth the number of the policy sued on, its relevant provisions, and the amount of coverage. Paragraph three of the answer in this action admits the allegations of paragraph three of the complaint, and further states the policy is referred to for its exact terms. The complaints in the other nine actions have a similar paragraph three, qualified only in respect to the number of the policy and the amount of coverage in each case, and paragraph three of the answers in the other nine cases is similar to paragraph three in the answer in the action against The American Insurance Company. In these other nine actions the record contains only paragraph three of the complaints and paragraph three of the answers.

The complaint in the action against The American Insurance Company alleges in substance: Plaintiff was the owner of a one-story frame building occupied as a club building, with articles of personal property therein, situate on the south side of Atlantic Boulevard on Atlantic Beach, and was so described in defendant's standard fire insurance policy. On 11 September 1960 the coastal area at Atlantic Beach was struck by high winds of hurricane force, which hurricane is known as Hurricane Donna. That Hurricane Donna, with its attendant high gusts and tornadoes, struck plaintiff's property insured by defendant against direct loss by windstorm, and as a direct and proximate result of Hurricane Donna striking the building, the building and its contents were totally destroyed.

Defendant in its answer admits that plaintiff was the owner of the property described in its complaint, and that Hurricane Donna at sometimes contained high winds, but avers these winds did not damage plaintiff's property. And as a further answer and defense it alleges that the damage to plaintiff's property was caused by waves, wave-wash, and water or the action and washing of water and waves against and upon plaintiff's building and against and around its support, and that such loss is not covered by reason of the water exclusion provision contained in its policy.

Evidence was offered by plaintiff and by the defendants in support of the allegations in the pleadings. The following issues in the consolidated action were submitted to the jury and answered as appears:

> "1. Did the plaintiff sustain direct loss by windstorm to the property under the policies sued on in this action, as alleged?
>
> "ANSWER: Yes.

"2. If so, what was the actual cash value of the loss sustained by the plaintiff to its building?

"ANSWER: $36,604.20.

"3. What was the actual cash value of the loss sustained by the plaintiff to the contents located in said building?

"ANSWER: $8,833.33."

The parties stipulated that the amount of damages, if any, would be determined by the court as to each defendant pursuant to its pro rata insured obligation as determined by the amount of each policy with respect to the entire coverage.

From a separate judgment against each of the ten defendants entered pursuant to the verdict and to the above stipulation, all the defendants appeal.

Smith, Leach, Anderson & Dorsett and Harvey Hamilton, Jr., for defendant appellants.

Wallace & Wallace and C. R. Wheatly, Jr., for plaintiff appellee.

PARKER, J. The ten defendants have filed a joint brief. They assign as error the denial of their motion for a judgment of nonsuit in each case, made at the close of all the evidence.

Plaintiff offered evidence which, considered in the light most favorable to it, *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184, tends to show the following:

Its building, located on Atlantic Beach, was a one-story frame building, constructed on cypress piling. The piling was buried in sand five feet. The first main floor elevation was five feet above the elevation of the beach. The walls were of 2x4 studs covered with cypress shingles. The roof framing was of 2x8, 2x10, 2x6, which was good heavy construction. The roof was originally covered with cypress shingles, later covered with asphalt shingles. The building contained a ballroom 50x30 feet, over which was a high-pitched roof with a cupola in the center. At each of the four corners of the main section was attached a wing, over each of which was a low-pitched roof. This building on 11 September 1960 before Hurricane Donna came was in good condition, and had in it furnishings and equipment of the actual cash value of $11,500.00.

The building was located on the beach about 140 to 150 feet from the average high water mark of the Atlantic Ocean and on land about a foot above sea level. The Oceana Motel constructed of masonry was 260 feet to the northwest of plaintiff's building. The Oceana property

is 134 feet to the west on a line parallel with the ocean front, at which point the Oceana Beach House is located. The relative elevation of the land between these buildings was practically the same. Plaintiff's building was about 700 to 800 feet south of the Fort Macon-Atlantic Beach Road. From its building to this road was an asphalt driveway through a gap in sand dunes and across land about level.

About 9:00 p.m., or earlier, on 11 September 1960 a hurricane known as Hurricane Donna struck the Atlantic Beach area from a direction approximately southeast. After 8:30 p.m. on this date, H. G. Ball, manager of the Oceana Motel, tried to go around the east side of the motel, and could not; the wind was too strong, it blew him back just like he "was on roller skates." He took hold of the handrailing and tried to pull himself around, and could not do so. He had a spotlight with a battery that would throw a beam 1000 feet. He testified: "I did shine my light over toward The Dunes Club area to see if there was any water. I observed on the ground that night a lot of debris; I didn't observe any water. By debris, I meant building materials, shingles, and such as that. I could identify the debris as to where they came from." He was then permitted to testify, over defendants' objection, that the debris and building material came from The Dunes Club.

About five o'clock next morning H. G. Ball examined the Oceana Motel. On the east side he saw cypress shingles and debris everywhere that he could identify. The windows on the east side had plate glass windows about half an inch thick. These were broken out. On the east side of the motel was an upper deck 8 or 9 feet above the ground. He testified: "No water during the night of September 11, 1960 got on the yard area or any portion of the area of the Oceana Motel." The closest building east of The Dunes Club was about 1000 to 1500 feet distant.

He was permitted to testify, over the objection of the defendants, in substance as follows: On the upper deck of the motel he saw a door and a lot of shingles and building material. The door was the inside door from The Dunes Club; the shingles and building material came from The Dunes Club. He had seen the door before; it was painted green on one side, and the other side was stained; it was the same kind of door which was inside The Dunes Club. Inside the rooms on the east side, where the windows were broken out, he found shingles and pieces of lumber next morning.

He testified further, without objection, in substance as follows: He was at sea for eight years in the Merchant Marines, and he has lived in Carteret County twenty years. He has been in hurricanes when at

sea on shipboard, and he has been in Hurricanes Hazel, Ione, Connie, and Donna in Carteret County. He was then permitted to testify, over defendants' objection, in substance as follows: He has a wind gauge, which has a glass tube with a special fluid in it. The gauge is fastened "to a thing up on the roof, the tube running down in the office." The wind pushes the fluid up and it is graduated in miles per hour. He has had this wind gauge a couple of years, and he has watched it to see how hard the wind blows. The wind of Hurricane Donna on 11 September 1960 was very much stronger than the highest winds he experienced in Hurricane Hazel.

David Hart Mansfield on 11 September 1960 was manager of the Oceana Beach House and fishing pier. Before then he had worked for 27 years on a dredge boat—about ten years as captain—between Wilmington, Delaware, and the Canal Zone. "It operated a 27" pipeline." During that time he was particularly concerned with winds and hurricanes. He had a ship-to-shore radio in order to get radio reports every hour, and "when the wind got to a certain velocity, I had to take it in." He had a wind gauge aboard the dredge and read the gauge. He had a weather map under a glass on his desk, and he would sit there and plot the wind on the map as he received the radio reports of the velocity of the wind. He had a wind gauge on the wall of the beach house, which he had installed in the spring of 1959. He described the gauge in detail. It has a red fluid, which the wind pulls up and down. He knows how to calibrate it, and from time to time has attempted to calibrate it for accuracy.

Mansfield was permitted to testify, over the objection of the defendants, in substance as follows: He had compared the readings on his gauge with official weather reports and with the readings of other wind-measuring devices, and the readings on his gauge would be the same as others, maybe a point off one way or the other. By official weather reports he meant radio reports. He has been in 15 or 20 hurricanes and cyclones, and has measured them with wind gauges. At 9:15 p.m. on 11 September 1960 he could not tell what his wind gauge read because "it went out of sight up into the fluid here." The last number he read was 80 miles per hour. He stood on the north side of the beach house. He saw debris blowing over the parking lot: it was in a whirl, going round and round. He had been in cyclones that acted like that. The next morning he saw debris on the ground. It was shingles and lumber from The Dunes Club, and an inside wall of The Dunes Club lying across the motel sidewalk. There was so much of this debris that he could not get his car to the beach house. Some of the boards were from 3 to 16 feet long, and there were some 2x4s and 3x6s.

Mansfield further testified, without objection, to this effect: About 9:15 p.m. on 11 September 1960 you could not keep your eyes open on the north side of the beach house for sand and wind. Visibility was bad. At the intersection of the Fort Macon Highway and The Dunes Club Road, the road was all gone, and a big hole was there, 5 or 6 feet deep. About 100 feet of The Dunes Club Road leading from the Fort Macon Road was gone.

About 8:17 a.m. the next day Edward Dixon, president of plaintiff, went to its property. At that time the only part of The Dunes Club's building standing was the men's locker room; all the rest of it was scattered here and there down to the Fort Macon Road. The roof part of the building was banked against a dune 50 to 75 feet from the Fort Macon Road. The dune was about 15 feet high. A part of the roof was within two or three feet of the top of the dune. The windows in the cupola on the roof were not broken. The ballroom floor of The Dunes Club was across the Fort Macon Road turned upside down. In The Dunes Club's building there had been an iron safe weighing 1000 to 1200 pounds in a little office adjoining the men's locker room. He saw this safe 100 feet from where the building stood, buried halfway in sand. He testified: "I observed debris in the vicinity of the Oceana Motel that morning; I saw shingles and quite a few shingles from the Club that I could identify on the porch and in the rooms of the Oceana Motel. I went into the bedroom because the windows on the east and west side of the motel were blown out. I saw debris in the bedrooms and on the porch of the Oceana Motel that had come up from The Dunes Club. I found debris on the outside of the motel on the porch and in some of the bedrooms upstairs and down." Where The Dunes Club Road intersected the Fort Macon Road, both roads were washed out.

The evidence tended to show the Oceana Motel Beach House, which had a sea wall, sustained no damage except the loss of a few shingles, and that the Oceana Motel's damage consisted of the broken windows on the east side and the removal of the covering of the roof.

Defendants' evidence tended to show that plaintiff's loss was caused by or resulted from or was contributed to or aggravated by water and was not a direct loss by windstorm. They offered as witnesses a highway patrolman and a free-lance photographer, who visited the scene the following morning and illustrated their testimony as to what they saw by over 50 photographs. They also offered as a witness David M. Mackintosh, Jr., who was held by the court to be an expert witness in the field of engineering and architecture, and who testified in substance as follows, illustrating his testimony by many photographs: A

few days after 11 September 1960 he came to Atlantic Beach in a professional capacity to make an investigation in respect to The Dunes Club's building, and generally along the beach. He found the roof section of The Dunes Club's building with the cupola near the Fort Macon Road in very good structural shape. It was not distorted or cracked. On this roof he saw a line caused by dirt, salt in the water, and grass. When water goes down it leaves such a line. In his opinion, the roof with the cupola was not blown off, but floated to where it came to rest, and this is shown, among other things, by this line. That the static high-water line on The Dunes Club's property was 5½ feet above the level of the club's driveway, as determined by the water lines inside the club's property and checked with static high-water line indications in adjoining and nearby properties, showing that the water was 5½ feet deep inside the club's property when the water became still and began receding. That the club's driveway and Fort Macon Road were washed out by water moving from south to north through the gap in the dunes. In his opinion, plaintiff's building could not have been moved off its foundation supports by the action of the wind. In his opinion, the ballroom floor of The Dunes Club floated to where it came to rest. In his opinion, the iron safe of plaintiff was too heavy to be blown where it was found or to float there; that it floated away on a floor from where it was in the building and slid off where it was found, and the floor floated on.

Mackintosh testified, without objection, on cross-examination: "Anything above 75 miles per hour is classified as a hurricane.* * *On September 11th there was a hurricane tide coming; it was not a normal tide; it was a hurricane that night."

Defendants assign as error that the witness Ball was permitted over their objections to testify in substance that on the morning of 12 September 1960 he saw on the upper deck of the Oceana Motel a door and a lot of shingles and building material, and that they came from The Dunes Club; that the door was an inside door of The Dunes Club; and that some of the shingles and pieces of lumber were inside the rooms on the east side of the motel. Defendants also assign as error that the witness Mansfield was permitted to testify over their objections that the next morning he saw shingles, lumber and an inside wall from The Dunes Club on the ground about the Oceana Beach House and the Oceana Motel. Edward Dixon was a witness before Ball and Mansfield were called as witnesses, and testified without objection to the same or similar effect as did Ball and Mansfield later in the part of their testimony challenged as set forth above in this paragraph. This Court said in *Shelton v. R.R.,* 193 N.C. 670, 139 S.E.

232: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." The Court in the *Shelton* case, as shown by the record and the cases cited in support of the statement, is referring to the examination of the same witness. It seems that the rationale of the rule brings within its scope that if incompetent evidence is admitted over objection, but the same or similar evidence has theretofore or thereafter been given by a witness or other witnesses in the trial without objection, the benefit of the exception is ordinarily lost. In 5A C.J.S., Appeal and Error, sec. 1735, p. 1030, it is said: "Error, if any, in permitting a witness to testify as to his opinion or conclusion is cured* * *by the witness' testimony as to the same fact being admitted at another point without objection." The objections to the testimony of Ball and Mansfield set forth above in this paragraph are overruled.

Defendants assign as error that Ball was permitted over their objections to testify that the wind of Hurricane Donna on 11 September 1960 was very much stronger than the highest winds he experienced in Hurricane Hazel. These assignments of error are overruled. 32 C.J.S., Evidence, sec. 499. It would seem from reading his testimony in context that his comparison of the velocity of the wind in Hurricane Donna with the wind in Hurricane Hazel was based not upon any records or reports or reading of his wind gauge, but was based upon his experiences in having been in many hurricanes on land and on sea and upon his experiences in those two named hurricanes, and that the facts as to the velocity of the winds in the two named hurricanes as they appeared to him and were experienced by him cannot adequately and clearly be reproduced, described and detailed to the jury. The courts for that reason have found it necessary to admit this class of evidence, even from non-expert witnesses, which is usually called "opinion evidence." *Steele v. Coxe*, 225 N.C. 726, 36 S.E. 2d 288; 20 Am. Jur., Evidence, sec. 769; Stansbury, N. C. Evidence, sec. 125. In *Wood v. Insurance Company*, 245 N.C. 383, 96 S.E. 2d 28, this is said: "The exception and assignment of error to the question and answer: 'Q. And to what extent was the wind blowing if you have a way of describing it? A. Well, it was just blowing too hard for me to get outdoors and face it. . .' is without merit. The witness had previously testified: 'The wind sure was blowing that day.' There was other testimony: 'The wind was blowing so terrific that it was almost impossible to stand up on the outside. . .' "

Defendants assign as error that Ball was permitted over their objections to testify in respect to his wind gauge and his watching it to see how hard the wind blows. These assignments of error are overruled for the reason that a close reading of his testimony in the record discloses that it was of no benefit to plaintiff and of no prejudice to the defendants because, *inter alia,* he did not testify as to what his readings were.

Defendants assign as error that Mansfield was permitted over their objections to testify about his wind gauge, his operation of it, and a comparison of his readings on it with radio reports; that on 11 September 1960 he could not tell what his wind gauge read, "because it went out of sight up into the fluid here"; and the last number he read was 80 miles per hour. The manifest purpose of this evidence is to show there was a hurricane that night, and the velocity of the wind. Defendants' witness Mackintosh testified, without objection, on cross-examination: "Anything above 75 miles per hour is classified as a hurricane.* * *On September 11th there was a hurricane tide coming; it was not a normal tide; it was a hurricane that night." Even if we concede that the proper foundation had not been laid for Mansfield to testify that the last number he read on his wind gauge was 80 miles per hour, it would seem to be harmless because of Mackintosh's testimony there was a hurricane that night, and anything above 75 miles per hour is classified as a hurricane. However, we think that his testimony that he could not tell what his wind gauge read "because it went out of sight up into the fluid here," should have been excluded because of insufficient evidence to show that his wind gauge was properly made and operated to follow and accurately measure the velocity of wind according to sound scientific principles approved and generally accepted, and that it was in proper working condition at the particular time under consideration, and for the further reason that the radio reports and other wind-measuring devices with which he compared its measurements were not properly shown to be accurate. Wigmore, The Science of Judicial Proof, 3rd Ed., ch. XXI, sec. 220, p. 450.

Defendants assign as error that Mansfield was permitted over their objections to testify to the effect that at 9:15 p.m. on 11 September 1960 he saw debris blowing over the parking lot: it was in a whirl, going round and round. He had been in cyclones that acted like that. We think this evidence of what he saw then and had seen in previous cyclones was competent.

The evidence in this case is in sharp conflict. Accepting plaintiff's evidence as true and considering it in the light most favorable to it, and giving it the benefit of every reasonable inference to be drawn

therefrom, *Smith v. Rawlins, supra,* and considering so much of defendants' evidence as is favorable to plaintiff, *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, as we must do in ruling upon a motion for an involuntary judgment of nonsuit, we cannot say that plaintiff's evidence which was competent, and defendants' evidence favorable to it, if accepted by the jury, is insufficient to support a verdict for plaintiff that it sustained a direct loss by windstorm of its building and its contents therein under the provisions of the policies of insurance here, and that the building and its contents were destroyed by winds of hurricane velocity before the water from the ocean came rushing upon its property. Hence, there was no error in the denial by the court of defendants' motion for a judgment of nonsuit in each case made at the close of all the evidence. *Wood v. Insurance Company,* 243 N.C. 158, 90 S.E. 2d 310; same case, 245 N.C. 383, 96 S.E. 2d 28; *Sun Underwriters Ins. Co. of N. Y. v. Loyola University,* 196 F. 2d 169.

On cross-examination by plaintiff of defendants' witness Mackintosh, one of plaintiff's counsel stated: "I am handing you the tide tables put out by the U. S. Department of Commerce, Coast and Geodetic Survey, High and Low Water, 1960, the East Coast for North and South America, including Greenland, and I ask you to examine this book* * *." He then asked him a number of questions as to what this book showed as to the tide at various times at Atlantic Beach on 11 September 1960, and over the objections of defendants the witness was permitted to answer a number of such questions as to what this book showed and to read from it. Defendants assign this as error, as set forth in exceptions 91-116. Defendants in their brief particularly complain of Mackintosh's answer to the effect that high tide on the night in question was around midnight.

There is nothing in the record to show that this book handed to Mackintosh by plaintiff's counsel was an official publication of the U. S. Department of Commerce, Coast and Geodetic Survey, except the statement of counsel, or that it was properly authenticated as required by G.S. 8-35, or where it came from. It was not introduced in evidence, and we do not have it before us. Therefore, for the court under these circumstances to permit Mackintosh, over defendants' objections, on cross-examination, to state what this book showed and read from it was error. *Wood v. Insurance Company,* 245 N.C. 383, 96 S.E. 2d 28; *S. v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323; *Knott v. R.R.,* 98 N.C. 73, 3 S.E. 735, 2 Am. St. Rep. 321; Stansbury, N. C. Evidence, sec. 153; 20 Am. Jur., Evidence, secs. 1023-1026; Annotations 50

A.L.R. 2d 1197 and 34 A.L.R. 2d 1249. 33 U.S.C.A. sec. 883a, as amended 5 April 1960, 74 Stat. 16, provides that "the Director of the Coast and Geodetic Survey* * *, under direction of the Secretary of Commerce, is authorized to conduct the following activities: * * *(2) Tide and current observations* * *." See *City of Oakland v. Wheeler,* 34 Cal. App. 442, 168 P. 23; *Taylor v. State* (Tex. Civ. App.), 158 S.W. 2d 881. In the *Wood* case the Court held that testimony as to the contents of weather bureau records is properly excluded, since the records themselves should have been put in evidence. We think the admission of this evidence was highly prejudicial to defendants, because plaintiff had offered evidence tending to show that around 9:00 p.m. shingles and pieces of lumber from its building were being blown through the air, and this evidence tended to show that the high tide on that night was around midnight, and that this evidence would permit a reasonable inference that their building and its contents had about three hours to be destroyed by hurricane wind, and were in fact so destroyed, prior to the time the water reached its highest level and came on its property during the high tide about midnight. *Sun Underwriters Ins. Co. of N. Y. v. Loyola University, supra.* It would seem that the harmful effect to defendants of this testimony was emphasized by the court in its charge, when in stating the contentions of plaintiff it stated: "The plaintiff also says and contends that the computations made by the defendant and the conclusions made by him did not take into account the tides, that is the high and low tides on the day in question; (that the high tide on the night in question was around midnight; the low tide being at 5:35 in the afternoon)* * *." Defendants assign as error the part in parentheses.

For errors in the admission of evidence, as above pointed out, defendants are entitled to a

New trial.

H. K. PERRY v. W. M. JOLLY, GUARDIAN OF FLORENCE JOHNSON PERRY, INCOMPETENT AND HILDA P. PEARCE AND HUSBAND, MARSHALL E. PEARCE, PURCHASERS.

(Filed 1 May 1963.)

1. Judicial Sales § 5—

Confirmation constitutes the last and highest bidder at a judicial sale the equitable owner of the land, and he must be given notice and an

opportunity to be heard upon a motion to set aside the sale, and his equitable title may be defeated only for fraud, mistake, collusion, or vitiating defect appearing on the face of the record.

2. Insane Persons § 4—

G.S. 35-15 authorizes a court of equity to order that the property of an incompetent be sold, as well as mortgaged, for the support and maintenance of the incompetent.

3. Husband and Wife § 17—

While a tenancy by the entireties may be terminated by a voluntary sale on the part of both husband and wife, when one of them has been adjudged incompetent a sale cannot be the voluntary act of both and therefore when the court orders a sale in such instance the right of survivorship is transferred to the proceeds of the sale.

4. Pleadings § 29—

Where the original answer denies the existence of a material fact but the amended answer admits such fact, the fact is no longer at issue.

5. Judgments § 2; Judicial Sales § 4—

The resident judge of the district is a proper officer to confirm a judicial sale, and he may do so out of the district with the consent of the parties.

6. Judicial Sales § 4—

Where the petitioner obtains an offer for the private purchase of lands at a judicial sale and asks the court to authorize and approve such sale, he may not thereafter complain that the order of confirmation was entered without a finding by the court that the sale was fair and just.

7. Husband and Wife § 2—

The husband is under legal duty to support his wife.

8. Husband and Wife §§ 15, 17; Insane Persons § 4—

Where the wife has been adjudged incompetent and the court orders a sale of lands held by the entireties, the husband is entitled to hold the proceeds of the sale and is entitled to the income therefrom subject to his duty to support his wife, but he holds the *corpus* as trustee for the survivor and may not invade the *corpus* except to the extent his income from all sources is insufficient for his wife's and his own needs, and the court is without discretionary authority to dissolve the rights of survivorship in the funds.

9. Appeal and Error § 2; Insane Persons § 3—

A person who has been adjudged incompetent becomes a ward of the court and the Supreme Court will *ex mero motu* protect such incompetent's rights in the subject matter of the litigation.

PARKER, J. concurring.

RODMAN, J., concurring in part.

BOBBITT, J., dissenting in part.

SHARP, J., joins in dissent.

APPEAL from *Hobgood, J.,* November 13, 1962, FRANKLIN Superior Court.

On August 7, 1962, H. K. Perry, petitioner, instituted this special proceeding before the Clerk Superior Court against W. M. Jolly, Guardian of petitioner's wife, Florence Johnson Perry. The purpose of the proceeding was to have the court authorize the private sale of a specifically described tract of land containing 120.5 acres in Franklin County. The petition alleged:

"1. That Florence Johnson Perry is the wife of the petitioner, and is of the age of (77) years, and has heretofore been adjudged by this Court to be incompetent from want of understanding to manage her affairs by reason of mental and physical weakness on account of disease, and that W. M. Jolly has heretofore been appointed by this Court and is now acting as the general guardian of said incompetent.

"2. That the petitioner herein, H. K. Perry, and his wife, Florence Johnson Perry, are the owners as tenants by the entirety of the following described land lying and being in Dunn Township, Franklin County, North Carolina, the same having been conveyed to them by deed dated January 22, 1935, and recorded in Book 320 at page 590, Franklin County Registry, the same being more particularly described as follows: (description omitted)

"3. That the petitioner is now of the age of (75) years, and by reason of his advanced years is physically infirm and unable to do any manual labor, but is otherwise healthy and mentally alert, and can anticipate many years of life; that said Florence Johnson Perry, wife of the petitioner, is in very poor physical and mental health, she having only recently required hospital care and treatment and now needs constant care and attention, which petitioner himself is unable to render personally, and the expense of her maintenance and care, and living expenses of the petitioner are such that the income from the rental of the crops on the lands of the petitioner and his wife is not sufficient to pay all such expenses, together with the upkeep of the croplands and the maintenance of the buildings, and the taxes assessed upon the land; that the land of the petitioner and his wife is deteriorating and the buildings thereon are in need of repairs and modernization; that farm land is now generally selling at high prices;

that the petitioner verily believes and therefore avers that it is for the best interests of both himself and the estate of his wife for said lands to be sold in order that the petitioner may be able to provide more adequately for the maintenance and support of himself and his wife. That the petitioner has been offered the sum of $45,000.00 for said land, and the petitioner believes that the said sum is the full, fair and adequate value of said land, and that it would be for the best interest of the petitioner and his wife for said lands to be sold as aforesaid, and the proceeds of the sale used for the support and maintenance of the petitioner and his wife."

The guardian answered (date not given) denying paragraph three of the petition and further alleging the described land was worth $60,000.00, and that the income from the land and from other sources rendered unnecessary the proposed sale. However, the guardian, by leave of the court, filed an amended answer which, admitting other essential facts, contained the following:

"2. That Mrs. Hilda P. Pearce, a daughter of plaintiff and defendant's ward, and her husband, Marshall E. Pearce, have offered the sum of $45,000.00 for said land, subject to the life estate of the plaintiff and defendant's ward in and to the main dwelling house, which this defendant, after further information and belief and in view of the condition of the farm buildings thereon, considers to be a fair and adequate value for said land, and further believes that it would be for the best interest of this defendant's ward for said lands to be sold for the aforesaid price at private sale; that the net proceeds of said sale be divided equally, that is one-half to plaintiff and one-half to this defendant as Guardian of Florence Johnson Perry, to the end that the one-half paid to this defendant shall be used for the support and maintenance of this defendant's ward as by law provided."

Three disinterested freeholders filed a joint affidavit stating the proposed private sale at $45,000.00, subject to the life estate in the residence and two acres surrounding it was a "full and fair value of said lands." The clerk entered the following order:

"This cause coming on to be heard, and being heard before Honorable John W. King, Clerk of Superior Court of Franklin County, North Carolina, upon the verified petition, answer and amended answer, affidavit of three disinterested freeholders, and

other satisfactory proof, and it appearing to the Court and being found as facts as follows:

"1. That the facts set forth in the petition and amended answer herein are true; and that it will be to the best interest of defendant's ward, Florence Johnson Perry, incompetent, for the land described in the petition to be sold at private sale to Mrs. Hilda P. Pearce and husband, Marshall E. Pearce, for the sum of $45,000.00 cash, reserving a life estate unto H. K. Perry and wife, Florence Johnson Perry, and the survivor of them, in and to the main dwelling and two acres surrounding the same for yard, with one-half of the said proceeds of said sale to be paid to the petitioner H. K. Perry and one-half of the net proceeds of said sale to be paid to W. M. Jolly, Guardian of Florence Johnson Perry, incompetent, to be used by said guardian for the support and maintenance of his said ward in a manner provided by law.

"2. That W. M. Jolly, Guardian of Florence Johnson Perry, has no funds or property in his hands belonging to his ward, who has been committed to the Dorothea Dix State Hospital in Raleigh, and it is necessary that funds be made available to said guardian for the payment of the support and maintenance of said Florence Johnson Perry, and that it is most advantageous to said ward and her interest will be materially promoted by a sale of the said lands at the price of $45,000.00 cash as aforesaid.

"NOW, THEREFORE, it is ordered, adjudged and decreed that Hill Yarborough and E. F. Yarborough be, and they are hereby appointed commissioners to make a private sale to Mrs. Hilda P. Pearce and husband, Marshall E. Pearce, of the lands described in the petition, subject to the reservation of life estates in the main dwelling house situate thereon and 2 acres of land surrounding same unto said H. K. Perry and wife Florence Johnson Perry, and the survivor of them, for the price of $45,000.00 cash, and that said commissioners shall report their sale to this court for confirmation and further proceedings as provided by law.

"It is further ordered that out of the proceeds derived from said sale said commissioners shall pay the costs and expenses of said sale and this proceeding, and one-half of the net proceeds of said sale shall be paid to W. M. Jolly, Guardian of Florence Johnson Perry, incompetent, and one-half of said net proceeds shall be paid to the said petitioner or such person as designated by him."

The Commissioners reported the private sale as follows:

"TO HONORABLE JOHN W. KING, CLERK OF SUPERIOR COURT OF FRANKLIN COUNTY, NORTH CAROLINA:

"The undersigned, Hill Yarborough and E. F. Yarborough, Commissioners appointed with herein to sell at private sale the lands described in the petition, hereby report to the court that, pursuant to said Order, they have agreed, subject to the confirmation of the court and to the provision of law regarding an increased or upset bid, to sell to Hilda P. Pearce and husband Marshall E. Pearce at the price of $45,000.00 cash, the lands described in the petition herein, and containing 120.5 acres, more or less, subject to the reservation of life estates in the main dwelling house situate thereon and 2 acres of land surrounding same unto said H. K. Perry and wife Florence Johnson Perry, and further subject to the rental contract for the year 1963.

"That your Commissioners verily believe, and so aver, that said price is full, fair and adequate, and is as much as, if not more than, they could reasonably expect to obtain for said land by a sale at public auction, and that said sale would be for the best interest of all parties concerned.

"WHEREFORE, your commissioners respectfully recommend to the Court that the matter be allowed to remain open for 10 days as by law provided, and that if no advance or upset bid is filed with the Court, that the sale hereby reported be confirmed.

"This the 9th day of October, 1962."

The Clerk entered the following confirmatory decree:

"This cause coming on to be heard, and being heard upon the Report of Sale filed herein on 9 October 1962 by Hill Yarborough and E. F. Yarborough, Commissioners, and it appearing to the Court and being found as facts:

"1. That the aforesaid Commissioners reported to this Court on 9 October 1962 a sale of the lands described in the Petition to Hilda P. Pearce and husband, Marshall E. Pearce, for the price of Forty-five Thousand and no/100 Dollars ($45,000.00), cash, subject to the reservation of life estates in the main dwelling house situate thereon and two (2) acres of land surrounding same unto said H. K. Perry and wife, Florence Johnson Perry, and further subject to the rental contract for the year 1963.

"2. That Florence Johnson Perry is the wife of H. K. Perry, the petitioner, and that said Florence Johnson Perry is mentally incompetent, and it is necessary and desirable that said lands be

sold in order to provide funds for the support and maintenance of said Florence Johnson Perry.

"3. That it appears to the satisfaction of the undersigned Clerk of Superior Court of Franklin County that the aforesaid sale is necessary and to the best advantage of said Florence Johnson Perry, and is not prejudicial to her interest.

"4. That the aforesaid Report of Sale filed by the Commissioners herein has remained on file in this office for more than ten (10) days and no advanced bid has been filed and no objection made to said sale; and the affidavit of three disinterested freeholders has been filed by said Commissioners that said price is fair and adequate and the full and fair value of said lands.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the aforesaid sale be, and the same is hereby approved and confirmed, and Hill Yarborough and E. F. Yarborough, Commissioners, are authorized and directed to execute and deliver to the purchasers a deed for said lands, subject to the reservation of the above mentioned life estates and to the rental contract for the year 1963, upon the recipt by said Commissioners of said purchase price in full.

"Out of aforesaid purchase price of $45,000.00, the Commissioners shall first pay the costs and expenses of this proceeding the same to include an allowance to said Commissioners of five (5) per cent of said purchase price, and out of the remaining funds in their hands, shall pay one-half of same to the petitioner, H. K. Perry, and one-half of same to W. M. Jolly, General Guardian of Florence Johnson Perry, incompetent.

"This 22nd day of October, 1962."

Judge Hobgood, Resident Judge of the Ninth Judicial District, entered an order confirming the private sale in all respects. The order was actually signed in Alamance County, but upon the written consent and approval of counsel of record for both parties. Subsequently the petitioner, by W. H. Perry, attorney in fact, gave notice of appeal, upon grounds discussed in the opinion.

The Sheriff served the notice of appeal upon the Commissioners and Mr. Jolly, guardian. This notice was not served on either Mr. or Mrs. Pearce, the purchasers. Judge Hobgood entered the following order:

"This cause coming on to be heard, and being heard upon the motion of H. K. Perry, plaintiff, that the confirmatory decree entered in this cause on 22 October 1962 be set aside; and it

appearing to the Court and the Court finding that the parties have agreed that the said confirmatory decree be set aside and that the lands involved in this proceeding be sold at public auction to the highest bidder for cash; and proceeds divided equally.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by the Court, in its discretion, that the said confirmatory decree entered in this proceeding on 22 October 1962 be, and the same is hereby set aside; and this proceeding is hereby remanded to the Clerk of the Superior Court for further proceedings to the end the lands involved in this proceeding be sold at public auction to the highest bidder for cash, and the proceeds be divided equally between petitioner and said guardian, and that Hill Yarborough be paid such compensation as the Court may hereafter determine for services as attorney and Commissioner which amount shall be charged in the bill of costs herein.

"This 3 November, 1962. /s/ HAMILTON H. HOBGOOD, Judge of Superior Court.

"WE CONSENT:

/s/ W. H. Perry, Attorney in Fact for H. K. Perry

/s/ W. M. Jolly, Guardian of Florence Johnson Perry

/s/ Hill Yarborough, Commissioner

/s/ E. F. Yarborough, Commissioner

/s/ John F. Matthews, Attorney for H. K. Perry."

Five days after Judge Hobgood signed the consent judgment of November 3, 1962, Mr. and Mrs. Pearce excepted and appealed to the Supreme Court.

John F. Matthews for plaintiff appellee.
Gaither M. Beam for purchasers, appellants.

HIGGINS, J. This proceeding seems to have changed direction twice as it meandered through the Superior Court. In order that the true course may be more easily followed, we have included in the statement of facts the full text of certain pertinent documents which show the guardian first objected to the proposed sale, both for lack of need and for inadequacy of price. However, with court approval, the guardian substituted an amended answer, omitting the objection and admitting the need. He recommended a private sale to Hilda P. Pearce and husband, Marshall E. Pearce, at $45,000.00, however, retaining for Mr. and Mrs. Perry a life estate in the house and a lot.

The clerk ordered the private sale to Hilda P. Pearce and husband, appointed commissioners to make it, and directed them to make report for the court's further order. The commissioners complied with the order by making the sale as directed, and recommended that it be confirmed in the absence of an advance bid within ten days. Thirteen days after the sale and report thereof the clerk entered an order of confirmation, directed the commissioners to execute and to deliver deed to the purchasers. Judge Hobgood, on that same day, approved, confirmed, and ratified the sale. Judge Hobgood signed the approval order in Alamance County by written consent of the attorneys of record for both the petitioner and the guardian.

Two days after the entry and approval of the confirmatory decree, W. H. Perry, attorney in fact for the petitioner, gave notice that he appealed for these errors: (1) The power of the court is limited to the execution of mortgages, etc., by G.S. 35-15. (2) The sale destroyed the tenancy by the entireties. (3) Paragraph three of the original answer raised issues of fact not determined by the court. (4) Judge Hobgood approved the confirmatory decree outside Franklin County. (5) The court failed to find that $45,000.00 was a fair price for the lands.

Judge Hobgood entered an order finding "that the parties have agreed that the said confirmatory decree be set aside and that the land involved be sold at public auction to the highest bidder." The order vacating the confirmation was based solely upon the consent of W. H. Perry, the attorney in fact for the petitioner, the guardian, and the two commissioners. Mr. and Mrs. Pearce were not parties to the agreement to set the sale aside.

By virtue of the sale, the Pearces had become the equitable owners of the land. This Court said in *Page v. Miller,* 252 N.C. 23, 113 S.E. 2d 52: "After confirmation, the power of the court is much more restricted. The purchaser is then regarded as the equitable owner, and the sale . . . can only be set aside for 'mistake, fraud, or collusion' established on petitions regularly filed in the cause," citing *Upchurch v. Upchurch,* 173 N.C. 88, 91 S.E. 702; *Beaufort County v. Bishop,* 216 N.C. 211, 4 S.E. 2d 525; *Joyner v. Futrell,* 136 N.C. 301, 48 S.E. 649; *McLaurin v. McLaurin,* 106 N.C. 331, 10 S.E. 1056; *Evans v. Singletary,* 63 N.C. 205. " . . . (A)ll motions . . . other than those grantable as a matter of course . . .must be on notice." *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Boone v. Sparrow,* 235 N.C. 396, 70 S.E. 2d 204. The court was powerless to take away the vested interest of Mr. and Mrs. Pearce without notice and opportunity to be heard. G.S. 1-581; *Collins v. Highway Commission, supra; In Re*

Woodell, 253 N.C. 420, 117 S.E. 2d 4. The sale may be set aside only after proper notice and for valid reasons. *Page v. Miller, supra.*

The five assigned grounds upon which the petitioner seeks to set aside the private sale are not in and of themselves sufficient in law to invalidate the sale. (1) G.S. 35-15 does not limit the court's power to authorize a mortgage. The court may authorize a sale. (2) The sale does not destroy or separate the interests of the tenants by entireties if one of the parties is incompetent. The right of survivorship is transferred to the fund. A divorce will convert tenancy by entireties into a tenancy in common. A *voluntary* sale will work a conversion of the land into personalty to be held as other personalty. *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468. However to be voluntary, the sale must be made by both husband and wife. Both must be *sui juris.* If one is incompetent, a sale cannot be the voluntary act of both. When the court finds it necessary for the good of the parties to require a sale, it is necessary that a good title pass to the purchaser. However, the right of survivorship is transferred to the fund to be held in the manner hereinafter discussed. (3) Paragraph (3) of the original answer was omitted from the amended answer, thus eliminating the third objection. (4) The Judge of the Ninth Judicial District was a proper officer to approve the confirmation. He could do so outside the district by consent. Counsel of record for both parties presented the order and consented to it in writing. *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448; *Jeffreys v. Jeffreys,* 213 N.C. 531, 197 S.E. 8; *Pate v. Pate,* 201 N.C. 402, 160 S.E. 450. (5) The court found the sale for $45,000.00 was for the best interest of the ward. The petitioner had obtained an offer for the private purchase for $45,000.00 which he had asked the court to authorize and to approve. He is not in a position to complain.

Ordinarily discussion respecting the disposition of the purchase price received for the property would not be required. However, in this instance one of the interested parties is incompetent. She is under guardianship — a ward of the court. That part of the court's order with respect to the division of the fund does not seem to be authorized. Having held the involuntary sale of the lands does not destroy the tenancy by the entireties, but merely transfers the rights of the tenants from the land to the fund, we call the Superior Court's attention to these legal principles: The husband is under the legal duty to support his wife. *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414. During marriage he is entitled to control and to receive the rents and profits from property held by entireties. *In Re Estate of Perry,* 256 N.C. 65, 123 S.E. 2d 99; *Nesbitt v. Fairview Farms,* 239 N.C. 481,

80 S.E. 2d 472. The law applicable to the fund in this instance, therefore, gives the husband the right to control. The income from it is his, but he must support himself and his wife. He may not invade the corpus of the fund except to the extent his income from all sources is insufficient for his wife's and his own needs. Otherwise he holds the corpus of the fund as trustee for the survivor unless the wife be restored to competency, in which event the parties, acting together, may make a legal disposition. The discretion given the court by G.S. 35-17 is limited to the protection of the incompetent's interests. The power to dissolve the rights of survivorship incident to the entireties estate is not within the court's discretion. The wisdom of an estate by entireties may be debatable. Nevertheless the principle is firmly imbedded in our decisions, and a wife's right to take all if she survives was vested in her by the original conveyance. *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466.

The order entered on November 3, 1962, is vacated. Unless the sale is set aside for mistake, fraud, or collusion, the purchasers, Hilda P. Pearce and husband Marshall E. Pearce, upon the payment of the purchase price, are entitled to a deed from the commissioners. The Superior Court still holds the fund. Disposition of it will be in accordance with applicable law.

Error and remanded.

PARKER, J., concurring in the majority opinion. The court below made an erroneous adjudication in respect to the vitally important question of the distribution of the proceeds of the sale of the estate by the entirety, as clearly set forth in the majority opinion. To remand this special proceeding to the superior court without deciding that question would probably result in a similar erroneous adjudication which would necessitate another appeal to this Court, the cost and expenses of which would impair the corpus of the estate by the entirety. Florence Johnson Perry is an incompetent person, and as such it is unquestionable that she is a ward of the superior court of Franklin County which has full equitable powers and jurisdiction of her person. It is the special duty of this court having such jurisdiction to conserve her estate by the entirety. 44 C.J.S., Insane Persons, secs. 57 and 79. What was said in *Latta v. Trustees of the General Assembly of the Presbyterian Church,* 213 N.C. 462, 196 S.E. 862, in respect to infants is equally applicable in respect to incompetents like Florence Johnson Perry:

> "In all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights. When necessary the courts will go so far as to take notice *ex mero motu* that the rights of infants are endangered and will take such action as will properly protect them."

"Normally questions not determinative of the appeal are not decided," but in this instance I feel that the majority opinion is not only justified in stating the law applicable to the fund in this case, which is a pure question of law, but that this court should do so to discharge its duty to a ward of the court in order to conserve the estate by the entirety for the benefit of the incompetent. I find precedent for my opinion in *De Bruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553; *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503.

BOBBITT, J., dissenting in part. I agree that, for the reasons stated in the majority opinion, the order of November 3, 1962, should be vacated.

I do not agree that the proceeds from a sale of real estate authorized and consummated in accordance with G.S. Chapter 35, Article 4, are to be treated as real estate owned by husband and wife as an estate by entirety. These statutory provisions apply when the husband or the wife or both are mentally incompetent. In my view, the legal effect of such authorized and consummated sale is the same as if both husband and wife were competent and had made a voluntary sale and conveyance, that is, one-half of the proceeds becomes the separate property of each spouse. Under this view: (1) If the husband is the incompetent, the wife becomes the absolute owner of one-half and the husband's one-half is immediately available for the support of the incompetent husband and of his wife. (2) If the wife is the incompetent, she becomes the absolute owner of one-half and the husband's one-half is primarily liable for her support. (3) If both husband and wife are incompetent, the incompetent wife becomes the absolute owner of one-half and the husband's one-half is primarily liable for her support.

SHARP, J., joins in this dissenting opinion.

RODMAN, J., concurring in part: High bidders at a judicial sale whose bid had been accepted by decree of confirmation are deprived of

vested rights by an order entered without notice to them and without an opportunity to be heard. They appeal from the order setting aside the decree of confirmation. That appeal presents the single question: Were appellants entitled to notice and an opportunity to be heard? *Justice Higgins,* speaking for the majority, answers in the affirmative. With this conclusion I am in complete agreement for the reasons so clearly stated by him.

Questions relating to the distribution of the proceeds of sale are not germane to the question presented by appellants. I think it unwise to express opinions on questions not raised by the appeal. It may be noted the parties who challenged the decree of confirmation have consented to the order of 3 November which orders a division of the proceeds of sale between the husband and wife. If in fact such division is for the best interest of the incompetent, no reason now occurs to me why the court should be deprived of the power to make such order.

GENERAL INSURANCE COMPANY OF AMERICA v. WILLIAM F. FAULKNER AND WIFE, MRS. WILLIAM F. FAULKNER.

(Filed 1 May 1963.)

1. Parent and Child § 7—

At common law the mere relationship of parent and child did not impose liability on the parent for the torts of the child, but liability on the part of the parent usually obtained only when there was an agency relationship or when the parent in some way joined in the commission of the tort.

2. Same; Constitutional Law §§ 11, 20, 24—

G.S. 1-538.1 imposing liability on the parent in an amount not exceeding $500 for malicious or wilful destruction of property by the child affords the parent notice and opportunity to be heard and is a constitutional exercise of the police power for the purpose of curbing juvenile delinquency. Article I, § 17, of the Constitution of North Carolina.

3. Constitutional Law § 23—

The Fifth Amendment to the Constitution of the United States does not limit the powers of the States but operates solely on the Federal Government.

4. Pleadings § 12—

A demurrer admits the truth of the facts properly alleged in the complaint and the relevant inferences deducible therefrom, but such admission is solely for the purpose of the demurrer and does not obtain if the

demurrer is overruled, nor does the demurrer admit inferences or conclusions of law.

5. Insurance § 86; Parent and Child § 17—

An insurance company paying the loss sustained in a fire maliciously set out by a minor in a school is subrogated to the rights of the county board of education against the parent of the minor under G.S. 1-538.1, since the right of subrogation is not limited to claims arising in tort but extends to rights afforded by statute.

6. Subrogation; Parties § 2—

An insurer paying for damage to property owned by the insured is subrogated to the rights of the insured both under G.S. 58-176 and under equitable principles, and upon payment the insurer becomes the real party in interest and therefore must maintain in its own name an action against the party liable for the loss.

BOBBITT, J., dissents.

APPEAL by plaintiff from *Clark, J.*, 8 October 1962 Civil Term of WAKE, Small Claims Division.

Civil action, by virtue of G.S. 1-538.1 to recover $500.00 in damages from the parents of an eleven-year-old son living with them for his malicious or wilful destruction of property, heard upon a demurrer to an amended complaint.

We summarize the allegations of the amended complaint.

Plaintiff issued to the Kinston City Board of Education its policy number 43-125F-4064 providing insurance coverage for the Teachers Memorial School in Kinston. Among the risks covered by the policy was loss by fire to the building and its contents to the maximum limit of $479,000.00. The policy was in full force and effect on 1 December 1961.

On 1 December 1961 Freddie Faulkner, an eleven-year-old boy living with his parents, went into the auditorium of the Teachers Memorial School and maliciously and wilfully set fire to certain drapes or curtains constituting a part of the furnishings of the auditorium, and before the fire was discovered and extinguished it had damaged the property of the school in the amount of $2,916.50. This damage was proximately caused by the malicious and wilful conduct of Freddie Faulkner.

The Kinston City Board of Education made demand upon plaintiff under the provisions of its policy for payment for its loss by fire in the amount of $2,916.50, which amount plaintiff paid under the provisions of its policy, and plaintiff thereby became subrogated to the

rights and claims of the Kinston City Board of Education against any tort-feasor or tort-feasors responsible for the fire and loss.

Plaintiff is entitled to recover from defendants a sum not to exceed $500.00 by virtue of the provisions of G.S. 1-538.1, and prays for a recovery from the defendants, jointly and severally, in the amount of $500.00.

Defendants demurred to the amended complaint upon the following grounds:

One. It fails to allege that any act or omission to act on the part of the defendants was the proximate cause of any injury to plaintiff.

Two. Plaintiff is not one of the persons, firms, corporations, or organizations named in G.S. 1-538.1 as being authorized to institute an action and recover under the statute.

Three. It fails to allege facts sufficient to show that plaintiff is the real party in interest, and entitled to maintain the action.

Four. The statute is penal in nature, is not based on any default or wrongful act on the part of the defendants, is in derogation of the common law, and plaintiff is not entitled to maintain this action as subrogee or otherwise.

Five. G.S. 1-538.1 is unconstitutional as being in violation of Article I, section 17, of the North Carolina Constitution, and in violation of the Fifth Amendment to the Constitution of the United States.

Six. It fails to allege sufficient facts to constitute a cause of action for the breach of any legal duty on the part of the defendants, or either of them, or any legal liability on their part.

From a judgment sustaining the demurrer, and dismissing the action, plaintiff appeals.

Dupree, Weaver, Horton & Cockman by Jerry S. Alvis for plaintiff appellant.

White & Aycock by Charles B. Aycock for defendant appellees.

PARKER, J. G.S. 1-538.1, which was enacted by the General Assembly at its regular session in 1961, inclusive of the Title, reads:

> "DAMAGES FOR MALICIOUS OR WILFUL DESTRUCTION OF PROPERTY BY MINORS.—Any person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization, or any nonprofit cemetery corporation, or organization, whether incorporated or unincorporated, shall be entitled to recover dam-

> ages in an amount not to exceed five hundred dollars ($500.00), in an action in a court of competent jurisdiction, from the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property, real, personal or mixed, belonging to any such person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization."

At common law, with which our decisions are in accord, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. *Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598. Parental liability for a child's tort at common law was imposed generally in two situations, *i.e.,* where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. *Lane v. Chatham, supra; Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; Strong's N. C. Index, Vol. 3, Parent and Child, sec. 7; 67 C.J.S., Parent and Child, secs. 67 and 68.

Dissatisfaction with the common law rule, which often leaves the injured party with a worthless action against an insolvent minor, has been frequently manifested by circumvention by the courts of the rule through dubiously founded agency relationships, and at times through strained application of the "foreseeability" rule in order to find that some negligent act on the parent's part is the proximate cause of the injury. It seems that as a result of this apparent judicially expressed dissatisfaction, which in reality is an expression of the thoughts of modern society, and as a result of the increased incidents of juvenile vandalism, a large number of states, particularly in very recent years, have enacted parental liability statutes.

In *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784, the Court, speaking by *Moore, J.,* states:

> "While the family purpose doctrine sometimes deals with relationships other than that of parent and child it constitutes an exception to the common law rule with respect to the liability of a parent for the torts of his minor child, in automobile cases. * * *
>
> "* * *In this State it is not the result of legislative action, but is a rule of law adopted by the Court. 'The doctrine undoubtedly involves a novel application of the rule of *respondeat superior* and may, perhaps, be regarded as straining that rule unduly.' 5 Am. Jur., Automobiles, s. 365, p. 705."

With the enactment of G.S. 1-538.1, North Carolina joins thirty-one other states which have imposed, by more or less similar statutes,

vicarious liability upon parents by virtue of their parental relationship for the malicious, or wilful, or intentional acts of their children. N. C. Law Review, Vol. 40, p. 625, where in an appendix to a Statutory Comment on "Parental Responsibility Statute" beginning on p. 619, there is set forth a list of the states with a statutory reference, the year of original passage, the maximum liability, and the age of the minor as set forth in the statutes of these thirty-one states. It appears that all of these statutes, except that of the State of Hawaii, are concerned in varying degree with property destruction caused by the child. These statutes significantly depart from the common law rule set forth above. "It is said that no person has a vested right in a continuance of the common or statute law." *Pinkham v. Mercer,* 227 N.C. 72, 40 S.E. 2d 690.

Defendants by their demurrer assert that G.S. 1-538.1 is unconstitutional as in conflict with Article I, section 17, of the North Carolina Constitution and as in conflict with the Fifth Amendment to the United States Constitution.

So far as a diligent search on our part and the briefs of counsel disclose, we know of only one case where the constitutionality of these statutes has been challenged, and that is *Kelly v. Williams* (Tex. Civ. App.), 346 S.W. 2d 434, rehearing denied 12 May 1961. In this case in a non-jury trial, appellee Williams obtained a judgment against appellant Kelly, father of the minor Warner S. Kelly, pursuant to the provisions of Article 5923-1, Vernon's Ann. Civ. St. An appeal was taken asserting primarily the unconstitutionality of the statute, in that it violated certain specified sections of the Constitution of the State of Texas, and violated the Fifth and Fourteenth Amendments to the United States Constitution. The pertinent part of the statute reads:

> "Section 1. Any property owner, including any municipal corporation, county, school district, or other political subdivision of the State of Texas, or any department or agency of the State of Texas, or any person, partnership, corporation or association, or any religious organization whether incorporated or unincorporated, shall be entitled to recover damages in an amount not to exceed Three Hundred Dollars ($300) from the parents of any minor under the age of eighteen (18) years and over the age of ten (10), who maliciously and wilfully damages or destroys property, real, personal or mixed, belonging to such owner. However, this Act shall not apply to parents whose parental custody and control of such child has been removed by court order, decree, or judgment."

The Court affirmed the judgment below, holding that the statute is not unreasonable and discriminatory and a denial of equal protection and due process of law, and is not in violation of certain specified sections of the Constitution of the State of Texas and of the Fifth and Fourteenth Amendments to the Constitution of the United States. The Court ended its opinion with this language:

> "Twenty-four other states, inclusive of Alaska and Hawaii, have enacted comparable legislation, the constitutionality of which have never been under attack. Exhaustive law articles have also been written on the subject. All authors (see 37 Texas Law Review, p. 924) have endorsed these laws and have commented on the public justice accomplished by their passage. We quote the following from Villanova Law Review, Vol. 3, p. 529: 'The Civil Codes of Europe, Central and South America, Quebec, Louisiana, Hawaii and Puerto Rico have always provided for parental liability for the torts of children.' Now '* * *these legislatures * * * have decided that in all fairness, it is better that the parents of these young tort feasors be required to compensate those who are damaged, even though the parents be without fault, rather than to let the loss fall upon the innocent victims.' "

For other exhaustive law articles on this subject, see Chicago-Kent Law Review, Vol. 34, p. 222, June 1956; University of Kansas City Law Review, Vol. 28, p. 185, summer 1960; Michigan Law Review, Vol. 55, p. 1205, 1957; Notre Dame Lawyer, Vol. 30, p. 295, 1955; Washington Law Review, Vol. 36, p. 327, 1961; West Virginia Law Review, Vol. 60, p. 182, 1958; West Virginia Law Review, Vol. 64, p. 354, 1962.

In the University of Kansas City Law Review article in respect to legislation imposing vicarious liability upon parents for the tortious acts of their children, this is said on pp. 186-7:

> "There appears to have been no cases in which the constitutionality of these statutes has been tested. As will be seen, these statutes resemble in their purpose the various 'family car' statutes that have been on the books for many years. Without going into any great detail, the constitutionality of these 'family car' statutes seems to rest on a balancing of the public interest and the individual interest. With the public interest held paramount the courts have found such statutes as being within the police power of the state. There seems to be no valid reason that the courts would hold otherwise on the 'vandalism' statutes. It seems fair and equitable to put the responsibility on the parent who may be

at least partly to blame for the child's conduct, rather than the innocent injured party."

G.S. 1-538.1, and similar statutes, appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. Thus, the limitation in our statute of liability to malicious or wilful acts of children, as well as the limitation of liability to an amount not to exceed $500.00 for the destruction of property, fails to serve any of the general compensatory objectives of tort law. Its rationale apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children.

In *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717, the Court said: "Under Article I, section 17, of the State Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process of law are interchangeable terms."

G.S. 1-538.1 gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding, adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. For the plaintiff to recover from the parents he must establish, *inter alia,* by the greater weight of the evidence, (1) that the minor was under the age of eighteen years living with his parents, and (2) that the child maliciously or wilfully destroyed property, real, personal, or mixed.

The Fifth Amendment to the United States Constitution, "unlike the Fourteenth, has no equal protection clause." *Currin v. Wallace,* 306 U.S. 1, 14, 83 L. Ed. 441, 450. "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on the Federal Government. * * * Due process and equal protection of the laws are guaranteed by the Fourteenth Amendment, and this amendment operates to restrict the powers of the state * * *." *Brown v. New Jersey,* 175 U.S. 172, 44 L. Ed. 119.

It is our opinion, and we so hold, that the enactment by the General Assembly of G.S. 1-538.1 is within the police power of the State of North Carolina, and that it is not violative of the provisions of

Article I, section 17, of the State Constitution, or of the provisions of the Fifth Amendment to the Federal Constitution.

The demurrer admits, for the purpose, the truth of factual averments well stated in the amended complaint, and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. City of High Point,* 237 N.C. 66, 74 S.E. 2d 440. The admissions inherent in a demurrer are not absolute, because the conditional admissions made by a demurrer forthwith end if the demurrer is overruled. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

The demurrer admits as true the factual averments in the amended complaint that the damage by fire to the school building and its contents amounted to $2,916.50, and that plaintiff paid the amount of damage in full as required by its contract of insurance. Consequently, if the right of subrogation exists for plaintiff to sue defendants under the provisions of G.S. 1-538.1, plaintiff is a necessary party plaintiff, must sue in its own name to enforce its right of subrogation, because it is entitled to the entire fruits of the action, and must be regarded as the real party in interest under G.S. 1-57. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

Subrogation originated in equity and is a creature of equity. Its object is the prevention of injustice and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; 83 C.J.S., Subrogation, sec. 2. "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. [Citing authority.] The party who is subrogated is regarded as entitled to the same rights and, indeed, as constituting one and the same person whom he succeeds. [Citing authority.]" *Dowdy v. R.R.* and *Burns v. R.R.,* 237 N.C. 519, 75 S.E. 2d 639; *Peek v. Trust Co., supra,* p. 15.

It is well-settled law that an insurer paying a loss by fire under the obligations of its policy is entitled to subrogation to the rights of insured against persons whose fault or negligence caused the loss, to the extent of the loss paid, both by the provisions of G.S. 58-176 and under equitable principles. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Winkler v. Amusement Co.,* 238 N.C. 589, 79 S.E. 2d 185; 46 C.J.S., Insurance, sec. 1209, p. 152.

It is said in 46 C.J.S., Insurance, pp. 154-5: "The doctrine of subrogation is based on principles of natural justice and is created to afford relief to those required, as insurers, to pay a legal obligation which ought to have been met, either wholly or partially, by an-

other.* * *Insurer's right to subrogation is not limited to cases where the liability of the third person is founded in tort, but any right of insured to indemnity will pass to insurer on payment of the loss, including rights under contracts with third persons, and rights under a statute making a city liable for injury to property by a mob or riot therein." See to same effect, Appleman, Insurance Law and Practice, Vol. 6, p. 521.

This is said in 29A Am. Jur., Insurance, sec. 1720, p. 799:

> "The insurer's right of subrogation has been held to exist, although the liability of the third person was not founded in tort, as where an insurer who had paid to the insured the value of internal revenue stamps lost in a fire was held entitled to the latter's statutory right to reimbursement by the government; where the insurer was held to be subrogated to the insured's right to enforce contribution for the cost of a party wall; and where the insurer was held entitled to be subrogated to the rights of the insured against his lessor. An insurer may be subrogated to the right of the insured under a statute, as for example, the latter's right to recover against a railroad company under a statute rendering the latter liable to property owners for damages caused by fires set by the operation of the road, although the statute cannot be construed as giving the insurer a right of recovery independent of the insured. Likewise under some circumstances, the insurer may be subrogated to the rights of a mortgagee. However, the equitable doctrine of subrogation is applicable in aid of an insurer only where the insurer has some right which equity recognizes, to be furthered thereby."

If the Kinston City Board of Education had had no fire insurance on the school building and its contents, it would undoubtedly have been able to bring an action against defendants by virtue of the provisions of G.S. 1-538.1. The question presented is: May plaintiff, an insurance company, bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who, pursuant to the provisions of G.S. 1-538.1 would have been able to bring such an action in its own name? This question is of first impression in this State. So far as an exhaustive search on our part discloses, this question has not been passed upon by any one of the thirty-one other states which have statutes similar to our G.S. 1-538.1. The answer to the question is, Yes.

We cannot accept the narrow and niggardly interpretation of G.S. 1-538.1 as contended for by defendants. That interpretation would lead to the illogical result that the defendants admittedly liable according to the admissions made by the demurrer for damage to the property of the Kinston City Board of Education in an amount not exceeding $500.00, if it had had no insurance, are relieved of all liability by reason of the collection of insurance by the Kinston City Board of Education; in other words, the defendants would receive the benefit of the insurance without having to pay a cent for it. To paraphrase language used in *Lyon & Sons v. Board of Education,* 238 N.C. 24, 76 S.E. 2d 553, in holding that the right of subrogation existed under the provisions of G.S. 143-291 *et seq.,* known as the Tort Claims against State Department and Agencies, it is not apparent why the prudent foresight of the Kinston City Board of Education in protecting its property by insurance should result in a detriment to the insurance company who paid the fire loss in full. The granting of subrogation will reach an equitable result: to deny it would accomplish injustice.

There is no merit to the contention of defendants that the amended complaint is fatally defective, because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of any injury to plaintiff, for the reason that G.S. 1-538.1 imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilful destruction of property by a child under the age of eighteen living with them. The amended complaint states facts sufficient to constitute a cause of action against defendants under the provisions of G.S. 1-538.1.

The judgment sustaining the demurrer is

Reversed.

BOBBITT, J., dissents.

IN THE MATTER OF: THE WILL OF MINNIE MORGAN MARKS, DECEASED.

(Filed 1 May 1963.)

1. Wills § 8; Courts § 20—

Where the will of a nonresident is probated in the state of her residence in accordance with its laws, an exemplified copy of the will and probate proceedings may be brought to this State and probated here

in the county in which property of the estate is located, G.S. 28-1(3), in which event it is effective to pass title to the personalty in this State, but does not pass title to realty in this State unless the probate in the state of the deceased's domicile meets the solemnity required of probate in this State. G.S. 31-27.

2. Same—

Where two separate wills of the same deceased have been probated respectively in two states, the courts of each state have jurisdiction to determine the question of where the deceased was domiciled at the time of her death, and neither is bound by the adjudication of the other of the question of domicile, which is determinative of the jurisdiction of the court to probate the will. G.S. 28-1(1); G.S. 31-12.

3. Same; Wills § 7—

A written will may be revoked by a subsequently written will executed in the manner provided by statute, but in order to establish the revocation of a probated will by a subsequent writing it is necessary to prove the revocation in the manner required to establish the validity of the paper originally offered for probate. G.S. 31-5.1(1).

4. Wills § 12—

In this State the proper procedure to challenge the validity of the probate of an instrument in common form is by caveat.

5. Same—

After the will of a decedent has been probated in this State it is error to allow the probate of an exemplified copy of the probate in another state of another instrument written by the same decedent, the proper procedure being to attack the probate in this State by caveat, in which caveat proceeding the executors named in the instrument executed in the other state may offer to probate that instrument in solemn form, or controvert the fact of the deceased's domicile.

6. Same; Clerks of Court § 11—

An assistant clerk of the Superior Court has plenary authority to probate an instrument in common form. G.S. 2-10.

APPEAL by movants from *Riddle, S.J.*, October 22, 1962 Special Civil Term of MECKLENBURG.

Charles J. Henderson, named as executor, offered for probate in the Superior Court of Mecklenburg County a paper writing dated 19 January 1961 purporting to be the last will and testament of Mrs. Minnie Morgan Marks. On 29 March 1961 this writing was adjudged to be Mrs. Marks' will and admitted to probate as such in the Superior Court of Mecklenburg County.

Mary Schulhofer and Arthur Schulhofer, hereafter designated as movants, filed in the Superior Court of Mecklenburg County on 31 March 1961 a verified petition in which they alleged: (1) Mrs. Marks

died 21 March 1961 "while residing and being domiciled" in South Carolina; (2) she owned at her death real and personal properties in Mecklenburg County worth approximately $60,000; (3) she died testate; her will dated 14 February 1961 was duly proved and admitted to probate in Aiken County, S. C., on 27 March 1961. Attached to the petition was an exemplified copy of the proceedings in South Carolina where the paper writing dated 14 February 1961 was probated in common form. The petition for probate filed in South Caroline alleged: "That Minnie Morgan Marks age 82 years, who last dwelt in Aiken in the County and State aforesaid, died testate. . ." Movants are beneficiaries and executors of the writing probated in South Carolina.

On 5 April 1961 the clerk of Mecklenburg County Superior Court ordered the exemplified copy of the South Carolina proceeding recorded and admitted the writing dated 14 February 1961 to probate as Mrs. Marks' will. Movants were, on 23 May 1961, appointed administrators c.t.a. of Mrs. Marks' estate.

On 21 March 1962 movants filed with the clerk a written motion alleging the death of Mrs. Marks in South Carolina, the probate there on 27 March 1961 of the writing dated in February, the filing of the transcript of the South Carolina proceedings in North Carolina, and the probate in North Carolina on 29 March 1961 of the writing dated in January 1961. They prayed that the order of probate entered 29 March 1961 be set aside. The clerk gave notice of this motion to the executor and beneficiaries named in the writing of January 1961. The executor answered. He alleged: Mrs. Marks was a resident of Mecklenburg County. She died while visiting in Aiken, S.C. He asserted the validity of the order dated 29 March 1961 probating the January writing.

The clerk, after hearing the parties, concluded the probate of 29 March 1961 "was in all ways correct and proper; and that the recordation of the South Carolina probate and the appointment of Administrators c.t.a. by this court on or about April 5, 1961, were improvidently entered by this court." He ordered the transcript of the South Carolina proceeding stricken from the records.

Movants appealed to the Superior Court. It affirmed the order of the clerk. Movants excepted to the judgment affirming the order of the clerk and appealed.

Blakeney, Alexander & Machen by Ernest W. Machen, Jr., for movant appellants.

Clayton & London by O. W. Clayton and David H. Henderson for respondent appellees.

RODMAN, J. The right to make testamentary disposition of property is conferred by statute. *In re Will of Roberts,* 251 N.C. 708, 112 S.E. 2d 505; *Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352.

A writing declared by its author to be his will is ineffectual to pass title to property prior to probate in conformity with the laws of the state where the property is located. *Morris v. Morris,* 245 N.C. 30, 95 S.E. 2d 110; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *Paul v. Davenport, supra; Cartwright v. Jones,* 215 N.C. 108, 1 S.E. 2d 359; *In re Thomas,* 111 N.C. 411.

The word "probate" when used in reference to a document purporting to be a will means "the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court, and ascertains whether or not it is the last will of the deceased." *Brissie v. Craig, supa; Stevens' Executors v. Smart's Executors,* 4 N.C. 83; *U. S. v. Hiawassee Lumber Co.,* 238 U.S. 553, 59 L. ed. 1453.

Each of the instruments claimed by the parties to be Mrs. Marks' will names an executor. Each purports to be witnessed, the writing dated in January by two witnesses, the other dated in February by three witnesses. It is the duty of a person named as executor to apply to the court having jurisdiction to have the writing probated. G.S. 31-12.

To pass title to property in North Carolina an attested will must be witnessed by at least two competent witnesses. G.S. 31-3.3. Such a will may be probated on the testimony of two of the attesting witnesses, but if the testimony of only one attesting witness is available, then upon the testimony of such witness with proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and proof of the handwriting of the testator, unless he signed by his mark, and proof of such other circumstances as will satisfy the clerk of the Superior Court as to the genuineness and due execution of the will. G.S. 31-18.1(2). The testimony of a witness is unavailable "when the witness is dead, out of the State, not be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify." G.S. 31-18.1(3)(c). A written will may be revoked by a subsequent written will executed in the manner provided for the execution of written wills. G.S. 31-5.1(1).

It is the duty of the clerk taking probate of a will to embody the substance of the testimony of witnesses in his certificate of probate to be recorded with the will. G.S. 31-17. Compliance with this statute is essential to a valid probate. *R.R. v. Mining Co.,* 113 N.C. 241; *In re Thomas, supra.*

The Legislature has provided different rules for the probate of wills dependent upon the testator's domicile and the situs of property disposed of. The will of a resident of this state should be probated in the county of his domicile. G.S. 28-1(1). When a resident of this state dies outside the state and his will is probated in another state, a duly certified copy of the will so probated may be offered for original probate in this state, and its validity as a testamentary disposition of property established in the same manner as if the original had been offered for probate here. G.S. 31-22. When the will of a nonresident dying outside the state disposes of property in the state, the will may be offered for original probate before the clerk of the county in which the property is situated. G.S. 28-1(3). Instead of offering such will for original probate in this state, the interested parties may have it probated in the state in which the testator was domiciled. When probated according to the laws of that state, an exemplified copy of the will and the probate proceedings may be brought to this state and probated here. Such a will, unless probated in accordance with the laws of this state, is not sufficient to dispose of real property in this state. G.S. 31-27. It has no efficacy for any purpose in this state until probated here, but when probated here on the exemplified copy, it suffices to pass title to personalty and the right to enforce claims which testator could assert against citizens or properties in this state, even though not executed or proven as required by the laws of this state. *McEwan v. Brown,* 176 N.C. 249, 97 S.E. 20. This is true because personalty as a general rule has its situs at the domicile of the owner, and a will valid in the state of his domicile transfers the title thereto irrespective of the physical location of the personal assets. *Warlick v. Reynolds,* 151 N.C. 606, 66 S.E. 657; *Jones v. Layne,* 144 N.C. 600; *Hornthal v. Burwell,* 109 N.C. 10; *Grant v. Reese,* 94 N.C. 720; *Moye v. May,* 43 N.C. 131; *Williamson's Adm'r. v. Smart,* 1 N.C. 355; 6 Bowe-Parker: Page on Wills, sec. 60.11; 11 Am. Jur. 476.

The probate court in South Carolina did not expressly find that Mrs. Marks was a resident of that state at the time of her death. We may presume that court acted upon the assumption that she was a resident of that state, thereby authorizing the probate court of South Carolina to take jurisdiction. *Henson v. Wolfe,* 130 S.C. 273, 125 S.E. 293.

Domicile is, however, a question of fact. Different courts may reach different conclusions with respect to this factual question. An express adjudication by the probate court of South Carolina in a proceeding to probate in common form a paper as Mrs. Marks' will that she was a resident of that state would not be binding on the courts of this state. If that question be raised on an offer to probate in North Carolina, our court, on evidence presented to it, might reach a different factual conclusion without invading constitutional rights. *Riley v. New York Trust Co.*, 315 U.S. 343, 86 L. ed. 885; *Burbank v. Ernst*, 232 U.S. 162, 58 L. ed. 551; *Tilt v. Kelsey*, 207 U.S. 43, 52 L. ed. 95. Nor would comity compel us to accept a finding so made.

Only one witness testified in the probate proceeding in South Carolina. No explanation is made for not taking the testimony of the other witnesses. The proof made in South Carolina would not suffice to permit the will to original probate in North Carolina. G.S. 31-18.1.

When a writing purporting to be a will has been duly probated and thereby determined to be the last will of the deceased, such as the January paper writing, it is effective as of the moment of testator's death. G.S. 31-41. The date appearing on the instrument then becomes immaterial. Manifestly, testator cannot dispose of his property later than the moment immediately preceding his death.

Courts, when called upon to determine whether it is necessary to caveat a writing theretofore admitted to probate in order to establish a later writing as a will, have reached different conclusions. See *Re Bronson*, 107 A.L.R. 238, and *Re Elliott*, 157 A.L.R. 1335, decided by the Supreme Court of Washington, and the annotations to those cases.

This court has consistently adhered to the rule that the proper way to challenge the validity of a probate in common form is by caveat. *In re Will of Puett*, 229 N.C. 8, 47 S.E. 2d 488; *Walters v. Children's Home*, 251 N.C. 369, 111 S.E. 2d 707; *Holt v. Holt* 232 N.C. 497, 61 S.E. 2d 448

The probate in South Carolina of the February writing did not pass title to property in North Carolina, nor did it give anyone authority to act in this state until probated here. Because it could not be probated here until the judgment establishing the writing dated in January as Mrs. Marks' will had been set aside, it follows that it was necessary for the South Carolina executors to caveat the previously probated will. *In re Will of Puett, supra; Conzet v. Hibben*, 112 N.E. 305, Ann. Cas. 1918A 1197. They could, as a part of the caveat proceeding, offer to probate in solemn form the writing dated in February 1961. *In re Will of Hine*, 228 N.C. 405, 45 S.E. 2d 526. In such a pro-

ceeding interested parties would have the right to challenge the assertion of the South Carolina executors that Mrs. Marks was domiciled in South Carolina at her death.

The February writing in specific language revokes "all previous wills or instruments of a testamentary nature heretofore by me made." To establish the revocation of a will by a subsequent writing it is necessary to prove the revocation in the manner required to establish the validity of the paper writing originally offered for probate. G.S. 31-5.1(1). Notwithstanding the probate in South Carolina, it would be competent, on the caveat, for interested parties to show the writing of February 1961 was not in fact Mrs. Marks' will. *In re Will of Chatman,* 228 N.C. 246, 45 S.E. 2d 356; *Rice v. Jones,* 8 Call's Rep. 89 (Va.); *Kerr v. The Devisees of Moon,* 9 Wheat. 565, 6 L. ed. 161; *Allaire v. Allaire,* 37 N.J.L. 312; *Evansville Ice & Cold-Storage Co. v. Winsor,* 48 N.E. 592.

The January writing was probated by the assistant clerk. She had plenary authority to act. G.S. 2-10. The order admitting the February writing to probate made a few days after the assistant clerk had acted was made by the clerk himself. He was apparently inadvertent to the fact that his assistant had previously probated the January writing. When his attention was called to the prior probate, he properly vacated his order of April probating the February writing.

Affirmed.

IN THE MATTER OF THE ESTATE OF MINNIE MORGAN MARKS, DECEASED.

(Filed 1 May 1963.)

Executors and Administrators § 4—

Upon the revocation of the probate in this State of the will of a nonresident, it is proper for the clerk to revoke his order appointing as administrators c. t. a. the persons named executors in the purported will, since the clerk may not appoint persons to administer an estate as directed by a writing until that writing has been here established as a will.

APPEAL by petitioners from *Riddle, S.J.,* October 22, 1962 Special Civil Term of MECKLENBURG.

Clayton & London by O. W. Clayton for petitioner appellee.

Blakeney, Alexander & Machen by Ernest W. Machen, Jr., for appellants.

RODMAN, J. This is a companion case to *In re Will of Marks,* ante, 326. The facts are there stated. The February writing, which was there held not entitled to probate until the writing previously probated had been successfully attacked by caveat, named petitioners Mary Schulhofer and Arthur Schulhofer as executrix and executor. When they sought to probate the February writing, they likewise prayed for the appointment of ancillary administrators. They gave bond as required by G.S. 28-186 and were, on 23 May 1961, issued letters c.t.a.

The clerk, in his order of 12 April 1962, revoked the probate of the paper naming petitioners as executors and likewise revoked the order appointing them as administrators c.t.a.

Manifestly the clerk's order, which was affirmed by the judge, was correct because the writing dated in February 1961 had not been established in North Carolina as Mrs. Marks' will. Petitioners could not here administer an estate as directed by a writing until that writing had been here established as a will.

Affirmed.

STATE v. JAMES EDWARD WOODRUFF.

(Filed 1 May 1963.)

1. Criminal Law § 71—

The competency of a confession is a preliminary question for the trial court and the court's determination of the question of the voluntariness of the confession is conclusive on conflicting evidence, but what facts amount to threats or promises rendering a confession involuntary and incompetent is a question of law which is reviewable on appeal.

2. Same—

The use of promises or threats invalidates a subsequent confession unless it is made to appear that their influence had been entirely done away with before the confession was made.

3. Same— Facts in evidence held not to support conclusion that confession was voluntary.

Evidence tending to show that the sheriff answered in the affirmative defendant's inquiry whether he would like information relating to a particular homicide, obtained favors and concessions on the part of State officials to induce defendant to aid in solving the homicide, and promised that if the evidence obtained involved defendant in the commission of the offense that he would try to help defendant, without evidence show-

ing affirmatively that any promises were withdrawn prior to defendant's confession, *held* insufficient to support the conclusion that the confession was voluntary, and the admission of the confession in evidence is prejudicial error.

APPEAL by defendant from *Clarkson, J.*, August Term 1962 of CALDWELL.

This is a criminal action in which the defendant James Edward Woodruff was tried upon a bill of indictment charging him with the premeditated murder of Mrs. Mary Chandler. The defendant pleaded not guilty.

The State's case rests almost exclusively on confession and admissions against interest purportedly made by the defendant. Defendant's brother, Odell Woodruff, on 27 February 1962, signed a confession to the effect that he and his brother agreed to rob the home occupied by Thomas R. Chandler and his wife, Mary Chandler.

According to the confession, Odell Woodruff entered the Chandler home and pretended to want to buy liquor. When he asked Chandler for his money, Chandler grabbed a shotgun. Odell shot him (which resulted in his death). Mrs. Chandler reached under a mattress and he shot her (she apparently died instantly). Odell's confession further stated that the defendant James Edward Woodruff came through the door of the Chandler home about that time; they searched the house but apparently found no money, although officers later discovered approximately $5,700 in cash in the house. Following Odell's confession he pleaded guilty to murder in the first degree and is serving a life sentence.

Later, Odell repudiated his confession and claims that he confessed and pleaded guilty merely to avoid taking any chance on being convicted and sentenced to death in the gas chamber. This defendant likewise denied that he ever admitted to the truth of Odell's confession as to his participation in the robbery-murder and offered evidence tending to establish an alibi.

When Odell's confession was read to the defendant James Edward Woodruff, according to the State's evidence the defendant agreed that it was correct except for three things which bear no substantial relationship to the question of guilt or innocence.

The crime of which the defendant was convicted was committed on 29 October 1959, and from that time until in February 1962 this defendant was not under suspicion of having participated in the commission of the crime.

In the meantime, the defendant James Edward Woodruff was arrested and held in jail on certain charges of forgery. He got in touch

with J. B. Myers, Sheriff of Caldwell County, while in jail and asked him if he would like to know something about the Chandler killings. The Sheriff told him he would. The defendant wanted to have several forgery charges against him consolidated for trial and he further wanted his cousin, Wilma Carroll, who was subject to an 18 months' prison sentence, to serve her time in jail in Caldwell County instead of being committed to the Women's Prison in Raleigh. Sheriff Myers talked with the proper authorities and the requests were granted. The defendant then informed the Sheriff that a few weeks before the Chandler slayings he and Odell were out one night driving with a certain Bobby Coffey and that Coffey suggested that they should rob the Chandlers because the Chandlers kept money in the house. The defendant said he refused.

Thereafter, Sheriff Myers located Bobby Coffey in Winston-Salem and ascertained where he was rooming. Sheriff Myers came to Raleigh and requested the Governor, the Director of Prisons, and the Chairman of the Parole Commission to grant the defendant, who was at that time confined in prison, a temporary parole in order that the defendant might work with the Sheriff on the Chandler case. The parole was arranged and Woodruff was taken to Winston-Salem and housed in a hotel. The Sheriff gave the defendant $40.00 on two occasions in Winston-Salem and told the defendant to use the money any way he could to get information. The Sheriff's testimony tends to show that the defendant was authorized to buy liquor and to get Bobby Coffey drunk, if necessary, to get information out of him about the Chandler killings. Bobby Coffey was arrested in Winston-Salem but no pertinent evidence was obtained out of him at that time and he was later released. The defendant was then taken to Joyceton in Caldwell County and housed in a motel. The next day, the defendant's wife was brought to the motel and permitted to stay with her husband two or three nights. The Sheriff paid the motel bill. The Sheriff then took the defendant to his father's home where he and his wife stayed for about a week until the defendant was returned to prison.

The record is not clear as to the exact date the Sheriff concluded that the defendant was a party to the murders of Mrs. Mary Chandler and her husband, Thomas R. Chandler. However, it does not appear that the promises of Sheriff Myers to help the defendant if the defendant would help solve the Chandler case were withdrawn prior to the time the alleged confession of Odell Woodruff was read to this defendant in the office of the S.B.I. in Raleigh on 28 February 1962.

In the trial below, Sheriff Myers testified that it looked like James Woodruff, Odell Woodruff, and Bobby Coffey were all three involved

in the murders of the Chandlers. "(I)t looked like all three were in it — at that time it looked like Ed Woodruff did not go in the house and was not involved all the way in this thing, I did tell Ed Woodruff several times if he would help me out on this thing I would certainly appreciate it." (The defendant is referred to in the record at times as James and at other times as Ed Woodruff.)

The following question was propounded to Sheriff Myers: Q. "I believe you have answered the question, but to make sure * * * you did give him to understand at one time that if he confessed that it would go lighter with him — that you would try to see that it went lighter with him?" A. "I told him at one time — that was before he was even suspected in this thing — that if he was in this and he could explain and get this thing with us to where it would involve him (at that time the testimony was beginning to show he may be in this thing) — that if he would help us with this thing, we certainly would try to help him. Never did I tell him anything like this after he was once suspected of this thing."

The defendant testified on *voir dire* that he did not admit to the truth of the confession of Odell Woodruff which was read to him. He testified that he said, "There's three lies right there as plain as the nose on your face. You can check. And Mr. Vanderford (an S.B.I. agent) turned around and said, 'There's just three things wrong with it?' and I said, 'It's a d..... lie * * *.' No, I never did admit that any part of the statement was true."

The evidence further tends to show that sometime prior to his purported confession the defendant was taken to a room in Raleigh at 8:00 o'clock one morning and kept there until 4:00 o'clock the next morning, during which period of twenty hours he had one hamburger and a cup of coffee. In the meantime, he took two lie detector tests and was questioned off and on during this entire period of time; that during a part of this time he was handcuffed to a chair.

The court held the evidence offered on the *voir dire* was competent and ruled that the alleged confessions, if any, made by the defendant were not induced by any threats or by any inducements. The witnesses offered on the *voir dire* then testified before the jury and the State offered the confession of Odell Woodruff against the defendant. The jury returned a verdict of guilty with a recommendation of life imprisonment, and sentence was pronounced in accord therewith.

From the judgment imposed, the defendant appeals, assigning error.

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

A. R. Crisp and Hal B. Adams for defendant.

DENNY, C.J. The appellant assigns as error the ruling of the court below to the effect that the alleged confessions, if any, made by the defendant, were not induced by any threats or by any inducements, and to the admission of such purported confessions, together with the confession of Odell Woodruff against the defendant.

The competency of a confession is a preliminary question for the trial court, and is not ordinarily subject to review. *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319; *S. v. Rogers,* 216 N.C. 731, 6 S.E. 2d 499; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704.

In *S. v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121, Stacy, C.J., speaking for the Court, said: "It is conceded that if the evidence in respect of the voluntariness of the statements were merely in conflict the court's determination would be conclusive on appeal. *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885 * * *. Equally well established, however, is the rule that 'what facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court.' *S. v. Andrew,* 61 N.C. 205 * * *. And further, where a 'person in authority' offers some suggestion of hope or fear, *S. v. Livingston,* 202 N.C. 809, 164 S.E. 337, *S. v. Grier,* 203 N.C. 586, 166 S.E. 595, to one suspected of crime and thereby induces a statement in the nature of a confession, the decisions are at one in adjudging such statement to be involuntary in law, and hence incompetent as evidence. * * *

"A free and voluntary statement in the nature of a confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but any statement wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Patrick,* 48 N.C. 443. * * *"

In *Barnes v. State,* 36 Tex. 356, the Court said: "The legal proposition that confessions made while under an arrest, induced by promises or threats, cannot be used in evidence against a party making them, has been too long and definitely settled to now require argument or citation of authority to sustain it. It is also quite well settled, as a presumption of law, that the influence of threats or promises once made continue to operate until rebutted by proof clearly showing that it had ceased to operate."

In *S. v. Drake,* 113 N.C. 624, 18 S.E. 166, this Court said: "It is a well-settled rule that if promises or threats have been used, it must be

made to appear that their influence has been entirely done away with before subsequent confession can be deemed voluntary, and therefore admissible."

We think the evidence introduced in the hearing below on the competency of the purported confession, tends to show the defendant had every right to believe that the Sheriff of Caldwell County had substantial influence with court officials and others in places of authority. It will be noted that as a prerequisite or condition upon which the defendant had agreed to give information that might be helpful in solving the Chandler killings, he requested that several charges against him for forgery be consolidated for trial and, further, that his cousin, Wilma Carroll, who had been convicted and given a prison term of 18 months, be permitted to serve her sentence in jail in Caldwell County instead of being committed to the Women's Prison in Raleigh. Sheriff Myers obtained approval of both requests. Thereafter, Sheriff Myers had requested and gotten the approval of the Governor, the Director of Prisons, and the Chairman of the Parole Commission to grant the defendant a temporary parole in order that he might help the Sheriff in solving the Chandler killings. While on parole, the defendant was housed in a hotel in Winston-Salem for several days and given $80.00 spending money, then taken to a motel in Caldwell County where he spent several nights with his wife, and the Sheriff paid the motel bill. Thereafter, the defendant and his wife were carried to the home of defendant's father where they lived together for about a week before the defendant was returned to prison.

Furthermore, we think the Sheriff's testimony with respect to any promises made to the defendant is susceptible of the interpretation that if the defendant would help him solve the Chandler case and it developed that the defendant was involved, he, the Sheriff, would "certainly try to help him." Moreover, we think the evidence suggests the conclusion that this promise was made after the Sheriff felt reasonably sure the defendant was involved in the Chandler killings. The Sheriff was present in Raleigh on 28 February 1962 when the confession of Odell Woodruff was read to the defendant, and there is nothing in the record to indicate that the promise or promises theretofore made to the defendant were not still available to him.

We do not think the purported confession of the defendant can be considered free and voluntary within the meaning of our decisions, and his purported confession and that of Odell Woodruff should have been excluded. It follows, therefore, that the defendant is entitled to a new trial, and it is so ordered.

New trial.

CLAUDE ANDREW GIBSON v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES.

(Filed 1 May 1963.)

1. Automobiles § 2—

The Department of Motor Vehicles is given exclusive authority to issue, suspend, or revoke licenses to operators of motor vehicles upon the public highways of the State, but a license is a privilege in the nature of a right of which the licensee may not be deprived except upon the conditions and in the manner prescribed by statute.

2. Same—

The suspension or revocation of an operator's or chauffeur's license for driving during the period of revocation or suspension of license must be based upon a conviction of that offense, and neither a conviction of driving 75 miles per hour in a 60 miles per hour zone, nor a conviction of having no driver's license, warrants a suspension or revocation of license under G.S. 20-28(a), nor do such convictions warrant the mandatory suspension or revocation of license, G.S. 20-17, G.S. 20-16.1, G.S. 20-16(a)(1), nor the suspension of license under G.S. 20-16.

PARKER, J., dissents.

APPEAL by plaintiff from *Copeland, Special Judge,* January 7, 1963, Civil Term of WAKE.

Proceeding under G.S. 20-25 for review of an order issued February 23, 1962, by the Department of Motor Vehicles directing that petitioner's North Carolina motor vehicle operator's license and also his California license be suspended effective January 18, 1962, until January 18, 1964, heard below on the facts set forth in a stipulation dated January 7, 1963, to wit:

"1. The plaintiff is at present a resident of the City of San Diego, State of California, where he lives at 4124 Campus Avenue, Apartment #6. The plaintiff is now playing professional football under a contract with the San Diego Bears.

"2. Before June, 1961, the plaintiff resided in the City of Asheville, Buncombe County, North Carolina. He attended North Carolina State College through the years 1958, 1959, 1960, and January through May of 1961.

"3. On July 21, 1958 the plaintiff obtained a motor vehicle operator's license issued by the State of North Carolina, which license expired on May 26, 1962.

"4. On May 2, 1960 the plaintiff was convicted in the Recorder's Court of Randolph County of speeding 80 miles per hour.

He was directed to pay a fine of $35.00 and costs, to surrender his operator's license and not to operate a motor vehicle until his license was returned.

"5. On May 20, 1960 the Director of the North Carolina Department of Motor Vehicles issued an order of suspension to the plaintiff directing that his North Carolina motor vehicle operator's license be suspended for a period of 90 days effective from May 2, 1960 until August 2, 1960. The cause of suspension was stated: 'speeding over 75 miles per hour, G.S. 20-16.1, G.S. 20-16(10). Date of conv: May 2, 1960.'

"6. After the plaintiff's conviction on May 2, 1960, and before issuance of the suspension order of May 20, 1960, the plaintiff requested a hearing on the suspension order before an officer of the Department of Motor Vehicles. The Hearing Officer recommended that 30 days be deducted from the period of suspension provided the plaintiff successfully completed a driver improvement clinic. This recommendation was approved by Ralph C. Stephens, the Chief Hearing Officer, on May 20, 1960. The records of the Motor Vehicle Department show that the plaintiff successfully completed the driver improvement clinic on July 12, 1960.

"7. The official records of the North Carolina Motor Vehicle Department contain a second order of suspension dated May 20, 1960 similar to the order referred to in Paragraph 5, with the exception that the following words have been superimposed on the face of the record: 'Reinstate July 2, 1960, provided the provisions of the Safety Responsibility Act (G.S. 20-279.1 — 20-279.30) has (*sic*) been complied with. B.C.B., Reviewing Officer.'

"8. The plaintiff failed to file proof of financial responsibility with the North Carolina Motor Vehicles Department as required by G.S. 20-279 until November 30, 1962.

"9. On July 8, 1960 the plaintiff was charged with the offense of no driver's license. He was tried for this offense in the Raleigh City Court on July 27, 1960, was convicted, and was ordered to pay a fine of $25.00 and costs.

"10. On July 11, 1960 the North Carolina Department of Motor Vehicles issued an order to the City Police of Raleigh, North Carolina to pick up the operator's license of the plaintiff for the reason that he had been convicted of speeding over 75 miles per hour in Recorder's Court, Randolph County. This order was served July 11, 1960 by G. W. Mann of the Raleigh Police Department.

"11. On March 24, 1961 the North Carolina Department of Motor Vehicles issued an order of suspension to the plaintiff suspending his operator's license for one additional year to the prior suspension or until August 2, 1961. The cause of suspension was: 'driving while license suspended by no operator's license. G.S. 20-28 date of conv: July 27, 1960, City Court, Raleigh, North Carolina.'

"12. The plaintiff moved to San Diego, California in June, 1961 and began playing professional football under his contract with the San Diego Bears in August, 1961.

"13. On November 21, 1961 in San Diego, California the plaintiff obtained a State of California Driver's License which will expire on May 26, 1964. On said date the plaintiff purchased an automobile, and also obtained an automobile liability insurance policy, being Northwestern Mutual Insurance Company Policy No. 7108-4401, a copy of which is attached hereto.

"14. In January, 1962, the plaintiff returned to North Carolina to take additional work at North Carolina State College. On January 2, 1962 the plaintiff was charged with speeding 75 miles per hour in a 60 mile-per-hour zone in High Point, North Carolina. He waived appearance and was convicted in the Municipal Court of High Point on January 18, 1962. He was fined $15.00 and ordered to pay court costs. The records of the court show that he had a California driver's license and was driving an automobile with a California license plate.

"15. On February 23, 1962 the Department of Motor Vehicles issued an order of suspension to the plaintiff directing that his North Carolina motor vehicle operator's license and also his California license be suspended effective January 18, 1962 until January 18, 1964. The cause of suspension was stated as: 'driving while license suspended (second offense) by speeding 75 mph. G.S. 20-28. Date of Offense: January 2, 1962, Municipal Court, High Point, N. C.'

"16. The defendant herein is the Commissioner of Motor Vehicles, State of North Carolina.

"17. The plaintiff on November 30, 1962 purchased National Indemnity Company Automobile Insurance Policy No. ACEE-204704. Said insurance company has filed due and proper proof of financial responsibility with the North Carolina Department of Motor Vehicles, and such filing is still in effect."

From judgment affirming the Department's said order of February 23, 1962, plaintiff appeals.

William Joslin for plaintiff appellant.

Attorney General Bruton and Assistant Attorney General Barham for defendant appellee.

BOBBITT, J. Plaintiff was convicted on May 2, 1960, of operating a motor vehicle upon the public highways at a speed in excess of seventy-five miles per hour. For this offense, G.S. 20-16(a)(10) and G.S. 20-19(b) authorized the issuance on May 20, 1960, of the order suspending plaintiff's operator's license from May 2, 1960, until August 2, 1960.

The order issued March 24, 1961, suspending plaintiff's operator's license for an additional year, that is, until August 2, 1961, was based on plaintiff's conviction on July 27, 1960, in the City Court of Raleigh, of operating a motor vehicle upon the public highways on July 8, 1960, without an operator's license. The order issued February 23, 1962, suspending plaintiff's operator's license for two years, that is, until January 18, 1964, was based on plaintiff's conviction on January 18, 1962, in the Municipal Court of High Point, of operating an automobile upon the public highways on January 2, 1962, at a speed of seventy-five miles per hour in a sixty-mile per hour zone.

Neither the offense for which plaintiff was convicted in the City Court of Raleigh nor that for which he was convicted in the Municipal Court of High Point is an offense for which upon conviction the suspension or revocation of an operator's license is mandatory. G.S. 20-17, G.S. 20-16.1, G.S. 20-16(a)(1). Moreover, neither is an offense for which the Department is authorized by G.S. 20-16 to suspend an operator's license.

G.S. 20-28(a), the statute on which defendant relies as authority for the order of February 23, 1962, in part, provides:

"Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense; . . .

"Notwithstanding any other provisions of this section, in those cases *of conviction of the offense provided in this section* in which the

judge and solicitor of the court wherein *a conviction for violation of this section was obtained* recommend in writing to the Department that the Department examine into the facts of the case and exercise discretion in suspending or revoking the driver's license for the additional periods provided by this section, the Department shall conduct a hearing and may impose a lesser period of additional suspension or revocation than that provided in this section or may refrain from imposing any additional period. Any person *convicted of violating this section* before or after May 14, 1959, shall be entitled to the benefit of the foregoing relief provisions.

"Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of the court, or both; provided, however, the restoree of a suspended or revoked operator's or chauffeur's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without an operator's license." (Our italics)

G.S. Chapter 20, Article 2, entitled "Uniform Driver's License Act," vests exclusively in the State Department of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles upon the public highways. *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 34, 84 S.E. 2d 259, and cases cited; *Honeycutt v. Scheidt,* 254 N.C. 607, 608, 119 S.E. 2d 777. However, "(a) license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696; *Harvell v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 699, 706, 107 S.E. 2d 549.

It is mandatory for the Department to revoke the license of any operator upon receiving a record of such operator's *conviction* of any offense listed in G.S. 20-17. *Carmichael v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 472, 106 S.E. 2d 685. It is mandatory for the Department to suspend for thirty days the license of any operator on receiving a record of such operator's *conviction* of any offense listed in G.S. 20-16.1 *Shue v. Scheidt, Comr. of Motor Vehicles,* 252 N.C. 561, 114 S.E. 2d 237. As a basis for suspension or revocation of an operator's license, a plea of *nolo contendere* has the same effect as a conviction or plea of guilty of *such offense. Mintz v. Scheidt,* 241 N.C. 268, 84 S.E. 2d 882, and cases cited.

Subject to the provision discussed below, "*(c)onviction* of operating a motor vehicle when operator's license has been suspended makes mandatory an additional suspension of his license, G.S. 20-28." (Our

italics) *Beaver v. Scheidt, Comr. of Motor Vehicles,* 251 N.C. 671, 111 S.E. 2d 881. G.S. 20-16(a), in part, provides that "(t)he Department shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee: (1) Has committed an offense for which mandatory revocation of license is required *upon conviction.*" (Our italics)

Here, plaintiff has never been convicted of or tried for the offense defined in G.S. 20-28(a), namely, the operation of a motor vehicle while his operator's license was suspended or revoked. Unless and until he is so tried and convicted, G.S. 20-28(a) vests no authority in the Department in respect of the suspension or revocation of his operator's license.

Defendant contends plaintiff's convictions in the City Court of Raleigh and in the Municipal Court of High Point for offenses involving the operation of a motor vehicle upon the public highways are sufficient to authorize and *require* the order of February 23, 1962. (Hence, the order of February 23, 1962, was issued without prior notice to plaintiff or hearing.) This contention ignores the *second* paragraph of G.S. 20-28(a), made an integral part of G.S. 20-28 by Chapter 1406, Session Laws of 1957, which indicates plainly that suspension for an additional period or revocation must be based on a *conviction for violation of G.S. 20-28(a).* It provides further that, in the event of *such conviction,* if the solicitor and judge of the court in which the operator is convicted so recommend in writing, suspension for an additional period or revocation is not mandatory but within the discretion of the Department after it has conducted a hearing. Obviously, the General Assembly anticipated there would be hardship cases where the violation of G.S. 20-28(a) would be technical rather than wilful. Defendant's contention is in conflict with the language and with the purpose of said 1957 amendment.

The judgment of the court below is reversed on the ground that, absent a conviction of plaintiff for the criminal offense defined in G.S. 20-28(a), the Department's order of February 23, 1962, was not authorized by G.S. 20-28(a) or otherwise. We do not reach and therefore do not discuss other questions debated in the briefs.

Reversed.

PARKER, J., dissents.

RANDOLPH J. JEWELL AND ELEANOR K. JEWELL, PLAINTIFFS V. E. JACK PRICE, DEFENDANT.

(Filed 1 May 1963.)

1. Appeal and Error § 3—

An order allowing motion to strike paragraphs of the answer is immediately appealable when the paragraphs in question set forth complete and independent defenses so that the order amounts to sustaining demurrer to the defenses. Rule of Practice in the Supreme Court No. 4(a).

2. Pleadings §§ 15, 34—

A demurrer or motion to strike a defense presents the legal question of the sufficiency of the facts alleged to constitute a defense, and since the demurrer or motion admits for its purposes the truth of the facts alleged, the court must decide the question without hearing evidence or finding facts *dehors* the record.

3. Insurance § 86; Parties § 2—

Allegations that an insurer had paid plaintiff the entire loss sued for constitute a complete defense to plaintiff's right to maintain the action, G.S. 1-57, and plaintiff's assertion that payments made by insurer covered only a portion of the loss raises an issue of fact but cannot entitle plaintiff to have defendant's defense striken from the answer.

4. Contracts § 23.1; Pleadings § 34— Construction of house in accordance with specifications is defense to action for negligent construction.

In an action by the owners to recover of the contractor damages from a fire resulting from the alleged negligence of the contractor in the installation of the furnace in the house, the contractor is entitled to allege that he built or caused the house to be built in accordance with plans and specifications established by plaintiffs and that plaintiffs had accepted the completed job prior to the fire, and therefore plaintiff's motion to strike such defense in its entirety should have been denied. Whether particular allegations should have been striken is not presented in the absence of motions under G.S. 1-153 directed to the particular allegations.

APPEAL by defendant from *McConnell, Special Judge,* August 27, 1962, Special Civil "A" Term of MECKLENBURG.

The hearing below was on plaintiffs' motion to strike the further defenses alleged in defendant's answer.

Plaintiffs instituted this action January 12, 1962, to recover damages of $48,851.88 on account of the destruction of their house and personal property by fire on January 18, 1959.

Under date of April 18, 1958, plaintiff Randolph J. Jewell and defendant entered into a contract whereby defendant, for the sum of $24,100.00, agreed to construct a house for plaintiffs. Section 23 of the plans and specifications attached to and made a part of said contract

provided for the installation in said house "of a forced warm air York-Heat oil burning furnace Model No. LB5-150."

Plaintiffs alleged the fire and their loss were proximately caused by the negligence of defendant in failing, in particulars set forth, to install said furnace in accordance with contract and legal requirements.

Defendant, answering, denied all allegations of negligence. By way of further answer and in bar of plaintiffs' right to recover defendant alleged two further defenses, *viz.*:

> "AND FOR FURTHER ANSWER AND DEFENSE, AND IN BAR OF ANY RECOVERY HEREIN, the defendant alleges that at the time of the fire referred to in the complaint the plaintiffs had fire and personal property and other property insurance coverages with Lumbermens Mutual Casualty Company, an insurance corporation organized, existing and doing business under the laws of North Carolina; that after the fire the plaintiffs made claim against Lumbermens for their various losses, including all the losses referred to in the complaint, and that thereafter Lumbermens Mutual paid to the plaintiffs for damage to the house and damage to the contents and for living expenses sums equivalent to all the losses which the plaintiffs sustained in the fire, and that the said Lumbermens Mutual Casualty Company is therefore the real party in interest in this case and is a necessary party for the complete and proper determination of the controversy, and that without the presence of Lumbermens Mutual Casualty Company as a party, the suit cannot be properly completed; that the plaintiffs have heretofore testified under oath that they do not know anything about how the fire started and have never personally made any investigation about how the fire started and that they have filed proofs of loss with Lumbermens Mutual Casualty Company covering the items allegedly lost in the fire and the alleged damage to the house; that this suit was not started until January 12, 1962, which lacked only six days of being three years after the time of the fire; that the suit was instituted by attorneys for the insurance company; that they are in fact in actual as well as theoretical control of the litigation; and that the suit ought to be in the name of Lumbermens Mutual Casualty Company so that proper discovery of the actual losses can be had and so that the distribution of the recovery, if any, can be properly made and so that the requirements of the statute that actions be prosecuted in the name of the real party in interest can be complied with.

"AND FOR A SECOND FURTHER ANSWER AND DEFENSE, AND IN BAR OF ANY RECOVERY HEREIN, the defendant Price alleges that this defendant built or caused the house to be built according to plans and specifications established by the owners, the plaintiffs herein; that the defendant Price obtained the services of Roy S. Garmon and Garmon Roofing and Heating Company, the additional defendants herein, to install the furnace according to the plans and specifications; that as far as the defendant Price knew the defendants Garmon were competent and qualified to do the job they undertook to do; that the whole job was completed and turned over to the owners two months or so before the fire; that the contract of this defendant was fully completed and accepted by the owners before the alleged casualty occurred, and that if there was any fault in the construction of the building or the installation of the furnace, which is denied, it was the fault and responsibility of the defendants Garmon or the supplier of some part or parts of the specified furnace and its related installation, and not of the defendant Price, and that the completion of the work and the intervening contract work of the defendants Garmon and the aforesaid matters and things are specially pleaded in bar of any recovery herein."

Thereupon, plaintiffs filed a motion dated May 10, 1962, to strike from defendant's answer the following:

"1. All of the first FURTHER ANSWER AND DEFENSE and paragraph 1 in prayer for relief for that Lumbermens Mutual Casualty Company is not the real party in interest and is not a necessary party, the payments by said company to the plaintiffs having covered only a portion of the plaintiffs' loss, and for that the allegations aforesaid contain no allegations of fact but are conclusions of the defendant, E. Jack Price, and are irrelevant, immaterial and improper.

"2. All of the SECOND FURTHER ANSWER AND DEFENSE and paragraphs 2 and 3 in the prayer for relief for that the plaintiffs have elected to pursue this action against the defendant, E. Jack Price, with whom they contracted, in order to recover damages for an alleged breach of their contract, and plaintiffs should be permitted to do so without having contested litigation between the defendant, E. Jack Price, and his subcontractor projected into this action, and further for that the allegations aforesaid contain no allegations of fact but are conclusions

of the defendant, E. Jack Price, and are irrelevant, immaterial and improper."

Plaintiffs attached to said motion an affidavit of T. M. Mayfield dated May 10, 1962, stating that, as president of T. M. Mayfield & Company, he personally investigated and adjusted the loss of plaintiffs arising out of the fire on January 18, 1959; that the sum of $37,495.92 was paid by Lumbermens Mutual Casualty Company to plaintiffs; that plaintiffs executed a loan receipt in that amount on January 24, 1959; and that the aforesaid payment was insufficient to compensate plaintiffs in full for their loss and, due to the insufficiency of their insurance coverage, represented only a part of their loss.

On June 27, 1962, a hearing on plaintiffs' said motion to strike was continued to permit counsel for defendant to take the deposition of Mayfield in order to obtain "additional information and evidence" for use by defendant in the hearing on plaintiffs' said motion. The record does not show whether the deposition of Mayfield was taken.

On September 17, 1962, the cause came on for hearing on plaintiffs' said motion at which time an order was signed in which the court "ORDERED, ADJUDGED AND DECREED that the motion of the plaintiffs in this action to strike all of the First and Second Answers and Defenses and Paragraphs 1, 2, and 3 of the prayer for relief as set out in the answer of the defendant, E. Jack Price, is allowed."

The said order of September 17, 1962, contains no reference to the Mayfield affidavit or to a deposition of Mayfield. Nor does it contain any findings of fact.

Defendant excepted (1) "to the signing and entry of the order striking out the first further answer and defense," and (2) "to the signing and entry of the order striking the second further answer and defense and the material from the prayer for relief," and appealed.

Howard B. Arbuckle, Jr., and Carswell & Justice for plaintiff appellees.

Helms, Mulliss, McMillan & Johnston for defendant appellant.

BOBBITT, J. Plaintiffs' motion to strike is addressed to each further answer and defense in its entirety and in substance, if not in form, is a demurrer to each further answer and defense. The court, in allowing plaintiffs' motion to strike, in effect sustained a demurrer to each of defendant's further defenses. Hence, Rule 4(a); Rules of Practice in the Supreme Court, 254 N.C. 783, 785, does not apply. *Jenkins & Co. v. Lewis,* 259 N.C. 85, 87, 130 S.E. 2d 49; *Williams v. Hunter,* 257

N.C. 754, 127 S.E. 2d 546; *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554, and cases cited.

"A demurrer or motion to strike admits, for the purpose of the hearing thereon, the truth of the allegations so challenged. When the demurrer or motion is, as here, directed to the sufficiency of a pleaded defense, the one question presented to the judge for decision is as to whether the facts alleged constitute a valid defense, in whole or in part, to plaintiff's cause of action. The judge is not permitted to hear evidence or find facts *dehors* the record. He must accept the facts as alleged and bottom his answer thereon." Barnhill, J. (later C.J.), in *Stone v. Coach Co.,* 238 N.C. 662, 664, 78 S.E. 2d 605; *Dunn v. Dunn,* 242 N.C. 234, 87 S.E. 2d 308; *Hinson v. Dawson,* 244 N.C. 23, 26, 92 S.E. 2d 393, 62 A.L.R. 2d 806.

In the first further answer and defense defendant alleged *inter alia* that Lumbermens Mutual Casualty Company, plaintiffs' insurer, "paid to the plaintiffs for damage to the house and damage to the contents and for living expenses sums equivalent to all the losses which the plaintiffs sustained in the fire," and that the Casualty Company, not plaintiffs, is "the real party in interest." G.S. 1-57.

Where insured property is destroyed or damaged by the tortious act of a third party, and the insurance company pays its insured, the owner, *the full amount* of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third party. In such event, the insurance company is "the real party in interest" (G.S. 1-57) and must sue in its own name to enforce its right of subrogation against the tort-feasor. *Burgess v. Trevathan,* 236 N.C. 157, 160, 72 S.E. 2d 231; *Herring v. Jackson,* 255 N.C. 537, 543, 122 S.E. 2d 366; *Insurance Co. v. Trucking Co.,* 256 N.C. 721, 125 S.E. 2d 25.

Plaintiffs, in their motion to strike, assert that "Lumbermens Mutual Casualty Company is not the real party in interest," that "the payments by said company to the plaintiffs . . . covered only a portion of the plaintiffs' loss," and that defendant did not allege facts but conclusions.

Defendant's allegation that the Casualty Company paid plaintiffs the full amount of their loss is an allegation of fact and may not be challenged by demurrer. As to a "speaking demurrer," see *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 488-9, 98 S.E. 2d 852, and cases cited. Moreover, if and when defendant's said factual allegation is properly traversed, the factual issue so raised, absent waiver, is for determination by a jury. G.S. 1-172; *Hershey Corp. v.*

R.R., 207 N.C. 122, 176 S.E. 265; *Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E. 2d 410.

For the reasons stated the portion of Judge McConnell's order allowing plaintiffs' motion to strike *in its entirety* defendant's first further answer and defense and paragraph 1 of his prayer for relief is reversed.

With reference to the second further answer and defense, defendant had a clear right to allege that he had built plaintiffs' house or caused it to be built according to plans and specifications established by plaintiffs and that plaintiffs had accepted the completed job prior to the fire. Hence, the portion of Judge McConnell's order allowing plaintiffs' motion to strike *in its entirety* defendant's second further answer and defense and paragraphs 2 and 3 of his prayer for relief, is reversed.

Whether particular allegations of either or both of defendant's further answers and defenses should be stricken is not before us. A motion to strike under G.S. 1-153 should be directed to specific allegations. *Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362. Plaintiffs have not made such a motion. Suffice to say, each further answer and defense contains sufficient factual allegations "of . . . new matter constituting a defense" (G.S. 1-135(2)) to withstand plaintiffs' motion that it be stricken *in its entirety*.

No question is presented as to the rights and liabilities of defendant and the Garmons *inter se*. The record contains no cross complaint by defendant against the Garmons. Nor does it show service of process on the Garmons.

As to matters *dehors* the record, albeit discussed freely in the briefs, we refrain from comment.

Reversed.

SUSAN TART NORRIS v. BELK'S DEPARTMENT STORE OF DUNN, NORTH CAROLINA, INCORPORATED.

(Filed 1 May 1963.)

1. Negligence § 37b—

The proprietor of a store owes the duty to his customers to exercise reasonable care to keep the aisles and passageways in a reasonably safe condition so as not to expose the customers unnecessarily to danger, and the duty to give warning of unsafe conditions of which the proprietor

knows or in the exercise of reasonable supervision and inspection should know, but the proprietor is not an insurer of the safety of his customers.

2. Same—

Where an unsafe condition is created by third parties or an independent agency, plaintiff must show that such condition had existed for such a length of time that defendant knew, or by the exercise of reasonable care should have known, of its existence in time to have removed the danger or to have given proper warning of its presence, and what length of time is sufficient to charge the proprietor with implied knowledge depends upon the facts and circumstances of each case.

3. Negligence § 37f— Evidence held insufficient to be submitted to jury on issue of negligence of store proprietor.

Evidence tending to show that plaintiff customer fell in the aisle of defendant's store when a small round stick under a small piece of tissue paper rolled when she stepped on it, without evidence of how long the debris had been on the floor before plaintiff fell, and without evidence from which it might be inferred that the type of goods sold at the counters was such that if merchandise were dropped dangerous conditions would result, and without evidence that the aisles and passageways were not swept and cleaned at reasonable intervals, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence, since it was not reasonably foreseeable that harm would result to anyone from the presence of the tissue paper, and that a stick was under the paper was no more apparent to defendant than to plaintiff.

APPEAL by plaintiff from *Braswell, J.*, January 1963 Term of HARNETT.

Action to recover damages for personal injuries.

Plaintiff alleges: While shopping in defendant's retail department store, her foot slipped and she fell when she "stepped upon a spot or area (of a tiled floor in an aisle) . . .which was covered with an oily or greasy substance of a slippery nature and where trash and debris had accumulated, so as to make the floor extremely dangerous for persons using said aisle." Defendant knew, or in the exercise of reasonable care should have known, that the floor was unsafe. Defendant was negligent in failing to keep the aisle reasonably free of debris, maintaining a dangerous condition by permitting the debris to remain on the floor, failing to warn plaintiff of the danger, and arranging fixtures and merchandise so as to partially obscure plaintiff's view of the aisle. Such negligence proximately caused injury to plaintiff.

Defendant denies the allegations of negligence and alleges contributory negligence.

Plaintiff's evidence is in substance as follows: Plaintiff entered defendant's store at Dunn, N. C., about 1:15 P. M. on 14 March 1961, and went to several departments. About 2:15 P. M. she went to the

infant's department on the second floor. She was an expectant mother. The merchandise was displayed on counters along an aisle. She examined a dress, and as she turned to leave the counter her foot suddenly slipped from under her, she fell and was injured. She testified: "My foot slipped on some paper and a sucker stick under the paper. . . . I looked on the floor and saw . . . two or three pieces of paper and the sucker stick was underneath the paper and caused my foot to roll out from under me. I saw the sucker stick after I fell. After I fell, I looked at the paper the sucker stick was on and it was like it had chewed it up, crinkled." It was tissue paper "just like that where you wrap up baby clothes." The paper and stick were close to the counter which was inset about 4 inches at the bottom. The floor was of some sort of tile. Plaintiff was wearing low shoes with good heels. The place where she fell was 15 or 20 feet from the wrapping counter and cash register. There is a clear view of this part of the aisle from the counter and cash register. Plaintiff reported the accident to an employee and the assistant manager of the store. About 35 minutes before the accident, plaintiff's mother-in-law saw two or three pieces of tissue paper at the place where the accident occurred.

At the close of plaintiff's evidence the court sustained defendant's motion for nonsuit. From judgment of nonsuit plaintiff appeals.

Bryan & Bryan and Wilson and Bain for plaintiff.
Maupin, Taylor & Ellis and Robert B. Morgan for defendant.

MOORE, J. Plaintiff appellant asserts that the "sucker stick" covered by tissue paper constituted a hidden danger, this condition had existed in the aisle for thitry-five minutes at least, defendant in the exercise of reasonable care should have discovered and removed the hazard or warned plaintiff of its existence, and by failure to do so defendant is exposed to liability for damages.

It is axiomatic that storekeepers are not insurers of the safety of their customers while on store premises. *Copeland v. Phthisic*, 245 N.C. 580, 96 S.E. 2d 697. Customers are invitees and the law imposes on storekeepers the duty of exercising reasonable care to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not to unnecessarily expose them to danger, and to give warning of unsafe conditions of which the storekeeper knows or in the exercise of reasonable supervision and inspection should know. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33.

Where an unsafe condition is created by third parties or an independent agency, plaintiff must show that it had existed for such a

length of time that defendant knew, or by the exercise of reasonable care should have known, of its existence in time to have removed the danger or given proper warning of its presence. *Case v. Cato's, Inc.*, 252 N.C. 224, 113 S.E. 2d 320; *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56. "The length of time for which a dangerous condition in a store must exist to charge a storekeeper with knowledge of it depends on the nature of the business, the size of the store, the number of customers, the nature of the dangerous condition, and its location." 65 C.J.S., Negligence, s. 51, pp. 547-8.

The instant case is factually unique in that the dangerous substance was a stick concealed by an innocuous piece of tissue paper. While there is no specific description of the stick in the record, it is assumed that it was cylindrical, wooden or plastic, three or four inches long, and had a diameter smaller than an ordinary pencil, and that it had been inserted in a piece of candy as a handle and was discarded after the candy was eaten. There is no showing that candy was sold in the infant's department or anywhere in the store. The dimensions of the tissue paper are not given, but inasmuch as it was of the type of paper used to wrap or separate infant's garments, the inference is that its size was relatively small. There is no evidence that either the stick or the paper was dropped or thrown on the floor by an employee of defendant.

Where a storekeeper or his employee has knowledge that a slippery, or otherwise inherently dangerous, substance is present in an aisle or passageway of a store and negligently permits it to remain there and fails to warn imperiled customers, or where such substance is and remains in the aisle or passageway for such period of time that the storekeeper or his employees in the exercise of reasonable care should have discovered its presence and removed it or given warning, and fails to do so, liability attaches for injury in consequence of such neglect. *Raper v. McCrory-McLellan Corp.*, ante. 199.

The two or three pieces of tissue paper referred to in the evidence may not be classified as inherently dangerous susbstances when lying on a level floor. There is no evidence that the floor itself was slippery. It was not reasonably foreseeable that harm would come to anyone from the presence of the tissue paper. *Wentz v. J. J. Newberry Co.*, 273 N.Y.S. 449 (1934). That a sucker stick was under the paper was no more apparent to defendant than to plaintiff.

Defendant had the duty to exercise reasonable care to keep the aisles and passageways in reasonably safe condition. A storekeeper must use reasonable care to prevent trash and debris from accumulating in and on its aisles and stairways to such extent as to be obvious-

ly dangerous to customers who are expected to use these passageways. *Relahan v. F. W. Woolworth Co.*, 67 P. 2d 538. But this does not mean that every storekeeper must maintain a continuous sweeping and cleaning operation and see that no scraps of paper remain on the floor, nor are they required to anticipate that some dangerous substance may lurk under each piece of paper that falls. They are charged only with reasonable care. There is not a scintilla of evidence in this record that there was any trash or debris in any of the aisles or passageways of defendant's store other than the tissue paper and sucker stick. There is no suggestion that the aisles and passageways were not swept and cleaned at reasonable intervals. There is no evidence from which it may be inferred that the type of goods sold was such that if merchandise were dropped dangerous conditions would result. We find no evidence of neglect of duty on the part of defendant proximately causing plaintiff's injury.

Smith v. American Stores Co., 40 A. 2d 696 (Pa. 1945), is in some aspects quite similar to the case at bar. Plaintiff was making a purchase in defendant's meat and produce market. While carrying a package from the meat counter to the cashier's desk she stepped on a piece of paper. The paper was about a foot square and apparently was flat on the floor. Actually there were some carrot tops under the paper. When plaintiff stepped on the paper her foot slipped, she fell and was injured. The trial court allowed recovery, but the appellate court reversed. The evidence failed to disclose how long the carrot tops had been there and who put them there. The legal questions involved were in some respects different from those presented on the present appeal, but the facts were quite similar. We have found no decision more nearly in point.

The judgment below is

Affirmed.

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

(Filed 1 May 1963.)

1. Trial § 33—

It is error for the court to charge the jury as to matters materially affecting the issues but not raised by the pleadings or supported by the evidence in the case.

2. Same; Negligence § 28—

A correct charge on aspects of negligence presented by the evidence and on proximate cause is rendered prejudicial by a further instruction permitting the jury to answer the issue of negligence in the affirmative if defendant was "negligent in any other way which the court may not have specifically mentioned," since such additional instruction does not confine the jury to aspects of negligence raised by the pleadings and supported by evidence.

3. Master and Servant § 21; Negligence § 22—

Even when the crucial question is whether defendant was employed to do the work as an independent contractor or whether plaintiff merely leased defendant's servant and equipment in order to do the job himself, evidence that defendant did not obtain liability insurance for the job cannot be admissible as tending to show that defendant did not regard himself as liable in the performance of the work, since the prejudicial effect of the evidence outweighs any probative force it may have on the question.

APPEAL by defendant from *Hobgood, J.*, April 1962 Civil Term of DURHAM. This appeal was docketed in the Supreme Court as Case No. 669 and argued at the Fall Term 1962.

Civil action to recover damages to an electric switchboard which fell while defendant was hoisting it with a crane truck for installation on the second floor of a new addition to the Herald Sun Building in Durham in which plaintiff was installing the electrical system. Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in plaintiff's favor. From a judgment entered on the verdict, defendant appealed.

Haywood & Denny by George W. Miller, Jr., and Egbert Haywood for plaintiff appellee.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant and F. Gordon Battle for defendant appellant.

SHARP, J. This is the second appeal in this case. The first is reported in 255 N.C. 64, 120 S.E. 2d 533. The evidence in the two trials was substantially the same, and reference is made to the former opinion for a full resume of both the pleadings and the evidence. Briefly, the controversy revolves around this question: Did plaintiff employ defendant as an independant contractor to unload and hoist the switchboard to the second floor of the building or did plaintiff merely lease defendant's servant and equipment in order to do the job himself? If, in the hoisting operation, the operator of the crane, Thomas A. Gooch, was subject to the control of plaintiff as a lent or

hired servant, defendant would not be liable to the plaintiff for Gooch's negligence. *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 227. For a full discussion of the law applicable to the loaned-servant situation, see the opinion of *Bobbitt, J.,* in *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610. While this principle formed the background of the case, it was not brought into sharp focus either by the issues or in the charge.

Defendant assigns as error the italicized portion of the following excerpt from the charge:

> "Now, if you find from the evidence and by its greater weight that the defendant through its employee failed to use due care, or that the defendant either himself or through his employee failed to properly supervise the hoisting operation and that he further had the duty to supervise it and you are satisfied by the greater weight of the evidence of those facts, and you are satisfied that this was negligence, *that he was negligent in one of these respects, or negligent in any other way which the Court may not have specifically mentioned,* and if you further are satisfied by the greater weight of the evidence that such negligence was a proximate cause of the damage suffered by the plaintiff, it would be your duty to answer Issue #1, YES."

G.S. 1-180 requires the trial judge to "declare and explain the law arising on the evidence given in the case." We have repeatedly held that it is error for the judge to charge the jury as to matters materially affecting the issues but not raised in the pleadings or supported by the evidence in the case. *William v. Dowdy,* 248 N.C. 683, 104 S.E. 2d 884; *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51; *Farrow v. White,* 212 N.C. 376, 193 S.E. 386; *McGinnis v. Robinson,* 252 N.C. 574, 114 S.E. 2d 365. *A fortiori,* it is error to give the jury *carte blanche* to speculate and apply to the case their individual notions as to what might constitute negligence "in any other way which the court might not have specifically mentioned." An identical instruction was specifically disapproved in *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601. To borrow the phrase used by *Justice Higgins* in *Utilities Commission v. Public Service Company,* 257 N.C. 233, 125 S.E. 2d 457, this instruction was "a grant to roam at large in an unfenced field." It would have been potentially hazardous even in the vacuous pre-television era. Today, as all trial judges know, on every panel there are jurors who have never before been to court but who have become arm-chair courtroom buffs as the result of regular attendance upon television trials which can be counted on to provide a dramatic

solution to the issues in the case within the time allotted to the program. Frequently the denouement has not been supported by any visible evidence, but it is always calculated to satisfy the audience.

In *Louisville & N.R. Co. v. Loesch,* 215 Ky. 452, 284 S.W. 1097, the plaintiff sued for damages sustained when the car in which she was riding struck a guardrail at defendant's toll bridge. Her only allegation of negligence was that the defendant failed to adequately light the guardrail. The judge charged the jury that it was defendant's duty "to use ordinary care to protect vehicular traffic using said bridge at said place at nighttime, by giving such notice, by the use of lights *or other means* as was reasonably sufficient to give timely warning to the traveling public of the presence of said timber guard referred to." (Italics ours) The court said:

> "(W)e are impelled to the conclusion that the insertion of the words 'or other means' was not only erroneous but prejudicial to appellant's substantial rights. That such an instruction might have been misleading to the jury is obvious, for they might have assumed under that language it was the duty of the defendant to have had posted at or near the timber guards an employee to especially warn and notify each traveler of the existence of that timber guard, or they might have considered it to be the duty of defendant to use other means of an undefined nature for the furnishing of protection."

Since this case must go back for a new trial because of the error in the charge, we deem it expedient to discuss one other question raised by defendant's assignments of error on this appeal. For the purpose of showing that he was not acting as an independent contractor on the occasion in question, defendant attempted to testify that he carried no liability insurance on this particular job; that when he assumed responsibility, it was his custom in all such instances to carry liability insurance; that on a previous job for the plaintiff, plaintiff had stopped the work when he learned defendant had no liability insurance and had procured the insurance himself. Upon plaintiff's objection this evidence was excluded from the jury. It is noted that the excluded evidence did not tend to show that the parties ever discussed liability insurance with reference to this job.

Evidence that the defendant carried liability insurance is clearly irrelevant on the issue of negligence. 20 Am. Jur., Evidence, Section 388. The converse, a showing that the defendant had no insurance, is equally immaterial and erroneous for it amounts to nothing more than a plea of poverty. *Piechuck v. Magusiak,* 82 N.H. 431, 135 A 534;

King v. Starr (Wash. S. Ct.-1953), 260 P 2d 361; *Rojas v. Vuocolo,* 142 Tex. 152, 177 S.W. 2d 962; *Graham v. Wriston* (W. Va. S. Ct. of App.-1961), 120 S.E. 2d 713.

However, as this Court has held, circumstances may render the fact of insurance competent upon other issues. Stansbury, North Carolina Evidence, Section 88; *Davis v. Shipbuilding Co.,* 180 N.C. 74, 104 S.E. 82. In a suit for damages growing out of the operation of a vehicle, it may tend to prove the relationship of the defendant to the operator or his ownership thereof since persons do not ordinarily provide insurance on property which they do not own or control. Anno: Showing as to Liability Insurance, 4 A.L.R. 2d 761, 765,; 20 Am. Jur., Evidence, Section 390. It does not necessarily follow, however that the reverse is true.

If a defendant contends that X whose active negligence caused the plaintiff's damage, was an independent contractor for whom he was not responsible, the relevancy of evidence that the defendant had protected himself against liability for X's negligence is apparent. *Isley v. Winfrey,* 221 N.C. 33, 18 S.E. 2d 702; *Biggins v. Wagner,* 60 S.D. 581, 245 N.W. 385.

The defendant contends that evidence that one alleged to be an independent contractor had not protected himself with insurance against the negligence of the operator of his equipment is equally competent to show the operator was not his employee. He argues in his brief: "A man does not purchase insurance to protect himself where he entrusts the responsibility of equipment to another. A man does purchase insurance when he knows that he is bearing the risk of loss inherent in responsibility and control." However, it is not necessarily so. A man may fail to take out insurance for many reasons. Among others, he may lack funds; he may deliberately assume the risk of liability as a self-insurer; he may have forgotten or neglected to do it; the job may have been uninsurable. It seems to us that the prejudicial effect of this evidence would so far outweigh any small probative value it might have that it must be held inadmissible.

The only case cited by the defendant in behalf of the admissibility of this negative evidence— and the only one our research has discovered — is *Albrecht v. Safeway Stores Inc., et al.* 159 Ore. 331, 80 Pac. 2d 62, in which plaintiff sued a father and his son for injuries sustained when the son, operating the father's car, collided with the automobile owned by the third defendant and operated by its agent, the fourth defendant, in which plaintiff was a passenger. The father testified that the son was driving his car without his permission which had been refused because the father had no liability insurance. The

other defendants moved for a mistrial because of this testimony. The motion was denied. When the jury exonerated the father and son and held the third and fourth defendant solely liable they appealed, assigning the denial of their motion as error. The Oregon Court said: "It was entirely proper and relevant for the father to state the reason why he did not give his consent for such use of the car even if it did bring to the attention of the jury the matter of insurance."

The two cases cited by the Oregon Court to sustain this conclusion do not seem to us to do so. In both, the fact that the defendants were insured was elicited to show the interest and bias of certain witnesses. Furthermore, even if we were to concede that it is the same thing to say, "I refused to lend my car because I had no insurance on it," and "I did not take out any insurance on my equipment on this particular occasion because my employee was operating it as the agent of another," the result of this Oregon case seems to demonstrate the overriding prejudicial effect of such evidence. We do not mean to say that there might not be situations in which evidence that a party had no liability insurance would be competent, but we do hold that the ruling of the trial court excluding it in this case was correct.

For the reasons stated there must be a

New trial.

JOHN LLOYD MILLS AND WIFE, ROSELLA MILLS v. W. H. LYNCH.

(Filed 1 May 1963.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and defendant's evidence in conflict therewith must be disregarded.

2. Cancellation and Rescission of Instruments §§ 2, 10—

Evidence that defendant and the attorney acting for all the parties induced plaintiffs to sign a deed to the defendant by falsely representing that the instrument was a deed of trust, that plaintiffs were prevented from reading the paper or having it read to them by positive assertion that this was unnecessary because plaintiffs knew it was a deed of trust and that the attorney was in a hurry, *held* sufficient to overrule nonsuit in an action to set aside the deed for fraud.

3. Same; Fraud § 5—

Ordinarily a party is under duty to read an instrument before signing it and may not avoid the instrument on the ground of mistake as to its

contents, but this rule does not apply when the failure to read the instrument is due to fraud or oppression, and the party defrauded has acted with reasonable diligence in the matter.

4. Cancellation and Rescission of Instruments § 2; Fraud § 1—

Inducing a person to execute the very instrument intended by the use of false and fraudulent representations constitutes fraud in the treaty; inducing a party to execute an instrument different from the one intended by the use of trick, artifice or fraud is fraud in the *factum*. However, the distinction is immaterial when the action is between the original parties to the instrument.

APPEAL by plaintiffs from *Walker, S.J.*, September 1962 Civil "A" Term of RANDOLPH.

Action to set aside a deed upon allegations of fraud. Plaintiffs' evidence tended to show the following facts:

Prior to June 19, 1961, John Lloyd Mills, the male plaintiff, owned an undivided one-sixth interest in a tract of land in Randolph County containing about eighteen acres. The land was subject to his mother's dower and had a tobacco allotment in her name. Plaintiff had an agreement with his brothers and sisters, who owned the other interests, to buy their shares in the land. Previously, defendant had sent word to John Lloyd Mills by his wife, the other plaintiff, that if he needed to borrow the money with which to buy the other interests he would let him have it. In consequence of this message, plaintiff advised defendant that he wanted to borrow the money from him. He asked plaintiff, "How can you make me safe?" Plaintiff replied, "Mr. Lynch, I can make you safe, a deed of trust on my place." Defendant then told plaintiff to have the attorney, who was representing plaintiff and his brothers and sisters in dividing the land and settling their father's estate, to prepare the papers. Defendant said, "Lloyd, you can pay me this money back as you raise tobacco on the place. You can pay me back at the end of the year."

When plaintiff went to the attorney's office to have the papers prepared he was informed they were already fixed and the attorney said, "All we want is the money." Thereafter the defendant discovered that the tobacco allotment on the place was not in plaintiff's name, and he said he wasn't interested in letting plaintiffs have $3,000.00 without the tobacco allotment. As a result, on June 19, 1961, plaintiff, defendant, and the attorney went to the home of plaintiff's mother. At first she refused to sell plaintiff her interest in the land because it was her only source of income. In the presence of the plaintiff and defendant the attorney said to her, "You sell your part to Lloyd, that is the only way he will let Lloyd have the money." Defendant told the mother

that she could have the house as long as she lived and then it would go to plaintiffs. As a result, the deed was then prepared at her house, and she conveyed her interest in the land to plaintiff, reserving the right to occupy the house during her lifetime. Plaintiff then went to his home, got his wife, and together they went to the attorney's office where defendant was waiting. The attorney said he had to be in Greensboro at 5:30 p.m. and was in a great hurry. In defendant's presence the attorney said to plaintiffs, "I will fix these papers without you being down here; you all ain't got a thing to do but sign a note (to) your brothers and sisters, $150.00 a piece, ($550.00) . . . Sign this deed of trust, you all know what it is; no need for you to read it, you all know what it is."

Plaintiff has only a fourth grade education and cannot read. In consequence of the representations made to him by the attorney and the defendant, he did not ask to have the paper which he signed read to him. Plaintiff testified, "I signed the note and my wife signed the note, and we both signed a deed of trust."

Plaintiffs and defendant left the office together. Outside on the street defendant said to the plaintiff, "You have got this thing straightened out, you ain't got a thing to do but go on and go to work and pay me my money."

Plaintiff had agreed to pay his brothers and sisters $500.00 each for their interests, a total of $2,500.00 and to pay his mother $750.00 for her dower, making a total of $3,250.00 for the place. The amount of the loan was $3,000.00 Plaintiff signed five notes to his brothers and sisters, each for $150.00. $500.00 went to the attorney for the fees which plaintiff and his brothers and sisters owed him for services rendered in connection with their father's estate.

About three weeks later plaintiff sold the timber off the place. When defendant stopped the cutting of the timber plaintiff learned for the first time that he and his wife had signed a deed to the defendant for the land instead of a deed of trust on it. Plaintiff had never discussed selling the property to the defendant and he never intended to sell him the land.

At the conclusion of this evidence defendant's motion for nonsuit was allowed.

Coltrane and Gavin; Elreta Melton Alexander for plaintiff appellants.

Norman and Reid for defendant appellee.

SHARP, J. This appeal presents only the question of whether the plaintiffs' evidence was sufficient to survive the motion for nonsuit.

There are a number of discrepancies and omissions in plaintiffs' evidence. Defendant's evidence, of course, was not before the court. In his answer defendant categorically denies that he was guilty of any fraud. He alleges the transaction was handled by plaintiffs' own attorney who had been employed by the family to sell the land of their father in order to pay his debts, and the proceeds of the sale were used for that purpose; that the brothers and sisters had theretofore conveyed their interest in the land to the plaintiff in order to expedite the sale; that he had refused to make plaintiffs a loan and it was at all times understood by those concerned that defendant was buying the land outright.

Albeit the facts may be different, on motion to nonsuit, plaintiffs' evidence must be taken as true and considered in the light most favorable to them. 4 Strong's North Carolina Index, Trial, Section 21. Applying this well-established rule, plaintiffs' evidence, if believed, would establish that they were wilfully misled and misinformed by the defendant and the attorney acting for all parties; that the attorney of the defendant informed plaintiffs, an illiterate man and his wife, that the instrument they were signing was a deed of trust when it was actually a deed; that plaintiffs were prevented from reading the paper or having it read to them by the positive assertion that this was unnecessary because they knew what it was, a deed of trust.

"(T)he duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity." *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40. However, we cannot say, as a matter of law, that plaintiffs' evidence in this case shows an absence of fraud or oppression. Neither can we hold as a matter of law, under the circumstances and considering the relation of the plaintiffs to the attorney acting for all the parties, that plaintiffs might not reasonably have relied upon the positive misrepresentations which they say were made.

Fraud affecting the validity of deeds is of two kinds, fraud in the treaty and fraud in the *factum. Medlin v. Buford,* 115 N.C. 260, 20 S.E. 463; *Cutler v. Roanoke R.R. & Lumber Co.,* 128 N.C. 477, 39 S.E. 30. Although it has been said "definitions are a bog for the unwary and a chart for the wicked," courts frequently find it necessary to attempt a demarcation. Where a party knowingly executes the very instrument he intended but is induced to do so by some false and fraudulent representation, we have an instance of fraud in the treaty. *McArthur v. Johnson,* 61 N.C. 317; *Medlin v. Buford,* supra; *Cutler v. Roanoke R.R. & Lumber Co., supra.*

"As a general rule, it may be said that fraud in the *factum* arises from a want of identity or disparity between the instrument executed and the one intended to be executed, or from circumstances which go to the question as to whether the instrument, in fact, ever had any legal existence, as, for example, where a grantor intends to execute a certain deed, and another is surrepetitiously substituted in the place of it . . . or where a blind or illiterate person executes a deed when it has been read falsely to him on his request to have it read . . . or where some trick, artifice or imposition, other than false representation as to the meaning and content of the instrument itself, is practiced on the maker in effecting the execution of the instrument." *Furst v. Merritt, supra.*

Plaintiffs contend that the evidence in the case makes out a case of fraud in the *factum*. However, the action is between the original parties to the deed. Therefore, the difference between fraud in the *factum* and fraud in the treaty is of no practical importance. In an action between original parties, if it appears that one induced the other to execute a paper by false and fraudulent misrepresentations as to its contents, the one who relied upon those misrepresentations to his injury — *if he acted with reasonable prudence in the matter* — is not obligated to the one who deceived him into executing the paper. *Furst v. Merritt, supra.* See also *Isley v. Brown,* 253 N.C. 791, 117 S.E. 2d 821.

It is for the jury to say what the facts are.

Reversed.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION v. RYDER TANK LINE, INC., AND CENTRAL TRANSPORT, INC.

(Filed 1 May 1963.)

1. Utilities Commission § 9—

The Utilities Commission's resolutions of the questions of public need for a particular carrier service and the ability of the applicant to perform that service are conclusive if supported by competent, material, and substantial evidence.

2. Carriers § 2—

Evidence that having a truck terminal near to port warehouses would be conducive to the development and expansion of business by enabling

shipments to be dispatched promptly is properly considered by the Utilities Commission upon the question of public need for a new carrier with nearby terminals when all other carriers authorized to transport such goods in the same territory have terminals some distance from the warehouses.

3. Same—

Evidence *held* sufficient to support the conclusions of the Utilities Commission that there was a public need for the limited carrier service proposed, and the ability of the applicant to perform that service.

4. Utilities Commission § 9—

The question of public convenience and necessity is primarily for the determination of the Utilities Commission, and its order will not be disturbed on appeal except upon a showing of capricious, unreasonable, or arbitrary action, or disregard of law.

APPEAL by Ryder Tank Line, Inc., and Central Transport, Inc., from *MacRae, S.J.*, January 14, 1963 Civil Term, WAKE Superior Court.

On June 4, 1962, Bulk Haulers, Inc., a newly chartered corporation, filed with the North Carolina Utilities Commission a verified application for common carrier authority to transport commodities in bulk, liquid or dry, in tank or hopper vehicles, and cement in bulk, bag or containers, and return rejected shipments and empty containers . . . over irregular routes between all points and places within the State of North Carolina. Two carriers filed protests and were permitted by the Commission to intervene.

Ryder Tank Line, Inc., with terminal facilities at its headquarters in Greensboro, and at Charlotte and at Fayetteville, has operating authority with identical rights applied for by Bulk Haulers, Inc. Central Transport, Inc., with headquarters in High Point, likewise has operating authority covering the same commodities and the same territory. Both Ryder and Central protested on the ground the Haulers' application duplicated their services; that there was neither present nor probable future need for the service, and that granting the requested authority would jeopardize the protestants' solvency and render their operations less profitable.

After hearing, the Commission found:

"1. Applicant has sustained the burden of proof that a public demand and need exists for its service in the transportation of caustic soda and molten sulphur in tank trucks from Wilmington, North Carolina, and a radius of 25 miles thereof, to all points and places in North Carolina and return of rejected shipments over irregular routes in addition to existing authorized transportation service.

"2. Applicant failed to sustain the burden of proving that a public need exists for additional facilities and services in the transportation of commodities other than caustic soda and molten sulphur, and that present carriers are unable to and cannot meet these needs.

"3. Applicant is fit, willing and able to properly perform the proposed service."

The Commission concluded:

"The record in this proceeding fails to reveal that there is a public demand and need for an additional transportation facility or service to transport all liquid and dry commodities, in tank or hopper equipment, of which there are perhaps hundreds, but the evidence is sufficient to satisfy us that additional facilities and service are needed to transport caustic soda and molten sulphur, liquid, in tank vehicles, from Wilmington and a radius of 25 miles thereof to all points and places in North Carolina."

The Commission ordered that a certificate issue authorizing Bulk Haulers, Inc., to transport over irregular routes caustic soda and molten sulphur in tank vehicles from Wilmington, North Carolina, and points within a radius of 25 miles thereof to all points and places in North Carolina and return rejected shipments. Upon appeal, the Superior Court overruled all exceptions and affirmed the order of the Utilities Commission. The protestants appealed to the Supreme Court.

Cannon, Wolfe & Coggin, by J. Archie Cannon, for Ryder Tank Line, Inc., appellant.

Martin and Whitley, by Robert M. Martin, for Central Transport, Inc., protestant appellant.

Bailey, Dixon & Wooten, by Ruffin Bailey, Hogue & Hill, by C. D. Hogue, Jr., for Bulk Haulers, Inc., appellee.

HIGGINS, J. The technical objections to the form of Bulk Haulers' application and the Commission's order allowing it in part, are inconsequential. They are not sustained. We need, therefore, discuss only the questions whether the applicant has carried the burden of showing (1) a public need for the limited service, and (2) the ability to perform that service. The Commission's resolution of these questions is binding on the Court if supported by competent, material and substantial evidence "in view of the entire record." *Utilities Comm. v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886; G.S. 62-121.5, *et seq.* (Truck Act of 1947).

The applicant is a new corporation operating out of Wilmington, North Carolina, and organized for the purpose of carrying the described liquid and dry commodities in tank or hopper motor vehicles over irreguar routes between all points in North Carolina. The evidence disclosed that Diamond Alkali Company has just finished at Wilmington a storage facility for bulk caustic soda. The Texas Gulf Sulphur Company is in the process of finishing a storage facility for molten sulphur. The President of the Wilmington Chemical Terminal testified the terminal is a warehouse facility, receiving caustic soda and liquid sulphur from tanker ships and barges by water from points in Texas; that present facilities are sufficient to store 3,500 long tons of caustic soda and 8,000 tons of molten sulphur; that these products are basic in the manufacture of textiles, paper, and fertilizer, and other commodities, and that heretofore these manufacturers have been required to keep on hand as much as two months' supply. With the warehousing of these products at Wilmington, only a few days' supply is necessary, thereby saving thousands of dollars in inventories.

In particular, Mr. Packer, President of Wilmington Chemical Terminal, Inc., testified: "We are supporting the petition for two reasons: one, we find it necessary to have local haulers who have terminals nearby simply so that we can get the trucks at exactly the time we need them. It really does not work in having these 75 miles away, they have to be local so we can get them quickly; that is very necessary for us. Number two is this, we specifically are supporting it because presently at this time we are soliciting new accounts . . .; twice in the last two months I have had to tell people who are coming in here that there were no local terminals in there, that the trucking service in my opinion was inadequate. This in itself keeps us from getting new business."

Mr. Henly, Southern Traffic Manager for Burlington Industries, testified: "I am supporting the application. The reason for this is that we are large user of chemicals, at our various textile plants which we now secure from vendors in states other than North Carolina, we feel that the new facilities that are being established in the State of North Carolina that a carrier certificated in Wilmington, at the origin of the supply, would be to our advantage. It is my intention to use this carrier if the certificate is granted to Bulk Haulers."

The Vice President of the North Carolina National Bank of Wilmington testified: "I am satisfied that if the certificate of authority is granted, that the funds are available to Bulk Haulers, Inc., for the operation of the business."

The evidence of many witnesses (some of which is sketchily quoted) was sufficient to show a present need for available motor carrier service of the type granted to Bulk Haulers, Inc. The evidence amply shows that a carrier based in Wilmington is essential to the future development of that port's potential storage and distribution of caustic soda and molten sulphur. A need is now present. The present availability of the service is a need for its further expansion. This the Commission may properly consider.

The protesting carriers are authorized to carry many commodities. They are based many miles from the storage facilities at Wilmington. The transportation of caustic soda and molten sulphur, and the equipment to carry them, are only incidental to the protestants' other activities. Bulk Haulers, Inc., will carry only soda and sulphur. Its tanker trucks will be operating from Wilmington. A hurried call may be answered by having a loaded tanker on the road within minutes. The advantages are obvious. The evidence of convenience and need is substantial. "It is to be remembered that what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables . . ." *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. "(T)he courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law." *Utilities Commission v. Ray*, 236 N.C. 692, 73 S.E. 2d 870.

The evidence before the Utilities Commission was sufficient to sustain its findings. The judgment of the Superior Court overruling the exceptions and approving the Commission's order is

Affirmed.

GILBERT P. WELCH AND HUSBAND, J. ARTHUR WELCH, PETITIONERS v. RUTH P. KEARNS AND HUSBAND, AUSTIN F. KEARNS, A. M. PRIMM AND WIFE, SARAH H. PRIMM, CLEO P. GREEN AND HUSBAND, WALTER GREEN, RICHARD W. PRIMM AND WIFE, GERTRUDE B. PRIMM, DEFENDANTS.

(Filed 1 May 1963.)

1. Judicial Sales § 8; Partition § 9—

A commissioner appointed to sell land for partition is entitled to have the Superior Court determine *de novo* the reasonableness of his commission upon appeal by some of the tenants in common from order of the

clerk fixng such commission. The power of the clerk to fix a fee in an amount as he may deem just, fair and reasonable, G.S. 1-408, is not divested by the provisions of G.S. 28-170.

2. Appeal and Error § 4—

A commissioner who is entitled to have his fees or compensation fixed as provided by law, and taxed as a part of the cost, is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth.

APPEAL by the commissioner from *Olive, J.*, 8 December Term 1962 of DAVIDSON.

This is a special proceeding instituted by the plaintiffs on 11 March 1961, which, according to the petition filed herein, alleges that the parties are all the heirs, including their respective spouses, of Archie A. Primm, who died intestate owning 17.38 acres of land which is the subject of this proceeding.

The petitioners alleged that a partition of the land was not practicable and requested that a commissioner be appointed to sell the land as a whole or that it be subdivided and sold in the discretion of the commissioner. M. E. Gilliam was appointed commissioner and given authority to do that which in his opinion was necessary to obtain the highest price for the property.

The commissioner subdivided the land into twenty lots and sold the lots for a total sum of $72,194.10, less expenses of the sales in the sum of $3,267.17, leaving a net balance of $68,926.93, which amount was paid into the office of the Clerk of the Superior Court of Davidson County and which sum is now held by said Clerk.

The Clerk of the Superior Court of Davidson County appointed E. W. Hooper as attorney for the commissioner. Said Clerk allowed the commissioner the sum of $7,000 for his services and his attorney the sum of $3,500.

Cleo P. Green and Ruth P. Kearns, two of the defendants, each of whom owns a one-fifth interest in the proceeds from the sale of the land involved, appealed to the Superior Court from the order making the aforesaid allowance.

His Honor, Judge Olive, heard the appeal and reduced the attorney's fee to $2,500, from which there is no appeal; and ruled as a matter of law that the commissioner's fee is determined by G.S. 28-170 and cannot exceed five per cent of the receipts and disbursements, excluding distribution of the shares of the heirs.

Whereupon, the cause was remanded to the Clerk of the Superior Court of Davidson County to compute and pay the commissioner's

fee at five per cent of the receipts and disbursements, excluding distribution of the shares of the heirs.

The commissioner appeals, assigning error.

W. H. Steed for defendant appellees.
E. W. Hooper for commissioner appellant.

DENNY, C.J. The question for determination is whether in a civil action or special proceeding wherein a Commissioner is appointed to sell land, such commissioner's fee is to be determined pursuant to the provisions of G.S. 1-408 or G.S. 28-170.

In the case of *Ray v. Banks,* 120 N.C. 389, 27 S.E. 28, this Court held the compensation to a commissioner for making a partition sale was governed by Section 1910 of the Code of 1883. This section read as follows: "In sales of real estate under this chapter, the allowance for services in making sale and title, to the officer or person appointed to sell, shall be as follows: For sales of five hundred dollars or less, not more than ten dollars; for sales of two thousand and not less than five hundred dollars, not more than two per centum; and, when the allowance shall amount to forty dollars, any additional compensation shall not exceed the rate of one per centum."

In *Williamson v. Bitting,* 159 N.C. 321, 74 S.E. 808, the defendants excepted to the report of the referee because he had allowed W. A. Whitaker (one of the executors) as commissioner, on the proceeds from the sale of lands for partition, more than the amount fixed by the statute for sales in partition proceedings. This Court said: "This was a sale for partition, and not in the execution of any trust by the executors. It is such in form and substance, and the commissioner or executors should be allowed commissions only at the statutory rate. Revisal, sec. 2792; *Ray v. Banks,* 120 N.C. 389."

The provisions of Section 2792 of the Revisal of 1905 were substantially the same as those contained in Section 1910 of the Code of 1883, and the provisions of Section 3896 of the Consolidated Statutes of 1919 were identical with Section 2792 of the Revisal of 1905.

The General Assembly of 1923 enacted Chapter 66 of the Public Laws of North Carolina, and Section 1 of said Chapter, now codified as G.S. 1-408, reads as follows: "In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services per-

formed under such order, decree or judgment, which fee shall be taxed as a part of the costs of such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same *de novo.*

Section 3 of Chapter 66 of the Public Laws of 1923 repealed all laws and clauses of laws in conflict with the provisions of said Chapter to the extent of such conflict.

In the General Statutes of North Carolina none of the provisions contained in Consolidated Statutes, Sections 3894 through 3899, were brought forward, but in the table of deleted sections in Volume 4A of the General Statutes of North Carolina, at page 397, the foregoing sections are shown as superceded by G.S. 1-408.

The previous statutes, Section 1524 of the Code of 1883, Section 149 of the Revisal of 1905, and Section 157 of the Consolidated Statutes of 1919, applied only to commissions to be paid to executors, administrators and collectors. Section 157 of the Consolidated Statutes of 1919 was rewritten and enacted by the General Assembly in Chapter 124 of the Public Laws of 1941, now codified as G.S. 28-170, and governs the amount of commissions to be paid to executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries. Even so, we do not construe the provisions of G.S. 28-170 to divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of G.S. 1-408 with respect to the fees of commissioners appointed for the sale of land as provided therein. Hence, we hold that the appellant is entitled to have this cause remanded to the judge of the superior court, who shall hear the matter *de novo* and fix the appellant's fee in such amount as he may deem just, fair and reasonable.

The appellees contend and insist that since the appellant is not a party to this proceeding he is not entitled to a review of the order entered below. No case is cited from this jurisdiction in which the identical point has been adjudicated, and we have found none.

In 4 C.J.S., Appeal and Error, section 193, page 592, it is said: "An executor or administrator is entitled to review of a decision making allowances for expenses of administration, or fixing his compensation at less than he is entitled to."

In the case of *Edwards v. Western Land & Power Co.,* 27 Cal. A. 724, 151 P 16, the Court said: "In so far as the order of the court undertaking to settle the accounts of the receiver and fix his compensation is concerned, the receiver has the right of appeal * * *."

Likewise, since the commissioner is an agent of the court and accountable to it for his actions in connection with the discharge of his

duties as commissioner, and entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, we hold he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth.

Error and remanded.

FRANK A. JOHNSON AND WIFE, MARGIE B. JOHNSON; FARMERS MUTUAL FIRE INSURANCE ASSOCIATION, RANDOLPH COUNTY BRANCH, AND H. WADE YATES, TRUSTEE FOR THE FARMERS MUTUAL FIRE INSURANCE ASSOCIATION, RANDOLPH COUNTY BRANCH v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 1 May 1963.)

1. Appeal and Error § 1—

The Supreme Court will not decide a constitutional question which was not raised and considered in the court below.

2. Eminent Domain § 7a—

In proceedings by the owners of land to recover compensation for its taking by the State Highway Commission, allegations of defendant are deemed denied when the answer is not served on plaintiffs, and therefore when the answer alleges that the land in dispute was within the area of a prior right of way granted to the Commission for the highway prior to its relocation, the burden is upon the Commission to prove the defense and the court may not enter judgment until the correct location of the previously granted right of way has been properly ascertained. G.S. 136-108.

APPEAL by plaintiffs from *Johnston, J.*, November Term 1962 of RANDOLPH.

This is a civil action instituted by the plaintiffs pursuant to the provisions of Article 9, Chapter 136 of the General Statutes of North Carolina, and, more specifically, in accordance with G.S. 136-111, against the North Carolina State Highway Commission for damages growing out of the alleged taking of the property of the plaintiffs located in Randolph County, North Carolina.

The Highway Commission filed a verified answer in which it denied in pertinent part the allegation of the complaint except that the action was instituted within the time prescribed by statute.

For a further answer and defense, the defendant alleged that the work of relocating, reconstructing and improving Secondary Road No.

1530, known as Johnson Road, was done under Project 5.572, Randolph County; that on 20 September 1957 the plaintiffs executed a petition granting to the North Carolina State Highway Commission a 60-foot right of way for Secondary Road No. 1530 across a portion of plaintiffs' land described in the complaint, a photostatic copy of which was attached to the answer marked Exhibit "A" and incorporated therein by reference; that as Project 5.572 was reconstructed across plaintiffs' land, part of the old road was relocated; that the additional area of land taken was 0.15 of an acre, as will appear in blue on the Highway Commission's map filed in this proceeding as required by G.S. 136-106 (c); that 0.15 of an acre, shaded in green on said map, is that portion of the new road constructed within the area of the previously granted right of way; and that area previously within the 60-foot right of way which has been abandoned by the relocation of the road, contains 0.19 of an acre and appears on said map in yellow. The map referred to herein was prepared by the engineers of the defendant and was attached to the answer and identified as Exhibit "B" and made a part thereof by reference thereto.

The defendant filed in the Superior Court, where this action was pending, a Notice of Deposit, and has deposited with said court the sum of money estimated by the Commission to be just compensation for the taking of the additional 0.15 of an acre of plaintiffs' land.

The defendant further alleged in its answer that the relocating and improving of the Johnson Road had offset or diminished the damages, if any, caused by said relocation and improvement thereof.

The plaintiffs placed this case on the motion docket on 5 November 1962 for a pre-trial conference, according to the statement of case on appeal.

This cause came on for hearing at the November Term 1962 of the Superior Court of Randolph County and the Court heard the matter pursuant to the provisions of G.S. 136-108, over the objection of plaintiffs' counsel. Plaintiffs were not in court.

It was ascertained and determined by the court that the note held by the Farmers Mutual Fire Insurance Association, secured by a deed of trust to H. Wade Yates, Trustee, referred to in the complaint, had been paid in full and the deed of trust cancelled of record. Therefore, the court struck out the names of all parties-plaintiff to this action except Frank A. Johnson and wife, Margie B. Johnson. Whereupon, the court further found that the plaintiffs are the owners of the land described in the complaint in fee simple, subject only to the 60-foot right of way previously granted to the defendant by the plaintiffs in 1957.

The plaintiffs introduced no evidence; the defendant introduced Exhibits "A" and "B" and rested. The court proceeded to determine all issues raised by the pleadings other than the issue of damages. It was stipulated by counsel for the respective parties that plaintiffs might waive their request for the appointment of commissioners, and the appointment of commissioners was waived by plaintiffs' counsel.

Upon the facts determined, the court entered judgment on 28 November 1962 to the effect that 0.15 of an acre, shown in blue on the Highway map filed in the case, was all the additional land taken as the result of the relocation and improvement of the Johnson Road; that the previously granted 60-foot right of way within Project 5.572 contains 0.15 of an acre and appears in green on said map; that the previously granted 60-foot right of way which had been abandoned by the Highway Commission, contains 0.19 of an acre and appears in yellow on the aforesaid map.

The plaintiffs appeal, assigning error.

Attorney General Bruton; Asst. Attorney General Harrison Lewis; Trial Attorneys John C. Daniel, Jr., and Andrew McDaniel for the State.

Ottway Burton for plaintiffs appellant.

DENNY, C.J. The appellants undertake to challenge for the first time in this Court, the constitutionality of G.S. 136-108, which reads as follows: "After the filing of the plat, the judge, upon motion and ten (10) days' notice by either the Highway Commission or the owner, shall, either in or out of term, hear and determine any issue raised by the pleadings other than the issue of damages, including, if controverted questions of necessary and proper parties, title to the land, interest taken and area taken."

It is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below.

In *Phillips v. Shaw, Comr. of Revenue*, 238 N.C. 518, 78 S.E. 2d 314, this Court said: "The question of constitutionality of the Act was not raised in the court below. It may not be raised for the first time in this Court. *Woodard v. Clark* 234 N.C. 215, 66 S.E. 2d 888; *S. v. Lueders*, 214 N.C. 558, 200 S.E. 22; *S. v. Cochran*, 230 N.C. 523, 53 S.E. 2d 663; *Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151; 11 A.J. 720." See also *S. v. Jones*, 242 N.C. 563 89 S.E. 2d 129; *S. v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1; *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398.

The only other question presented on this appeal is whether or not the exhibits alone, which constituted the only evidence introduced by the defendant with respect to the area of land taken in connection with Project 5.572 and the location of the previously granted right of way, were sufficient to sustain the findings of the court below in this respect.

As we construe the statutes governing this type of action, an answer not served on the opposing party (according to the record, defendant's answer was not served on the plaintiffs), is deemed denied as to all affirmative allegations therein. Exhibits "A" and "B" were incorporated in the defendant's answer and made a part thereof.

Therefore, in our opinion, since the plaintiffs alleged that the defendant Highway Commission had taken from them, in connection with the relocation and construction of Project 5.572, the area shown on the defendant's map Exhibit "B" in blue, as well as the area shown in green, the burden was upon the defendant to establish by competent evidence that the area shown on said map in green lies wholly within the 60-foot right of way as it existed along Johnson Road after it was taken over by the Highway Commission in 1957 and before the road was relocated and reconstructed under Project 5.572. When the correct location of the previously granted right of way has been properly ascertained, the plaintiffs having waived the appointment of commissioners, the case will be tried before a jury on the issue of damages for the additional land taken.

Error and remanded.

STATE v. D. H. SOSSAMON, JR.

(Filed 1 May 1963.)

1. Indictment and Warrant § 9—

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in a plain, intelligible, and explicit manner, G.S. 15-153, but if the statutory words fail to charge the offense they must be supplemented by other allegations supplying the deficiency.

2. Automobiles § 3—

A warrant charging that defendant operated a motor vehicle on the public highway "after" his driver's license had been revoked or suspended fails to charge the offense defined in G.S. 20-28(a), it being

necessary to charge that defendant operated a motor vehicle during the period his license was suspended or revoked.

3. Indictment and Warrant § 14; Criminal Law § 121—

A warrant which is fatally defective because of its failure to charge a criminal offense may not be cured by the court's instructions or by the verdict of the jury, and motion in arrest of judgment must be allowed.

4. Criminal Law § 121—

Arrest of judgment for a fatally defective warrant does not bar further prosecution upon a valid warrant.

APPEAL by defendant from *Johnston, J.*, October 8, 1962, Regular Criminal Term of CABARRUS.

Defendant was tried initially in the Recorder's Court of Cabarrus County and thereafter, upon his appeal from the judgment of said court, was tried *de novo* in the superior court.

In the superior court, defendant was tried on a warrant, which, as amended, charged that defendant on March 26, 1961, in No. 4 Township, Cabarrus County, "did unlawfully, willfully, operate a motor vehicle upon the public highways of North Carolina after his license had been revoked or suspended by the Department of Motor Vehicles in violation of 20-28 of the Motor Vehicles Laws of North Carolina, this being the defendant's second offense of the aforesaid crime, the same offender, D. H. Sossamon, Jr., having been convicted theretofore on or about the 29th day of February 1960, in the Cabarrus County Recorders Court of the offense of driving after his license was suspended," against the form of the statute, etc. Evidence was offered by the State and by defendant.

The jury was instructed to return one of three verdicts: "(1) Guilty of driving a motor vehicle upon the public highway during and while his driver's license were *(sic)* revoked, he having theretofore been convicted of driving a motor vehicle on the public highways during and while his driver's license were *(sic)* revoked; or (2) Guilty of driving a motor vehicle on the public highways during and while his driver's license were *(sic)* revoked; or (3) Not Guilty."

The verdict was: "Guilty of operating a motor vehicle on the public highways during and while his license was revoked."

Upon return of the verdict, defendant made a motion in arrest of judgment and excepted to the court's denial thereof.

Judgment imposing a prison sentence of eight months was pronounced. It provided that this prison sentence "shall run concurrently with the prison sentence of eight months pronounced in the Recorder's Court of Cabarrus County and for which commitment was ordered

issued by this Court this date in Case No. 8378 on the Criminal Issue Docket." (Note: The present case was designated Case No. 8377 on the Criminal Issue Docket.)

Defendant excepted to said judgment and appealed. Upon appeal, defendant assigns as error, *inter alia*, the denial of his said motion in arrest of judgment.

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

T. O. Stennett and Harry E. Faggart, Jr., for defendant appellant.

BOBBITT, J. Whether defendant's motion in arrest of judgment should have been allowed depends upon whether the amended warrant is fatally defective. This must be determined by application of the well settled legal principles stated below.

"A valid warrant or indictment is an essential of jurisdiction." *S. v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166; *S. v. Thornton*, 251 N.C. 658, 660, 111 S.E. 2d 901. A warrant or indictment must charge all the essential elements of the alleged criminal offense. *S. v. Morgan, supra.* The reasons underlying this requirement are summarized by *Parker, J.*, in *S. v. Greer*, 238 N.C. 325, 77 S.E. 2d 917. Nothing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the essential elements of the offense must be charged. *S. v. Gibbs*, 234 N.C. 259, 261, 66 S.E. 2d 883, and cases cited; *S. v. Strickland*, 243 N.C. 100, 101, 89 S.E. 2d 781; *S. v. Cox*, 244 N.C. 57, 60, 92 S.E. 2d 413.

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." G.S. 15-153; *S. v. Eason*, 242 N.C. 59, 86 S.E. 2d 774. If the statutory words fail to do this they "must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *S. v. Cox, supra*, and cases cited.

The reference in the amended warrant to G.S. 20-28 discloses an intent to charge a violation of the offense defined therein. However, "(m)erely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient." *S. v. Ballangee*, 191 N.C. 700, 702, 132 S.E. 795, and cases cited.

G.S. 20-28(a), in pertinent part, provides:

"Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this chap-

ter, *who shall drive* any motor vehicle upon the highways of the State *while such license is suspended or revoked* shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense; . . ." (Our italics)

The amended warrant charges that defendant on March 26, 1961, operated a motor vehicle upon the public highways "after his license had been revoked or suspended" but does not charge he did so "while such license (was) suspended or revoked." Nor does it allege when or for what period defendant's license had been revoked or suspended. Hence, the amended warrant does not allege an essential element, indeed the gist, of the offense defined in G.S. 20-28(a). To constitute a violation of G.S. 20-28(a), such operation must occur "while such license is suspended or revoked," that is, during the period of suspension or revocation.

It is noted that the amended warrant refers to an alleged prior conviction of defendant on February 29, 1960, for "driving after his license was suspended," not for driving while his license was suspended.

True, the jury found defendant "Guilty of operating a motor vehicle on the public highways during and while his license was revoked." It is noteworthy that the court's instructions to the jury excluded "Guilty as charged" as a permissible verdict. This suggests the court was at least doubtful as to the sufficiency of the amended warrant. Be that as it may, a fatal defect in the amended warrant could not be cured either by the court's instructions or by the verdict. *S. v. Tyson,* 208 N.C. 231, 180 S.E. 85.

We are constrained to hold that the amended warrant is fatally defective in that it does not allege in words or in substance an essential element of the offense defined in G.S. 20-28(a). The fatal defect appears on the face of the amended warrant. *S. v. Dunston,* 256 N.C. 203, 204, 123 S.E. 2d 480, and cases cited.

For the reasons stated defendant's motion in arrest of judgment should have been and now is allowed. However, the arrest of judgment on the ground a warrant is fatally defective does not bar further prosecution on a valid warrant. *S. v. Barnes,* 253 N.C. 711, 718, 117 S.E. 2d 849, and cases cited.

Judgment arrested.

STATE v. D. H. SOSSAMON, JR.

(Filed 1 May 1963.)

Criminal Law § 136—

Judgment activating a suspended sentence for condition broken may not be based upon a conviction on a fatally defective warrant.

APPEAL by defendant from *Johnston, J.*, October 8, 1962, Regular Criminal Term of CABARRUS.

This is a companion case to *S. v. Sossamon, ante,* 374, and is the case referred to therein as Case No. 8378 on the Criminal Issue Docket of Cabarrus Superior Court.

On February 29, 1960, defendant was tried in the Recorder's Court of Cabarrus County on a warrant charging that, on February 5, 1960, defendant "did unlawfully, willfully and feloniously Operate a motor vehicle upon the public highways of N. C., after his license had been revoked or suspended by the Dept. of Motor Vehicles in violation of G.S. 20-28 of the motor vehicle laws of N. C.," contrary to the form of the statute, etc. Defendant was found guilty and prayer for judgment was continued. On March 31, 1960, judgment imposing a prison sentence of eight months was pronounced. This sentence was suspended on the condition, *inter alia,* that "he (defendant) not own or operate a motor vehicle upon the public highways of the State of North Carolina for the next two years."

Thereafter, the said recorder's court entered judgment which, upon defendant's appeal, was affirmed by judgment of the superior court, activating the prison sentence of eight months imposed by the judgment of March 31, 1960.

The sentence in this case (Case No. 8378) was activated on the ground defendant had been convicted in Case No. 8377 of operating a motor vehicle on the public highways on March 26, 1961, as set forth in *S. v. Sossamon, ante,* 374, and thereby had violated the quoted condition of suspension.

In the superior court, defendant made a motion that the judgment of March 31, 1960, be arrested and excepted to the court's denial thereof. Defendant excepted to and appealed from the judgment activating the (suspended) sentence imposed by the judgment of March 31, 1960.

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

T. O. Stennett and Harry E. Faggart, Jr., for defendant appellant.

PER CURIAM. For reasons stated in *S. v. Sossamon, ante,* 374, the warrant on which the judgment of March 31, 1960, is based is fatally defective and therefore insufficient to confer jurisdiction in that it does not allege an essential element of the offense defined in G.S. 20-28(a). See *S. v. Jernigan,* 255 N.C. 732, 122 S.E. 2d 711. Hence, defendant's motion in arrest of judgment should have been and now is allowed.

Judgment arrested.

ALEX LEE WAINWRIGHT, ADMINISTRATOR OF THE ESTATE OF ALEX LEE WAINWRIGHT, JR., DECEASED v. HOYAL MILLER.

(Filed 1 May 1963.)

1. Automobiles § 34—

When a motorist sees, or in the exercise of reasonable care should see, a child ahead of him on or near the highway, the motorist is under duty to maintain a vigilant lookout, to give timely warning of his approach, and to drive at such speed and in such manner that he can control his vehicle if the child, in obedience to childish impulses, attempts to cross the street in front of his vehicle.

2. Automobiles § 41m—

Evidence permitting the inference that a motorist failed to see a child ahead of him walking on the sidewalk near the curb when, in the maintenance of a proper lookout, he should have seen the child, or that the motorist saw the child but ignored the possibility that the child might run into the street in front of his car, and did not blow his horn or use proper care with respect to speed and control of the vehicle, and that omission of duty in one or the other of these respects was the proximate cause of fatal accident to the child, is sufficient to overrule nonsuit.

APPEAL by defendant from *Paul, J.,* October 1962 Civil Term of LENOIR.

Action for the wrongful death of plaintiff's intestate allegedly caused by the actionable negligence of the defendant. Defendant's motions for judgment as of nonsuit were overruled at the close of plaintiff's evidence and at the conclusion of all of the evidence. Issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. From a judgment on the verdict, defendant appealed. The only assignments of error are that the court erred in denying the motions of nonsuit.

White & Aycock for plaintiff appellee.
Jones, Reed & Griffin for defendant appellant.

SHARP, J. The evidence in this case, viewed in the light most favorable to the plaintiff tends to show the following facts:

Bright Street in the City of Kinston is thirty-five feet wide, paved, and runs east and west. It is crossed at right angles by McDaniel Street which runs north and south. There was a path, but no paved sidewalk, on the north side of Bright Street. On the afternoon of November 27, 1959 the Christmas parade was held in down-town Kinston, and at about 3:00 p.m. children from all over town were returning to their homes from the parade. Plaintiff's intestate, Alex Wainwright, Jr., an eight-year old boy in the second grade at school, had crossed McDaniel Street and was walking in the path on the north side of Bright Street at an ordinary gait about thirty-five feet ahead of two ladies and three or four other small children. Homes and apartments were located on both sides of Bright Street near the intersection, and many children lived in this area.

The defendant, driving a 1955 Oldsmobile westwardly on Bright Street, traversed the intersection and collided with Alex, Jr., about four feet out in the street just as he stepped off the curb at a point about seventy-nine feet west of the intersection. The boy fell back on the concrete and left blood in the street about one foot from the curb. He died within an hour as a result of the injuries sustained. Witnesses estimated that defendant's car went from seventy-eight to one hundred and fifteen feet beyond the point of impact before he stopped and backed up. He told the investigating officer that he did not see the boy until the child struck the car; that it all happened so suddenly he did not have time to apply his brakes.

As he approached or crossed the intersection, the motorist driving behind the defendant observed the little boy walking down the path seventy to seventy-five feet west of the intersection. There was nothing to block defendant's view of the north side of Bright Street. He was driving about four feet from the north curb at a speed of from twenty to twenty-five miles per hour. A garbage truck was parked on the south side of the street some distance west of the intersection.

On cross-examination defendant testified that the child was "just about to the curb" when he first saw him. He also said that after he had passed the intersection he saw the child running ahead of some grown people and some smaller children and that he had seen the group of children in the beginning. He testified that he didn't blow his horn because "there wasn't any need to at that time because he wasn't

in the street; the street was clear." He explained: "I was coming along and just about the time I thought probably he would stay on his side he turned and came this way like he wanted to run out on the side of the car. . .He got out in such time, in other words, that I wasn't able to stop. He came out with a force. He darted out there — He was hit between the front fender and the middle of the front door. . . I didn't give him any warning; I didn't blow my horn; I didn't slow down after I saw him; I wasn't running too fast; I was running slow to start with. I continued running at about the same speed."

The duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway has been frequently declared by this Court. He must recognize that children have less discretion than adults and may run out into the street in front of his approaching automobile unmindful of the danger. Therefore, proper care requires a motorist to maintain a vigilant lookout, to give a timely warning of his approach, and to drive at such speed and in such a manner that he can control his vehicle if a child, in obedience to a childish impulse, attempts to cross the street in front of his approaching automobile. *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488; *Walker v. Byrd*, 258 N.C. 62, 127 S.E. 2d 781.

Under the evidence in this case the jury might reasonably have found: (1) the defendant failed to see Alex, Jr. and to blow his horn when, in the exercise of a proper lookout and proper care he would have done both, or (2) he did see the child but, ignoring the possibility that he might run into the street, he did not blow his horn or use proper care with respect to speed or control of his vehicle, and (3) that this omission of duty proximately caused the death of Alex Wainwright, Jr.

The evidence was sufficient to withstand the motions of nonsuit. The judgment of the court below is

Affirmed.

DOROTHY S. LOOMIS, ADMINISTRATOR OF THE ESTATE OF CECIL LEROY LOOMIS v. JOE ELMER TORRENCE.

(Filed 1 May 1963.)

Automobiles § 38—

The fact that defendant changes his testimony so as to aver that he first saw intestate's vehicle when it was 85 feet away instead of 150 feet

away does not render defendant's testimony as to the speed of the vehicle incompetent for want of opportunity by defendant to judge its speed when defendant further testifies that he saw the car again when 50 feet away, and as it passed through and beyond the intersection, and that it continued on through the intersection at about the same speed.

APPEAL by defendant from *Phillips, J.*, December, 1962 Term ROWAN Superior Court.

Civil action by the personal representative to recover for the wrongful death of her intestate, Cecil LeRoy Loomis. Issues of negligence, contributory negligence, and damages were raised by the pleadings. The jury answered all issues in favor of the plaintiff. The defendant appealed, assigning errors.

Kluttz & Hamlin, by Lewis P. Hamlin, Jr., for plaintiff appellee.
Kesler and Seay, by Thomas W. Seay, Jr., for defendant appellant.

HIGGINS, J. The evidence material to decision disclosed the following: The plaintiff's intestate was killed at a street intersection in Salisbury at 9:30 a.m. on June 30, 1961. He was driving a Ford North on Lee Street. The defendant was driving a Pontiac East on Henderson Street. Both streets were paved. Each was 24 feet wide. A stopsign required east-bound traffic on Henderson to yield to north-bound traffic on Lee.

The plaintiff contended the defendant was negligent in entering the intersection in disobedience to the stopsign. The defendant contended he stopped at the sign, did not see any vehicle approaching on Lee, then slowly moved up even with the curbline, or not more than a foot beyond, on Lee, again stopped, and for the first time saw the Ford approaching at a distance of 85 to 150 feet. He glanced to his left, then back to his right, and the Loomis Ford was 50 feet away. After passing a parked pickup truck, Loomis cut sharply, "in such a manner that the car tilted up on two wheels and throwed the back end around and hit the right front end of my car . . . he went diagonally back across the street at still the same speed he was going . . . the back end switched around again and struck . . . Mr. Guffey's Packard. . . .(90 feet beyond the intersection) . . . I have an opinion satisfactory to myself as to the speed of the Loomis car and that is that he was running 50 or 60 miles per hour."

The court charged the jury:

"Now, Gentlemen of the Jury, over objection of the plaintiff when the defendant testified first that he observed the plaintiff's intestate's car 150 feet away and saw the speed of it then, observed

how it was driven, and then saw it again when it was 50 feet away, the Court permitted him to give an opinion satisfactory to himself as to the rate of speed that the plaintiff's intestate's automobile was travelling at the time of the collision. Now, since the defendant has further amended his testimony and said that he didn't see it 150 feet away but the first time that he saw it it was 85 feet away and then again at 50 feet away, the Court is striking out his opinion as to the speed and telling you not to consider it because our law says a man must have sufficient time and distance to observe the speed of an automobile before his opinion would be competent to give an estimate of the speed of a car, and so the Court is striking his estimate of the speed or his opinion of the speed of 50 to 60 miles an hour, is striking that out and telling you not to consider that."

If we accept the court's view that defendant amended his statement, and that Loomis was only 85 rather than 150 feet away, nevertheless he saw the Ford again when it was 50 feet from the intersection and observed it afterwards through the intersection and for 90 feet beyond, and until it collided with Guffey's Packard. The witness stated that it continued at "the same speed." We cannot say the defendant disqualified himself by showing lack of opportunity to estimate speed. The evidence afforded the defendant sufficient opportunity to form an estimate as to the speed of the Ford. The inconsistencies in his estimates bear on the weight of his testimony rather than on its competency.

Key v. Woodlief, 258 N.C. 291, 128 S.E. 2d 567; *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; and *State v. Becker,* 241 N.C. 321, 85 S.E. 2d 327, are readily distinguishable.

This case was especially well tried. We regret the necessity of sending it back, but the error in excluding defendant's testimony of speed entitles him to a

New trial.

FLOYE WHICHARD STATON v. ALBERT BLANTON, III.

(Filed 1 May 1963.)

1. Courts § 10—

Where a term of Superior Court is held on the date prescribed by statute, the fact that the clerk incorrectly designates it as the fourth

rather than third Monday after the first Monday of the month is immaterial.

2. Evidence § 1; Judges § 2—

The Supreme Court will take judicial notice of the Minute Book showing the assignment of judges by the Chief Justice, and will take notice that the Superior Court judge holding the particular term of court in question had been assigned to hold said term. Constitution of North Carolina Art. IV, § 11; G.S. 7-46; G.S. 7-71; G.S. 7-29.1(3).

APPEAL by plaintiff from *Burgwyn, E. J.,* October 22, 1962 Civil Term of PITT.

Plaintiff brought this action to recover damages for personal injuries resulting from a collision of automobiles, one driven by her, the other, by defendant. She alleged the collision was caused by defendant's negligence. Defendant denied plaintiff's allegations and asserted plaintiff's negligence as a contributing cause of the collision. The usual issues of negligence, contributory negligence and damages were submitted to a jury. It answered the first issue in the negative. Judgment was entered on the verdict. Plaintiff excepted and appealed.

Charles L. Abernethy, Jr., for movant.

White & Aycock and Roberts & Stocks by Charles B. Aycock for defendant appellee.

PER CURIAM. The only exception in the record is to the signing of the judgment. This exception raises a single question: Does error appear on the face of the record? *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.

On appeal the record should show that the judgment was entered in a court with jurisdiction to hear and decide and at a time authorized by law. *Vail v. Stone,* 222 N.C. 431, 23 S.E. 2d 329.

Plaintiff moves here for an order declaring the trial a nullity. She bases her motion on the minutes of the Superior Court which, as she asserts, show a trial at an improper time and fail to show authority of the judge to preside. The minutes, as copied in the transcript, read: "Be it remembered that at a Regular One Week Civil term of the Superior Court, begun and held for the County of Pitt, at the Courthouse in Greenville, North Carolina, on the Fourth Monday after the First Monday in October it being October 22, 1962, his Honor W. H. S. Burgwyn, Judge riding the Third Judicial District for the October 1962 Civil Term, present and presiding."

One of the statutory terms of the Superior Court of Pitt County is "the seventh Monday after the first Monday in September to con-

tinue for one week for the trial of civil cases only." G.S. 7-70. The seventh Monday after the first Monday in September 1962 was 22 October. The fact that the clerk incorrectly stated this date to be the fourth Monday after the first Monday in October does not invalidate judgments rendered at a term held at the time fixed by statute.

The Chief Justice of this Court is authorized to assign judges to hold terms of the Superior Court. N. C. Constitution, Art. IV, sec. 11; G.S. 7-46 and 7-71.

The Minute Book of the "Office of the Chief Justice of the Supreme Court," of which we take judicial notice, discloses that *Emery B. Denny,* as Chief Justice, on the 19th day of October 1962 made an order assigning "W. H. S. BURGWYN, E. J. to PITT COUNTY, 22 October 1962, to hold a one week term of Superior Court for the trial of civil cases, in lieu of Mintz, J." He authorized his administrative assistant to execute a commission to Judge Burgwyn to hold said court. G.S. 7-29.1(3). The commission was issued.

It affirmatively appears from facts of which we take judicial notice that the court convening on 22 October 1962 was held at a time and presided over by a judge duly authorized by law to act. The judgment is

Affirmed.

STATE v. JERRY WALSTON.

(Filed 1 May 1963.)

1. Criminal Law § 106—

It is prejudicial error for the court to place the burden upon defendant to prove an alibi.

2. Criminal Law § 151—

The Supreme Court is bound by the record as certified.

APPEAL by defendant from *Mallard, J.*, September Mixed Term 1962 of LEE.

Criminal prosecution on an indictment charging defendant with the commission of a crime against nature, a violation of G.S. 14-177.

Plea: Not Guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

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

H. M. Jackson and J. W. Hoyle for defendant appellant.

PER CURIAM. The evidence for the State was amply sufficient to carry the case to the jury. Defendant concedes this in his brief.

Defendant in his behalf offered evidence tending to establish an alibi. Defendant assigns as error this part of the charge: "The burden of proving an alibi, however, does rest upon the defendant, the burden of proof being brought up to show his inability to have committed the crime with which he is charged; his part in the crime charged are affirmative material facts that he must show beyond a reasonable doubt to sustain a verdict."

The assignment of error is good. The burden of proof rests upon the State to establish beyond a reasonable doubt all elements of the offense charged, including the defendant's presence at the place of the crime, at the time of its commission, where that is essential to his guilt. In the instant case, the presence of the defendant at the place of the crime, at the time of its commission, is essential to his guilt. *S. v. Allison,* 256 N.C. 240, 123 S.E. 2d 465; *S. v. Minton,* 234 N.C. 716, 68 S.E 2d 844; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; 22A C.J.S., Criminal Law, sec. 574, Alibi, p. 320. The Attorney General, with his usual fairness, concedes error in this challenged part of the charge.

In justice to the experienced trial judge, we deem it appropriate to say from reading the charge that it seems manifest that it has not been correctly transcribed, but if it has been, then the error appearing in the challenged part of the charge above set forth is "one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit." *S. v. Simpson,* 233 N.C. 438, 442, 64 S.E. 2d 568, 571. However that may be, the error appears in the record, and we are bound by it as it comes to us. *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463. The exception and assignment of error to the charge are well taken, and a new trial is ordered.

New trial.

STATE v. PAUL ALLEN TOOMES.

(Filed 1 May 1963.)

Automobiles § 59—

Testimony and physical evidence tending to establish that defendant was driving his car at an excessively high speed, resulting in the acci-

dent causing the death of the driver of the car with which he collided, held sufficient to be submitted to the jury in this prosecution for manslaughter.

APPEAL by defendant from *Johnston, J.*, September 3, 1962 Term RANDOLPH Superior Court.

Criminal prosecution upon indictment which charged the defendant with the felony of manslaughter in the death of J. W. Campbell. The jury returned this verdict:"Guilty of manslaughter and asks for mercy of the court." From sentence of 18 months in prison, the defendant appealed.

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

Ottway Burton for defendant, appellant.

PER CURIAM. The State's evidence tended to show that on February 24, 1962, at 8:30 p.m., J. W. Campbell, driving his 1952 Buick, attempted to turn west on State Highway No. 1510 at its T-intersection with U. S. Highway No. 220 near Randelman. At some point in the intersection, not clearly fixed by the evidence, the Oldsmobile driven by the defendant, Paul Allen Toomes, struck the Buick near the middle, sliced it into two approximately equal parts. The two sections came to rest more than 50 feet apart. Campbell's dead body and his passenger, Miss Ketchum, seriously injured, were in the front section. Miss Ketchum was unable to recall anything connected with the accident.

The defendant's Oldsmobile was equipped with three two-barrel carburetors. The witnesses fixed its speed at the time of the accident at 70 to 90 miles per hour. The physical evidence fully sustained the estimates. The defendant did not offer evidence.

After a careful review of the record, we find

No error.

MARCELLITE POOL HICKS v. UNBORN CHILDREN OF MARCELLITE POOL HICKS, AND CHARLES O'H. GRIMES, GUARDIAN AD LITEM.

(Filed 8 May 1963.)

Evidence § 4; Wills § 33—

Evidence that the life tenant at the time of the hearing was some 73 years old and had had an operation removing her ovaries *held* sufficient

to rebut the presumption of the possibility of further issue and to warrant the distribution of the remainder prior to her death.

APPEAL by the guardian *ad litem* from *Clark, J.*, November Regular Civil Term 1962 of WAKE.

This is an action to determine the ownership of certain government bonds, Series E, issued in the name of Charles G. Hicks, Jr., in the face amount of $1,925.00, and a cash balance of $15.75. Charles O'H. Grimes was appointed guardian *ad litem* for the unborn children of Marcellite Pool Hicks pursuant to the provisions of G.S. 1-65.2, 1961 Cumulative Supplement.

The pertinent facts which are not in dispute are as follows:

The bonds and cash involved herein are being held by the Clerk of the Superior Court of Wake County, as custodian, under the provisions of the last will and testament of S. C. Pool, deceased, which will was duly probated in the Superior Court of Wake County before the Clerk on 9 March 1907.

Under the provisions of the aforesaid will, S. C. Pool devised to his daughter, Marcellite Pool (now Hicks), "the Sasser Farm" for life, and after her death to her children.

Marcellite Pool intermarried with Charles G. Hicks on 7 July 1907, and they have lived together ever since as husband and wife and their respective ages are now: Charles G. Hicks, 76, and Marcellite Pool Hicks, 73. There was born to this union one child, Charles G. Hicks, Jr., on 1 August 1908.

Charles G. Hicks, Jr. died testate on 4 April 1962, leaving surviving him his widow and his parents but no children. Charles G. Hicks, Jr. made his widow, Virginia Presnell Hicks, the sole beneficiary under his last will and testament. Thereafter, on 18 August 1962, Virginia Presnell Hicks, by a duly executed written instrument, transferred all her right, title and interest in and to said bonds and cash referred to herein to the plaintiff, Mercellite Pool Hicks.

Some time prior to the death of Charles G. Hicks, Jr., a special proceeding was instituted in the Superior Court of Wake County pursuant to which "the Sasser Farm" was sold for reinvestment of the proceeds, and the bonds and cash referred to herein represent the reinvestment now in the custody of the Clerk of the Superior Court of Wake County.

Evidence was introduced in the court below to the effect that in 1928 the plaintiff underwent surgery for the removal of her ovaries which made it impossible for her thereafter to conceive and bear a child. Her family physician since 1950, an admitted medical expert and

specialist in surgery and gynecology, testified to the effect that it was his unqualified opinion that it is now impossible for the plaintiff to conceive and bear a child.

Upon the forgoing facts the court concluded "(t)hat the plaintiff, Marcellite Pool Hicks, is now physically incapable of bearing children, that as to her the possibility of issue is now extinct." Whereupon, the court held and entered judgment to the effect that the plaintiff, Marcellite Pool Hicks, is the absolute owner of the bonds and cash balance referred to herein and directed the Clerk of the Superior Court of Wake County to deliver said bonds and cash to her.

The guardian *ad litem* appeals, assigning error.

Mordecai, Mills & Parker for plaintiff appellee.
Charles O'H. Grimes, guardian ad litem.

DENNY, C.J. The sole assignment of error is to the signing of the judgment for that such judgment is contrary to law.

The appellant contends there is an irrebuttable presumption that the possibility of issue is not extinct until death. Therefore, he argues the court was in error in its conclusion with respect to the inability of the plaintiff to conveive and bear children, and, as a consequence of this erroneous conclusion, the court below erroneously held that the plaintiff, Marcellite Pool Hicks, is the owner of the bonds and cash balance now held by the Clerk of the Superior Court of Wake County, as custodian, under the provisions of the last will and testament of S. C. Pool, deceased, citing *Shuford v. Brady,* 169 N.C. 224, 85 S.E. 303; *Prince v. Barnes,* 224 N.C. 702, 32 S.E. 2d 224; *McPherson v. Bank,* 240 N.C. 1, 81 S.E. 2d 386 and *Bank v. Hannah,* 252 N.C. 556, 114 S.E. 2d 273.

Ordinarily, the law presumes that the possibility of issue is not extinct until death. *Bank v. Hannah, supra; McPherson v. Bank, supra.* However, this presumption is rebuttable.

In *McPherson v. Bank, supra,* Johnson, J., speaking for the Court, said: "While in many jurisdictions, including England, the question whether the possibility of issue is ever extinct, has been re-examined in the light of exact processes of medical science by which in given cases sterility or impotency may be shown as matters of scientific certainty, nevertheless, thus far this Court has not been presented with a situation sufficiently compelling to warrant relaxation of the common law rule."

It is said in 57 Am. Jur., Wills, section 1249, at page 827: "Where a testamentary gift is in some way conditioned upon a designated wom-

an's having issue or further issue, as, for example, in a gift to the child or children of a named woman, the question sometimes arises whether the gift may be distributed prior to that woman's death. Although it is a recognized legal presumption that the possibility of issue is never extinct as long as a person lives, the courts nevertheless have on occasion sanctioned distribution of a testamentary gift prior to the death of the woman on whose failure of issue or further issue it was conditioned, upon the theory that, because of her age or physical condition, the improbability of her having children (or more children) has been established to such a degree that such distribution is permissible."

In *United States v. Provident Trust Co.*, 291 U.S. 272, 78 L. Ed. 793, the identical question involved on the appeal now before us was raised and considered. The lower court had held that the woman involved was incapable of bearing children since she had undergone surgery for the removal of her "uterus, Fallopian tubes, and both ovaries." The Supreme Court of the United States said: "(T)he presumption here involved had its origin at a time when medical knowledge was meager, and many centuries before the discovery of anaesthetics and, consequently, before surgical operations of the kind here involved became practicable. It was not until a comparatively recent period, therefore, that the effect of such an operation was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children.

" * * * Whether in particular instances so-called irrebuttable presumptions are, in a more accurate sense, rules of substantive law rather than true presumptions, is a matter in respect of which a good deal has been said by modern commentators on the law of evidence. (Citations omitted) But it is unnecessary to consider that interesting distinction, since, as will appear, the presumption in question in this instance must be dealt with as open to rebuttal and, therefore, in any aspect of the matter, as a true presumption.

"The presumption generally has been held to be conclusive when the element of age alone is involved, albeit Lord Coke's view that the law seeth no impossibility of issue, even though both husband and wife be an hundred years old (Co. Litt. 551; 2 Bl. Com. 125), if now asserted for the first time, might well be put aside as a rhetorical extravagance. But the presumption, even where age alone is involved, has not been universally upheld as conclusive or applied under all circumstances. * * *" The judgment of the court below was affirmed.

We hold that the medical evidence adduced in the trial below was sufficient to rebut the legal presumption that the possibility of issue is not extinct until death and to support the conclusion of the court

below that the plaintiff, Marcellite Pool Hicks, is now physically incapable of bearing children; that as to her, the possibility of issue is now extinct.

The Possibility of Issue Extinct is the topic of annotations in 67 A.L.R. 538 and in 146 A.L.R. 794.

The judgment of the court below is

Affirmed.

J. A. FRYAR, JR., PLAINTIFF v. OREN CLIFTON GAULDIN, DEFENDANT.

(Filed 8 May 1963.)

1. Arrest and Bail § 14—

Judgment may not be entered against the sureties on a bail bond in a civil action without ten days notice, G.S. 1-436, notwithstanding that default judgment had been entered against defendant and notwithstanding that the bond acknowledges the sureties to be bound to pay plaintiff such damages and costs as may be assessed in the trial of the cause against defendant.

2. Appeal and Error § 3—

An order continuing the hearing of a motion until the determination on appeal on a judgment entered on another motion in the cause, is not appealable.

APPEAL by R. L. Gauldin and Minnie L. Gauldin from *Phillips, J.*, October 22, 1962, Civil Term, and from *Riddle, Special J.*, November 5, 1962, Civil Term, of GUILFORD, Greensboro Division.

Plaintiff instituted this action October 20, 1961, to recover damages on account of personal injuries he sustained September 21, 1961, as the result of an unlawful, wilful and malicious assault made upon him by Oren Clifton Gauldin, the defendant. Plaintiff prayed that he recover judgment against defendant for $5,000.00 and "for an order of arrest with bail in the sum of Five Thousand ($5,000) Dollars to be executed by sufficient surety payable to the plaintiff, to the effect that the defendant shall at all times render himself amenable to the process of the Court," and for costs, etc.

On the basis of plaintiff's verified complaint, affidavit and bond (G.S. 1-412), an assistant clerk, at the time the action was instituted, issued an order directing the sheriff "FORTHWITH to arrest OREN

CLIFTON GAULDIN, the defendant herein, and to hold him to bail in the sum of FIVE THOUSAND DOLLARS." In accordance with this order, Oren Clifton Gauldin, the defendant, was arrested October 24, 1961, but was released from custody upon the execution of a bond in words and figures as follows:

"KNOW ALL MEN BY THESE PRESENTS: That whereas the above named defendant, Oren Clifton Gauldin, has been arrested in this action;

"NOW, THEREFORE, we, R. L. Gauldin and wife, Minnie L. Gauldin, of Guilford County, as sureties, and Oren Clifton Gauldin, as principal, undertake in the sum of Five Thousand ($5,000) Dollars that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action and to such as may be issued to enforce judgment therein, and acknowledge ourselves bound to the plaintiff to pay such damages and costs as may be assessed and determined, or either, in the trial of this cause, against the defendant herein.

O. C. GAULDIN (Seal)
R. L. GAULDIN (Seal)
MINNIE L. GAULDIN (Seal)"

On December 6, 1961, on account of defendant's failure to answer, demur or otherwise plead, the clerk entered judgment by default and inquiry in which it was "ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant for such damages as a jury may award, and that inquiry of the amount of such damages be executed at the next civil term of the Superior Court of Guilford County, before a jury to determine the amount of said damages."

Nothing occurred after the entry of said judgment by default and inquiry until the events set forth below.

On October 19, 1962, R. L. Gauldin and Minnie L. Gauldin filed a petition based on G.S. 1-433 for an order exonerating them from liability as sureties on said bond. They asserted Oren Clifton Gauldin had been convicted at the March 2, 1962, Criminal Term of Guilford Superior Court, Greensboro Division, of charges involving an assault with a deadly weapon; that judgment, imposing a sentence of two years, was pronounced; and that defendant was then serving said sentence and in the custody of the State of North Carolina. A copy of said petition was delivered to counsel for plaintiff on October 19, 1962, together with a copy of a notice that said petitioners (R. L. Gauldin and Minnie L. Gauldin) would, upon the opening of court

on the 5th day of November, 1962, apply to the judge presiding at the November 5, 1962, Civil Term at Greensboro, North Carolina, for an order exonerating them from liability as sureties on said bond.

At October 22, 1962, Term of Guilford Superior Court, Greensboro Division, this issue was submitted to and answered by the jury: "What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: $3,000.00." Thereupon, Judge Phillips, presiding at said term, entered judgment on October 26, 1962, which, in pertinent part, provides:

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the plaintiff have and recover of the defendant the sum of $3,000.00 with interest thereon from the 22nd day of October 1962.

"And it FURTHER APPEARING that the defendant was arrested under arrest and bail proceeding as will appear of record and that defendant gave bond in the sum of $5,000.00, which was signed by his sureties, R. L. Gauldin and wife, Minnie Gauldin, and it is FURTHER ORDERED, ADJUDGED and DECREED that plaintiff have and recover of the defendant the sum of $3,000.00, and that this judgment is also entered against defendant together with his sureties on said bond in the sum of $3,000.00, and that the costs of this action be taxed against defendant and the sureties on his bond."

On November 5, 1962, R. L. Gauldin and Minnie L. Gauldin served on plaintiff a notice of their appeal from said judgment of Judge Phillips.

At the November 5, 1962, Civil Term of Guilford Superior Court, Greensboro Division, to wit, on November 7, 1962, Judge Riddle, presiding at said term, ordered that *the hearing* on said petition of R. L. Gauldin and Minnie L. Gauldin *be continued* "until after the final decision in the said appeal of said bondsmen from the final judgment of Judge Phillips, on October 22, 1962, is handed down by the Supreme Court of North Carolina." R. L. Gauldin and Minnie L. Gauldin excepted to this order and gave notice of appeal therefrom.

Hines, Dettor & Strange for plaintiff appellee.

Shreve & Merritt for R. L. Gauldin and Minnie L. Gauldin, appellants.

BOBBITT, J. The record indicates neither appellants nor their counsel had notice of the proceedings before Judge Phillips at October 22, 1962, Term. Too, the record indicates Judge Phillips was not then advertent to the fact that appellants had filed and served on October 19,

1962, their petition for an order exonerating them from liability as sureties on the $5,000.00 bond and a notice of a hearing to be held thereon at November 5, 1962, Term.

The brief of plaintiff-appellee states this is the sole question involved: "Did the liability of the sureties become final upon the signing of the judgment in this cause (a) *without notice served upon them* and (b) without exhausting any remedies against their principal?" (Our italics)

The bail required to obtain the discharge of Oren Clifton Gauldin, the defendant, from arrest, was a written undertaking, payable to the plaintiff, in the amount fixed in the order of arrest, "to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein." G.S. 1-420; G.S. 1-419. Indeed, as indicated in our preliminary statement, plaintiff prayed that defendant be required to give bond in the amount of $5,000.00 containing these statutory provisions.

Nothing in the record shows a breach of a bond drafted in accordance with G.S. 1-420. Indeed, it has not been established herein that Oren Clifton Gauldin, the defendant, *wilfully* and *maliciously* assaulted plaintiff. "In order that such an execution (against the person) may be issued, after the plaintiff has exhausted his remedy against the property of the defendant, a distinct and separate issue as to the essential fact upon which the right to the execution is based must be submitted to the jury so as to have an affirmative finding as to the existence of the fact." Walker, J., in *McKinney v. Patterson,* 174 N.C. 483, 486, 93 S.E. 967.

"In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to them." G.S. 1-436.

The $5,000.00 bond executed by appellants as sureties contains the provisions required by G.S. 1-420 and in addition the following: "and acknowledge ourselves bound to the plaintiff to pay such damages and costs as may be assessed and determined, or either, in the trial of this cause, against the defendant herein." Plaintiff asserts that under this additional provision appellants are liable unconditionally for the payment of plaintiff's judgment against Oren Clifton Gauldin, the defendant, without reference to whether the defendant is amenable to the process of the court. Appellants contend this additional provision is without consideration and void. Upon the present record, we express no opinion as to the legal significance of this additional provision. Suffice to say, this additional provision did not deprive appellants of

their right under G.S. 1-436 to ten days' notice of any motion for judgment against them for any alleged failure to comply with the terms of the $5,000.00 bond.

On account of plaintiff's failure to give notice as required by G.S. 1-436, the judgment entered by Judge Phillips at said October 22, 1962, Term, *as to appellants,* is vacated, and the cause is remanded for further proceedings. This vacates the $6,000.00 stay bond dated November 14, 1962, executed by appellants and by A. B. Fulp and Lorene G. Fulp.

Plaintiff, if so advised, may move for judgment against appellants and give ten days' notice of his motion. In such event, appellants, by answer to such motion, may assert the defenses on which they rely, including the matters set forth in their petition of October 19, 1962.

The purported appeal from Judge Riddle's order of November 7, 1962, is dismissed. Judge Riddle made no ruling on appellants' petition of October 19, 1962, but simply continued the hearing thereon until this Court had acted on appellants' appeal from the judgment entered by Judge Phillips at said October 22, 1962, Term.

Re: Appeal from Phillips, J., error and remanded.

Re: Appeal from Riddle, S. J., appeal dismissed.

HINYARD GROVER FAULK v. ALTHOUSE CHEMICAL COMPANY.

(Filed 8 May 1963.)

Automobiles §§ 41d; 42h—

Evidence tending to show that plaintiff before attempting to turn left into a side road gave the statutory signal and observed in his rear view mirror the line of traffic behind him and that the driver of the car immediately behind him was slowing down and giving the appropriate signal, and that defendant, hidden from plaintiff's view by other cars, passed four vehicles and collided with plaintiff's vehicle, *held* sufficient to be submitted to the jury on the issue of defendant's negligence, G.S. 20-140, and not to disclose contributory negligence as a matter of law on the part of plaintiff. G.S. 20-154.

APPEAL by defendant from *Carr, J.,* November 1962 Civil Term of COLUMBUS.

Civil action to recover damages for injuries resulting from a collision between a pickup truck and an automobile.

The jury answered the issues of negligence, contributory negligence, and damages in plaintiff's favor. From a judgment in accord with the verdict, defendant appeals.

Henry & Henry for defendant appellant.
John A. Dwyer for plaintiff appellee.

PER CURIAM. Defendant assigns as error the denial by the court of its motion for judgment of involuntary nonsuit made at the close of plaintiff's evidence. Defendant offered no evidence.

Plaintiff's evidence considered in the light most favorable to him, *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785, shows the following facts: About 1:30 p.m. on 14 June 1960, a clear day, he was driving a 1953 Dodge pickup truck owned by his father westwardly on U. S. Highway 74-76 just outside the corporate limits of the town of Whiteville. This is a two-lane highway 22 feet wide, and at this point is straight. He was driving on his right side of the highway, and was headed west toward the Columbus County Health Center about six-tenths of a mile west of Whiteville. His father was a passenger in the truck. When he passed the town limits of Whiteville, three or four automobiles were behind him, and he increased his speed to about 40 or 45 miles an hour. As he drove on, he looked in his rear-view mirror and saw traveling behind him a blue Studebaker, a Ford, a light-colored Cadillac, and a white Oldsmobile owned by defendant and driven by its employee. At that time the white Oldsmobile was about 300 yards behind him. When he looked in his rear-view mirror a second time, he did not see the Oldsmobile, but did see this line of traffic behind him. When he was within 150 yards, maybe better, from the road leading into the Health Center, he gave a hand signal that he was turning left into the Health Center road. The record shows that he illustrated his testimony "by holding out his left arm at right angles from his body, in the correct manner of indicating an intention to turn left." As he approached the place of turning left, he decreased his speed to where he was not traveling too fast and was watching cars approaching him on his left. During the last 150 yards he was traveling, he never saw the Oldsmobile because his view of it was blocked by reason of the two cars that were following him. When he came to the point of turning left, he glanced in his rear-view mirror, and saw the Studebaker behind him giving a stop signal or slow-down signal with arm extended out of the window. He proceeded to make a left turn with his arm still extended out of the window. When he was in the turn, he glanced in the rear-view mirror. At that time the rear end of

his truck was over the white line with its front end about off the highway, and that was when the white Oldsmobile hit him. When he was hit, he was traveling 5 or 10 miles an hour. As a result of the collision, his pickup truck whirled around, overturned, threw his father out, completely turned over, and landed in a ditch headed back toward Whiteville. Immediately prior to the collision he did not hear a thing from the white Oldsmobile; he was never aware that the white Oldsmobile behind him was about to pass. He was injured in the collision.

The collision occurred about six-tenths of a mile west of Whiteville at the intersection of rural paved road 1439, which is 16 or 18 feet wide and leads from U. S. Highway 74-76 at the Health Center over to the Pine Log Road. The speed limit at the scene of the collision is 50 miles an hour. A highway patrolman testified on cross-examination, "The debris that I found was approximately in the middle of the passing, the left or south lane." Plaintiff pulled his hand in to make his turn split seconds before he was hit. He also testified he angled into the turn.

Plaintiff's evidence would permit a jury to find that defendant was guilty of negligence in operating its automobile in violation of G.S. 20-140, reckless driving statute, in that it was attempting to overtake and pass four automobiles in front of it, without giving any signal of its doing so, when the automobiles ahead of it were slowing down due to plaintiff's preparing to make a left turn, which slowing down of automobiles ahead of it, it saw or in the exercise of due care should have seen, and when the Studebaker, the third automobile ahead of its automobile, was giving a stop signal or slow-down signal with arm extended out of the window which, under the circumstances here, it saw or should have seen in the exercise of due care as it neared the Studebaker; and in operating its automobile under the circumstances here without keeping a proper and adequate lookout; and that the defendant was further guilty of foreseeable injury, and of proximate causation of plaintiff's injuries as a result of its negligence.

Defendant has conditionally pleaded plaintiff's contributory negligence as a bar to recovery. Plaintiff's own evidence does not establish facts sufficient to show that he undertook to make a left turn without observing the precautions prescribed by G.S. 20-154 thereby contributing to his injuries, so clearly that no other conclusion can be reasonably drawn therefrom. From a study of the evidence, we are of opinion that plaintiff has not proved himself out of court by his own evidence, so as to be nonsuited on the ground of contributory negligence. *Lincoln v. R.R.*, 207 N.C. 787, 178 S.E. 601.

There is no fatal variance between plaintiff's *allegata et probata.* There is no merit to defendant's contention that it was entitled to a directed verdict, or that it was entitled to a judgment *non obstante veredicto. Johnson v. Insurance Co.*, 219 N.C. 445, 14 S.E. 2d 405; *Supply Co. v. Horton*, 220 N.C. 373, 17 S.E. 2d 493.

The trial court properly submitted the case to the jury, and was correct in denying defendant's motion to set the verdict aside, on the ground that it was against the greater weight of the evidence.

There is no exception in respect to the evidence. The charge is not in the record. Defendant's assignments of error are overruled. The judgment below is

Affirmed.

STATE OF NORTH CAROLINA v. CURTIS MAGELLON LEA.

AND

STATE OF NORTH CAROLINA v. FREDDIE LEE STALEY.

(Filed 8 May 1963.)

Criminal Law § 94—

Interrogations by the court of various witnesses during the course of the trial *held* prejudicial, the probable effect upon the jury and not the motive of the court being determinative of whether the court exceeded the bounds of questioning for a proper understanding and clarification of the testimony of the witnesses.

APPEAL by defendant from *Armstrong, J.*, December 3, 1962 Criminal Term of GUILFORD (Greensboro Division).

The defendant Freddie Lee Staley was originally tried in the Criminal Division of the Municipal-County Court of Guilford County upon a warrant charging him with the operation of a motor vehicle upon the highways of this State while under the influence of intoxicating liquor or narcotic drugs; and the defendant Curtis Magellon Lea was originally tried in the same court upon a warrant charging him with permitting the defendant Staley to operate Lea's automobile while said operator was under the influence of intoxicating liquor or narcotic drugs.

Upon conviction, both defendants appealed to the Superior Court of Guilford County, in which court the cases were consolidated for trial and the defendants were tried on the original warrants *de novo.*

A verdict of guilty as charged was returned by the jury as to each defendant and, upon pronouncement of sentence on each defendant, both defendants appealed, assigning error.

Attorney General Bruton; Asst. Attorney General Ray B. Brady for the State.

Elreta Melton Alexander for defendant appellants.

PER CURIAM. The appellants assign as error the refusal of the court below to grant their motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. The State offered ample evidence to take the consolidated cases to the jury against the respective defendants, and this assignment of error is overruled.

The defendants further assign as error the court's examination of witnesses tendered by the State as well as those tendered by the defendants.

The court interrupted the Solicitor or counsel for defendants some eight or ten times during the course of a comparatively short trial, and propounded approximately fifty questions to various witnesses. The questions propounded by the court would have been entirely proper if they had been asked by the Solicitor. Even so, in our opinion, many of these questions went beyond an effort to obtain a proper understanding and clarification of the testimony of the witnesses.

Certainly the able and conscientious judge who tried these consolidated cases below did not intend to do anything to prejudice the rights of the defendants, but it is the probable effect or influence upon the jury as a result of what a judge does, and not his motive, that determines whether the right of the defendants to a fair trial has been impared to such an extent as to entitle them to a new trial.

We are inclined to the view that these defendants are entitled to a new trial and it is so ordered on authority of *S. v. Peters,* 253 N.C. 331, 116 S.E. 2d 787.

New trial.

PERFECTING SERVICE COMPANY, A CORPORATION v. PRODUCT DEVELOPMENT AND SALES CO., A CORPORATION, AND RADIATOR SPECIALTY COMPANY, A CORPORATION.

(Filed 22 May 1963.)

1. Appeal and Error § 41—

Where the record does not show what the answer of the witness would have been, the Supreme Court cannot hold that the exclusion of the testimony from the jury was prejudicial.

2. Evidence § 42—

In order to be competent, the testimony of an expert must be based upon sufficient data; thus, when the crucial question is the tensile strength of metals in a mechanical device after modification in the design, it is not error to exclude expert testimony to the effect that tests disclosed that the tensile strength of the metals was insufficient for the device to perform the function for which it was manufactured when it does not appear whether the devices tested were manufactured before or after the modification of the design.

3. Evidence § 16—

In order for experimental evidence to be competent, the circumstances attendant the experiment must be substantially similar to those which attended the actual occurrence; thus, where the crucial question is whether the design or tensile strength of the metals in a mechanical device were sufficient to enable it to perform a particular function when properly installed in certain types of automobiles, evidence of the failure of the device when installed in a particular type of automobile is incompetent in the absence of evidence of proper installation in a type of automobile contemplated by the parties, etc.

4. Evidence § 48—

Metallurgical experts are competent to testify as to the tensile strength of metals in a mechanical device as affected by its design when such testimony is based upon facts observed by the witnesses in testing the materials or upon proper questions based on hypothetical facts in evidence.

5. Contracts § 29—

A party injured as a result of breach of contract is entitled to compensation which will place him, insofar as can be done by money, in the same position he would have occupied had the contract not been breached, which compensation includes gains prevented as well as losses sustained, provided they were within the contemplation of the parties at the time the contract was executed.

6. Evidence § 51

A hypothetical question should ask the expert witness whether a particular condition could or might have produced the result in question and not whether it did produce the result.

7. Damages § 14—

Plaintiff is not required to prove his damages with absolute certainty but is required to introduce evidence showing his damages with sufficient completeness and certainty to permit the jury to arrive at a reasonable conclusion.

8. Sales § 10—

If after partial delivery the purchaser wrongfully breaches its contract to buy a specified number of articles, the seller is entitled to recover as his damages the unpaid balance of the contract price for the units delivered, the loss of profits with respect to the undelivered portion of the order, measured by the difference between the contract price and the cost of manufacture, including cost of materials, direct cost of labor, overhead, and fixed charges incurred at the time of notification by the purchaser that it would not accept further shipments, and the cost of materials, less salvage, and of labor, overhead, and fixed charges wasted by reason of the breach.

9. Guaranty—

Where a third party, with the consent of the seller, assumes all liability of the original purchaser, and the original purchaser guarantees in writing to the seller the payment by such third party of the indebtedness, the original purchaser becomes a mere guarantor of payment.

10. Same; Sales § 8—

A guarantor of payment by the purchaser may not set up a counterclaim against the seller for breach of warranty and can realize no affirmative recovery thereon but, at most, may set up damages for breach of warranty as a setoff to be subtracted from the indebtedness of the principal for which the guarantor is liable.

APPEAL by defendants from *Walker, S.J.*, February 12, 1962, Special Civil "A" Term of MECKLENBURG.

Action for breach of a sales contract.

The complaint alleges in substance the following facts (numbering ours):

(1). All parties to this action are North Carolina corporations and their principal offices and places of business are in Mecklenburg. County.

(2). Defendant Radiator Specialty Company (Radiator) obtained from an Indiana corporation license to manufacture and sell a patented mechanical device, later called a Fan-O-Matic. (The device was for attachment to the water pump shaft of automobiles, and consisted of a drive plate and hub. A fan mounted on the hub was to replace the regular automobile fan. The device was so constructed that, when an automobile to which it was attached reached a given speed, the contrifugal force from the rotation of the water pump shaft would so

affect the mechanism as to release the fan and cause it to cease to rotate. The theory is that after automobiles attain a certain speed, 30 to 40 miles per hour, no fan is needed, and the release of the fan reduces engine noise and vibration and increases available horsepower, gas mileage and acceleration.)

(3) Radiator conferred with plaintiff in late 1955 and early 1956 and proposed that plaintiff manufacture the parts for Fan-O-Matic. Drawings of the inventor's model were presented to plaintiff and it was requested to quote a unit price for manufacture of the device. At the request of Radiator, plaintiff made drawings and designs and fabricated a model, for which Radiator paid plaintiff $1700.

(4). Revisions were made in the design and Radiator gave plaintiff authority by written purchase order to procure dies and molds for the manufacture of Fan-O-Matic parts. It was agreed that Radiator would pay $8750 for the dies and molds "upon approval by (Radiator) of sample units made from the dies and molds."

(5). On 13 June 1956 Radiator placed an order for parts for 10,000 units of Fan-O-Matic at $6.86 per unit, and plaintiff agreed to manufacture them at that price. Thereafter, defendant Product Development and Sales Company (Product Development) was organized and incorporated and with consent of plaintiff assumed all liability of Radiator for the purchase orders. Radiator guaranteed to plaintiff in writing the payment of the indebtedness which had been assumed by Product Development. On 4 February 1957 Product Development paid plaintiff $8750 for the dies and molds for the manufacture of the parts.

(6). Plaintiff purchased materials necessary to produce the parts for 10,000 units, manufactured 300 units and delivered them to defendants for testing and approval. Thereafter, defendants directed plaintiff to proceed with dispatch in manufacturing and delivering the remaining 9700 units. After plaintiff had made and delivered a considerable number of the parts for these units, Product Development in breach of the contract directed plaintiff to cease manufacturing the parts, declared the contract rescinded, and refused to make any further payments to plaintiff.

(7). Plaintiff is entitled to recover of defendants, for breach of the contract on the part of Product Development and upon Radiator's guarantee, the sum of $58,126.61.

Defendant Product Development, answering, denies that it breached the contract, and alleges by way of counterclaim the following ultimate facts (paragraphing ours):

(a). Plaintiff represented that it specialized in engineering, designing and manufacturing items composed of metal and metal parts, and

stated it could improve on the inventor's model. Plaintiff was paid $1700 for designing a new model and making a sample unit. Radiator completely relied on plaintiff's skill and judgment, and plaintiff was advised of the purpose of the item and that it was to be sold for use on automobiles.

(b). Radiator authorized plaintiff by purchase order to have dies and molds made for the manufacture of Fan-O-Matic at a cost of $8750, to be paid by Radiator upon its approval of sample units made from the dies and molds. And on 13 June 1956 Radiator ordered 10,000 units and obligated to pay $6.86 per unit. In connection with this order plaintiff made express warranties as follows: (1) Plaintiff "guarantees that the Fan-O-Matic unit will be functioning correctly in accordance with the data supplied by Radiator. . . ." (2) "All material and workmanship shall be guaranteed for a period of 18 months after shipment of first production lot."

(c). Fan-O-Matic was given nationwide advertising, and orders began to be received by Radiator. Product Development was organized and incorporated for the purpose of purchasing the Fan-O-Matic units from plaintiff. All the rights and liabilities of Radiator were assigned to Product Development with the approval of plaintiff; Radiator guaranteed to plaintiff the responsibility of Product Development for all purchases to be made from plaintiff. Product Development was to purchase the units from plaintiff and sell and deliver them to Radiator for resale to the trade. This plan was known to plaintiff.

(d). The first deliveries (300 units) were made by plaintiff in January 1957. As soon as these were put on the market complaints began to come in that "the units were flying apart and the bolt at the center bearing seat was breaking off." Defendants complained to plaintiff and changes were made, and plaintiff assured defendants that the units would cause no more trouble to users. Further deliveries were accepted. On 1 February 1957 Product Development, on the insistence of plaintiff, paid the $8750 account for dies and molds, but specified that the payment did not "constitute an acceptance or approval of the performance of the Fan-O-Matic unit."

(e). Product Development actually received 2,877 units, most of which were put in the channels of trade by Radiator. Again complaints began to come in that the units were flying apart in use and causing damage. Radiator recalled all shipments and 2,161 units were returned, many of them in broken condition. Radiator declined to accept any further deliveries, and Product Development notified plaintiff that

the order was rescinded and no further units were to be made or delivered.

(f). There was a breach of plaintiff's express warranties, and also of the implied warranty that the units were fit for use for the purpose intended. Product Development is entitled to recover of plaintiff all sums paid and loss of profits, totalling $23,544.

Radiator, answering, denies that it is liable to plaintiff in any amount on account of the guarantee, states essentially the same facts alleged by Product Development in its answer, and asserts by way of counterclaim right to recover loss of profits and expenditures made by it in connection with the venture, totalling $53,707.92, on account of breach by plaintiff of express and implied warranties.

Evidence was offered by all the parties at the trial. The court submitted to the jury the following issues:

"1. Did the defendant breach the contract with the plaintiff, as alleged in the Complaint?

"2. If so, what amount, if any, is the plaintiff entitled to recover from the defendants?

"3. Did the plaintiff breach the express warranties as alleged in the answers and counterclaims?

"4. If so, in what amount, if any, is Product Development & Sales Co. entitled to recover from the plaintiff?

"5. Did the plaintiff breach the implied warranty that the design was reasonably fit for the purpose for which they were sold and purchased, as alleged in the answers and counterclaims?

"6. If so, in what amount, if any, is Radiator Specialty Company entitled to recover of the plaintiff?"

The jury answered the first issue "Yes," and the second issue $51,485.37." Thereupon the court entered judgment for plaintiff and against defendants, jointly and severally, in the sum of $51,485.37.

Defendants appealed.

Pierce, Wardlow, Knox and Caudle, and Stuart R. Childs for plaintiff.

Weinstein, Waggoner & Sturges (formerly Weinstein, Muilenburg, Waggoner & Bledsoe) for defendants.

MOORE, J. There are more than 200 pages of evidence in the record. A detailed review of the evidence is not essential for decision of the questions raised on this appeal. General summaries of the contentions

of the parties, which find support in their evidentiary offerings, will suffice.

Plaintiff's contentions: When requested by defendant to manufacture the Fan-O-Matic, plaintiff advised that it had had no experience in the automotive field. To make the type of instrument defendant wanted die casting was necessary, and this process of manufacture was outside plaintiff's usual field of operation. Plaintiff suggested two or three manufacturers defendant might deal with. Defendant stated it wanted plaintiff to do the job because plaintiff was located in Charlotte, there were problems to be "ironed out," plaintiff was close at hand and defendant could follow the work and help expedite it. In every step of planning and designing there were extended conferences and close cooperation between the engineers and executives of plaintiff and defendant. Defendant's approval was had with reference to each decision. Plaintiff first made studies and drawings for production of a satisfactory design and model, and to determine price. The first price plaintiff quoted was $15 per unit. Defendant insisted that to market the device the manufacturer's price had to be much lower. By revisal of manufacturing methods, choice of materials, and reduction of the scope of plaintiff's work and responsibilities the unit price was finally lowered to $6.86. Defendant agreed that plaintiff would not furnish the fan, defendant would gather the necessary information concerning clearance space in the makes of automobiles on which the Fan-O-Matics were to be used (this information was necessary for determination of the size of the instrument), defendant would be responsible for problems related to installation on customers' cars and would prepare installation instructions, and plaintiff would not assemble the units but would deliver sub-assemblies in bulk. It was agreed that the drive plate and attachments would be die castings of aluminum material, and the hub of cast iron. After many conferences and the incorporation of the suggestions of defendant's engineer and executives, dies and molds were procured. Ten soft die models were made for initial testing. After tests by plaintiff and defendant, the latter approved enthusiastically. It was then agreed that a lot of 300 units would be made and sold to the trade, which would provide a test throughout the country in actual use. In the meanwhile defendant had advertised the Fan-O-Matic on a nationwide scale, and orders had begun to come in. Defendant had made a test at the Indianapolis Speedway. The responsible executive of defendant told plaintiff: "Forget about testing. We have enough proof now. Our entire organization is satisfied with it. . . . I want Fan-O-Matic coming out of our ears." Defendant placed an order for 10,000 units (including the 300 test

units), to be delivered at the rate of 2000 per month. Plaintiff purchased materials necessary to supply the units and went into production. Shortly after the 300 units were put on the market a few broken units were returned. In collaboration with defendant's engineer several changes were made to avoid installation errors. There were complaints that the hub was pulling out in installation or breaking out in operation. Plaintiff suggested steel inserts to strengthen the instrument at the hub. Defendant's engineer insisted that the mere insertion of a washer would solve the difficulty, and this plan was adopted. Defendant had advertised that Fan-O-Matic was adaptable to all cars, including sport cars and racers, and the cut out speed was at 40 miles per hour. The instrument, in accordance with defendant's instructions, was designed to cut out at the speed of 30 to 35 miles per hour, to be operated on motors having a maximum of 4800 revolutions per minute, and to be used on such standard cars in the moderate price field as clearance dimensions would permit. Defendant had drawn up installation instructions without consultation with plaintiff, and to make it adaptable to a wider range of cars sent along washers and other adapters, of which plaintiff had no knowledge. According to plaintiff's tests the instrument operated perfectly when installed so as to be in balance, and when the fan used was statically in balance and not too heavy. The failures of the instrument in use were due to faulty installation. About two months before defendant cancelled the order, defendant's engineer had begun work on another model. Defendant was making its own Fan-O-Matic and selling it within a few months after the contract with plaintiff was cancelled. Plaintiff's warranty was that the Fan-O-Matic would be manufactured "in accordance with the *approved design*" and would be functioning correctly "in accordance with the *data supplied by Radiator Specialty Company*." Defendant had approved the design, and it was manufactured in accordance therewith. It did function in accordance with the data furnished by Radiator. The materials used had been approved by defendant. Plaintiff agreed and stood ready to replace any units in which there were faulty materials or workmanship. (There are two defendants, but for the sake of simplicity the singular "defendant" is used in this opinion except when the discussion requires differentiation.)

Defendants' contentions: Plaintiff represented that it could improve on the inventor's model and make practical adaptation to a wider range of cars. Plaintiff agreed to engineer and design the Fan-O-Matic. Plaintiff's engineer drew the plans "for a die cast drive plate and specifically determined the configuration, thickness and shape of the hub." Defendant questioned whether the proposed die cast drive plate

would be strong enough and stated that plaintiff would have to guarantee to defendant that it would be. Plaintiff assured defendant that it would be strong enough. Even so, defendant required plaintiff to make the following express warranties at the time the $8750 purchase order for dies and models was given: (a) Plaintiff "guarantees that the Fan-O-Matic unit will be manufactured in accordance with the approved design, and will be functioning correctly in accordance with the data supplied by Radiator. . . ."; and (b) all material and workmanship shall be guaranteed for a period of 18 months after shipment of first production lot." At all stages defendant relied on plaintiff in all matters of design. When the ten soft mold models had been made and were being tested defendant wrote plaintiff, "The metal thickness between the sharp corner at the bottom of the .750 dia. counterbore in the drive plate, and a corresponding dia. on the beveled hub outside the drive plate is only .115. Is this two weak for the work required of this part?" Plaintiff replied, "On the metal thickness of the aluminum drive casting, please note that the wall thickness is ⅛ inch, however, the ribs on the front side, in conjunction with the hub, make this a very strong cross-section." As soon as the first Fan-O-Matics were put on the market, defendant began to receive complaints from customers, some of whom returned the units. Many necessary changes were made. Because of the lack of sufficient tensile strength of the materials used and faulty design the Fan-O-Matic, even after corrections, continued to fly apart in use. After each effort to remedy defects plaintiff assured defendant that the unit was all right. Plaintiff delivered nearly 3000 units, and complaints kept coming in. The units were flying apart and damaging automobiles. They were dangerous to persons and property. The hub of the drive plate was improperly designed, it would not withstand the stresses exerted upon it. The units were not fit for the purpose intended. Defendant cancelled the order. "It was and is the crux of the position of the defendants that the sharp corners on the neck (hub) . . . of the drive plate coupled with the brittle qualities of the casting, constituted a serious defect that prevented the unit from functioning properly or safely."

(1). Plaintiff's engineers testified, without objection, that the breakage that appeared in the damaged units which were returned resulted from faulty installation. To counter this evidence defendants offered the testimony of experts, which was excluded. Defendants assign as error the exclusion of this testimony.

R. B. Lincoln, a professional engineer registered in the State of Pennsylvania, testified for defendant. He recounted at length his

training, experience and professional connections, including graduate study at Carnegie Institute of Technology and the University of Pittsburg, employment for 26 years by Pittsburg Testing Company, and membership in the American Society for Testing Materials. His main experience was in testing for metal failures, particularly failures of parts of automobiles.

Mr. Lincoln made five inspections and tests of Fan-O-Matic:

(1). He put a brake block from a Fan-O-Matic drive plate in a testing machine and measured the deflection of the spring with given static loads. The deflection is the movement of the spring away from the force applied on it. Each time a load was removed he made a reading of the permanent "set," that is, the deflection that remained after the load was taken off.

"Q. What were the results of your tests, Sir?

"Plaintiff objected — sustained."

The record does not disclose what his answer would have been.

(2). He mounted a Fan-O-Matic on a simulated automobile water pump shaft, which could be driven at adjustable speeds. It was mounted according to printed instructions accompanying the unit. A fan furnished by defendants was attached; it was an ordinary automobile fan with four blades. The fan was not checked for balance — the instructions did not require it. The speeds of the drive plate and fan were measured separately by strobotach. Speed was periodically increased "until failure occurred."

If the witness reached any conclusions from this test, he was not interrogated with respect thereto and expressed no opinion.

(3). On 26 February 1960 a Fan-O-Matic was installed on a 1955 Chevrolet Station Wagon by a mechanic, under the supervision and in the presence of Mr. Lincoln. No adapters were necessary, and there was sufficient clearance. The installation was in accordance with printed instructions. The fan on the car was used; it was not checked for static balance. The vehicle was driven on the highway by the mechanic; Mr. Lincoln was present and observed speeds. Speeds up to 100 miles per hour were attained. The vehicle was driven in second gear at a speed of 72 miles per hour. After the test was completed the Fan-O-Matic was dismounted and upon examination Mr. Lincoln found "the corners of two of these little brake blocks broken off." The witness was not asked for an opinion and gave none. The testimony with respect to this test was given in the absence of the jury. The court ruled that this testimony was incompetent.

(4). On 26 February 1960 another Fan-O-Matic was installed in accordance with printed instructions on the same automobile. A test was

made to determine the number of revolutions of the fan per minute in relation to the speed of the automobile. At a car speed of 100 miles per hour the fan would revolve 4400 times per minute. After this test the vehicle was driven a short distance. The unit failed when the car gears were shifted from low to second — the car speed was about 10 miles an hour. The hood was opened and it was found that the free wheeling hub had separated from the drive plate, the fan was lying against the lower water hose and was damaged, and the car radiator was damaged. Mr. Lincoln examined the broken unit.

"Q. Now, Mr. Lincoln, state whether or not you have an opinion as to what caused that unit to break?

"A. I do, yes, Sir.

"Q. . . . What is that opinion, Sir?

"A. Well, the combination of the two sharp corners, namely, the one at the outside of the boss supporting the freewheeling hub and the threads right at the end of the steel bolt or cap screw that holds that, in combination with the rather brittle properties of the die casting rendered it unable to stand the stresses it had countered in this drive."

"Q. If the jury should find by the greater weight of the evidence that this Fan-O-Matic unit was designed, or to be designed, for speeds of 4800 RPM, do you have an opinion satisfactory to yourself as to whether or not the design and configuration of this drive plate in the hub or boss area was adequate for such speeds?

"A. I do.

"Q. What is that opinion?

"A. It was not.

"Q. What is the basis of that opinion?

"A. A sharp corner should never be combined with a material that is not exceedingly ductal and subject to dynamic stresses."

The testimony with respect to this test was given in the absence of the jury. The court excluded the testimony.

(5). While Mr. Lincoln was on the witness stand he was asked to examine three or four broken units which had been identified by other witnesses. With reference to one of them he was asked: "Upon your examination of that unit, Mr. Lincoln, what, in your opinion, caused the unit to break?" Plaintiff's objection to the question was sustained. There was no answer.

Robert N. Hooker, who was found by the court to be an expert metallurgical engineer, testified for defendants. He has a degree in metallurgical engineering from Purdue University. He has for the past

11 years been in charge of materials, research and process section for Douglas Aircraft Company, and evaluates and assists in application of materials and processing both as engineer and production assistant. He had previously done laboratory work for Studebaker Motor Company evaluating incoming materials and inspecting type failures.

Mr. Hooker made a laboratory examination of the materials in a Fan-O-Matic. He cut the drive plate into pieces and retained a portion. The plate was sectioned through the center, and one-half of the center portion of the hub was cut out and put in a plastic mount for observation. He testified in substance: The drive plate is a die casting. In the process of manufacture porous areas are left inside the casting, and the quality of die castings vary to a limited extent due to porosity. There were in the hub three sharp corners, which are referred to as stress risers. When you impose a stress riser in, it actually amplifies the amount of stress in that part. Stress is transmitted from the fan through the bolt to the area where the threads and stress risers are. Mr. Hooker expressed the following opinions: The ultimate tensile strength or endurance strength of the metal in the drive plate is 45,000 p.s.i. The sharp corners (stress risers) reduce the normal tensile strength of the metal about one-half. The failures in the broken units (then in the courtroom) are all in the same area, and progress from one stress riser to another, and the failures were caused by stress imposed in the area of the stress risers in excess of the strength of that portion of the metal. Pulsating or fatigue type loading was a major factor in the failures. It is always good practice to eliminate stress risers. Die casting and sharp corners (stress risers) are a combination that should not go together. Revving of the motor causes stress; how fast an engine is capable of revving is more important than maximum RPM. Therefore, testing under service conditions is better than laboratory testing.

"Q. Now, Mr. Hooker, if the jury should find, and by the greater weight of the evidence, that one of these units was installed on a motor vehicle and that thereafter, after approximately one month had passed, and if a jury should find by the greater weight of the evidence that during that one month the unit functioned correctly, and if the jury should then find that the owner of the car pressed on the accelerator to rev up the motor, and if the jury should then find, by the greater weight of the evidence, that the unit, like the Exhibits U-2 or U-5, snapped off at the bottom of the hub, or the stud at a point running from one of the V-grooves where the hub screw screws down from that point, across to a sharp corner on the upper side of the hub, do you have an opinion satisfactory to yourself as to the cause of that failure?

"A. Yes.

"Q. What is that opinion?

"A. I would attribute this to fatigue and it could be caused by more than one item here. It could be the fact that you have three risers here. These can be amplified or decreased by the machining that took place, if you happen to get exceptionally sharp radiuses in one place it would be amplified in all the others; also a possibility these castings are not completely uniform. By chance you could get one where defects might appear, line up in an area where maximum stress is being applied by all of them. I would attribute your evaluation of the stresses and stress risers would be such as to exceed strength of material and get failure.

"Q. Referring to the hypothetical question I just proposed to you, is it your opinion that the failures, under those circumstances, was caused by the sharp corners at the base of the hub in the drive plate, coupled with the fact the drive plate was made out of a die casting?

"A. I would say yes."

A portion of the testimony by Mr. Hooker was taken in the absence of the jury. The court ruled that it was incompetent.

From the record in this case we are unable to say that the court erred in excluding the opinion evidence of Mr. Lincoln and Mr. Hooker. With reference to tests and inspections 1, 2, 3 and 5 made by Mr. Lincoln, the record does not disclose what his opinions, if any, were. "The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to testify." 1 Strong: N. C. Index, Appeal and Error, s. 41, p. 121 (and Supp. p. 42), and cases there cited. With reference to Test 4 by Mr. Lincoln and the testimony of Mr. Hooker, the data was inadequate for opinion purposes. For instance, we are unable to ascertain from the record whether the Fan-O-Matics tested by them were from the lot of 10 soft die test models first made by plaintiff, from the lot of 300 test units, or from the final deliveries after corrections had been attempted. A most careful examination of the record does not disclose to us this vital information. If the opinion of an expert witness "is based on obviously inadequate data, the trial judge may properly refuse to allow it to go to the jury." Stansbury: North Carolina Evidence, s. 136, p. 270. The judge's ruling might also be sustained on other grounds which will be adverted to in our discussion below. Since there must be a new trial, because of error in another feature of the case, we think it appropriate to outline briefly pertinent principles relating to expert testimony.

Evidence of the Fan-O-Matic tests made by Mr. Lincoln in service on the highway was offered on the theory, in part as least, that these tests were experiments. Where the tensile strength of materials is an issue, evidence may be received as to tests of tensile strength of materials that are the same as, or are substantially similar to, those whose tensile strength is in controversy. 20 Am. Jur., Evidence, s. 759, p. 631; *State v. Commercial Casualty Ins. Co.*, 248 N.W. 807, 88 A.L.R. 790 (Neb. 1933). However, the circumstances of the instant case do not readily lend themselves to *in service* experiments (as the term "experiment" is ordinarily understood in the law of evidence) for proof of the tensile strength of the materials of the Fan-O-Matic drive plate. Plaintiff assumed certain responsibilities with respect to the instrument, and defendant assumed others. Plaintiff guaranteed that Fan-O-Matic would be manufactured in accordance with the *approved design* and would function correctly in accordance *with data supplied by defendant*, guaranteed all material and workmanship for a period of 18 months, and agreed to repair or replace all defective parts. Defendant assumed responsibility for installation, installation instructions, the fan, and the selection of the types of automobiles on which it was to be used. Plaintiff was not to be responsible for liability caused by installation, tempering, negligence or misuse. To be competent as in service experiments the tests by Mr. Lincoln must bave been such as to demonstrate that failures did not result from neglect of defendant to meet its responsibilities, that tempering, negligence and misuse played no part, and that failures arose from faulty design or the lack of tensile strength of materials. The in service tests failed to demonstrate this with sufficient clarity. There is no showing that the Fan-O-Matic was designed for use on a station wagon, that the station wagon was standard and in good condition, that the installation (though in accordance with instructions promulgated by defendant) was in keeping with good engineering practice, or that the fan was substantially in good static balance and of proper size and weight. Moreover, it is debatable whether a test at 72 miles per hour in second gear is not a misuse of the instrument.

In the law of evidence an experiment ordinarily involves the reenactment of an occurrence under circumstances substantially similar to those which attended the actual occurrence, and for the experiment to be competent those attending circumstances must be understood and simulated with reasonable certainty, and the experiment must tend to produce the same result as the occurrence and to demonstrate that the occurrence resulted from the cause or causes in issue. The experiment should speak for itself and be complete within itself.

"To be admissible in evidence, an experiment must satisfy this two-fold requirement: (1) The experiment must be under conditions substantially similar to those prevailing at the time of the occurrence involved in the action; and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence." *Mintz v. R.R.*, 236 N.C. 109, 72 S.E. 2d 38. Mr. Lincoln did not purport to re-enact a prior definite occurrence, making the circumstances of his in service tests conform thereto. The court did not abuse its discretion in excluding the testimony as an experiment. "The rule obtains in this jurisdiction that 'whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear.' 32 C.J.S., Evidence, s. 687. . . ." *Mintz v. R.R., supra.* See also: 76 A.L.R. 2d Anno: Evidence — Experiments — Admissibility, pp. 372, 376; 8 A.L.R., Anno. — Experimental Evidence, p. 18, supplemented by 85 A.L.R. 479; 9 N.C.L. Rev. 453. However, it should be borne in mind that a party has the right to present evidence of similarity of conditions attending the experiment with those attending at the time and place of the accident, as the basis of presenting evidence as to the results of such experiment. The exercise of this right is not a matter of judicial discretion. *Tuite v. Union Pacific Stages, Inc.*, 284 P. 2d 333, 345 (Ore. 1955).

In our opinion Mr. Lincoln and Mr. Hooker did not make the inspections and tests, described by them, as experiments in the legal sense. They were experiments in the scientific sence, it is true. They each made a series of inspections and tests to enable them, from the information thus obtained and from their knowledge as engineers and metallurgical experts, to express opinions as to the tensile strength, affected by the design, of the Fan-O-Matic drive plate and hub. The rule is that an expert "must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the question." *Summerlin v. R.R.*, 133 N.C. 550, 555, 45 S.E. 898; *Yates v. Chair Co.*, 211 N.C. 200, 202, 189 S.E. 500. "Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience. Such testimony does, in a broad sense, encroach upon the province of the jury; and when it relates to matters directly in issue, it should not be admitted unless its admission is demanded by the necessities of the individual case." 20 Am. Jur., Evidence, s. 782, p. 653; *Patrick v. Tread-*

well, 222 N.C. 1, 5, 21 S.E. 2d 818. The facts upon which an expert grounds his opinion "must be brought before the jury in accordance with the recognized rules of evidence. When these facts are all within the expert's own knowledge, he may relate them himself and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross examination." Stansbury: North Carolina evidence, s. 136, p. 268. When the facts upon which an expert bases his opinion are within his own knowledge he "will be permitted to testify directly as to what in his opinion caused a particular occurrence or condition, and is not restricted, as in case of answers to hypothetical questions, to stating what might or could have caused it." *ibid,* pp. 269, 270. "The opinion of an expert may be introduced as to the cause of a break or other sign of damage in an object, appliance or apparatus affected by an accident or occurrence, formed upon his examination of it and offered as evidence of the cause of the event." 38 A.L.R. 2d, Anno: Opinion Evidence — Cause of Accident, p. 39.

We have already noted that the court properly excluded the opinion evidence in this case because it was based on inadequate data. Had the data been adequate, we can conceive of no reason why this evidence would not have been competent. *Keith v. Gregg,* 210 N.C. 802, 188 S.E. 849; *Tire Setter Co. v. Whitehurst,* 148 N.C. 446, 62 S.E. 523. The hypothetical questions addressed to the expert witnesses were faulty in form. The witnesses were asked whether a particular condition *did* produce the result. The inquiry should have been whether the condition *could* or *might* have produced the result. Stansbury: North Carolina Evidence, s. 137, p. 272.

(2). In our opinion errors affecting the second issue, relating to plaintiff's alleged damages, compel a new trial.

Mr. William W. Bowers, plaintiff's accountant, gave testimony to serve as a basis for determining these damages. Much of this testimony was received in evidence over the objection of defendants. The witness stated in substance: At the time the purchase order for the 10,000 Fan-O-Matics was cancelled, plaintiff had manufactured and delivered 3111 units. Product Development had been billed for these at $6.86 per unit, and had made payments on account. 230 units had been returned and Product Development had been given credit for them. There was a balance of $11,823.51 due plaintiff on account of the delivered units. Plaintiff had expended for the materials necessary for the manufacture of the 10,000 units the sum of $25,028.87. The cost of direct labor for work done on the order was $7,995.15. The factory overhead (including salaries for shipping and receiving clerks, fore-

men and superintendents, the cost of insurance, perishable tools, power, light, gas, supplies, etc.) was $14,791.03, which is 185% of direct labor cost. Administrative and selling expenses (including salaries of officers, clerks and stenographers, and cost of stationary and supplies, etc.) amount to $11,581.38, which is 23.78% (13.72% for selling, plus 10.06% for administrative expense) of the unbilled portion of the purchase order. And profits prevented amounts to $4,427.48.

The only principle of law stated by the trial judge in the charge for the guidance of the jury in determining damages is the following: "The damages to which one party to a contract is entitled because of a breach thereof, by the other, are such as arise naturally from the breach thereof, or such as may be reasonably supposed to have been within the contemplation of the parties at the time of making the contract as a probable result of the breach. Conversely, damages which do not arise naturally from a breach of the contract, or which are not within the reasonable contemplation of the parties, are not recoverable." After the court had delivered the charge the jury made at least three requests for a "financial breakdown" and directions for determining damages. In response, the court did nothing more than recapitulate the evidence. The jury was left without legal guidance to assess damages from testimony utterly inadequate in form and content for a proper determination.

For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for the breach. Where one violates his contract he is liable for such damages, including *gains prevented* as well as *losses sustained,* which may fairly be supposed to have entered into the contemplation of the parties when they made the contract. *Tillis v. Cotton Mills,* 251 N.C. 359, 111 S.E. 2d 606; *Chesson v. Container Co.,* 215 N.C. 112, 1 S.E. 2d 357.

By "gains prevented" is meant loss of profits, if any would have been realized from the completed transaction. In determining loss of profit, the following rules are applicable in appropriate circumstances: The measure of damages for the buyer's breach of a contract for the manufacture of goods, where the goods have already been manufactured or produced and where there is an available market therefor, is the difference between the contract price and the market price at the time fixed for delivery. However, if the goods are manufactured for a particular purpose, or for other reasons have no general market

value, the rule of damages based on the difference between the contract price and the market price does not apply. In such case, the measure of damages has been generally stated to be the difference between the contract price and the cost of manufacture. If at the time of the breach a part of the goods has been manufactured and delivered, the seller may recover as damages the full contract price (less any credits) for the goods delivered and, as to the portion of the goods not delivered, may recover the difference in the contract price of the undelivered goods and what it would have cost the seller to manufacture and deliver the undelivered portion. *Springs Co. v. Buggy Co.*, 148 N.C. 533, 62 S.E. 637; *Clements v. State*, 77 N.C. 142; 78 C.J.S., Sales, s. 479(c), pp. 145-6; 44 A.L.R., Anno: Damages — Sales — Buyer's Breach, p. 215, supplemented in 108 A.L.R. 1482; 3 Williston, Sales (Rev. Ed. 1948) s. 583a, p. 246.

"In addition to lost profits, the seller may recover expenditures for labor and materials reasonably made in part performance of the contract, to the extent that they are wasted when performance is abandoned." 78 C.J.S., Sales, s. 479(d), p. 147; *Leiberman v. Templar Motor Co.*, 140 N.E. 222, 29 A.L.R. 1089 (N.Y. 1923). In this category of damages "any expenses which might be reasonably contemplated by the buyer as the probable result of his failure to comply with the contract are properly included." (78 C.J.S., Sales, s. 482, p. 150) — provided, of course, they are wasted expenses, expenses attributable to undelivered goods. But recovery of damages and expenses referred to in the two preceding sentences are limited to such as accrued prior to notification by the buyer that he would accept no further deliveries. *Advertising Co. v. Warehouse Co.*, 186 N.C. 197, 119 S.E. 196. In determining damages for wasted materials, the market or salvage value of unused materials is to be deducted from the cost of the unused materials. The seller must use reasonable diligence to minimize damages. 78 C.J.S., Sales, s. 479(d), pp. 146-7; *Bennett v. S. Blumenthal & Co., Inc.*, 155 A. 68 (Conn. 1931); *Atalah v. Wilson Lewith Machinery Corp.*, 200 F. 2d 297 (4th Cir. 1952).

There is also the question whether, in determining lost profits by ascertaining the difference between the contract price of the undelivered goods and what it would have cost to manufacture and deliver these goods, the cost should include overhead expenses and fixed charges reasonably applicable to the undelivered portion of the contract. In cases, such as the one at bar, where the seller has an established and going business and is manufacturing and selling goods to various buyers, overhead and fixed charges constitute elements of cost of manufacture and are the subject of proper inquiry, and they

are susceptible of approximate ascertainment. *Worrell & Williams v. Kinnear Mfg. Co.*, 49 S.E. 988 (Va. 1905). It follows, in such case, that overhead and fixed charges are elements of damages for wasted labor and expenses, insofar as they are reasonably applicable thereto. In passing, it should be noted that in cases where the contract requires the seller to build a factory or expend large sums in particular preparation to supply the particular buyer for a long period of time, the cost of production is computed without including therein any allowance for overhead or fixed charges. *Georgia Power & Light Co. v. Fruit Growers Express Co.*, 190 S.E. 669 (Ga. 1937).

Plaintiff's evidence of damages must be certain, and sufficient in form and content to enable the jury to make the determination in accordance with the applicable legal rules. "Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." *Tillis v. Cotton Mills, supra.*

Applying the foregoing rules, plaintiff may, if Product Development has breached the contract, recover of defendants as damages: (a) The unpaid balance of the contract price for the units manufactured and delivered; (b) lost profits with respect to the undelivered portion of the purchase order, that is, the difference between the contract price of the undelivered units and what it would have cost to manufacture and deliver them. The cost of manufacture is to include the cost of materials necessary to manufacture the undelivered units, the cost of direct labor thereon, and overhead and fixed charges. Overhead, of course, includes such items as factory overhead, administrative costs and selling costs. (c) Cost of materials, labor, overhead and fixed charges wasted by reason of the breach, but only such as accrued prior to the notification to cease deliveries. The amount of damages for materials wasted is to be determined by the difference between the cost of the materials on hand at the time of notification and the market or salvage value of such materials.

(3). Radiator counterclaimed directly against plaintiff for $53,707 .92 damages for alleged breach of express and implied warranties of merchantability on the part of plaintiff. The court permitted Radiator to introduce evidence to show that it had paid plaintiff $1700 for drawings and a model unit, but excluded all other evidence of damages in support of Radiator's counterclaim. Radiator contends that the exclusion of the evidence was error.

This raises the question whether Radiator may maintain a counterclaim against plaintiff for breach of such warranties. The answer is no.

Neither the evidence nor the facts pleaded permit an inference that there was any express warranty running from plaintiff to Radiator. Plaintiff sues Product Development on its purchase orders, and Radiator on it guaranty of Product Development's obligation. *Milling Co. v. Wallace,* 242 N.C. 686, 89 S.E. 2d 413. At the insistence of Radiator, plaintiff had agreed to permit Product Development to assume all liability for purchase orders and dealings with plaintiff, and to relieve Radiator thereof, and Radiator agreed to guarantee the payment of Product Development's obligation to plaintiff. This, by solemn agreement of the parties, created the relationship of buyer and seller between Product Development and plaintiff, and of guarantor and creditor between Radiator and plaintiff. A contract of guaranty creates secondary liability. Guaranty requires two contracts, one binding the principal debtor, the other engaging the responsibility of the guarantor. 24 Am. Jur., Guaranty, s. 11, pp. 879, 880. It is true that in an action by a creditor against the principal debtor and guarantor jointly, a claim existing in favor of the principal debtor may be set off by the guarantor against the demand of the creditor, unless the claim constiutes an independent cause of action in favor of the principal debtor. 38 C.J.S., Guaranty, s. 89, pp. 1261-2. There is authority to the effect that a warranty does not inure to the guarantor. *Fulton Bank v. Mathers,* 166 N.W. 1050 (Iowa 1918). But assuming that it does in the instant case, Radiator may insist on it only by way of setoff, and in so doing must stand in the shoes of Product Development, and can realize no affirmative recovery against plaintiff. Product Development is fully asserting its counterclaim for breach of warranty, and, if successful, Radiator is benefitted thereby.

Moreover, Radiator may not maintain its counterclaim on the theory of a breach of implied warranty. Radiator purchased Fan-O-Matics from Product Development, not from plaintiff. Radiator does not contend otherwise. It is the general rule that the benefit of a warranty in the sale of personalty does not run with the chattel on its resale and does not inure to the benefit of a subsequent purchaser of the chattel so as to give him any right of action on the warranty as against the original seller. 46 Am. Jur., Sales, s. 307, p. 489. Our decisions are in accord. *Prince v. Smith,* 254 N.C. 768, 119 S.E. 2d 923; *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21; *Simpson v. Oil Co.,* 217 N.C. 542, 8 S.E. 2d 813; *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705; *Daniels v. Swift & Co.,* 209 N.C. 567, 183 S.E. 748; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30. A majority of the jurisdictions, including North Carolina, require privity between the parties for a recovery for a seller's breach of warranty. This rests on

the ground that the warranty is contractual in nature; therefore any party to an action for its breach must also have been a party to the sales contract. *Prince v. Smith, supra; Wyatt v. Equipment Co., supra.;* 1 Williston: Sales (Rev. Ed. 1948), s. 244, p. 645; 75 A.L.R. 2d, Anno: Products Liability — Privity, p. 39; 30 N.C.L. Rev. 191. Ordinarily the resale purchaser may sue the seller from whom he bought for breach of warranty, and the seller may bring in the manufacturer or wholesaler with whom he dealt, on the theory that the latter is primarily liable. *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822; *Williams v. Chevrolet Co.,* 209 N.C. 29, 182 S.E. 719. But Radiator seeks no recovery in this action against Product Development.

It is not clear upon what theory Radiator was allowed to introduce evidence of its $1700 payment to plaintiff for drawings and a model unit. This evidence is not competent upon any theory of breach of warranty, and there is no suggestion that the drawings and model unit were not satisfactorily made.

For the reasons stated, there will be a

New trial.

AMERICAN BAKERIES COMPANY v.
W. A. JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 22 May 1963.)

1. Taxation § 28b—

The mere fact that a foreign corporation engaged in business in this and other states owns a subsidiary corporation in another state, which subsidiary does no business in this State and owns no property here, does not in itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business, even though the subsidiary is engaged in a business similar to that of the parent corporation.

2. Same—

Plaintiff taxpayer was engaged in the wholesale bakery business, manufacturing and selling to customers not owned or controlled by it. Plaintiff taxpayer owned a subsidiary engaged in the manufacture and retail of bakery products, selling same to the general public, including restaurants and cafes, but the subsidiary purchased no products from plaintiff, and the subsidiary did no business in this State and owned no property here. *Held:* Plaintiff is not liable for income tax to this State on dividends received by it from the subsidiary. G.S. 105-134.

BAKERIES CO. *v.* JOHNSON, COMMISSIONER OF REVENUE.

APPEAL by plaintiff from *Clark, J.*, December Civil Term 1962 of WAKE.

This cause came on to be heard in the Superior Court of Wake County, without the intervention of a jury and upon a stipulation of fact, and it having been further stipulated that the court might find the facts from the stipulation of facts and from other evidence not inconsistent with the stipulated facts.

The trial judge found the facts, made his conclusions of law and entered judgment as follows:

"1. This is an action to recover income taxes in the amount of $6,003.76 paid under protest for the years 1953 and 1954 brought against James S. Currie, the then Commissioner of Revenue of the State of North Carolina, it having been stipulated in open court that W. A. Johnson, the present Commissioner of Revenue, be substituted as party defendant.

"2. The petitioner is American Bakeries Company, a Delaware corporation with its principal office in Chicago, Illinois.

"3. The deficiencies as determined by the Commissioner are in income taxes for the taxable years 1953 in the amount of $2,692.92 plus interest as provided by law and 1954 in the amount of $1,675.75 plus interest as provided by law, all of which is in dispute.

"4. The facts upon which the petitioner American Bakeries Company relies as the basis of its position are as follows:

"(a) Prior to June 13, 1953 all of the operations in North Carolina were by the American Bakeries Company, a Florida corporation which had no subsidiaries.

"(b) As of June 14, 1953 the American Bakeries Company (Florida) merged with Purity Bakeries Corporation, a Deleware corporation. Purity Bakeries Corporation, the successor corporation, changed its name to American Bakeries Company.

"(c) After the merger, American Bakeries Company owned the subsidiaries which it had formerly owned under its old name, Purity Bakeries Corporation, which had been changed at the time of the merger to American Bakeries Company. At that time, Grennan Bakeries Company, a subsidiary of Purity Bakeries Corporation, also changed its name to the former name of the parent.

"(d) The subsidiaries of American Bakeries Company as of June 14, 1953, were as follows:

"Purity Bakeries Corporation (Delaware)

Purity Bakeries Service Corporation (Illinois)

Taystee Baking Company (Illinois)
Cushman's Sons, Inc. (New York)

"(e) The Purity Bakeries Service Corporation and the Taystee Baking Company were merged into the parent company as of December 31, 1953.

"(f) As of December 31, 1953, the American Bakeries owned only two subsidiaries, Purity Bakeries Corporation (formerly Grennan Bakeries Company) and Cushman's Sons, Inc. Purity Bakeries Corporation had always been a wholly owned subsidiary and after the redemption of certain outstanding stock in December 1956, Cushman's Sons, Inc. became a wholly owned subsidiary of American Bakeries Company.

"(g) The Purity Bakeries Service Corporation (Illinois), prior to its merger with the parent company, American Bakeries Company, was the service corporation for all of the companies mentioned. As a service corporation, it made payment for salaries and administrative expenses, billing the parent company or the respective subsidiary for the amount due from each. The amount charged as a Service Charge was determined by a proration based on the production value of products made by each company. In other words, until 1953 the inter-company service arrangement was handled through the Purity Bakeries Service Corporation. This arrangement also included Cushman's Sons, Inc.

"(h) After December 31, 1953, Cushman's Sons, Inc. was one of the two subsidiaries of American Bakeries Company. However, the parent company after the merger with the service corporation continued to handle the administrative expenses for the remaining subsidiaries, Purity Bakeries Corporation (Delaware) and Cushman's Sons, Inc., on the same basis as it had formerly been handled by the service corporation. In other words, after 1953, the inter-company service arrangement was handled through the parent with Cushman's Sons, Inc. instead of through the service company, which had been absorbed into the parent.

"(i) The parent, American Bakeries Company, made a service charge to its subsidiaries which was determined by a formula whereby the percentage to be allocated to each company was determined by the production value of products made by each company to the total production value of products made by all of the companies, parent and subsidiaries.

"A breakdown by corporation showing the percentage of administrative expense allocated to each corporation for the years 1953 and 1954 is as follows:

	1953	1954
"American Bakeries Company	83.0	83.7
Cushman's Sons, Inc.	15.3	15.2
Purity Bakeries Corporation	1.0	1.1
Taystee Baking Company	0.7	*
	100	100

*Merged into American Bakeries Company 12/31/53.

"(j) The only subsidiary which paid any dividends during the years involved was Cushman's Sons, Inc., which paid dividends to its parent company, Purity Bakeries Corporation, until June 13, 1953, in the total amount of $182,364. After the merger of Purity Bakeries Corporation on June 14, 1953, with American Bakeries Company, Cushman's Sons, Inc. paid dividends to its parent in the amount of $182,819. Cushman's Sons, Inc. also paid dividends to its parent, American Bakeries, in the year 1954.

"(k) Cushman's Sons, Inc. maintained separate records and books of account from those of the parent, American Bakeries Company. The income of each company can be determined from the separate records and books of account of each company.

"(l) American Bakeries Company is engaged exclusively in the wholesale bakery business and manufactures bakery products for sale to business customers not owned or controlled by American Bakeries Company, such as some of the chain grocery stores.

"(m) Cushman's Sons, Inc. engages in the retail bakery business and manufactures its own bakery products which it sells to the general public, including restaurants and cafes.

"(n) There were no inter-company loans during any of the years involved. There may have been a transfer of some personal property between companies; however, if this were ever the case all such personal property would have been billed to the receiving company at book value and the billing would have been paid by check. Any exchange of products or purchases between the parent and subsidiary was very minor as shown by the following schedule:

	1953*	1954
"Sales (cents omitted)		
American Bakeries Company	$62,342,072	$113,905,351
Cushman's Sons, Inc.	11,099,362	19,510,223
	$73,441,434	$133,415,574
Inter-company net transfers	$ 65,594	$ 52,866

*Period involved:
6/15/53 to 12/31/53

"(o) In including the dividend income received from a subsidiary in allocable income of American Bakeries Company, the North Carolina Commissioner of Revenue has allowed no credit for the property, sales or payroll factors producing such income.

"(p) The subsidiary, herein, Cushman's Sons, Inc., conducts no business activities in North Carolina.

"(q) The United States Treasury Department through an Internal Revenue Agent made adjustments to the income of American Bakeries Company for the years 1953 and 1954, which are the years involved herein. Final agreement with the United States Treasury Department was consummated in 1959, which was more than three years after the due date or filing date of income tax returns for the years involved to the State of North Carolina by American Bakeries Company. The adjustments and changes made by the Internal Revenue Agent were immediately reported to the State of North Carolina and the additional tax due the State of North Carolina as a result of these adjustments and changes were paid to the State. Upon receipt of the report and check the State calculated the interest due on the additional payment. In addition, the Commissioner made adjustments to the income to American Bakeries Company which had not been made by the Internal Revenue Agent by including dividend income from the subsidiary, Cushman's Sons, Inc., in the allocable income of American Bakeries Company during the years involved.

"5. The following schedule reflects the difference between,

"(1) the amount of tax due the State of North Carolina for the years 1953 and 1954 as computed by the Commissioner of Revenue, including the amounts in controversy, and

"(2) the amount of tax which would be due the State of North Carolina under applicable income tax statutes for the years 1953 and 1954, if American Bakeries Company and its subsidiary, Cushman's Sons, Inc., had filed consolidated income tax returns in North Carolina for those years.

	1953	1954
"Tax as computed by Commissioner including amounts in controversy, number (1) above	$42,307.45	$66,120.81
Tax computed on a consolidated basis of American Bakeries Company and its subsidiary, Cushman's Sons, Inc., number (2) above	$35,854.80	$60,045.06
Difference	$ 6,452.65	$ 6,075.75

"6. If the income tax allocation formula, under North Carolina statutes, included the property and cost of manufacture of the subsidiary, Cushman's Sons, Inc., which produced the income of Cushman's Sons, Inc. on a consolidated basis with American Bakeries Company, the tax due the State of North Carolina (1) for the year 1953 would have been $6,452.65 less than the amount computed by the North Carolina Commissioner of Revenue, and (2) for the year 1954 would have been $6,075.75 less than the amount computed by the North Carolina Commissioner of Revenue.

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

"1. The defendant acted within his power in making the additional assessments for the years 1953 and 1954 pursuant to G.S. 105-159 following corrections and changes in plaintiff's Federal tax returns by the Federal authorities.

"2. The business of plaintiff in North Carolina and the business of its subsidiary, Cushman's Sons, Inc., is unitary.

"3. Defendant properly included in plaintiff's income apportionable to the State of North Carolina dividends received from plaintiff's subsidiary, Cushman's Sons, Inc., without taking into consideration Cushman's Sons, Inc.'s property, payroll and sales in allocating and apportioning plaintiff's taxable income to the State of North Carolina.

"4. Plaintiff is not entitled to relief prayed for in its complaint.

"Upon the foregoing findings of fact and conclusions of law, it is CONSIDERED, ORDERED and ADJUDGED that plaintiff take nothing by its complaint, that this action be dismissed, and that the costs be taxed against the plaintiff."

The plaintiff appeals, assigning error.

Attorney General Bruton; Asst. Attorney General Peyton B. Abbott for the State.

Smith, Leach, Anderson & Dorsett for plaintiff.

Joyner & Howison, Amicus Curiae, for Southern Railway Company.

DENNY, C.J. Two questions are presented for determination on this appeal:

1. Whether dividends paid to the plaintiff (taxpayer) by its subsidiary corporation derived from the earnings of the subsidiary's manufacture and sales of bakery products outside of North Carolina, are subject to income taxes imposed by North Carolina pursuant to the provisions of G.S. 105-134.

2. Whether the North Carolina Commissioner of Revenue is limited in adjustment of plaintiff's income tax returns to the area of Federal changes when changes in the Federal income tax returns are made by the Federal authorities; and more than three years have passed since the filing and due date of such returns; and plaintiff complies with the statute regarding filing reports of the Federal changes with the North Carolina Commissioner.

The appellant, American Bakeries Company, is a Delaware corporation with its principal office in Chicago, Illinois. Its subsidiary, Cushman's Sons, Inc., is a New York corporation, owns no property in North Carolina, is not domesticated in this State, and has never carried on any business activities in North Carolina.

American Bakeries Company voluntarily paid all taxes due the State of North Carolina pursuant to the formula arrived at pursuant to the provisions of G.S. 105-134, except the taxes assessed by the State on dividends received by the appellant from its subsidiary, Cushman's Sons, Inc., during the years 1953 and 1954. These taxes were paid under protest.

On the facts found, the court below concluded that the business of American Bakeries Company in North Carolina, and the business of its subsidiary, Cushman's Sons, Inc., is unitary. The court below likewise found that "American Bakeries Company is engaged exclusively in the wholesale bakery business and manufactures bakery products for sale to business customers not owned or controlled by American Bakeries Company, such as some of the chain grocery stores"; and that "Cushman's Sons, Inc., engages in the retail bakery business and manufactures its own bakery products which it sells to the general public, including restaurants and cafes."

In *Maxwell, Comr. v. Mfg Co.*, 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476, this Court said: "That term (unitary) is simply descriptive, and primarily means that the concern to which it is applied is carrying on one kind of business — a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units. By contrast, a dual or multiform business must show units of a substantial separateness and completeness, such as might be maintained as an independent business (however convenient and profitable it may be to operate them conjointly), and capable of producing a profit in and of themselves.

"Conceding that a unitary business may produce an income which must be allocated to two or more states in which its activities are carried on, such business may not be split up arbitrarily and conventionally in applying the tax laws. It would seem to be necessary

that there should be some logical reference to the production of income * * *."

As we interpret our tax laws, the mere fact that a foregin corporation engaged in business in North Carolina and other states, owns a subsidiary corporation in another state, which subsidiary does no business in North Carolina and owns no property in this State but is engaged in a similar business to that of the parent corporation, such factual situation does not of itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business.

Certainly the parent corporation controls and supervises its subsidiary, but the stipulations and facts found below clearly establish the fact that Cushman's Sons, Inc. is not a customer of American Bakeries Company or engaged in selling its products. In other words, this subsidiary is not a retail outlet for the parent coroporation, but manufactures its own bakery products and sells them to the retail trade, not to or through the parent corporation.

In the case of *Hans Rees' Sons v. N. Carolina ex rel Maxwell,* 283 U.S. 123, 75 L. Ed. 879, Chief Justice Hughes, speaking for the Court, said: "Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. * * *

"When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

In *Cargill v. Spaeth,* 215 Minn. 540, 10 N.W. 2d 728, the plaintiff, Cargill, Inc., was organized under the laws of Delaware, where it

maintained a statutory office for the purpose of continuing its right to exist and function as a corporation, but transacted no business in that State. The corporation had its general business office in Minneapolis, where all its corporate business was transacted. Its business consisted of merchandising, warehousing, and handling of grain and other commodities. Its operations extended to substantially every grain-producing state, including Nebraska and Illinois.

During the taxable periods involved, the taxpayer received dividends from three foreign corporations, which transacted no business in Minnesota and all of whose capital stock Cargill owned.

One of these subsidiaries was incorporated under the laws of Nebraska and conducted a grain business in that State. Another one was incorporated under the laws of Illinois and transacted substantially the same line of business as the parent corporation. The third subsidiary was incorporated in Delaware and was engaged in the transportation of grain by vessels on the Great Lakes and on the seas and by barges on the Erie Canal.

The Court said: "The separate entity of the parent and of the stock-owned subsidiaries was observed. Each transacted its own business as a separate corporation. In their intercorporate relations they made contracts, leases, and charges for services and use of money the same as if no such relationship existed. * * *

"Proof that the subsidiaries' stocks were not employed in the parent's business is not confined to the admissions. The other evidence supports the view that the separate corporate entities of the parent and the subsidiaries were punctiliously observed and that their intercorporate business was transacted as if no parent-subsidiary relationship existed. 'Where * * * the corporate separation is maintained and the subsidiary conducts its own business, the subsidiary, not the parent, is doing the business.' *Garber v. Bancamerica-Blair Corp.*, 205 Minn. 275, 282, 285 N.W. 723, 727. Accord, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634."

The decision of the Supreme Court of Minnesota was to the effect that the commercial domicile of Cargill, Inc. was in the State of Minnesota, and that Cargill could only be taxed on dividends received from these subsidiaries in the state of its commercial domicile if the respective corporations were operated separately and were not merely one in fact; but if the corporations were so interrelated as to make up a single business unit, then the dividend income would have to be apportioned equitably among the states in which the parent corporation did business so there would be no danger of double taxation. The taxes assessed by the State of Minnesota against the parent corporation on

all the dividend income from the three subsidiaries were upheld. See *Southern Pacific Co. v. McColgan,* 68 Cal. App. 2d 48, 156 P 2d 81, and *Connecticut Gen. L. Ins. Co. v. Johnson,* 303 U.S. 77, 82 L. Ed. 673. See also 67 A.L.R. 2d Anno: Tax-Income of Foreign Corporation, page 1322.

In the case of *Standard Oil Co. v. Thoresen,* C.C.A. 8th Cir., 29 F 2d 708, the State of North Dakota made an additional assessment against the oil company, based upon the allocation to that State of a portion of the income made by the oil company in the business of producing crude oil from the ground, and in the business of manufacturing and refining crude oil, although it neither produced a barrel of crude oil in the State of North Dakota nor did it refine any oil in that State. Thereupon, the oil company brought suit to enjoin the collection of additional taxes assessed upon its business of the production and refining of oil done in other states.

The question posed for decision was this: "Does the law of the State of North Dakota require the plaintiff to pay taxes on its producing and refining oil business done altogether in states other than that State because of the fact it is engaged in the business of marketing refined oils in that State?"

The Court said: "In the first place, we are of the opinion from a reading and consideration of the many cases controlling here, the Legislature of the State in enacting the statute above quoted did not intend to impose a tax on the property of the plaintiff company or its income arising from the doing of business other than the character of business done in the State of North Dakota, that is, selling oil in that State. * * *"

The State of North Dakota contended that "(t)he business of plaintiff may and should, for the purpose of taxation, be regarded as a unit for the production, transportation, refining and marketing of oil. From a reading and consideration of the many cases on the subject we are not of that opinion. In some cases the unit theory of taxation attempted to be here applied is all right and has been upheld by the Supreme Court of our country in such cases as *Underwood Typewriter Co. v. Chamberlain, Treasurer of State of Conn.,* 254 U.S. 113, 41 S.Ct. 45, 65 L. Ed. 165, and in *Adams Express Co. v. Ohio,* 165 U.S. 194, 17 S.Ct. 305, 41 L. Ed. 683. * * *

"The plaintiff in this case is engaged in the production of crude oil in those states wherein crude oil is found. There is no crude oil discovered in the State of North Dakota. The plaintiff is also engaged in the manufacture or refining of crude oils in many states, but has not done so in the State of North Dakota. It has engaged in marketing

refined oil alone in that State. On its properties within the State of North Dakota employed in the business of marketing oil, and on the income arising from the doing of that business within the State of North Dakota it may be there taxed by the State and the tax must be paid. On its business of producing and refining oil it should be taxed only by the state in which this production is found or refining done. * * *"

In *Transportation Co. v. Currie, Comr. of Revenue,* 248 N.C. 560, 104 S.E. 2d 403 (affirmed 359 U.S. 28, 3 L. Ed. 2d 625; petition to rehear denied 359 U.S. 976, 3 L. Ed. 2d 843), this Court said: "Under the facts of this case we conclude that it is clearly manifest that the State of North Carolina has the right to collect the nondiscriminatory income taxes imposed on plaintiff, which taxes were imposed solely on that part of plaintiff's income earned within the State of North Carolina in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State."

Likewise, in the case of *Power Co. v. Currie, Comr. of Revenue,* 254 N.C. 17, 118 S.E. 2d 155 (*certiorari* denied 367 U.S. 910, 6 L. Ed. 2d 1250), this Court, speaking through *Parker, J.* said: "In the apportionment of a unitary business the formula used must give adequate weight to the essential elements responsible for the earning of the income * * *."

In light of the stipulations entered into by the parties, and the facts found thereon in the court below, in our opinion, there is no valid legal basis for requiring the appellant to pay income taxes to the State of North Carolina on the dividends received from its subsidiary, Cushman's Sons, Inc., in 1953 and 1954, which dividends were paid out of earnings of the subsidary, no part of which was earned from business conducted or transacted in the State of North Carolina.

In view of the conclusion we have reached, we deem it unnecessary to discuss and consider other questions raised in connection with the first or second questions posed.

The judgment of the court below is

Reversed.

A. GLENDON JOHNSON v.
WILLIAM W. JOHNSON AND LOIS F. JOHNSON, TRUSTEE.

(Filed 22 May 1963.)

1. Pleadings § 19—

Where there is no appeal from an order sustaining a demurrer to a pleading and granting the pleader time to amend, the ruling becomes the law of the case and the pleading can be made effective only by an amendment supplying the deficiencies.

2. Pleadings § 34

A motion to strike a pleading in its entirety and dismiss the action is in substance, if not in form, a demurrer to the pleading.

3. Pleadings § 2—

Plaintiff's pleadings should contain a statement of the substantive and constituent facts upon which plaintiff's claim to relief is based, and a prayer for the relief to which plaintiff supposes himself entitled, G.S. 1-122(2), G.S. 1-122(3), and should not contain a narration of the evidence.

4. Pleadings § 12—

A demurrer for failure of a pleading to state a cause of action admits only those facts properly pleaded and does not admit legal inferences and conclusions of the pleader.

5. Same—

The requirement that a pleading be liberally construed upon demurrer with a view to substantial justice between the parties does not warrant the court in reading into a pleading facts which it does not contain. G.S. 1-151.

6. Contracts §§ 2, 25—

In order to constitute a contract, the parties must assent to the same thing in the same sense, and therefore when the allegations of a pleading fail to disclose a definite agreement on the part of one of the parties to purchase the rights of the other, and a definite agreement on the part of the other to sell upon the terms and conditions stipulated, the pleading fails to set up an enforceable contract.

7. Pleadings § 19—

Repugnant allegations of a pleading destroy and neutralize each other, therefore where it is alleged in one paragraph that a party defendant agreed to sell her interest in a business upon specified terms and conditions, and in another paragraph it is alleged that it was agreed that such party should retain her interest in the business subject to the pleader's right to call for a sale at a later date, and in another paragraph that such party was to take stock in corporation to be formed to operate the business, the allegations neutralize each other, and the pleading fails to state a contract to sell.

8. Trusts § 5—

In an action against a trustee to enforce the trustee's agreement to sell an interest in a particular partnership, plaintiff must allege that the trustee had power to sell such interest.

9. Pleadings § 19—

Where the allegations of a pleading in regard to one of its causes of action are so irrelevant, immaterial, redundant, repugnant, and confusing as to affirmatively show that it constitutes a statement of a defective cause of action, such action is properly dismissed upon demurrer.

APPEAL by plaintiff from *Copeland, S.J.,* 28 January 1963 Assigned Civil Session of WAKE.

Civil action heard upon (1) a motion by plaintiff to reverse an order sustaining a demurrer; (2) a motion by defendant, Lois F. Johnson, trustee, to strike the pleading filed by plaintiff under date of 10 December 1962 entitled "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint"; and (3) a motion by defendant, William W. Johnson, to strike certain portions of plaintiff's reply filed on 4 December 1962. Plaintiff's motion is not in the record, and consequently we do not know what order he refers to. Defendant William W. Johnson's motion is not in the record, and consequently we do not know what portion of plaintiff's reply he moved to strike. The court denied plaintiff's motion, and allowed the second and third motions without stating what was stricken out of paintiff's reply, and ordered that this action insofar as it relates to the defendant Lois F. Johnson, trustee, be dismissed. The court in its order decreed further: "The plaintiff is allowed thirty (30) days from this date in which to file a substitute reply to the first, second and third further answers and defenses of the defendant William W. Johnson on condition that in said substitute reply the plaintiff shall either admit or deny each of the allegations of said first, second and third further answers and defenses. Plaintiff shall also be allowed to plead such additional allegations, if any, as he may be advised, consistent with the practice of this Court, as may constitute a legal defense to the allegations of the defendant William W. Johnson's said pleadings." From the order allowing the motion of Lois F. Johnson, trustee, and dismissing the action as to her, plaintiff appeals.

Lake, Boyce & Lake by Eugene Boyce for plaintiff appellant.

Dupree, Weaver, Horton & Cockman by F. T. Dupree, Jr. for defendant appellee, Lois F. Johnson, Trustee.

PARKER, J. In fairness to plaintiff's counsel of record in the Supreme Court, it should be stated that in the statement of case on appeal it is said that plaintiff in person drafted all his pleadings, and up to the time of this appeal has acted as his own attorney. However, in Judge Copeland's order it is stated that an order had previously been entered allowing Phillip Ransdell to withdraw as plaintiff's counsel. There is no other reference to Phillip Ransdell in the record before us.

On 31 March 1961 plaintiff obtained an order from the court for an extension of time until 20 April 1961 to file a complaint, apparently against his brother William W. Johnson. In his application for such an order, he stated the purpose of the action was "to formally terminate the existing partnership, and/or readjust certain personal financial responsibilities for or of the operation of the partnership business, as requested by the defendant herein; and agreed to in principle by both parties hereto, made respectively plaintiff and defendant herein."

On 4 April 1961 he had summons in this action to issue.

On 18 April 1961 plaintiff filed a motion to make Lois F. Johnson, trustee, wife of his brother William W. Johnson, a party defendant on the ground "that she is in fact a party to the partnership, though not directly in the controversy, except as she received a 20% interest in the formation of the original partnership, and the court may wish to look into the matter of her interest in the partnership dissolution." Carr, J., entered an order granting his motion, and stated in the order, "Lois F. Johnson, trustee, would and should be a proper party to the partnership dissolution matter now before the court, and that making her a party hereto would be the legal method of providing her an opportunity to be heard, or her interest in the partnership properly protected."

The summons was served on 20 April 1961.

On 18 September 1961 plaintiff filed a complaint. This complaint is not in the record. Defendants filed a motion to strike certain portions of the complaint, which is not in the record. On 15 November 1961 Hooks, S.J., entered an order allowing the motion to strike in its entirety, and granting plaintiff 30 days in which to file an amended complaint. There is nothing in the record to indicate what this complaint alleged, or what was asked to be stricken, or what was stricken.

On 14 December 1961 plaintiff filed an amended complaint, representing a complete departure from the purpose of his original action as stated by him in his application to the court for an order granting him an extension of time in which to file a complaint. In his amended complaint he alleges in substance: Since the fall of 1938 he and his

brother William W. Johnson were partners doing business as a partnership under the name of Standard Homes Company on an informal, verbal basis as to work and division of proceeds. The latter part of 1953 a written partnership agreement was signed, and a 25% interest in North Carolina Standard Homes Company was relinquished to Lois F. Johnson as trustee for herself and their children. There was a clearly understood mutual agreement, that if either party became dissatisfied, the other would either buy or sell. When a disagreement arose in February 1961, William W. Johnson declared the partnership dissolved, suggested recourse to the buy-or-sell type of termination, and supplied figures for a price and terms to be followed in settlement. Plaintiff verbally contracted to buy, and defendants verbally agreed to sell all of their interests in the partnership at the price and according to the terms set forth by William W. Johnson. The terms of the verbal contract were: (1) The properties of Standard Homes Company were valued at $150,000.00; (2) William W. Johnson, owner of a 55% interest in the partnership, was to be paid $82,500.00, and Lois F. Johnson, as trustee, owner of a 20% interest, was to be paid $30,000.00; (3) a detailed statement of a cash down payment of 10% and of deferred payments in a mutual effort to eliminate the possibility of a capital gains tax. In keeping with the terms of the verbal contract, he made preparations for the down payment, and made "constructive tender thereof on March 27, 1961; and has been at all times since both willing and ready to make actual delivery of the down payment," but that on 29 March 1961, William W. Johnson told him he had decided not to sell, and Lois F. Johnson, trustee, told him she would have to abide by the decision of her husband, William W. Johnson. Thereafter, defendants instituted an action in the Wake County Superior Court for a dissolution of the partnership, to have a receiver appointed, and sell the business. (Note: In this action, the present plaintiff was defendant, and he appealed from an order making the receivership permanent. We affirmed. *Johnson v. Johnson*, 255 N.C. 719, 122 S.E. 2d 676.) The receiver is now conducting the affairs of Standard Homes Company. Wherefore, he prays that defendants be compelled to specifically perform their contract to sell to him their interest in the partnership, and that defendants be required to account to him for all profits earned by the partnership since 27 March 1961, and to refund to him any money received by them from the partnership since that date.

On 9 January 1962 defendants filed a motion to require plaintiff to make his complaint more specific by attaching to his complaint a copy of the partnership agreement, and to allege the exact terms, verbal or

written, as to their alleged offer to sell their interests in the partnership. On 10 January 1962 Mallard, J., entered an order allowing defendants' motion, and allowing plaintiff 20 days in which to comply with his order.

On 25 January 1962 plaintiff filed an amendment to his amended reply, in which he alleges the contract to sell by defendants was entered into after lengthy discussions and that "on March 25, 1961, the plaintiff advised both defendants that he had elected to buy the defendant William W. Johnson's interest in said partnership, *and the defendant Lois F. Johnson's interest if she desired to sell,* on the terms as set forth in paragraph 9 of the Amended Complaint previously filed in this action; that on said date, and at the same time, the defendant, William W. Johnson advised the plaintiff that he (WWJ) would have to consult a 'tax lawyer' regarding the capital gains or income resulting from the sale, but would give the plaintiff a definite answer on Monday, March 27, 1961; *that on Monday afternoon, March 27, 1961, the defendant Wm. W. Johnson advised the plaintiff that he would sell on the terms which they had tentatively agreed upon, which terms are set forth in Paragraph 9 of the plaintiff's Amended Complaint* * *.*" (Emphasis supplied.) Plaintiff attached to this amendment a copy of the written partnership agreement. Then he filed an unverified "Further Reply to Order of January 10, 1962," in which he states it is conceivable Judge Mallard did not sufficiently "scrutinize (or analyze)" the motion presented to him, but in order to comply with his order he files three additional exhibits. The first one is a copy of a letter of William W. Johnson to him dated 1 March 1961, in which he discusses in a general way the value of the partnership, terms of a possible sale, how it could be paid for if sold to plaintiff, and in which he writes, "I have not discussed with Lois any price for the 20% but this might be left as an interest in the business." The second one is a long memorandum on dissolution of partnership submitted by plaintiff on 25 March 1961, which shows no acceptance by anyone, and in which he states he elects to buy. In this memorandum he states:

> "In view of indications that the seller, Wm. W. Johnson, may wish to do some 'second guessing' on paragraph 5 (ibid), it is suggested that this '20% — left as an interest in the business,' might be carried as '6%, participating, preferred' or '5%, cumulative, preferred' (or vice versa) stock in any corporation formed of the business; or, in the event of a decision by the seller, Wm. W. Johnson, to advise or direct his wife Lois to require the liquidation of her trust account interest in the business, somewhat

simultaneously with the liquidation of his own interest therein, &/or his management and control thereof, it is hereby suggested that the seller agree to reduce his personally required payments to $750 for 99⅓ months (8 yr., 3-⅓ mo.) and accept installments of $250 for 108 mo. (9 yrs), after a $3,000 (10%) down-payment, on his wife's Trustee Interest, — to maintain the principle and spirit of the originally proposed and hereby accepted offer of income to the seller and payments by the purchaser of 'about $1,000 per month.'"

The third one is an unsigned, so-called deed of settlement, wherein Mrs. Beulah Olive Johnson, mother of plaintiff and the male defendant, is named grantor, which is not in the form of a deed of settlement and refers to her farm. (Note: In plaintiff's pleadings and exhibits the interest of Lois F. Johnson, trustee, is sometimes spoken of as 20% and at other times as 25%.)

On 12 February 1962 Lois F. Johnson, trustee, demurred to plaintiff's amended complaint, and the amendment thereto, on the ground that it failed to state facts sufficient to constitute a cause of action against her, in that its allegations of fact show that she, as trustee, never agreed to sell her interest as trustee in the partnership, and never accepted any proposal of plaintiff to buy the same. On 12 November 1962 Copeland, J., entered an order sustaining her demurrer, and allowing plaintiff 30 days in which to file an amendment to his amended complaint as to defendant Lois F. Johnson, trustee. To this order plaintiff did not except.

On 10 December 1962 plaintiff filed what he terms "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," which is six pages in length. In this pleading, he alleges at great length "squabbles" with his brother, William W. Johnson, domestic difficulties between defendants, and the crying of his mother and defendants on his shoulder. He further alleges in substance that Lois F. Johnson offered to sell her interest in the business to him at any price and on any terms in any way comparable to the terms agreed upon between him and William W. Johnson, and that as an additional or alternate offer to be elected or determined by him, she would hold or permit her 20% interest in the business to remain as a minor partner in order to limit the burden of an excessive capital outlay by him, but subject to his call therefor at a later date. That he elected to buy the business and presented to both defendants a signed memorandum enumerating the terms of the business dissolution. William W. Johnson accepted the memorandum, subject to the opinion of a tax lawyer

on whether or not the provisions of the memorandum would hold up in its attempt to soften the bite of the capital gains tax. Lois F. Johnson accepted the fact of the sale and the term of the memorandum as written. He alleged in paragraph 7, in part:

> "That the language used by the plaintiff in his January 25, 1962 Amendment to his Amended Complaint was somewhat restricted by a request or demand that he give exact terms, words, or language of the alleged offer and acceptance of the parties to the agreement; and in the last major phrase (or part of a sentence) given at the bottom of page 1 of that paper, to-wit:
>
> > 'That on March 25, 1961, the plaintiff advised the defendants that he had elected to buy the defendant William W. Johnson's interest in said partnership, and the defendant Lois F. Johnson's interest if she desired to sell, on the terms set forth. . . .'
>
> it was the intent of the plaintiff to give as near as possible the exact ideas expressed that day* * *."

He alleged further in substance that William W. Johnson became enraged at his mother over a disagreement as to the nature and time of an assumed conveyance of the home place by her to him, and notified him in writing that he was not satisfied with his mother's arrangement on the realty matter and that he should forget about the partnership transfer until later. Then Lois F. Johnson told him she would have to abide by her husband's decision. He has been ready, willing and prepared to make the down payment required and to assume control of the business and carry out the contract. This pleading further alleges in substance: Defendants instead of complying with their contract swore falsely to untrue statements about the causes of the dissolution of the partnership, secured the appointment of a receiver for the partnership, and a sale of the business of the partnership at the courthouse door, thereby "placing the assets of the former partnership beyond the legal reach of this Court for purpose of permitting a required compliance in case of an Order, or Judgment for Specific Performance." Plaintiff ends this pleading as follows:

> "WHEREFORE, in addition to the prayers for relief sought in the prior pleadings of this case, and hereby included by this reference thereto, the plaintiff further prays the Court:
>
> "1. To reinstate the above-named defendant Lois F. Johnson, Trustee, as a proper party in the above-entitled action.
>
> "2. To adjudge the former partnership property now held by the defendants to be in law and fact held only in trust. * * *"

On 14 December 1962 defendant Lois F. Johnson, trustee, made a motion to strike plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," filed 10 December 1962, on the ground that the allegations of the pleading are irrelevant, immaterial and redundant; that they state merely conclusions on the part of the plaintiff; and that they do not state facts sufficient to constitute a cause of action against her. On 29 January 1963 Copeland, J., allowed her motion and decreed that this action as it relates to her be dismissed.

On 12 November 1962 Judge Copeland entered an order sustaining the demurrer of Lois F. Johnson, trustee, as to plaintiff's amended complaint, and the amendment thereto, on the ground it failed to state facts sufficient to constitute a cause of action against her, and allowed him 30 days to amend his complaint as to her. To this order plaintiff did not except, and from it he did not appeal. Thereupon, the ruling that the amended complaint, and the amendment thereto, failed to state a cause of action against her became the law of the case. Thereafter, plaintiff is compelled to rely on his "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint" to maintain his action against Lois F. Johnson, trustee. *Webb v. Eggleston,* 228 N.C. 574, 46 S.E. 2d 700. So far as the record shows, defendant William W. Johnson did not demur to plaintiff's amended complaint, and the amendment thereto, and the record shows that he has filed at least three answers in this action.

Plaintiff has one assignment of error, based on one exception, and this is, he assigns as error the entry of Judge Copeland's order on 29 January 1963 allowing the motion of Lois F. Johnson, trustee, to strike his "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," and dismissing the action as it relates to her.

Her motion is in substance, if not in form, a demurrer to this pleading of plaintiff, and will so be considered. *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554.

A complaint, or an amended complaint, must contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition * * *." G.S. 1-122(2); *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615. It must likewise contain "a demand for the relief to which the plaintiff supposes himself entitled." G.S. 1-122(3); *Parker v. White, supra.*

The function of a complaint is not the narration of the evidence, but the statement of the substantive and constituent facts upon which the

plaintiff's claim to relief is based. *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47.

"A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits the truth of every material fact properly alleged. [Citing authority.] However, it is to be noted that on demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded." *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5. G.S. 1-151 requires us to construe the allegations of the challenged pleading liberally with a view to substantial justice between the parties.

Plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint" is filled with allegations of fact which are irrelevant, immaterial, and redundant within the purview of the rules of pleading set forth in *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. The same thing is true as to all of plaintiff's pleadings appearing in the record.

Construing plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," as we are required to do upon the demurrer's challenge, we fail to find therein any statement of facts tending to show an identity between plaintiff's alleged offer to buy the interest of Lois F. Johnson, trustee, in the partnership, and her alleged acceptance of his alleged offer to buy, or to show plaintiff and Lois F. Johnson, trustee, have assented to the same thing in the same sense, consequently there is no valid and enforceable contract to buy and sell. *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897, 149 A.L.R. 201.

This pleading alleges in one place she offered to sell her interest in the business to him at any price and on any terms in any way comparable to the terms agreed upon between plaintiff and her husband, or as an additional offer, to be elected or determined by him, she would hold or permit her 20% interest in the business to remain as a minor partner, subject to plaintiff's call at a later date. Further, this pleading says she accepted both the fact of the sale and the term of the memorandum as written by him. When we look at the memorandum submitted by plaintiff, a part of which is set forth verbatim above, it is stated therein that her 20% interest as trustee might be carried as preferred stock in any corporation formed of the business, or William W. Johnson might advise his wife to liquidate her interest as trustee in the partnership. This pleading also contains this language:

> "That the language used by the plaintiff in his January 25, 1962 Amendment to his Amended Complaint was somewhat re-

stricted by a request or demand that he give exact terms, words, or language of the alleged offer and acceptance of the parties to the agreement; and in the last major phrase (or part of a sentence) given at the bottom of page 1 of that paper, to-wit:

'That on March 25, 1961, the plaintiff advised the defendants that he had elected to buy the defendant William W. Johnson's interest in said partnership, and the defendant Lois F. Johnson's interest if she desired to sell, on the terms set forth. . . .'

it was the intent of the plaintiff to give as near as possible the exact ideas expressed that day* * *."

When we read all of plaintiff's prior pleadings in the record, we find the same failure to allege facts tending to show a valid, enforceable contract between plaintiff and Lois F. Johnson, trustee, to buy and sell.

Further, in plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint" we find repugnant allegations of fact in respect to plaintiff's alleged offer to buy the interest of Lois F. Johnson, trustee, in the partnership, and her alleged acceptance of the same, and repugnant allegations of fact destroy and neutralize each other, and when these are eliminated no allegations of fact are left sufficient to state a cause of action against Lois F. Johnson, trustee. While we are required to construe this pleading liberally, we are not permitted to read into it facts which it does not contain. *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337. The same is true in all of plaintiff's prior pleadings in the record in respect to Lois F. Johnson, trustee.

Further, there is nothing in all of plaintiff's pleadings to indicate that Lois F. Johnson, trustee, had any power to sell the trust property held by her in the partnership. *Maxwell v. Barringer*, 110 N.C. 76, 14 S.E. 516, 28 Am. St. Rep. 668; 54 Am. Jur., Trusts, sec. 433.

Plaintiff has a series of bizarre pleadings in the record before us as to Lois F. Johnson, trustee. At the beginning in his application for extension of time to file a complaint he states: "* * *the nature and purpose of this action are as folows: To formally terminate the existing partnership, and/or readjust certain personal financial responsibilities for or of the operation of the partnership business, as requested by the defendant herein; and agreed to in principle by both parties hereto, made respectively plaintiff and defendant herein." At that time the parties were plaintiff and his brother, William W. Johnson. Shortly thereafter plaintiff made a motion in the case to make Lois F. Johnson, trustee, a party and in this motion he states: "Lois F. Johnson, Trustee, is or may become a necessary party to this action, and

without whose presence in or before the Court a complete determination of the controversy, and of her interest therein, cannot be had, in that she is in fact a party to the partnership, though not directly in the controversy, except as she received a 20% interest in the formation of the original partnership, and the Court may wish to look into the matter of her interest in the partnership dissolution." Judge Carr entered an order allowing his motion on the ground that "Lois F. Johnson, Trustee, would and should be a proper party to the partnership dissolution matter now before the Court, and that making her a party hereto would be the legal method of providing her an opportunity to be heard, or her interest in the partnership properly protected." Shortly thereafter plaintiff filed his complaint and Judge Hooks entered an order allowing a motion by the defendants to strike certain paragraphs of plaintiff's complaint in its entirety, and allowed plaintiff to file an amended complaint. This complaint is not in the record, and what was stricken out of it is not in the record. Thereafter plaintiff filed an amended complaint in which he seeks specific performance of an alleged contract by defendants to sell to him their interest in the partnership. Judge Mallard entered an order requiring him to make this complaint more specific. Plaintiff then filed an amendment to the amended complaint and Judge Copeland entered an order sustaining the demurrer of Lois F. Johnson, trustee, to this complaint on the ground it failed to state facts sufficient to constitute a cause of action against her. To this ruling plaintiff did not except, and from it he did not appeal. Whereupon, plaintiff filed what he terms "Further Amendment to the Prior Amended Complaint and Amendment to the Amended Complaint." In this pleading he alleges in substance that the defendant had a receiver appointed for the alleged partnership and sold the business of the partnership at the courthouse door, and that the defendants have placed the assets of the former partnership beyond the legal reach of the court for purpose of permitting a required compliance in the case of an order for specific performance. In this last pleading plaintiff prays that the former partnership property now held by defendants to be in law and fact held only in trust. According to the allegations of fact of plaintiff's last pleading, the former partnership property has been sold by a receiver appointed by the court, and the former partnership property is not held by defendants.

A study of plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint" with its prolixity, and with its irrelevant, immaterial, redundant, repugnant, and confusing allegations of fact affirmatively shows that it contains a statement of a defective cause of action against Lois F. Johnson, trustee, and

when her demurrer to it was sustained, it was proper to dismiss the action as to her. *Perrell v. Service Co.*, 248 N.C. 153, 102 S.E. 2d 785; Strong's N. C. Index, Vol. 3, Pleadings, p. 638. We are fortified in our opinion by all of plaintiff's prior pleadings, with their attached exhibits, in the record.

Judge Copeland's order entered on 29 January 1963 allowing the motion of Lois F. Johnson, trustee, to strike plaintiff's "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," and decreeing that plaintiff's action as to Lois F. Johnson, trustee, be dismissed is

Affirmed.

RUSSELL O. WARREN v.
STEGALL TRUCKING COMPANY, A CORPORATION, AND FRANK MILES.

(Filed 22 May 1963.)

Evidence § 58—

Where plaintiff, in cross-examination of defendant's witness, uses a written statement and has the witness identify his signature to the statement and read parts of the statement inconsistent with the testimony of the witness at the trial, it is prejudicial error for the court to refuse the request of defendant's counsel to see the statement and to use it if he deems it desirable to do so, notwithstanding the statement was not introduced in evidence. Defendant's objection *held* directed to the refusal of the court to permit him to see the statement and not to the failure of plaintiff's counsel to put the statement in evidence.

APPEAL by defendants from *Crissman, J.*, 21 January 1963 Civil Session of GUILFORD.

Civil action to recover damages for personal injuries, allegedly caused by the actionable negligence of Frank Miles, an employee of Stegall Trucking Company, a corporation, in operating a tractor-trailer unit owned by his employer in furtherance of his employer's business.

Defendants have filed a joint answer in which they deny Stegall Trucking Company is a corporation, but admit that at the time of the collision Frank Miles was an employee of T. G. Stegall trading and doing business as T. G. Stegall Trucking Company, and was driving the tractor-trailer unit of his employer at that time in furtherance of his employer's business, but they deny they were negligent, and in addition plead conditionally plaintiff's contributory negligence as a

bar to any recovery by him. Further, in their answer, Frank Miles pleads a counterclaim against plaintiff to recover for loss of wages and personal injuries allegedly caused by plaintiff's actionable negligence, and T. G. Stegall files a similar counterclaim to recover for damage to his tractor-trailer unit.

Plaintiff filed a reply in which in respect to Miles' counterclaim he denies he was negligent and avers Miles' loss of wages and personal injuries were solely and proximately caused by his own negligence, and in which in respect to Stegall's counterclaim he conditionally pleads contributory negligence of defendants as a bar to recovery.

The jury found by its verdict that plaintiff was injured by the negligence of the defendants as alleged in the complaint, that plaintiff was free from contributory negligence as alleged in the answer, and awarded him damages in the sum of $7,000.00 The jury did not answer the issues raised by the counterclaims of defendants.

From judgment on the verdict in favor of plaintiff, defendants appeal.

Jordan, Wright, Henson & Nichols by Charles E. Nichols and G. Marlin Evans for defendant appellants.

Cahoon, Egerton & Alspaugh by Robert S. Cahoon and James L. Swisher for plaintiff appellee.

PARKER, J. Plaintiff's evidence tends to show the following facts:

About 8:00 p.m. on 12 January 1961 he was driving a tractor-trailer unit of his employer, Atlantic States Motor Lines, loaded with 16,000 pounds of freight, at a speed of 45 to 50 miles an hour, north on U. S. Highway #29 between the city of Greensboro and the city of Reidsville. The road was dry; the weather was clear; no fog. At that time U. S. Highway #29 was a two-lane highway. When he passed over the bridge crossing Reedy Fork Creek and started uphill, he overtook and passed a tractor-trailer unit operated by defendant Miles and owned by defendant Stegall. While he was traveling toward Reidsville, the Stegall unit attempted to pass him three or four times, and would fall back in line. "He'd whip out and he'd whip back; he did that on three or four different occasions. Then when we came into the Haw River bridge, which is, oh, maybe a half-mile, three-quarters of a mile, from where Troublesome Creek is, he whipped out again and attempted to pass on the bridge and fell back, and then he followed right up under me." When he rounded a curve approaching Troublesome Creek, the Stegall unit cut out into the left lane and attempted to pass him "on the straightaway" again. From the end of the curve going north to the bridge over Troublesome Creek, the highway is straight for about

1,000 feet. When the front of the Stegall unit reached the tandem wheels of his tractor, there was seen the headlights of an approaching motor vehicle. The Stegall unit "dropped back" and "whipped" quickly to the right hitting the left side of his trailer with the front of the Stegall tractor, and causing him to lose control of his tractor-trailer unit and slide into the bridge abutment. His unit then hit the left side of the bridge, crossed the bridge, and jackknifed on the right side of the highway. Three wheels of his tractor were torn off, the cab was torn loose, and when his unit came to rest, he was lying under the left front wheel and the axle on the tractor. He was injured, and his co-driver was thrown out on the highway and injured.

Defendants offered as a witness Frank Miles, who testified in substance on direct examination:

He was driving a small tractor-trailer unit, owned by T. G. Stegall and loaded with thirty-four or thirty-five thousand pounds of ice-packed chickens, at a speed of 45 to 50 miles an hour, north on U. S. Highway #29. Several tractor-trailer units of the Johnson Motor Lines passed him going north. Just before he reached the bridge over Troublesome Creek, an Atlantic States Motor Lines tractor with a Johnson Motor Lines trailer hooked on to it passed him at a pretty good rate of speed. He lost sight of its lights on a curve before the highway reaches Troublesome Creek bridge. When he rounded the curve and his lights shone toward the bridge over Troublesome Creek, he saw something that looked like fog and smoke. He slowed up to see what it was, and saw a pair of wheels in the left-hand lane of the bridge. When he approached closer, he saw a lot of rubbish on the bridge, and just beyond the bridge an Atlantic States Motor Lines trailer sitting flat down on the ground with no wheels on it. He held his brakes as tight as he could, and eased into the back of the trailer. After he stopped, he saw lots of steam where the radiator had burst, with oil and stuff all over the hot engine. He saw a man lying in the road hollering, "Oh, Lordy, somebody help me." He saw plaintiff there and he talked like he was in a daze.

In cross-examination by plaintiff's counsel, Frank Miles was asked to look at a written statement marked for identification as Plaintiff's Exhibit #14, and was then asked as to whether or not that is a true copy, photostatic copy, of a statement that he had made and signed telling about what happened on the night of the accident. He testified: "* * *and as to reading it all the way through and making sure it's my statement, well, I tell you—I don't have no education, your Honor, to read all this that he's got down there. No, I'm not; I've not got a high-school education. I can read a very little and I can't

read all of it, no, sir. I'd rather you would describe it because I can't make it plain and I'd rather it be plain for them. Yes, sir, that's my signature (indicating on paper writing). No, sir, I did not give a statement on January 13th, the next day. The night it happened is the only time I signed anything."

Later on, in cross-examination by plaintiff's counsel, this appears in the record:

> "* * *No, sir, I did not put in my statement that I couldn't see more than 10 to 15 feet in front of me. As to reading the statement (handed the witness by the attorney) and it saying, 'And I could not see more than 10 to 15 feet in front of me; no, sir, I don't remember putting that down. That's right, that is my signature right down below it (indicating the exhibit).
>
> "As to your question — 'How come you to keep on going 45 to 50 miles an hour when you couldn't see what was up in the road in front of you?' — the night that that happened, when that was made out (indicating paper writing), I don't know who wrote it. Some gentleman come up and he just wanted me to sign it and I was shook up, too, myself, and I may have said that but I could see farther than 10 or 15 feet. I could see as good vision as my light shone. As to how far my lights go, I couldn't say just how far. I imagine they would shine a thousand feet. As to just as soon as I got around the curve then and straightened out going down the road whether I could see for a thousand feet ahead of me, I don't think so. There wasn't that much distance between me and the outfit. I could not see whatever distance it was to the end of the bridge to the far end of the bridge, not clear on account of that steam."

Further, in cross-examination, Miles in response to questions by plaintiff's counsel testified as to what his statement said in respect to the front of his tractor running into the back of the trailer and moving it just a little ahead, and his front was still against the trailer, and as to what his statement said as to there being no other traffic in the area following him or meeting him and the lights on the Johnson rig were not working; and as to his leaving Charlotte at 4:30 p.m. and the wreck happening at 8:30 p.m. Then he was asked to account for the fact that it took him four hours to make the trip going at the speed he said he was traveling.

After the cross-examination of Miles ended and after three lines in the record of redirect examination by plaintiff's counsel, the record shows the following:

"MR. NICHOLS: I would like to see that statement.

"MR. CAHOON: I haven't offered it in evidence.

"MR. NICHOLS: You questioned him about it and I have a right to see what it is when you questioned him about it.

"THE COURT: Well, he hasn't offered it.

"MR. NICHOLS: I would like to get this part in the record, if your Honor please: Attorney for defendants requested the statement of counsel who examined Mr. Miles on the basis . . .

"THE COURT (interrupting): Now, just hold it just right there just a moment. What is it you are trying to do?

"MR. NICHOLS: I just wanted to get it in the record that I requested the statement and . . .

"THE COURT (interrupting): Well, it's in the record. There is nothing to keep it from being in the record.

"MR. NICHOLS: I mean that I requested . . .

"THE COURT (interrupting): I understand. You did request it and she is putting it down now—there is no need to go over it.

"MR. NICHOLS: I want to OBJECT then. The Statute . . .

"THE COURT (interrupting): He wants to enter an objection to the fact that plaintiff's attorney wouldn't let him have a statement that has been identified as plaintiff's exhibit fourteen but not offered in evidence.

"This constitutes

DEFENDANTS' EXCEPTION No. 1."

Defendants assign as error that the judge failed to require plaintiff's counsel to give to their counsel for inspection, and use if he deemed it desirable, the writing identified as Plaintiff's Exhibit #14, which writing plaintiff's counsel used in the cross-examination of defendant Miles. Plaintiff contends defendants' counsel never asked the court to require him to give the written statement to him, that the court made no ruling adverse to defendants on this question, that defendants' exception is to an act by opposing counsel, and that he never put the written statement in evidence. Plaintiff's exhibit #14 was not introduced in evidence, and is not in the record. Reading the colloquy between defendants' counsel and the trial judge, and the interruptions of the trial judge, it seems clear that defendants' counsel requested the court to compel plaintiff's counsel to give him this written statement for his inspection, and use if he deemed it desirable, and the court refused to do so. The failure of the judge to require plaintiff's counsel to accede to the re-

quest of defendants' counsel is prejudicial error entitling defendants to a new trial.

Before proceeding with a discussion of this question, we deem it proper to state that defendants offered evidence to the effect that the Stegall tractor sustained considerable damage in the collision, that Miles was injured in the collision and missed work for two weeks; and that defendants in their brief state they have abandoned their exceptions to their motions for judgment of involuntary nonsuit of plaintiff's action.

On the question presented by defendants' assignment of error based on their Exception 1, *People v. Carter*, 48 Cal. 2d 737, 312 P. 2d 665, rehearing denied 16 July 1957, is in point. In this case defendant was convicted of murder in the first degree, and the jury imposed the death penalty. Defendant contended that it was error to deny him the right to inspect a document used in the cross-examination of his wife. Mrs. Carter stated in cross-examination that she could not remember if defendant was wearing a red cap when he left the house on the morning of September 29. The prosecutor then asked her if she remembered being interviewed by the sheriff on September 30 when a stenographer was present, and read from the stenographer's transcript questions put to Mrs. Carter, and her answer that she believed defendant had been wearing a cap. Defense counsel requested and was denied the right to inspect the transcript. In holding that this was error, the Supreme Court of California said:

> "* * *It is clearly unfair to deny the defendant an opportunity to show that the extracts have been taken out of context, and that when read with other parts of the statement the alleged inconsistency disappears. To be effective such an opportunity must include the right to see the transcript the prosecution has used; the witness' memory of what he said is not enough. See *People v. Stevenson*, 103 Cal. App. 82, 88-92, 284 P. 487; *Meadors v. Commonwealth*, 281 Ky. 622, 136 S.W. 2d 1066, 1068-1069; 6 Wigmore, Evidence, 477 (3d ed. 1940)."

The case of *Burnell v. British Transport Commission* (1956), Law Reports, 1 Queen's Bench Division 187, (1955), 3 All England Law Reports 822, is in point. In this case plaintiff brought an action for damages for negligence against the defendants, who obtained a signed statement from a Mr. Anzani, who at the trial was called as a witness for the plaintiff. With the statement in his hands, counsel for the defendants asked the witness in cross-examination whether he had not given the statement and whether he had said certain things in it. The

witness agreed. Counsel for the plaintiff claimed the right to call for the statement and to require it to be put in evidence, and Sellers, J., ruled that he was entitled to do so. In the Court of Appeal the case was heard by Denning, Hodson, and Morris, L.JJ. In his opinion, Denning, L.J., said:

> "It seems to me that Sellers, J., was correct, because, although this statement may well have been privileged from production and discovery in the hands of the defendants at one stage, nevertheless, when it was used by cross-examining counsel in this way, he waived the privilege, certainly for that part which was used; and in a case of this kind, if the privilege is waived as to the part, I think it must be waived also as to the whole. It would be most unfair that cross-examining counsel should use part of the document which was to his advantage and not allow anyone, not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him. So it seems to me that the ruling of Sellers, J., was correct. It was in accordance with the practice as I have always understood it. Since the Evidence Act, 1938, once the document was legitimately in the presence of the court, it would be admissible as evidence under that Act also. I think, therefore, that Sellers, J., was right and that we should look at the document, just as he did."

Hodson, L.J., said:

> "I agree on the question of waiver and on the question of privilege. I only add this, that there is no suggestion in this case that anything unfair was done or sought to be done. A stand has been taken on a question of principle, as it was thought, on behalf of the defendants, not necessarily having in mind this case, but other cases in which this sort of problem arises."

Morris, L.J., said:

> "I agree with what has been said by my Lords."

People v. Karoll, 315 Mich. 423, 24 N.W. 2d 167, is another case in point. Defendant was convicted of giving a bribe to a public agent, servant or employee, and appealed. Defendant had been questioned by the grand jury in regard to the bribery alleged. During his trial, upon cross-examination the prosecutor asked defendant whether he had been asked certain questions and had given certain answers before the grand jury. The court denied the request of counsel to see all of defendant's own testimony given before the grand jury at the time

and place referring to the same subject matter, isolated parts of which testimony were read and used in cross-examination of defendant. Defendant's counsel was only permitted to see the questions and answers that had been read into the record by the prosecuting attorney. The Court in its opinion said:

> "In the present case, there was no reason given for refusing defense the right to see all of defendant's testimony given. There can be readily seen the absolute injustice and unfairness of picking out isolated sentences of testimony of a witness before the grand jury, when he is made a defendant in a subsequent case, and denying him the right to see the testimony so that his counsel may bring out any explanatory matters relevant to these isolated answers, if this can be done without jeopardizing the work of the grand jury. A denial without a good reason is improper and should not be repeated on a new trial."

A new trial was ordered.

To the same effect see *State v. George,* 93 N.H. 408, 43 A. 2d 256; 6 Wigmore, Evidence, 3rd Ed., p. 477.

What is said in the majority opinion in *S. v. Peacock,* 236 N.C. 137, 72 S.E. 2d 612, is apposite. In this case defendant objected to the use of notes and memoranda by the two officers, claiming that the witnesses were reading the notes to the jury and not using them for the purpose of refreshing their memories, and further that the notes and memoranda were not offered in evidence. The majority opinion states:

> "The use of notes to quicken the memory is well recognized procedure in this jurisdiction, if the memorandum is one which had been made by the witness, or in his presence, or under his direction. * * * Under certain circumstances, even notes of the testimony of a witness given at a former trial may be read to him for the purpose of refreshing his memory. * * *
>
> "It is customary for such notes to be made available to the opposing counsel so that he may examine and cross-examine relative thereto * * *."

Plaintiff's counsel having a written statement by defendant Miles at the trial, and having had Miles in cross-examination to read isolated parts of it to the court and jury, it is a decided dictate of fairness and justice for the court to require him to submit it to defendants' counsel for his inspection, and use of it if he deems it desirable. Under similar circumstances it has been the practice for many years in our trial courts for the court to require the submission of such written statement to op-

posing counsel for inspection, as we understand it. For the trial court's failure to compel plaintiff's counsel to submit this written statement for inspection to the counsel for defendants, they are entitled to a New trial.

STATE OF NORTH CAROLINA EX REL. THE UTILITIES COMMISSION v. CHAMPION PAPERS, INC.

(Filed 22 May 1963.)

1. Utilities Commission §§ 3, 9—

Within the time limited for transmitting the record to the Superior Court the Utilities Commission, notwithstandng the filing of notice of appeal, has jurisdiction and authority to reopen the case, to hear further evidence, and to make such changes in the original record as the Commission concludes the facts and the law warrant in order that the record may speak the truth. G.S. 62-26.4.

2. Utilities Commission § 9—

On appeal to the Superior Court the Utilities Commission's findings of fact are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the entire record.

3. Same; Utilities Commission § 9—

Conflicting evidence as to which of two formulae properly separated petitioning carriers' intrastate from their interstate traffic for the purpose of fixing intrastate rates, and conflicting evidence with respect to the carriers' rate of return on intrastate shipments, *held* to raise questions of fact for the determination of the Utilities Commission, and the Commission's findings in regard thereto are binding when supported by competent, material, and substantial evidence.

4. Utilities Commission § 6; Carriers § 5—

The findings of fact of the Utilities Commission in this proceeding *held* supported by competent, material, and substantial evidence, and the findings support an order of the Commission allowing in part petitioning carriers' request for an increase in certain intrastate rates in order to permit a fair return on the railroads' property used in intrastate transportation and to prevent disparity between intrastate and interstate rates.

5. Utilities Commission §§ 6, 9—

The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant to show error of law in the proceeding before the Commission.

APPEAL by Champion Papers, Inc., from *Clark (Heman), J.*, December, 1962 Civil Term, WAKE Superior Court.

This proceeding originated before the North Carolina Utilities Commission upon petition of thirty railroads for authority to increase their intrastate freight rates and switching charges. The petitioners alleged the increase is necessary to permit a fair return on the railroad properties used and useful in their intrastate transportation business and to prevent disparity between the interstate and intrastate rates. The petitioners also requested increase in switching charges.

In due course, Champion Papers, Inc., primarily interested in rates on pulpwood, wood cores and wood chips, paper and paper products, caustic soda, and waste neutral salts, filed a protest to the proposed increases and was permitted to intervene as a party to the proceeding. Seven other shippers, including the North Carolina State Highway Commission and the North Carolina Department of Agriculture, whose interests were primarily in rates on stone, sand and gravel, and fertilizer, protested and were permitted to intervene.

The Commission began the hearings on May 25, 1961. The petitioning railroads introduced evidence consisting of oral testimony, reports, financial statements, and charts showing operating revenues and expenses for the previous ten years. The evidence tended to show the proposed increase in rates is necessary to meet increases in wages, payroll taxes, prices of materials, fuel and supplies, and to maintain the rate level between interstate and intrastate freight moving in or through North Carolina. The composite of the charts, according to the petitioners, tended to show that the proposed increase in rates amounts to only 1.77 per cent over the 1958 rates and is actually insufficient to meet increased costs of operation; that the increase would provide a rate of return lower than for any year since 1950.

Champion Papers, Inc., offered evidence tending to show the proposed rates, while varying according to the length of the haul, would amount to an average increase of 6½ per cent on its intrastate carriage of pulpwood, wood cores and wood chips; 6.6 per cent on shipments of neutral salts; 1.9 per cent on caustic soda; and 50 per cent on its intraplant switching charges. This protestant's director of traffic expressed the opinion that the proposed increase on wood products would result in a diversion of these items from rail to truck transportation; hence would not benefit the railroads. The traffic manager of the North Carolina State Highway Commission testified that in 1956 the railroads transported 24.7 per cent of the construction aggregates which it used or furnished in highway construction. In 1958 the railroads carried 13.5 per cent, and in 1960, 7.3 per cent. These figures do not include purchases of these materials by road contractors.

At the conclusion of the hearings, the railroads and the protestants filed briefs. Among the many findings and conclusions, the Commission entered the following: "The evidence of record and arguments of the parties on the separation of intrastate and interstate operations and property cause us to conclude that neither formula is sufficiently sound to support a decision that either can be accepted as a basis for determining that present rates should be increased as proposed, increased only in part, or not increased at all." However, on the basis of other findings, the Commission (Worthington dissenting) entered its order allowing (subject to certain exceptions) the proposed increase in freight rates, but denying any increase whatsoever in switching charges. The order was entered on December 19, 1961.

The Commission, on application of Champion Papers, Inc., extended to February 17, 1962, the time for filing notice of appeal to the Superior Court. On February 12, 1962, Champion Papers, Inc., filed with the Commission its notice of appeal, specifying 25 exceptions and assignments of error upon the ground the findings were not supported by competent, material, and substantial evidence; and that the actual findings were insufficient to support the Commission's conclusion and to sustain its order allowing the increase in freight rates.

On March 7, 1962, the petitioning railroads filed with the Commission motion for a further hearing "for the sole and limited purpose of receiving additional evidence and further considering its decision as to the question of whether the method used by the Petitioners in separating intrastate revenues, expenses, and property values from interstate revenues, expenses and property values is reasonable and acceptable . . ."

On March 8, 1962, the Commission, after a hearing on the motion, entered an order denying it. However, on April 16, 1962, the Commission, on its own motion, entered an order for a further hearing and gave notice to all interested parties "for the purpose of determining what alterations or amendments, if any, should be made to the original order issued by the Commission on December 19, 1961, without changing the result of the order."

At the beginning of the further hearing, counsel for Champion Papers, Inc., entered a special appearance and objected to any further hearing or the entry of any further order, basing the objection upon the ground the notice of appeal removed the proceeding from the Commission to the Superior Court and consequently the Commission was without power or authority to proceed further but was required to transfer the proceedings to the Superior Court for review. The motion was overruled and the Commission proceeded with the

further hearing, at which Mr. Luckett, Assistant Comptroller, Southern Railway System, testified in part:

> "The lawyers representing the North Carolina railroads asked that the accountants of those railroads produce a formula or make a formula to the best of their ability that would attempt to approximate the intrastate operating results of the railroad within a state. A committee was formed of accountants representing 4 railroads—The Atlantic Coast Line, Seaboard, Norfolk-Southern and Southern Railway. I was appointed as a member representing Southern Railway and was made Chairman of that committee. This committee met on numerous occasions, studied every angle that they could, looked at each individual expense account. I repeat, 'individual expense account' and tried to think and determine the best method of separating expenses between interstate and intrastate operations. . . .
>
> "The committee, in examining the expense accounts, divided the expenses into 3 categories—those of terminal or yard expenses, those of supervisory or overhead expenses. They determined that in the terminal or yard expenses or expense accounts, the traffic that generated this expense was the ton. Speaking of freight, all of my remarks are confined to freight traffic. A ton of freight originated a yard or terminal expense. The movement of that ton which generates ton miles generated the running expenses and that the supervisory and overhead expenses were related to the terminal on one hand and the running on the other. So they there took those individual accounts that related to the yard and terminal, separated them on the basis of interstate tons and intrastate tons ratio to the total tons in the State of North Carolina. That is to say, if there were ten tons originating, 2 tons would be intrastate and 8 tons interstate. Twenty percent of the yard expense within the State of North Carolina was assigned to intrastate.
>
> "On running expenses, they took the intrastate ton miles within North Carolina, found the ratio of the intrastate to the total and applied such ratio to the running expenses within the State of North Carolina.
>
> "As to the overhead expenses, they took the accounts that had previously been split on the basis I have outlined, totaled them together, found a new percent and applied that percent to the supervision or overhead expense relating to those accounts."

Mr. Hempel, Assistant Comptroller, Atlantic Coast Line Railroad, testified that the petitioners' Exhibit No. 10, a breakdown of the inter-

state and intrastate freight operations was prepared according to the formula testified to by Mr. Luckett, and that the witness had used the same formula in proceedings before the regulatory commission in a Florida rate case; that conditions in the two states are similar.

At the further hearing, the Commission found that the formula testified to by Mr. Luckett and Mr. Hempel has been made the basis of orders by the Interstate Commerce Commission and by the State authorities of California, Florida, Kansas, and Utah. At the conclusion of the further hearing, the Commission, among other findings, entered the following:

> "The problem of jurisdictional separations is of the most technical nature, especially in the transportation industry. There is no simple, absolute method of accomplishing it. In the long run one apparently must simply rely upon informed judgment, which it is our duty to exercise.
>
> "In the original order issued in this docket, we approved most of the increases involved. The formula was discussed as we saw it based upon the evidence before us. We reopened this hearing on our own motion because we were convinced that to do so might tend to expedite the ultimate disposition of the matter before the Commission and the Courts. After hearing further evidence related to the formula used, and its application, we are now satisfied that Petitioners have reasonably and fairly attempted the task of separating their properties, expenses, and revenues, and that, as amplified, we should now remove any doubts as to whether we feel the use of the formula justified our continued reliance thereon."

The findings with respect to the failure of the petitioning railroads to produce a formula separating its intrastate from its interstate operations were stricken. The Commission concluded: "Petitioners have shown to our satisfaction that the increases which we have allowed are justified and necessary. We have, however, exercised our prerogatives under G.S. 62-124 and related statutes to require additional proof in corroboration of this satisfaction."

The amendatory order was entered August 9, 1962. The appeal was certified to the Superior Court of Wake County on August 16, 1962. On the appeal, Judge Heman R. Clark overruled all exceptions entered by the appellant and affirmed the Commission's order. Champion Papers, Inc., appealed.

Lake, Boyce & Lake, by I. Beverly Lake, for defendant Champion Papers, Inc., appellant.

Joyner & Howison, Maupin, Taylor & Ellis, Simms & Simms, for petitioners, appellees.

HIGGINS, J. By 30 exceptive assignments, the appellant challenges as erroneous the order of the Superior Court affirming the Utilities Commission's findings of fact, its conclusions of law, and its order giving the petitioning railroads authority to increase their tariffs on North Carolina intrastate shipments of freight. The appeal presents these questions of law: (1) Did the Commission exceed its authority by reopening the proceedings after Champion Papers, Inc., had filed its notice of appeal? (2) Are the Commission's findings of fact supported by competent, material, and substantial evidence in view of the entire record? (3) Do the facts found support the conclusions and the order allowing, in part, the requested rate increase?

The appellant's objection to the Commission's action in reopening the proceeding for further hearing is without merit. Although the appellant had given notice of appeal, the Commission's time limit for transmitting the record to the Superior Court had not expired. G.S. 62-26.4. The statute provides the Commission on motion of any party to the proceeding, or on its own motion, may set the exceptions for further hearing. Surely the authority to reopen carries with it the duty to make such changes in the original record as the Commission concludes the facts and the law warrant in order that the record may speak the truth. Any error in the record, whether discovered by a party or by the Commission itself, may be reconsidered and corrected after proper notice at any time before the record passes from the Commission to the Superior Court by appeal. Consequently the order of December 19, 1961, is not the final order. The original order as amended on August 19, 1962, became the final order. "Ordinarily, the procedure before the Commission 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." *Utilities Com. v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325.

On the appeal to the Superior Court the Commission's findings of fact are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the entire record. *Utilities Com. v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886; *Utilities Com. v. R.R.*, 238 N.C. 701, 78 S.E. 2d 780.

At the further hearing, Mr. Luckett and Mr. Hempel explained the foundation and operation of their formula for separating intrastate from interstate operations. The method of applying the formula to the facts disclosed by the exhibits satisfied the Commission that the

formula as so applied fixed with reasonable reliability the fair value of the carriers' property used and useful in conducting their intrastate operations and justified the rate increase allowed.

The combined operations of the four leading railroads doing business in North Carolina — Atlantic Coast Line, Seaboard, Norfolk-Southern, and Southern — for the ten-year period beginning with 1950 showed a net operating income on total investment between the high of 4.64 per cent in 1955, and the low, 2.97 per cent in 1960. The average for the ten-year period, excluding tax deferrals, was 3.61 per cent. During the same period the cost of wages had increased 71.2 per cent. The cost of materials and supplies, including fuel, increased 40 per cent. In addition to the charts and studies showing investment, operating costs and expenses, bond debt, etc., the petitioners offered evidence that the rate per ton per mile is lower on intrastate than on interstate freight due to the shorter haul and the lower-rated products carried intrastate. The intrastate traffic carries a larger percentage of the lower-rated products, consisting principally of pulpwood, rock, sand, gravel, and fertilizer. These make up the bulk of the North Carolina intrastate shipments.

The formula devised by the railroads and employed in this proceeding appears to have been the outgrowth of this Court's opinions in *Utilities Com. v. State,* 243 N.C. 12, 89 S.E. 2d 727; and on rehearing, 243 N.C. 685, 91 S.E. 2d 899. This formula in principle was applied in *Utilities Com. v. State,* 250 N.C. 410, 109 S.E. 2d 368, and seems to have been approved by this Court without discussion. According to the tables, the statewide income of the Southern (excluding tax deferrals) for 1960 produced a return of 4.69 per cent. The three other major roads showed a much smaller return. The evidence with respect to the Class Two roads, most of which operate entirely intrastate, is not more favorable to them than the tables show to be the case in the four major lines.

The protestants appear to have offered before the Commission their own formula for separating intrastate from interstate freight traffic, but the Commission concluded it was not reliable as applied in this proceeding. Likewise, the respondents offered evidence, in part, conflicting with that offered by the railroads with reference to the rate of return which the petitioners would realize if the requested rates were authorized. However, the conflicts in the evidence presented questions to be resolved by the Commission. Its resolution is binding on the courts if the findings are supported by competent, material, and substantial evidence in view of the entire record.

In our opinion the record before us and before the Superior Court showed the presence before the Commission of evidence which measured up to the standard required as legal support for the Commission's findings. The conclusions followed. The two support the rate increase authorized. "It is the prerogative of that agency to decide that question. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes on it, not us, the duty to fix rates." *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133.

After careful review of the long record and the many exhibits dealings with highly technical information, we are forced to conclude that the one appellant which brought the record here for review has failed to show error of law in the proceedings. The judgment of the Superior Court is

Affirmed.

LOIS BROWN STEPHENS v. SOUTHERN OIL COMPANY OF NORTH CAROLINA, INC., AND ADRIAN R. BUSTLE.

(Filed 22 May 1963.)

1. Automobiles §§ 15, 21, 25, 41b, 41c, 41r—

Evidence that defendant driver was traveling north 60 miles per hour in a 45 mile per hour zone, that upon approaching a wreck in his lane of travel he depressed his brake pedal and discovered that his brakes were not working, and that he then pulled to the left and collided with the left rear fender of plaintiff's vehicle, which was traveling south, *held* sufficient to take the issue of negligence to the jury. G.S. 20-141, G.S. 20-146, G.S. 20-124.

2. Automobiles § 6—

The violation of a statute enacted to promote the safe operation of motor vehicles on the public highways is negligence, and is actionable if such negligence proximately causes injury, and the question of proximate cause is ordinarily for the jury.

3. Automobiles § 21—

G.S. 20-124 must be given a reasonable interpretation and will not be construed to constitute the operator of a motor vehicle an insurer of the adequacy of the brakes of the vehicle, but the statute requires that the operator act with care and diligence to see that his brakes meet the standards prescribed by statute, without making him liable for a latent defect of which he has no knowledge and which is not discoverable by reasonable inspection.

4. Same; Automobiles § 46—

Defendants' evidence to the effect that brakes on the corporate defendant's vehicle had been overhauled and relined and had worked perfectly until some two days thereafter when the brakes suddenly failed, causing the accident in suit, and that after the collision it was ascertained that the flange on one of the wheels was broken, permitting the brake fluid to escape, *is held* to require the court to instruct the jury as to what facts, presented by the evidence, would excuse defendants' operation of the vehicle with defective brakes.

APPEAL by defendants from *Martin, S.J.*, November 12, 1962 Schedule B Regular Term of MECKLENBURG.

Plaintiff instituted this action to recover compensation for personal injuries and property damage claimed to have resulted from a collision between a Buick automobile owned and operated by her and an oil tanker owned by corporate defendant, operated by its agent, defendant Bustle. Plaintiff alleged the collision was caused by the negligence of defendants. The asserted negligence consisted of (a) operating the oil tanker without adequate brakes as required by G.S. 20-124, (b) failure of the driver to keep a proper lookout, (c) excessive speed in violation of G.S. 20-141, (d) driving on the wrong side of the road in violation of G.S. 20-148.

Defendants denied each alleged negligent act and as a further defense pleaded the collision was caused by "an unusual, unexpected failure of a brake drum on the truck of the defendant Southern Oil Company. . . "

Issues of negligence and damage submitted to the jury were answered in conformity with plaintiff's contention. Judgment was entered for plaintiff for the damages assessed. Defendants excepted and appealed.

Leon Olive for plaintiff appellee.

Carpenter, Webb & Golding by William B. Webb for defendant appellants.

RODMAN, J. The first question to be answered is: Did the court err in refusing to allow defendants' motion to nonsuit?

The evidence viewed in the light most favorable to plaintiff is sufficient to establish these facts: The collision occurred in the forenoon of 3 September 1960 at or near a bridge on Eastway Drive in Charlotte. The weather was clear and the road dry. Eastway Drive runs north and south. The maximum permissible speed is 45 m.p.h. Plaintiff was going south. Just before she reached the bridge she saw two cars which had collided in the eastern lane. This collision had stopped

several cars traveling north. The bridge and road north of the bridge were twenty-four feet wide but widened in the western lane south of the bridge to a total width of forty feet. Plaintiff reduced her speed to 15 m.p.h. Just as she reached the south edge of the bridge she saw the oil tanker coming from the south. Eastway Drive is straight and up a slight grade for 1400 feet going south from the bridge. When the tanker was 150 or 200 feet south of the bridge, it pulled from the northbound lane to the south bound lane. Its speed was 60 m.p.h. Plaintiff sought to avoid the impending collision by jerking her car to the right, but was struck on her left side. She was in her proper lane of traffic. Immediately following the accident the officer investigating the collision found the tanker's brakes would not work. The brake pedal was on the floor. Defendant Bustle said "he applied brakes and didn't have any."

Plaintiff's evidence is sufficient to permit a jury to find defendants violated three statutes, G.S. 20-141, G.S. 20-146, and G.S. 20-124, each enacted to promote safe operation of motor vehicles on the highways. One who fails to comply with the provisions of these statutes is negligent. *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601; *Krider v. Martello,* 252 N.C. 474, 113 S.E. 2d 924; *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345; *Arnett v. Yeago,* 247 N.C. 356, 100 S.E. 2d 855; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246. If the negligence resulting from the failure to comply with any of those statutes proximately causes injury, liability results. The question of proximate cause here and generally is for the jury. *Boyd v. Harper, supra.* The court properly overruled the motion to nonsuit.

That the collision occurred in the western lane of travel is not controverted by defendants. Their evidence in that respect corroborates the evidence of plaintiff. The defense and evidence in support thereof is that Bustle, traveling at a lawful rate of speed, 30 to 40 m.p.h., applied his brakes at a proper place and time to prevent a collision with the vehicles which had stopped in the eastern lane of travel. The collision occurred on Saturday. Defendants' vehicle had been inspected and the brakes overhauled and relined on the preceding Thursday. No difficulty had been experienced with the brakes since they were inspected and relined. They had worked properly early Saturday morning; but when Bustle, to avoid colliding with the cars ahead of him, pushed the brake pedal, it went completely to the floor. He was traveling downhill. The declivity tended to accelerate his speed. He was impelled to act promptly. A collision with the vehicles ahead of him was inevitable if he remained in his lane of travel. He thought because of

the extra width of the highway in the western lane he could avoid the cars in each of the lanes by pulling to his left. He sought as a means of checking his speed to throw the transmission in low gear, but was unable to do so. He actually collided with the back fender of plaintiff's car, doing negligible injury to it. Immediately following the collision it was discovered that a segment had been broken from the flange of one of the wheels. This permitted the brake fluid to escape without activating the brakes when the pedal was pushed down and rendered the hydraulic brakes totally ineffective.

Defendants except and assign as error portions of the charge relating to the violation of the safety statutes and to the failure of the court to properly instruct the jury with respect to their defense, to wit, an unavoidable accident. Their position is that the failure of the brakes was due to a latent defect unknown and not discoverable by them; and for that reason the failure to equip defendants' vehicle with adequate brakes was not negligence on which liability for injury could be based.

Plaintiff has shown the violation of a statute, G.S. 20-124, mandatory in its language. Notwithstanding this mandatory language, the statute must be given a reasonable interpretation to promote its intended purpose. The Legislature did not intend to make operators of motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, and for that reason not liable for injuries directly resulting from such loss of control. The injuries result from an unavoidable accident. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884.

The true rule is, we think, clearly and accurately stated in *Wilson v. Shumate,* 296 S.W. 2d 72. There plaintiff was driving defendant's automobile at his request. She was injuried because of the failure of the brakes on the car. The Court said: "Plaintiff's testimony, heretofore noted, that the brake pedal went clear to the floor as she 'again and again' used it in an attempt to stop the automobile, that it had failed to slow or stop but ran into the embankment, was sufficient evidence from which a jury reasonably could find that defendant's automobile was not equipped with two sets of brakes in good working order during the time plaintiff was driving and that the defective foot brake contributed to cause the collision. Defendant's failure to observe the duty or standard of care prescribed by the statute constituted negli-

gence. In recognition, however, of the principle that the statutes must be reasonably construed and applied, defendant could offer proof of legal excuse or avoidance of his failure to have observed the duty created by the statute, i.e., proof that an occurrence wholly without his fault made compliance with the statute impossible at the moment complained of and which proper care on his part would not have avoided. Upon adducing the substantial evidence tending to so prove, it was then a jury question as to whether the defendant was negligent for failure to have provided a foot brake in good working order." *Lochmoeller v. Kiel,* 137 S.W. 2d 625; *Merry v. Knudsen Creamery Co.,* 211 P. 2d 905; *Purser v. Thompson,* 219 S.W. 2d 211; *Eddy v. McAninch,* 347 P 2d 499. Similar conclusions have been announced by the courts with respect to other safety statutes. *Leek v. Dillard,* 304 S.W. 2d 60; *Scott v. Mackey,* 324 P. 2d 703; *Clark v. Hawkins,* 321 P 2d 648; *Bedget v. Lewin,* 118 S.E. 2d 650; *Frager v. Tomlinson,* 57 N.W. 2d 618.

Defendants' evidence, if accepted by the jury, was sufficient to negative the allegation of operating the tanker without adequate brakes. Nowhere in the charge did the court so inform the jury. It charged operation without adequate brakes was negligence *per se* and concluded its charge on the first issue by instructing the jury that plaintiff was entitled to recover if she had established by the greater weight of the evidence that defendants were guilty of negligence in the operation of the truck "*in that they operated same upon the public highways with insufficient brakes* (italicized part assigned as error) or operated same without maintaining a proper lookout or operated the same at a high and dangerous and unreasonable speed under the circumstances then existing, or operated the same without yielding one-half of the highway to the plaintiff, or operated the same on the wrong side of the highway, or operated the same in a dangerous and reckless manner, or in operating the same failed to use the emergency brake. . ." and that such negligence was the proximate cause of plaintiff's injuries.

Defendants contended the failure of the brakes created a sudden emergency excusing their turning from the northbound to the southbound lane of travel. The court properly charged that defendants were not entitled to the benefit of the sudden emergency doctrine if the situation was occasioned by excessive speed or a failure to keep a proper lookout or by failure to ascertain the defective condition of the brakes by applying them sooner than Bustle did, if a prudent man would have so applied them and would then have been able to take other steps to avoid injury to others.

Defendants were, we think, entitled to have the court address itself particularly to the question of the alleged negligence of defendants in operating the vehicle in violation of G.S. 20-124. An unexplained failure of the brakes warranted a finding of negligence, but defendants' evidence was sufficient to negative the charge of negligence with respect to the brakes. Whether defendants' evidence was sufficient to overcome the showing made by plaintiff was a question for the jury. Defendants were entitled to have the court instruct the jury what would excuse the operation of a motor vehicle with defective brakes. Defendants' assignment of error that the court failed to so charge is well taken, and because of such failure there must be a

New trial.

ELOISE LAMM THOMAS v. FRANK H. THOMAS.

(Filed 22 May 1963.)

1. Divorce and Alimony § 24; Infants § 9—

Where plaintiff alleges in her complaint the date she and defendant separated and admits in her reply that she is the mother of a six month's old child, which must have been conceived some fifteen months after the separation, and plaintiff's father testifies that plaintiff told him that the father of her child born after the separation was a person other than her husband, the record supports the court's conclusion that plaintiff is an unfit person to have custody of the children of the marriage.

2. Same—

In a hearing to determine the right to custody of the children of the marriage, the court's findings of fact are conclusive if supported by competent evidence.

3. Divorce and Alimony § 24; Courts § 9—

An order awarding the custody of minor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered in the wife's action for alimony without divorce, awarding the custody of the children to her does not preclude another judge of the Superior Court from awarding custody of the children to the husband in the wife's later action for absolute divorce under G.S. 50-6 when there is evidence that subsequent to the prior decree the wife had given birth to an illegitimate child.

4. Divorce and Alimony § 24; Infants § 9—

The fact that the father had been convicted of abandonment of his children and ordered to provide for their support does not preclude the

court from finding upon a hearing of a subsequent motion for the custody of the children in a divorce action that the father is a fit and suitable person to have custody of the children when there is uncontradicted evidence upon the hearing that the father has a good reputation in the community in which he lives.

5. Same— Welfare of children is determinative factor in awarding custody.

Where the court's conclusions that the mother is an unfit person to have custody of the children and that the father is a fit and suitable person to have their custody is supported by the findings, and it further appears that neither the father nor the paternal grandparents have a suitable home for the children but that the maternal grandparents, with whom the children were then living, have such a home, order awarding the custody of the children to the father on condition that the physical custody of the children be vested in their maternal grandparents and the father pay for their support, will not be disturbed on appeal, the welfare of the children being the determinative factor in the award of custody.

APPEAL by plaintiff from *Morris, J.*, 3 December 1962 Special Term of HARNETT.

Civil action instituted on 20 July 1962, under G.S. 50-6, for an absolute divorce on the ground of two years' separation, which separation began 16 June 1960. Defendant on 24 October 1962 filed an answer, wherein, *inter alia,* he alleged that there was born of the marriage between the parties two children, Connie Sue Thomas, age eight years, and Sandra Mae Thomas, age three years; that, as a further defense and cross-action, since the separation of the parties on 16 June 1960 plaintiff has been living in adultery with one Charles Howard and has given birth to a child now age four months; that plaintiff is an unfit person to have the custody of the two children, and that he is a suitable person to have their custody; and he prays that he be awarded their custody and that the bonds of matrimony existing between him and plaintiff be dissolved. Plaintiff filed a reply on 4 December 1962, in which, *inter alia,* she denies misconduct with Charles Howard, admits she is the mother of a child about six months old, avers defendant is an unfit person to have the custody of the children by reason of his abandonment and nonsupport of the children, and further avers that on 8 February 1961 she, by virtue of G.S. 50-16 (alimony without divorce, custody of children), instituted an action against defendant, in which he was served with process, and in which on 28 February 1961 Judge McKinnon entered an order awarding her the custody of the two children born of the marriage, and requiring defendant to pay $15.00 a week for their support, and that she pleads this in bar of defendant's further defense and cross-action, and prays that the court reaffirm Judge McKinnon's order.

The jury answered the customary issues in the divorce action in plaintiff's favor, and the court entered a judgment on the verdict awarding plaintiff an absolute divorce. From this judgment no appeal was taken.

At the same term Judge Morris had a hearing in respect to the custody of the two children born of the marriage between the parties, and entered an order. In the order Judge Morris briefly summarized the pleadings, and made the following findings of fact:

Plaintiff in her reply admits that since the separation of the parties she has given birth to a child now about six months old, and that the defendant is not its father. In defendant's answer and in plaintiff's reply, each requests the court to determine the custody of the two children born of the marriage. Subsequent to the separation of the parties defendant was tried in the recorder's court of Harnett County for the unlawful and wilful abandonment of his children, and ordered by the court to pay $15.00 a week for their support. Thereafter, plaintiff instituted, by virtue of G.S. 50-16 (alimony without divorce, custody of children), a civil action against defendant, in which an order was entered by McKinnon, J., on 28 February 1961 requiring defendant to pay $15.00 a week for the support of his children, and awarding plaintiff the custody of the two children born of the marriage between the parties. Defendant made payments as required by Judge McKinnon's order until plaintiff left North Carolina with the children and removed to California, where she resided until a short time ago. During her stay in California, one Charles Howard was also in California, and she has given birth to a child by him and has named the child Charles Howard, as admitted by her at the hearing. Defendant is now in arrears in the amounts required to be paid by him under Judge McKinnon's order in the sum of approximately $1,005.00. For most of their lives the two children have lived in the home of their maternal grandparents in Harnett County, which is near the home where their parents lived until their separation. Defendant bears a good reputation in the community where he lives, and lives in the home of his parents, where his brother and wife also live. Defendant's parents are tenants and not employed. Defendant is employed, and earns $60.00 to $65.00 a week. During the tobacco-curing season he goes to Canada, and earns $750.00 to $800.00 net there for curing tobacco. The home of defendant's parents is not equipped with running water, and is not large enough to accommodate defendant's parents, his brother and his wife, and defendant and his two children. Plaintiff's parents are people of good character and reputation, and their home is of sufficient size and equipment to provide adequate accommodations for the

two children. Plaintiff, having admitted in open court that she has lived in adultery with another man, and is the mother of a child other than by her husband, is an unfit person to have the custody and care of the two children born of the marriage between the parties. Defendant is a fit and suitable person to have their custody, though at the present time he has insufficient means to place them in a home sufficient and for their best interests. Based on his findings of fact Judge Morris concluded plaintiff is an unfit person to have the custody of the children, and that defendant and plaintiff's parents are fit and proper persons to have their custody. Whereupon, Judge Morris decreed that the custody of the two children be awarded to defendant, on condition that the physical custody of the children be vested in their maternal grandparents where the children shall live; that defendant shall pay for the support of the children $20.00 a week, and that plaintiff and defendant shall have visitation rights as specified in the order.

From the order of Judge Morris in respect to the custody of the children, plaintiff appeals.

Neill McK. Ross for plaintiff appellant.

Charles R. Williams and Robert B. Morgan for defendant appellee.

PARKER, J. Plaintiff assigns as error the following, which Judge Morris in his order calls a finding of fact, but which is in fact a mixed finding of fact and a conclusion: Plaintiff, having admitted in open court that she has lived in adultery with another man, and is the mother of a child other than by her husband, is an unfit person to have the custody and care of the two children born of the marriage between the parties.

Plaintiff contends there is no evidence in the record to support this finding of fact and conclusion. Plaintiff in her verified complaint for absolute divorce alleges: "That on the 16th day of June, 1960 * * * the plaintiff and defendant separated from each other, and have continuously lived separate and apart from each other since said date." Plaintiff in her reply in the divorce action verified on 4 December 1962 states: "It is admitted that the plaintiff is mother of a child about six months of age." Therefore, plaintiff admits in her pleadings that this child six months old on 4 December 1962 was conceived by her about 15 months after she and her husband had separated and since said separation had continuously lived separate and apart. Consequently, plaintiff's pleadings in her divorce action support the finding of fact that plaintiff is the mother of a child other than by her husband. In addition, her father testified before Judge Morris that

plaintiff went to California, he could not remember the date, and that she came back with a child, and told him Charles Howard was the father of the child. We find nothing in the record to support the finding of fact that plaintiff lived in adultery with another man, though a reading of the testimony of plaintiff's father permits a strong conjecture that plaintiff had an adulterous relationship with one Charles Howard in California. We presume that when Judge Morris stated in his order that plaintiff admitted in open court, he referred to admissions in her pleadings in the divorce action. We consider Judge Morris' finding of fact that plaintiff is the mother of a child other than by her husband is amply supported by allegations and admissions in her pleadings in the divorce action, and by the testimony of her father, and that this is sufficient to support the conclusion of the judge that plaintiff is an unfit person to have the custody and care of the two children born of the marriage between the parties. It is elementary learning that Judge Morris' findings of fact based on competent evidence are conclusive on appeal. *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684; *Spitzer v. Lewark,* 259 N.C. 49, 129 S.E. 2d 620.

Plaintiff further contends in respect to this assignment of error that Judge McKinnon's order awarding her the custody of the two children born of the marriage, entered in the action instituted by her by virtue of G.S. 50-16, barred Judge Morris in this action from concluding that she was an unfit person to have the custody of these two children; that she has pleaded in her reply Judge McKinnon's order as a plea in bar; and that Judge McKinnon's order awarding her the custody of the children should have been reaffirmed by Judge Morris. This contention is untenable.

The only part of the record in plaintiff's action against defendant, her husband, based on G.S. 50-16 is Judge McKinnon's order. It appears from what is in the record before us and from Judge McKinnon's order that this action was instituted in the superior court of Harnett County, that the parties at the time were residents of this county and are now, and that the two children born of the marriage were living in this county then and are now. The present action was instituted in the superior court of Harnett County. The jurisdiction of matters relating to the custody of these two children was invoked by the same parties in two actions in the same court in the same county. It is indubitable that the superior court of Harnett County had jurisdiction of matters relating to the custody of these children. There is nothing in the record to indicate that either plaintiff or defendant objected to Judge Morris passing on the matter of custody in the divorce action based on G.S. 50-6, or that plaintiff, preliminary to a hearing by Judge

Morris on the merits of the matter of the custody of these two children, insisted that the matter should be heard on a motion in the cause in her action based on G.S. 50-16. Under the particular facts here plaintiff has waived any right she might have to have the question of the custody of these two children passed on in her action based on G.S. 50-16. This Court said in *Montague v. Brown,* 104 N.C. 161, 10 S.E. 186:

> "The pendency of another action when this began, must, under the former practice, have been set up by plea in abatement before pleading to the merits, and now it must be especially averred as a defense, and insisted on, preliminary to a decision upon the merits, though it may be pleaded in the answer, with the denials and allegations of the complaint and other defenses."

See also G.S. 1-127, 1-133, and 1-134.

Blankenship v. Blankenship, 256 N.C. 638, 124 S.E. 2d 857, is clearly distinguishable. The defendant in this case instituted an action based on G.S. 50-16 against the plaintiff in this case on 31 January 1958 in the superior court of Warren County, entitled *Nancy Peete Blankenship v. Freneau Merritt Blankenship.* This case, an action for absolute divorce, was instituted on 16 February 1960 in the general county court of Buncombe County. Further, after the decree awarding Nancy Peete Blankenship the custody of the children was entered in the superior court of Warren County, there had been no change of circumstances affecting the welfare of the children before the entry of a decree on 29 March 1961 by the general county court of Buncombe County granting plaintiff's motion that that court take jurisdiction over the matter of the custody of the two children born of the marriage. In the instant case, there has been a material change of circumstances subsequent to the entry of Judge McKinnon's order awarding the custody of the children to plaintiff, in that since that time plaintiff has conceived and given birth to an illegitimate child.

A decree awarding the custody of minor children determines the present rights of the parties to the contest with respect to such custody, is not permanent in its nature, and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the children. This is one of the exceptions to the general rule that ordinarily one superior court judge has no power to alter, modify, or reverse the judgment of another superior court judge previously made in the same action. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884; *In re Means,* 176 N.C. 307,

97 S.E. 39; Strong's N. C. Index, Vol. 1, Courts, sec. 9, p. 655. In the instant case, plaintiff's going to California after Judge McKinnon's order, and returning with a bastard child begotten on her body by Charles Howard was a change of circumstances affecting the welfare of the children, which empowered Judge Morris to alter or modify Judge McKinnon's order if he deemed it necessary to do so to further the welfare of the children.

"The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96.

Plaintiff assigns as error Judge Morris' conclusion that defendant is a fit and proper person to have the custody of the two children born of the marriage. Though the findings of fact do not show defendant as a paragon of fatherly love and care, yet they do show he bears a good reputation in the community where he lives, which finding of fact is unchallenged. We think after a study of the record and of Judge Morris' order this conclusion should be sustained.

The unchallenged finding of fact by Judge Morris is that these two children for most of their lives have lived in the home of their maternal grandparents. Judge Morris awarded the custody of these two children to defendant, on condition that the physical custody of these two children be vested in their maternal grandparents where they live, and required defendant to pay for their support $20.00 a week.

The crucial findings of fact in Judge Morris' order are supported by competent evidence and they support his conclusions, which together support his order. Faced with a difficult problem the able and experienced trial judge seems to have made a wise decision, which will be for the best interest of the two children, the innocent victims of a broken marriage. We cannot forecast the future, but if there should be a change of circumstances adversely affecting the welfare of these children, the court is empowered to act, because all decrees with respect to custody and support of minor children are subject to further orders of the court. *Blankenship v. Blankenship, supra.*

All plaintiff's assignments of error are overruled. Judge Morris' order is

Affirmed.

THE M. BLATT COMPANY v. CHARLES L. SOUTHWELL.

(Filed 22 May 1963.)

1. Injunctions § 16—

G.S. 1-496 and G.S. 1-497 are *in pari materia* and must be construed together, therefore in order to be entitled to recover against plaintiff and the surety on his bond for damages resulting from the issuance of a temporary restraining order the defendant has the burden of showing that the court has decided by final judgment that plaintiff was not entitled to the temporary restraining order or circumstances equivalent to such decision.

2. Same—

It is error to allow defendant's motion for judgment against plaintiff and the surety on his bond for damages resulting from issuance of a temporary restraining order merely sequent to an order which dissolves the temporary restraining order without adjudicating that plaintiff was not entitled to the temporary restraining order or without finding the facts in regard to plaintiff's affidavit that the temporary restraining order was dissolved by voluntary agreement of the parties upon representation by defendant that he would not perform the acts therein proscribed.

3. Appeal and Error § 55—

Where it is apparent that the order appealed from was entered by the court under a misapprehension of the applicable law, the cause will be remanded to the end that the facts may be found in the light of the true legal principles.

APPEAL by plaintiff from *Crissman, J.*, January 7, 1963, Regular Term of GUILFORD, Greensboro Division.

The hearing below was on a motion by defendant for judgment against plaintiff and its surety for $500.00 as damages allegedly caused by the issuance and service of a temporary restraining order.

Defendant had been employed by plaintiff as manager of its Greensboro Branch Office under a written contract. On or about February 13, 1962, plaintiff delivered a letter to defendant notifying defendant he was discharged as such employee. Immediately thereafter, defendant instituted an action against plaintiff based on breach of contract. A day or two *thereafter* the present action was instituted.

On February 15, 1962, when summons was issued, plaintiff applied for and obtained an order extending the time for filing complaint; and, based on an affiidavit of its comptroller, plaintiff obtained a temporary order signed by his Honor Walter E. Johnston, Jr., restraining defendant from going upon plaintiff's premises at 1319 Headquarters Drive, Greensboro, North Carolina, and from interfering in any way with plaintiff's property and the dispatch of its business. The said order

contained this provision: "Plaintiff to give a bond in the sum of $2500.00 to indemnify defendant from loss." The said order notified defendant to appear before Judge Johnston on February 20, 1962, and show cause why said order should not be continued in effect until the final hearing. A copy of each of said documents was served on defendant on February 17, 1962.

On February 20, 1962, on return of said order to show cause, Judge Johnston entered an order in which he "vacated and dissolved" the temporary restraining order of February 15, 1962, and ordered that plaintiff be taxed "with the costs thereof." When submitted to Judge Johnston the (proposed) order contained this recital: "and it appearing to the Court upon such hearing that the plaintiff was not entitled to the said Restraining Order." Before signing the order, this recital was modified by Judge Johnston so as to read: "and it appearing to the Court that the Restraining Order should not be continued." The recital that "the plaintiff was not entitled to the said Restraining Order" was stricken by Judge Johnston.

Judge Johnston's order of February 20, 1962, recites the hearing on that date was "upon the Affidavits and arguments submitted by both the Plaintiff and the defendant." However, no affidavits then presented to Judge Johnston appear in the present record.

Nothing occurred after Judge Johnston's order of February 20, 1962, until December 28, 1962, when defendant filed his motion for judgment against plaintiff and its surety.

In his motion of December 28, 1962, defendant asserted that plaintiff had "executed a written undertaking with Fidelity and Deposit Company of Maryland as surety in the sum of Five Hundred Dollars ($500.00), conditioned that said plaintiff would pay to the party enjoined such damages as he might sustain by reason of said injunction if the Court should finally decide that the plaintiff was not entitled thereto"; that "this Court adjudged that said plaintiff was not entitled to said injunction and entered an Order dissolving the same"; and that defendant "suffered damages by reason of said injunction in the sum of Five Hundred Dollars ($500.00)."

Answering said motion: Plaintiff admitted it had executed a written undertaking with Fidelity and Deposit Company of Maryland as surety as condition precedent to the issuance of the temporary restraining order. It denied the court had adjudged plaintiff "was not entitled to said injunction," alleging the court expressly refused to sign a proposed order submitted by defendant's counsel containing such a finding or recital. It alleged that, at the hearing on February 20, 1962, defendant, through his counsel, represented to the court that he

would not return to plaintiff's premises and interfere; that the question had become moot; that defendant after February 20, 1962, voluntarily absented himself from the premises referred to in the temporary restraining order; that defendant had suffiered no damages on account of the issuance and service of the temporary restraining order; and that this action had abated on account of plaintiff's failure to file complaint or other pleadings. Plaintiff prayed that defendant's motion for damages be dismissed.

At the hearing before Judge Crissman defendant offered affidavits relating exclusively to the subject of damages allegedly caused by the issuance and service of the temporary restraining order. The only affidavit offered by plaintiff was the affidavit of Blair L. Daily, an attorney of record for plaintiff, in which he asserts that prior to the hearing on February 20, 1962, he was advised by defendant's counsel that defendant would stay away from plaintiff's premises and that the restraining order was not necessary, and that "the dissolution of the restraining order in this cause was by consent of the parties through their counsel and of the voluntary joint action of both plaintiff and defendant without any legal determination of the merits of the controversy or the propriety of the injunction . . ."

The judgment entered by Judge Crissman is dated January 24, 1963, and is in these words:

"THIS CAUSE coming on to be heard, and being heard by the Honorable Walter E. Crissman, Resident Judge of the Eighteenth Judicial District of North Carolina, upon a Motion made by the defendant for damages in accordance with General Statutes, Section 1-497; upon arguments of counsel for plaintiff and defendant and upon affidavits submitted by each, and the Court having found as a fact that an injunction was granted the plaintiff on February 15, 1962, and that same was vacated and dissolved by Order of the Court on February 20, 1962, and the Court having further found that the defendant sustained damages by virtue thereof;

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant have and recover of the plaintiff, The M. Blatt Company, damages as aforesaid in the sum of Three Hundred ($300.00) Dollars, and further, that the plaintiff be taxed with the costs to be assessed by the Clerk."

Plaintiff excepted and appealed.

Blair L. Daily and Jordan J. Frassineti for plaintiff appellant.

E. D. Kuykendall, Jr., and Weinstein & Weinstein for defendant appellee.

BOBBITT, J. Although defendant's motion is made under G.S. 1-497 for judgment against plaintiff and the surety on its undertaking or bond, the undertaking or bond is not in the record. Whether for $2,500.00 or $500.00, it is assumed the bond was drafted in accordance with G.S. 1-496. Defendant's motion for judgment thereon alleges the bond was "conditioned that said plaintiff would pay to the party enjoined such damages as he might sustain by reason of said injunction if the Court should finally decide that the plaintiff was not entitled thereto."

Section 341 of the Code of 1883 as amended by Chapter 251 of the Public Laws of 1893 included all of the statutory provisions subsequently codified as Sections 817 and 818 of the Revisal of 1905 and Sections 854 and 855 of the Consolidated Statutes of 1919 and now codified as Sections 1-496 and 1-497 of the General Statutes. G.S. 1-496 and G.S. 1-497 are *in pari materia* and must be construed together. There can be no recovery of damages under G.S. 1-497 on a bond given in accordance wtih G.S. 1-496 unless and until "the court finally decides that the plaintiff was not entitled" to the restraining order or injunction.

"It is held that no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision." 22 Cyc. 1027-1028; 43 C.J.S., Injunctions § 285, § 292(b); 28 Am. Jur., Injunctions § 338.

The question before Judge Johnston on February 20, 1962, was whether the temporary restraining order should be continued in effect until the final hearing or dissolved. The only reason stated in his order of February 20, 1962, for then dissolving the temporary restraining order is that it appeared to the court that "the Restraining Order should not be continued." The order contains no recital, finding or adjudication that plaintiff was not entitled to the temporary restraining order during the period it was in effect. As stated in *Scott v. Frank* (Iowa), 96 N.W. 764: "To sustain an action for damages it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. If rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages."

Absent an express decision that plaintiff was not entitled to the temporary restraining order, the question is whether the order of February 20, 1962, was the equivalent of such a decision. This question must be answered in the light of the legal principles set forth below.

In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond such as that required by G.S. 1-496, "(t)he voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought." *Gubbins v. Delaney* (Ind.), 115 N.E. 340; *St. Joseph & Elkhart Power Co. v. Graham* (Ind.), 74 N.E. 498, and cases cited; *Columbus, H. V. & T. Ry. Co. v. Burke* (Ohio), 43 N.E. 282; 43 C.J.S., Injunctions § 292b(2); 28 Am. Jur., Injunctions § 340; 54 A.L.R. 2d 505. It is so held in this jurisdiction. *R. R. v. Mining Co.*, 117 N.C. 191, 23 S.E. 181; *Timber Co. v. Rountree*, 122 N.C. 45, 29 S.E. 61.

"When, however, the dismissal of the action is by an amicable and voluntary agreement of the parties, the same is not a confession by the plaintiff that he had no right to the injunction granted, and does not operate as a judgment to that effect." *St. Joseph, etc. v. Graham, supra,* and cases cited; *Columbus, etc. v. Burke, supra; Gubbins v. Delany, supra; American Gas Mach. Co. v. Voorhees* (Minn.), 283 N.W. 114, and cases cited; *Janssen v. Shown* (CCA 9th), 53 F. 2d 608; 43 C.J.S., Injunctions § 292b(2); 28 Am. Jur., Injunctions § 340. As stated in *American Gas Mach. Co. v. Voorhees, supra*: "A judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued."

While the order of February 20, 1962, did not expressly provide the action was dismissed, these facts are noted: The sole object of plaintiff's action was to restrain defendant as provided in the temporary restraining order. No pleadings were ever filed by plaintiff or by defendant. The action was quiescent from February 20, 1962, until December 28, 1962. In these circumstances, the rule stated in the preceding paragraph would seem as pertinent as if there had been a formal dismissal of the action.

The facts set forth in the affidavit of Blair L. Daily were not controverted. They tend to show the temporary restraining order was dissolved by and with the consent of defendant on account of defendant's assurance to plaintiff that defendant thereafter would voluntarily refrain from the conduct the temporary order had restrained. If this be true, the order of February 20, 1962, dissolving the temporary restraining order, may not be considered the equivalent of a final decision that plaintiff was not entitled to the temporary restraining order.

Judge Crissman's order contains no findings of fact with reference to the matters referred to in the Daily affidavit. The order is based

solely on a finding that the temporary restraining order of February 15, 1962, was dissolved by the order of February 20, 1962, an undisputed fact. The burden of proof was on defendant to show, as a prerequisite to his right to recover damages from plaintiff and its surety, either that the court had finally decided plaintiff was not entitled to the temporary restraining order or that something had occurred equivalent to such a decision. Since it would seem the order was entered under misapprehension of the applicable law, the order of Judge Crissman is vacated and the cause is remanded for further hearing at which evidence may be offered and the facts found relevant to the matters referred to in the Daily affidavit.

It is noteworthy that nothing in the present record indicates defendant asserted at the hearing on February 20, 1962, that the restraining order had been improvidently issued or that he was entitled to judgment against plaintiff and its surety. In this connection, see *R. R. v. Mining Co., supra.*

Since the order is vacated for the reasons stated, we do not reach plaintiff's contention that the evidence was insufficient to show defendant suffered damages on account of the issuance and service of the temporary restraining order. However, it is noted that the order contained no findings of fact with reference to the nature and extent of defendant's damages.

Questions with reference to procedures for the ascertainment of the amount of damages upon motion under G.S. 1-497 are not presented.

Error and remanded.

MYRTLE BURTON v. A. L. DIXON, EXECUTOR OF THE WILL OF C. P. WILSON, ORIGINAL DEFENDANT, AND K. D. BURTON, ADDITIONAL DEFENDANT.

(Filed 22 May 1963.)

1. Conspiracy § 1—

If two or more individuals agree to do an unlawful act or to do a lawful act in an unlawful manner, and an overt act which causes damage is committed by any one or more of them in furtherance of the common design, the party injured may maintain an action against the conspirators jointly or severally.

2. Conspiracy § 2—

A pleading alleging that husband and wife, acting together, invited the wife's father to live with them, and acted as co-partners in a joint venture

to gain control of his property and convert it to their own use, that the husband persuaded his father-in-law to sign a power of attorney which the husband used to sell merchantable timber, and that the parties converted the proceeds of the sale to their own use, etc., *is held* sufficient to state a cause of action for civil conspiracy against the husband and wife, notwithstanding that it does not employ the words "conspiracy" or "conspirators."

3. Same; Husband and Wife § 2—

Under both Virginia and North Carolina law husband and wife may conspire together, and an action for civil conspiracy may be maintained against the husband or wife alone. Virginia Code § 55-36; G.S. 52-10; G.S. 52-15.

4. Pleadings § 8—

In a daughter's action against the estate of her father to recover for personal services rendered her father prior to his death, the personal representative's counterclaim alleging that the daughter and her husband conspired to obtain control of her father's property, and pursuant thereto the husband procured power of attorney under which he sold merchantable timber and converted the proceeds to their use, *held* to meet the requirments of G.S. 1-137 that a several judgment must be permissible on a counterclaim.

5. Same—

In an action *ex contractu* defendant may set up a counterclaim in tort if it arises out of the same transaction or is connected with the subject of the action.

6. Same; Executors and Administrators § 24a—

In a daughter's action against her father's estate to recover for personal services rendered her father, the defendant executor may set up a counterclaim against her for civil conspiracy between her and her husband pursuant to which the husband obtained a power of attorney and sold merchantable timber belonging to her father and converted the proceeds to their own use, since the counterclaim is connected with the subject of the plaintiff's action and is so related thereto that adjustment of both is necessary in a full and final determination of the controversy.

7. Judgments § 1; Parties § 8—

The court may not order a nonresident over whom it has no jurisdiction to be joined as a party, even though such nonresident be a proper or even a necessary party, since jurisdiction of an action *in personam* can be acquired only by personal service, acceptance of service, or general appearance.

8. Pleadings § 18—

Where, in a daughter's action against the estate of her father to recover for personal services rendered him, defendant files a counterclaim alleging that the daughter and her husband, pursuant to a conspiracy, acquired control of testate's property and converted it to their own use, the joinder of the husband would not constitute a misjoinder of parties and

causes, since the presence of the husband is necessary to a complete determination of the controversy.

APPEAL by plaintiff from *Hobgood, J.*, in Chambers at LOUISBURG, North Carolina, January 5, 1963. From Person.

Action against defendant executor to recover for services rendered defendant's testate and for expenses incurred in his behalf.

The substance of the complaint is: Plaintiff and her husband, K. D. Burton, reside in Virginia. C. P. Wilson, plaintiff's father, came to live with her in 1956. He was old and infirm, stated that he expected to pay plaintiff for the services, care and support rendered him and for expenses incurred on his behalf, and promised to make provision in his will to compensate her. He continued to live with plaintiff until his death in 1961. Plaintiff by personal care and at her expense provided for all his needs, including hospital, medical and funeral expenses. He did not make provision in his will to compensate plaintiff. She is entitled to recover $8,999.35.

Defendant executor, answering, denies the material allegations of the complaint and sets up a counterclaim, which is summarized in part and verbatim in part as follows (numbering ours):

(1). Plaintiff and her husband invited C. P. Wilson to live in their home "to gain control of his assets and convert the same to their own use." And "to this end . . . the plaintiff and her husband planned together, acted as co-partners and as husband and wife in a joint venture."

(2). ". . . (P)laintiff and her husband persuaded C. P. Wilson to sign . . . a legal instrument purporting to give K. D. Burton broad and general power of attorney over the property of C. P. Wilson, including the right to dispose of any timber which C. P. Wilson owned."

(3). ". . . (S)ometime in 1958 K. D. Burton disposed of and received the proceeds from the sale of all merchantable timber from the farm of C. P. Wilson. . . . (I)n selling this timber and in obtaining the power of attorney . . . K. D. Burton was acting with the knowledge, consent, approval and encouragement of his wife. . . ." It "was a joint venture in which plaintiff and her husband acted as co-partners. . . . (T)he amount of money . . . received from the sale of timber was fraudulently misapplied and converted to the use of the plaintiff and her husband. . . . (T)here has never been an accounting for the proceeds from the sale of said timber. . . ." The value of the timber converted is $6800.

(4) By virtue of the power of attorney, K. D. Burton in 1957, 1958, 1959 and 1960 collected rents due C. P. Wilson from the farm in the

total amount of $4,412.22, and plaintiff and K. D. Burton, acting as "co-partners and joint venturers," fraudulently converted these rents to their own use, and have never accounted therefor. An accounting is demanded.

Defendant executor prays that K. D. Burton be made a party defendant and that he be served with process, and for judgment against plaintiff and K. D. Burton in the amount of $11,212.22.

Plaintiff demurs to the counterclaim on the grounds:

"(4). That in the counterclaim there is a misjoinder of causes and parties."

"(5). That the purported counterclaim is a defective statement of any cause of action."

(The first three grounds are not relied on in Supreme Court, are deemed abandoned, and are omitted here.)

The judge below overruled the demurrer, and plaintiff appealed. Plaintiff also petitioned for certiorari and the writ was allowed.

Everett, Everett & Everett and T. Jule Warren for plaintiff.
R. B. Dawes, Sr., and R. B. Dawes, Jr., for Original Defendant.

MOORE, J. There are two questions for decision: (1) Does the counterclaim state a cause of action? (2) If so, is there a misjoinder of parties and causes?

Accepting the factual allegations of the counterclaim as true and construing them liberally, as we must in passing upon the demurrer (*Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 410, 111 S.E. 2d 614), we are of the opinion that the facts alleged are sufficient to constitute a cause of action for damages arising from a conspiracy to take possession of C. P. Wilson's property and convert it to the use of plaintiff and her husband.

A conspiracy is generally defined as an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful manner. *Muse v. Morrison*, 234 N.C. 195, 66 S.E. 2d 783. A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself. The combination or conspiracy may be of little consequence except as bearing upon rules of evidence or the persons liable. If a conspiracy is formed and an overt act, causing damage, is committed by any one or more of the conspirators in furtherance of the conspiracy, all of the conspirators are liable. All may be joined as parties defendant in an action for damages

caused by the wrongful act, but it is not necessary that all be joined; an action may be maintained against only one. The liability of the conspirators is joint and several. *Burns v. Gulf Oil Corporation,* 246 N.C. 266, 98 S.E. 2d 339; *Muse v. Morrison, supra.*

The counterclaim does not refer to plaintiff and her husband as conspirators; it designates them as "co-partners" and "joint venturers." However, it is not the titular designation that controls; the nature of the cause of action is determined by the facts alleged. It is alleged that plaintiff and her husband, acting together, invited C. P. Wilson to live with them for the purpose of gaining control of his assets and converting them to their own use, they persuaded C. P. Wilson to execute to the husband a general power of attorney and by means thereof sold timber and collected rents belonging to C. P. Wilson, and they converted the proceeds of the timber and rents to their own use. This is a sufficient statement of a cause of action for conspiracy, and according to the facts pleaded both conspirators committed acts pursuant to the conspiracy.

"Generally speaking, any person who is capable in law of being sued and who takes part in a conspiracy may be held civilly liable as a conspirator. . . . (A)t common law an action for conspiracy cannot be maintained against a husband and wife alone, since they are considered to be one person. . . . Since the gist of the modern action, however, is damages, and not the conspiracy, an action for conspiracy may now be maintained against a husband and wife alone." 11 Am. Jur., Conspiracy, s. 47, pp. 579-580; *Jones v. Monson,* 119 N.W. 179 (Wis. 1909). It is the law in Virginia that a married woman may "sue and be sued in the same manner and with the same consequences as if she were unmarried." Code Va., s. 55-36; *Furey v. Furey,* 71 S.E. 2d 191 (1952). The same is true in North Carolina. G.S. 52-10; G.S. 52-15.

This brings us to the question whether the defendant executor may assert his action for conspiracy as a counterclaim in plaintiff's action. It may be maintained as a counterclaim if it is a cause of action in favor of defendant and against plaintiff and in such action a several judgment may be had between them, and if the cause of action (counterclaim) arose out of the contract or transaction set forth in the complaint as the foundation for plaintiff's claim or is connected with the subject of the action. G.S. 1-137.

"A several judgment may be had on a counterclaim within the purview of the statute when judgment may be rendered for the plaintiff, or all of the plaintiffs, if more than one, or for the defendants, if more than one, accordingly as the court may decide in favor of the one side or the other." *Garrett v. Rose,* 236 N.C. 299, 305, 72 S.E. 2d 843; *Lum-*

ber Co. v. Wallace, 93 N.C. 22. It is apparent that the counterclaim in the instant action meets this test. On the record the husband, K. D. Burton, is not presently a party. But, as stated above, conspirators are jointly and severally liable. The test is met either with or without the husband as a party.

As to whether the cause of action stated in the counterclaim arose out of the transaction set forth in the complaint or is connected with the subject of the action, the following discussion in *Hancommon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614, sets out the guiding principles:

> "As the purpose of the two sections [G.S. 1-123 (1), G.S. 1-137 (1)] is to authorize the litigation of all questions arising out of any one transaction, or series of transactions concerning the same subject matter, in one and the same action, and not to permit multifariousness, it must appear that there is but one subject of controversy. (Citing authorities)
>
> "While the statute is designed 'to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action,' *Smith v. French, supra* (141 N.C. 1); *Sewing Machine Co. v. Burger,* 181 N.C. 241, 107 S.E. 14, that a connected story may be told is not alone sufficient. *Pressley v. Tea Co., supra* (226 N.C. 518, 39 S.E. 2d 382). Nor is mere historical sequence—'one thing led to another' order of occurrences—all that is required. *Finance Corp v. Lane,* 221 N.C. 189, 19 S.E. (2d), 849. . . .
>
> "The cross action must have such relation to the plaintiffs' claim that the adjustment of both is necessary to a full and final determination of the controversy. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. (2d), 555. This means that it must be so interwoven in plaintiffs' cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other.
>
> " 'The "subject of the action" means, in this connection, the thing in respect to which the plaintiff's right of action is asserted, ...' To be connected with the subject of action the 'connection of the case asserted in the counterclaim and the subject of the action must be immediate and direct, and presumably contemplated by the parties.' *Phillips, Code Pleading,* 2d ed., sec. 377, p. 423.
>
> " 'In respect to the phrase "connected with" the subject of the action, one rule may be regarded as settled by the decisions, and it is recommended by its good sense, and its convenience in

> practice. The connection must be immediate and direct. . . . the connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties must be assumed to have had this connection and its consequences in view when they dealt with each other.' Pomeroy, Code Remedies, 5th ed., sec. 652, p. 1059, sec. 670, p. 1085; *Schnepp v. Richardson, supra.*"

If it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim. *King v. Libbey,* 253 N.C. 188, 116 S.E. 2d 339; *Hancammon v. Carr, supra.*

"In litigation involving the assets of an estate even though complicated as to parties and involving multiple demands for relief, objection for misjoinder of causes and parties has an excellent chance of being overruled." 25 N.C. L. Rev. 22.

It seems clear to us that defendant's counterclaim is connected with the subject of plaintiff's action. The specific subject of the action is the contract between plaintiff and her father, and the court's inquiry is whether there was a breach of the contract, and, if so, in what amount the father's estate is indebted to plaintiff by reason thereof. The promised care of the father and attention to his needs may well have included the transaction of some business in his behalf, such as the sale of timber and collection of rents. But, if not, it was certainly within the contemplation of the parties to the contract that the father would, in the performance on his part, take into consideration the conversion of his assets by plaintiff. Indeed, this may explain the alleged failure of the father to make the promised provision for his daughter in his will. The adjustment of plaintiff's claim and defendant's counterclaim is necessary to a full and final determination of the controversy.

As stated above, K. D. Burton is not presently a party to the action. He is a resident of Virginia. "As a general rule a person over whom the court has no jurisdiction cannot be ordered to be brought in as a proper or necessary party to the action. . . ." 67 C.J.S., Parties, s. 74(k), pp. 1042-3. Jurisdiction of a party in an action *in personam,* as is the instant action, can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by general appearance, active or constructive. *Warlick v. Reynolds,* 151 N.C. 606, 66 S.E. 657. In an action *in personam* constructive service (by publication, or personal service outside the State) upon a nonresident is ineffectual for any purpose. *Stevens v. Cecil,* 214

N.C. 217, 199 S.E. 161; McIntosh: North Carolina Practice and Procedure (2d ed. 1956), s. 911, p. 479.

If jurisdiction of K. D. Burton is lawfully acquired, he is a proper, and perhaps a necessary, party. *Casaretto v. DeLucchi,* 174 P. 2d 328 (Cal. 1946), is in point. This case involved an action to recover the balance due on meat sold by plaintiff to defendants. Defendants set up a counterclaim alleging they had been overcharged and that plaintiff and one Schroeter had conspired to overcharge them. Shroeter was made a party. Demurrer to the counterclaim was overruled. The jury found for defendants. The appellate court affirmed, holding that there was not a misjoinder of parties and causes, that Schroeter was properly made a party, and that his presence was necessary to a complete determination of the controversy. See also: *Lesnik v. Public Industrials Corp.,* 144 F. 2d 968 (2nd. Cir. 1944); *Lumber Co. v. Silas,* 184 S.E. 286 (Ga. 1936); *George W. Woods, Inc. v. Althauser,* 209 N.Y.S. 416 (1925).

The judgment below is

Affirmed.

RUFUS MACON BROWN v. EDWIN HOYLE HALE, GEORGE KELLEY JOHNSON, AND JOSEPH G. BANKS, T/A BANKS USED CARS.

(Filed 22 May 1963.)

Judgments § 22— Neglect of attorney ordinarily will not be imputed to the client.

Where defendants, served with summons and complaint, deliver the suit papers together with information concerning matters relating to their defense to their insurer, and the insurer forwards the papers to attorneys selected by it who are reputable attorneys duly licensed to practice in the State, the neglect of the attorneys to file answer within the time limited because of the confusion incident to hospitalization in the family of the attorney to whom the suit had been assigned, will not be imputed to the defendants, and the allowance of defendant's motion under G.S. 1-220 to set aside default judgment upon appropriate findings, including the finding of a meritorious defense, will not be disturbed on appeal.

APPEAL by plaintiff from *Riddle, Special Judge,* 7 November Term 1962 of GUILFORD (Greensboro Division).

This action was instituted in the Superior Court of Guilford County, North Carolina, on 9 August 1962 by the plaintiff against the de-

fendants, trading as Banks Used Cars, to recover damages for personal injuries sustained in an automobile collision which occurred on Interstate Highway No. 85, in Orange County, North Carolina, near the Durham County line, on 13 March 1962.

The pertinent facts found by the court below which are essential to the disposition of this case are summarily stated as follows:

1. The summons and complaint were duly served on the defendants on 11 August 1962.

2. Promptly upon receipt of said summons and complaint the defendants caused the summons and complaint to be delivered to their automobile liability insurance carrier for defense of the action in accordance with the terms of the insurance policy, and they also furnished to their liability insurance carrier statements of witnesses and other information concerning matters involved constituting their defense to the action.

3. Promptly thereafter the summons and complaint, together with the additional information furnished by the defendants, were forwarded by the insurance carrier to the law firm of Ruark, Young, Moore & Henderson, Raleigh, North Carolina, for the purpose of defending said action on behalf of the defendants.

4. The law firm retained for the defense of this action is composed of attorneys licensed to practice in this State, and said law firm is a reputable, skilled and competent firm and is composed of attorneys experienced in handling and defending automobile accident litigation.

5. The defendants acted with reasonable prudence in forwarding the suit papers to their insurance carrier for assignment to counsel for the defense of the action. Likewise, the insurance carrier acted with reasonable prudence in selecting attorneys and forwarding suit papers and other information to the selected attorneys.

6. The suit papers were received by the attorneys on 24 August 1962 and the defense of this action was assigned to Joseph C. Moore of the firm of Ruark, Young, Moore & Henderson. On 28 August 1962 he requested the Clerk of the Superior Court of Guilford County to advise the date of service of the summons and complaint as this information was not shown on the copies served on the defendants.

7. Defendants' attorneys, by copy of a letter to the Clerk of the Superior Court of Guilford County, informed the insurance carrier that they had received the summons and complaint and were attending to the defense of the action.

8. Soon after undertaking the defense of this action Mr. Moore's wife entered Rex Hospital, Raleigh, North Carolina, for delivery of a

baby, which was Mr. Moore's fifth child. Mr. Moore was unable to employ a nurse to take care of his four other children, the new baby and his wife upon their return from the hospital, and it was necessary for him to take on this responsibility as well as his legal duties. Due to conditions in the home of Mr. Moore, he turned the defense of this action over to an associate in the firm of Ruark, Young, Moore & Henderson.

9. The statutory time for answering expired on 10 September 1962.

10. The associate neglected to file answer or any pleading within the statutory time.

11. Attorneys for defendants did mail to the Clerk of the Superior Court of Guilford County a motion, dated 7 September 1962, to remove this action to another county pursuant to G.S. 1-83.

12. The motion to remove was not received by the aforesaid Clerk until 11 September 1962. At approximately 11:30 a.m. on 11 September 1962 the plaintiff, through his attorney, took a judgment by default and inquiry before the Clerk of the Superior Court of Guilford County.

13. The failure to file answer or other pleading in apt time was at least in part occasioned by the confusion at defendants' attorneys' office due to the circumstances occasioned by Mr. Moore's wife's hospitalization.

14. Within a few hours after taking of the default judgment, defendants' attorneys telephoned plaintiff's attorney and requested that he withdraw the default judgment and permit answer to be filed, but plaintiff's attorney refused the request.

15. On 17 September 1962 the defendants filed in the Superior Court of Guilford County a motion to set aside the judgment by default and inquiry pursuant to G.S. 1-220 and attached a verified answer to the complaint, both of which are now of record in the Superior Court.

16. The plaintiff was not prejudiced or harmed in any manner whatsoever on the merits of his case by the short delay in the filing of defendants' answer.

17. The defendants acted with reasonable and ordinary prudence in relying on their attorneys to protect their interests and to see that answer or other pleading was filed within the time allowed, and further cooperated with the attorneys and furnished complete information, through their agent, for the preparation of answer and defenses, and had reason to expect that their interests were being protected and that all steps necessary to the defense of the action, including the filing of the answer, were being taken by their attorneys.

Upon the foregoing facts the court concluded that the facts and allegations of the defendants could justify a finding of no negligence on the part of the defendants, or that the plaintiff was himself contributorily negligent, and, therefore, the court concluded that the defendants have and have asserted a meritorious defense to plaintiff's alleged cause of action.

The court further found that the judgment by default and inquiry was taken because answer or other pleading was not filed within the time allowed, and was taken solely by reason of the neglect of defendants' attorneys; that there was no dereliction or neglect on the part of the defendants and that the neglect of their attorneys is not imputable to them; and that there has been excusable neglect on the part of the defendants within the meaning of G.S. 1-220.

Therefore, the Court entered judgment, vacating and setting aside the judgment entered by default and injuiry on 11 September 1962, and ordered the answer of the defendants theretofore attached to defendants' motion to be filed as the answer of the defendants in this cause.

The plaintiff appeals, assigning error.

Frazier & Frazier, H. Vernon Hart, W. P. Pearce for plaintiff appellant.

Holding, Harris, Poe & Cheshire; Smith, Moore, Smith, Schell & Hunter for defendant appellees.

DENNY, C.J. The determinative question before us is whether or not the neglect of defendants' attorneys in failing to file answer within the time allowed, in light of the facts and circumstances disclosed by the record, is imputable to these defendants.

What duty does the law impose upon a defendant in a civil action with respect to filing answer or other pleading?

The decisions on the subject now before us are not entirely satisfactory with respect to their consistency. In fact, many of them are irreconcilable. *Sutherland v. McLean,* 199 N.C. 345, 154 S.E. 662. However, the general rule seems to be that where a defendant employs reputable counsel and is guilty of no neglect himself, and the attorney fails to appear and answer, the law will excuse the defendant and afford relief. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890; *Gunter v. Dowdy,* 224 N.C. 522, 31 S.E. 2d 524; *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507.

In the case of *Gunter v. Dowdy, supra,* the Court said: "Since the failure to file an answer was due to the excusable neglect of the at-

torney employed in apt time by the defendants, and since the defendants made such attorney aware of their defense to the action, any failure or neglect of the attorney to file the answer could not be attributable to the defendants. *Schiele v. Ins. Co.*, 171 N.C. 426, 88 S.E. 764; *English v. English*, 87 N.C. 497; *Norton v. McLaurin*, 125 N.C. 185, 34 S.E. 269; *Mann v. Hall*, 163 N.C. 50, 79 S.E. 437."

In *Rierson v. York, supra*, this Court said: "In considering the propriety of the order entered on the hearing of defendant's motion, we must remember that the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. The neglect of the attorney, although inexcusable, may still be cause for relief. *Meece v. Commercial Credit Co.*, 201 N.C. 139, 159 S.E. 17; *Abbitt v. Gregory*, 195 N.C. 203, 141 S.E. 587; *Ice Co. v. Railroad*, 125 N.C. 17, 24, 34 S.E. 100; *Stallings v. Spruill*, 176 N.C. 121, 96 S.E. 890."

In *Moore v. Deal, supra, Parker, J.*, speaking for the Court, said: "We held as far back as 1871 in *Griel v. Vernon*, 65 N.C. 76, that an attorney's neglect to file a plea is a surprise on the client whose failure to examine the record to ascertain that it has been filed is an excusable neglect. * * *

"When an attorney is licensed to practice in a state it is a solemn declaration that he is possessed of character and sufficient legal learning to justify a person to employ him as a lawyer. He is an officer of the court which should hold him to strict accountability for his negligence or misdeeds, if he commits such. The client is not supposed to know the technical steps of a lawsuit. 'Where he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf.' * * * "

The cases of *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849; *Greitzer v. Eastham*, 254 N.C. 752, 119 S.E. 2d 884; *Jones v. Ice & Fuel Co.*, 259 N.C. 206, ... S.E. 2d ....., and similar cases, where the rule has been laid down to the effect, "that ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default," are factually distinguishable from those in the instant case. No counsel was employed in any one of the above cited cases until after judgment by default and inquiry had been obtained.

It clearly appears in the instant case that competent counsel was employed in apt time and that the defendants through their responsible agent, their insurance carrier, had furnished all the information necessary for counsel to file answer and set up their defenses to the action.

Nothing more was required of them. *Moore v. Deal, supra; Jones v. Ice & Fuel Co., supra.*

We hold that the defendants had the right to rely on the counsel selected by their insurance carrier to file answer within the time allowed and to represent them in the defense of the action. Moreover, the essential findings of fact upon which the judgment below was based, in our opinion, were supported by competent evidence. The judgment of the court below will be upheld.

Affirmed.

THE EMPLOYERS' FIRE INSURANCE COMPANY, A CORPORATION v. BRITISH AMERICA ASSURANCE COMPANY, SAM E. WHEELER AND WIFE, MILDRED C. WHEELER, T. S. ROYSTER, TRUSTEE, J. L. PARRISH, AND MRS. RUTH C. CURRIN.

(Filed 22 May 1963.)

1. Insurance § 68—

Both a mortgagor and mortgagee have an insurable interest in encumbered property.

2. Insurance §§ 72, 86—

When a mortgagee purchases with his own funds insurance solely for the protection of the debt due him, the insurer, upon payment of loss, is subrogated to the rights of the mortgagee against the mortgagor; but when the insurance is procured by the mortgagee pursuant to authority and at the expense of the mortgagor, no right of subrogation exists, and the amount paid by insurer must be applied to the discharge or reduction of the debt. G.S. 58-176.

3. Insurance § 72—

A standard loss payable clause in a policy of fire insurance issued to the mortgagor constitutes a separate contract insuring the mortgage interest, and loss paid by insurer thereunder must be applied to the reduction of the mortgage debt.

4. Insurance § 84—

The property destroyed by fire was insured by a policy issued to the mortgagee under authority of the mortgagor and the mortgagor was liable for the premiums thereon. The property was also insured under a policy issued to the mortgagor, which policy contained a standard loss payable clause. *Held:* The loss is properly prorated between the insurers. G.S. 58-176.

APPEAL by British America Assurance Company from *Clark, J.*, December 10, 1962 Assigned Civil Term of Wake.

This is an action under the Uniform Declaratory Judgment Act, G.S. 1-253 *et. seq.*, to determine the respective liabilities of plaintiff and appellant under policies of insurance insuring a building in Oxford against damage by fire.

The determinative facts found by the trial court on stipulation of the parties are: Mildred Wheeler owned a house and lot at 205 Williamsboro Street. Mrs. Wheeler was indebted to J. L. Parrish. Payment of her debt was secured by deed of trust on the house and lot to T. S. Royster. On 27 February 1961 the building was damaged by fire. The amount then owing including taxes and premiums paid appellant, both secured by the deed of trust, was $8,783.68. Prior to the fire Royster as trustee had advertised the property for sale as authorized by the deed of trust. Foreclosure had not been completed when the fire occurred.

On 21 January 1961 appellant issued its fire insurance policy covering the dwelling to J. L. Parrish, who was designated as the insured. The policy afforded the insured maximum protection of $12,000 for a period of one year.

On 22 February 1961 plaintiff issued its policy of fire insurance covering the dwelling. Mrs. Wheeler was named as the insured. The policy afforded maximum protection in the sum of $17,500 for a term of three years from its date. The policy names J. L. Parrish as first mortgagee.

Each of the policies is in the form prescribed by statute, G.S. 58-176(c).

The court concluded Parrish was entitled to recover from plaintiff and appellant the full amount of the damage which should be apportioned between the two insurers in the proportion which the sum named as maximum of liability in its policy bore to the total insurance. The liability of each insurer was computed and judgment entered against each for its proportionate part of the loss. Appellant excepted and appealed.

Dupree, Weaver, Horton & Cockman by Walter L. Horton, Jr., for plaintiff appellee.

Claude Bittle for appellant.

RODMAN, J. The question presented by the appeal is: Should each of the insurers contribute to the payment of the loss in the proportion which the sum insured bears to the total insurance, or must plaintiff pay all the loss?

Both a mortgagor and a mortgagee have an insurable interest in encumbered property. *Shores v. Rabon,* 251 N.C. 790, 112 S.E. 2d

556; *Jeffreys v. Ins. Co.*, 202 N.C. 368, 162 S.E. 761; *Bank v. Bank*, 197 N.C. 68, 147 S.E. 691.

The mortgagee's interest is limited to the debt due him. The standard policy, G.S. 58-176, expressly provides the insured shall not collect "in any event for more than the interest of the insured." When a mortgagee purchases with his funds insurance solely for his protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortgagee against the mortgagor. *Bryan v. Ins. Co.*, 213 N.C. 391, 196 S.E. 345; *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511; *Ins. Co. v. Reid*, 171 N.C. 513, 88 S.E. 779; 29A Am. Jur. 807; 46 C.J.S. 183. Where, however, the insurance is procured by the mortgagee pursuant to the authorization and at the expense of the mortgagor, no right of subrogation exists and the amount paid by the insurer must be applied to discharge or reduce mortgagor's obligation to mortgagee. *Buckner v. Ins. Co.*, 209 N.C. 640, 184 S.E. 520; *Batts v. Sullivan, supra; Concord Union Mutual Fire Ins. Co. v. Woodbury*, 45 Maine 447; *Hartford Fire Ins. Co. v. Bleedorn*, 132 S.W. 2d 1066; *Prentiss-Wabers Stove Co. v. Millers' Mut. Fire Ins. Ass'n.*, 213 N.W. 632; *Leyden v. Lawrence*, 81 A. 121; 46 C.J.S. 182; Couch on Insurance, sec. 2006F.

It is established by the finding that the premiums paid appellant were charged to the mortgagor and were a part of the debt which the owner must pay. If appellant discharges its obligation to its named insured who was acting with the authority of and at the expense of the mortgagor, it would have no right to assert a claim against the owner of the property. The payment so made would reduce or discharge the debt, dependent upon the amount of the loss and the debt owing. Payment made by plaintiff under the policy naming mortgagor as the insured but with a provision for the benefit of the mortgagee to the extent of his interest, *i.e.*, the debt owing, would likewise be applied to reduce mortgagor's debt.

Ervin, Jr., writing in *Green v. Ins. Co.*, 233 N.C. 321, 64 S.E. 2d 162, said: "It is the accepted position in North Carolina and most other states that when the standard or union mortgage clause is attached to or inserted in a policy insuring property against loss, it operates as a distinct and independent contract between the insurance company and the mortgagee, effecting a separate insurance of the mortgage interest. *Stockton v. Insurance Co.*, 207 N.C. 43, 175 S.E. 695; *Mahler v. Insurance Co.*, 205 N.C. 692, 172 S.E. 204; *Bennett v. Insurance Co.*, 198 N.C. 174, 151 S.E. 98, 72 A.L.R. 275; *Bank v. Bank*, 197 N.C. 68, 147 S.E. 691; *Bank v. Assurance Co.*, 188 N.C. 747, 125 S.E. 631; *Bank v. Ins. Co.*, 187 N.C. 97, 121 S.E. 37; Annotation: 124 A.L.R. 1035." This

declaration of the law was quoted by *Moore, J.*, in *Shores v. Rabon, supra.* He added: "This principle has been so steadfastly adhered to by this Court and for such long duration that it must be assumed that insurance companies contract and fix rates in full contemplation of the risk imposed thereby." No reason has been advanced which, in our opinion, would warrant us in reversing the conclusion reiterated as late as January 1960, *Shores v. Rabon, supra.*

We have then two policies of insurance issued with the authority and at the expense of the mortgagor payable to the mortgagee to the extent of his debt. Each policy insures the same property against the same peril. The mortgagee can proceed against either of the insurers and such payment as the insurer makes must be applied as a credit on the mortgage debt. The loss is less than the debt. The total insurance substantially exceeds the mortgage debt. Must the lost be paid by one of the insurance companies or should it be apportioned?

Each policy provides: "This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not." The quoted provision is a part of the standard policy prescribed by statute. G.S. 58-176. The court correctly held that the amount to be paid to the mortgagee should be apportioned in the proportion which each policy bore to the total insurance available for that purpose. *Bank v. Insurance Co.*, 187 N.C. 97, 121 S.E. 37, and 188 N.C. 747, 125 S.E. 631; *Eddy v. L.A. Corporation,* 143 N.Y. 311; *Camden Fire Ins. Ass'n v. Sutherland,* 284 S.W. 927; *Hagan v. Hudson Ins. Co.*, 173 S.E. 477; *Lipsitz v. Union Ins. Soc. Limited,* 268 N.Y.S. 179.

The element which distinguishes this case from *McCoy v. Continental Ins. Co.*, 40 N.W. 2d 146, and similar cases relied on by appellant is the fact that the insurance in those cases was not taken with the authority and at the expense of the mortgagor. Those cases belong to a group illustrated by *Ins. Co. v. Reid, supra.*

The judgment is

Affirmed.

MARY CARTER DEAL v. ROBERT A. DEAL.

(Filed 22 May 1963.)

1. Divorce and Alimony § 18—

The court, either in granting or refusing to allow alimony *pendente lite*, is not required to make specific findings of fact except in regard to adultery when adultery of the wife is pleaded in bar, and where defendant charges that plaintiff abandoned him, it will be assumed on appeal from the denial of alimony *pendente lite* that the court found the facts in favor of the husband. Whether the wife is entitled to an order for alimony when the husband has not ceased to provide her with necessary subsistence, *quaere?* G.S. 50-16.

2. Same—

Even though the court denies the wife's motion for alimony *pendente lite*, the court may properly allow counsel fees to the wife's attorney in order that she may have adequate means to meet her husband at the trial upon substantially even terms.

APPEAL by plaintiff from *Cowper, J.*, at Chambers November 3, 1962, in LENOIR.

Plaintiff sues for alimony without divorce, counsel fees, and custody of children, pursuant to G. S. 50-16.

The complaint alleges: Plaintiff and defendant intermarried in 1948 and have three minor children. Without provocation and fault on the part of plaintiff, defendant used alcoholic beverages to excess, was habitually away from home until late at night and at times stayed away all night, assaulted plaintiff on one occasion, subjected her to indignities and thereby rendered her condition intolerable and life burdensome, abandoned plaintiff and the children on 31 July 1961, and has failed to provide them support in accordance with their needs and his means. Plaintiff earns $600 per month.

Defendant, answering, denies the alleged misconduct on his part and charges that plaintiff abandoned him. The answer avers: Defendant operates a service station which requires him to work late. He owns an interest in two other enterprises and on many occasions he has to attend to these after closing the service station. He earns $450 per month. He has monthly payments in excess of $120 on mortgages involving property in which his wife is interested as tenant by the entirety. He has provided his family a comfortable home with all modern conveniences including air conditioning. He provides his wife with an automobile. He has at all times paid all household and family expenses and given his wife $20 to $30 per week for food and incidentals. He drinks socially but not to excess. Plaintiff is from Baltimore, has no friends in Kinston and is unhappy there. Before this suit was

instituted she made definite plans to return to Baltimore and take the children with her.

Plaintiff moved for alimony *pendente lite* and attorney's fees.

The court entered an order, in pertinent part as follows:

> "It appearing . . . that the parties are living separate and apart and that plaintiff is living in the home owned by the parties hereto as tenants by the entirety and that she has custody of the three children . . . ; . . . that the defendant is making the house payments . . . and in addition pays all the following bills . . . : electricity, water, telephone, milk bill, gasoline for plaintiff's automobile furnished by defendant as well as all other current household expenses and in addition gives plaintiff $20.00 to $25.00 per week; . . . that plaintiff while testifying . . . stated that she intended to move to Baltimore, Maryland, and take the . . . children with her out of the jurisdiction of the Court; and
>
> "It is the opinion of the court that plaintiff and the three children are being adequately provided for at this time by defendant and therefore her motion for alimony pendente lite is denied."

The court made no order with respect to custody, but directed defendant to pay $100 in fees to plaintiff's attorneys.

Plaintiff appeals.

Jones, Reed & Griffin for plaintiff.

C. E. Gerrans for defendant.

MOORE, J. Plaintiff assigns as error, (1) the failure of the court to pass "upon the issue as to whether defendant . . . abandoned the plaintiff" without fault on her part, (2) failure of the court to pass "upon the issue as to whether the conduct of defendant . . . offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome," and (3) the entering of the order.

As explained below, we think the court did pass on the issues mentioned in the first and second assignment of error. However, the court made no specific findings of fact with respect thereto, and no findings of fact were requested by plaintiff. "On motion for alimony *pendente lite* made in an action by the wife against the husband pursuant to G.S. 50-16, the judge is not required to find the facts as a basis for an award of alimony except when the adultery of the wife is pleaded in bar." *Creech v. Creech,* 256 N.C. 356, 358, 123 S.E. 2d 793; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436. And this rule applies where the motion for alimony *pendente lite* is denied. *Byerly*

v. Byerly, 194 N.C. 532, 140 S.E. 158. The discretion given to the trial judge is so wide that he is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife. *Phillips v. Phillips,* 223 N.C. 276, 25 S.E. 2d 848. See also *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283.

The principal question argued by plaintiff is whether the court may deny the motion for alimony *pendente lite* upon the mere finding that defendant is providing adequate support for his wife. The question is raised upon the exception to the entry of the order denying the motion. There is a conflict of authority as to whether, in a case in which a husband *has abandoned* his wife, allegations and proof that he is providing her adequate support is a defense to her motion for alimony *pendente lite.* Many courts hold that it is a good defense. 27A C.J.S., Divorce, s. 209(c), p. 917. The theory of these courts is that *pendente lite* allowances are based on necessity, and where no necessity exists there is no reason for an order of temporary alimony. *Friedman v. Friedman,* 171 N.Y.S. 2d 695 (1958). Other courts take a contrary view. They reason that the wife is entitled to the security of a court order fixing legal responsibility, even if the husband is voluntarily providing adequate support, for that it will avoid bickering and confusion between the parties, assure the continuance of the support by the husband, and permit the wife to decide what her needs are and the kind and quality of the articles she must accept. *See Pedersen v. Pedersen,* 107 F. 2d 227 (D.C. Cir. 1939). The decisions of the North Carolina Court are not entirely consistent, but the trend seems to be in the direction of the latter view. *Thurston v. Thurston,* 256 N.C. 663, 124 S.E. 2d 852; *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745.

However, it will be observed that in *Thurston, Butler* and all other cases in which it has been held that the wife is entitled to the security of a court order despite the fact that her husband is providing adequate support, there were definite findings that the husband *had abandoned* the wife or *was guilty* of conduct which would entitle her to a divorce absolute or from bed and board. A wife is not entitled to an order for support *pendente lite* merely because she has instituted an action and alleged grounds for divorce or alimony. The applicable statute, G.S. 50-16, provides that "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action. . . ." The statute provides two remedies, one for alimony

without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443. "The existence of grounds for divorce is a prerequisite to any allowance to the wife under G.S. 50-16. To warrant an allowance *pendente lite* she must allege and prove a cause of action for divorce." *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349; *Bateman v. Bateman,* 233 N.C. 357, 64 S.E. 2d 156; *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384. And plaintiff must show that she did not by her own conduct provoke the wrongs and abuses of which she complains. *Garsed v. Garsed,* 170 N.C. 672, 87 S.E. 45. The husband is not precluded from asserting and proving as a defense to his wife's action and motion that she has separated herself from him or abandoned him. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923. When the issue has been raised, it is not "sufficient that the judge merely examine the evidence or testimony to see whether there is any evidence to support plaintiff's charges or allegations which would operate as a *prima facie* showing. He must, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction." *Cameron v. Cameron, supra.* In *Byerly v. Byerly, supra,* the wife moved for an allowance *pendente lite* and counsel fees. She alleged abandonment by the husband which he denied. He charged that she had separated from and abandoned him. The trial court found no facts and denied the motion. On appeal this Court said:

> "The presumption is that he (the judge) based the judgment on the fact that plaintiff had abandoned and separated herself from the defendant, and defendant did not abandon and separate himself from plaintiff.
>
> "C.S., 1667, . . . and the amendments (G.S. 50-16) do not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees."

The briefs and order of Judge Cowper indicate that plaintiff and defendant testified at the hearing. However, the testimony is not in the record. There is nothing to show that Judge Cowper did not fully consider the pleadings and the evidence, pass upon the truth and falsity thereof, and find according to his conviction. It must be presumed that the court, for the purposes of the motion, resolved the crucial issues of fact against plaintiff.

The provisions of the statute with reference to the allowance of attorney fees are to enable the wife to have means to employ adequate

counsel to meet her husband at the trial upon substantially even terms. The amount of the allowance is a matter for the trial judge. *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. Provision was made for counsel fees. The order entered is not a final determination and does not affect the final rights of the parties.

The order entered below is

Affirmed.

JOHNNY H. WETHERINGTON v. LEAMON SMITH AND HIS WIFE, LILLIAN SMITH.

Highways § 12—

The right to have a cartway laid off acros the lands of respondents in order to afford petitioner necessary access to a public highway may not be defeated by a contention that necessary access could be afforded petitioner by laying off a shorter cartway across the lands of others to a neighborhood public road when the evidence discloses that the junction with the neighborhood public road would be some two thousand feet from the highway and that at times the neighborhood public road was hazardous or impassable, and that the construction of a cartway thereon would be more difficult and expensive because of the topography and existence of woods.

APPEAL by respondents from *Mintz, J.,* October 1962 Term of CRAVEN.

Special proceeding under G.S. 136-68 and G.S. 136-69 to establish a private way (cartway) from petitioner's land to a public road.

It was stipulated the jury of view found petitioner was entitled to a private way over the lands of respondents to N. C. Highway 55, hereafter referred to as the highway, and laid off as such private way a strip of land 20 feet in width along the northwest boundary of respondents' land, as shown on map prepared by Darrell D. Daniels, Civil Engineer, on July 7, 1959. The said 20-foot strip extends from petitioner's land 757 feet to the right of way, and 787 feet to the center, of the highway. Mr. Daniels was one of the three members of the jury of view. The clerk affirmed the report of the jury of view and respondents excepted and appealed.

Upon trial in the superior court, the court submitted and the jury answered these issues:

"1. Is petitioner entitled to a private way over the lands of the respondents to a public road? Answer: Yes.

"2. Is the roadway laid off by the jury of view necessary, reasonable and just? Answer: Yes.

"3. What amount of damages are respondents entitled to recover from petitioner for the roadway laid off by the jury of view? Answer: $300.00."

The court entered judgment in accordance with the verdict. Respondents excepted and appealed.

L. T. Grantham and Lee & Hancock for petitioner appellee.
David S. Henderson for respondent appellants.

BOBBITT, J. Respondents' property, a quadrangle, is shown on the Daniels map and referred to herein as the Leamon Smith land. It fronts approximately 700 feet on the highway. The highway frontage is its northeast boundary. Its southeast boundary, extending southwest from the highway, is the land of Jacob Allen *et al.* Its northwest boundary, extending southwest from the highway, is the land of Cora Hubbard Smith. Its southwest boundary (rear line, 679 feet) is the northeast boundary of petitioner's tract of 70.11 acres.

The cartway laid off by the jury of view and established by the verdict and judgment is a strip 20 feet wide crossing the Leamon Smith land where it adjoins the Cora Hubbard Smith land.

The Cora Hubbard Smith land is between the Leamon Smith land and a road, leading southwest from the highway, referred to in the evidence as the School House or Two Mile Road, hereafter referred to as the School House Road. This road extends, in courses and distances shown on the Daniels map, a total of 2,057 feet to a ditch or canal designated on said map as C. Testimony as to the course(s), distance(s) and character of this road beyond C is indefinite. The northwest corner of petitioner's land, designated on said map as A, does not adjoin the Leamon Smith land but is to the rear (southwest) of the Cora Hubbard Smith land or the Riggs land. The distance from A to C, by the courses shown on said map, is 706 feet. A private road or cartway from A to C would not cross the Leamon Smith land but would cross the Riggs land or the Gaskins land or both.

Petitioner's tract of 70.11 acres does not abut the highway or the School House Road. It consists of an interior area in the shape of a pan and handle. The handle portion is to the rear (southwest) of the Leamon Smith land and is bounded on the southeast by the land of Jacob Allen *et al.* and on the northwest by the land of Cora Hubbard Smith. The pan portion, containing the greater acreage, extends to the rear (southwest) of the said handle and also to the rear (southwest) of the Cora Hubbard Smith land and the Riggs land.

Before the jury of view and also upon trial in the superior court, the question was whether the cartway, if established, should be located from A to C across the Riggs land or the Gaskins land or both or across the Leamon Smith land. If located across the Leamon Smith land, the location thereof along its northwest boundary was, under all the evidence, calculated to do the least damage to the remainder of the Leamon Smith land. Respondents contended the School House Road was a public road and that the distance from A to C (706 feet) was less than the distance from petitioner's northeast line across the Leamon Smith land to the highway. As indicated in our preliminary statement, the distance from petitioner's northeast line to the highway right of way is 757 feet.

With reference to the School House Road, there was evidence tending to show: Years ago a school for Negro children was conducted on said road at a point 1114 feet southwest from the highway. The said road was the means of access to the schoolhouse and also to dwellings and land abutting thereon. The school was abandoned some twenty years ago. There is no evidence said road was ever maintained by any public authority or agency. The evidence is conflicting as to whether the road is usable with reasonable safety, particularly the portion from the schoolhouse location to C, except under very favorable weather conditions. There is no evidence bearing upon the extent, if any, the road is presently maintained by anybody.

To answer the first and second issues in the affirmative, the court instructed the jury in substance it was necessary that petitioner satisfy the jury from the evidence and by its greater weight, *inter alia*, that there was not a public road or other means of transportation affording necessary or proper means of ingress to and egress from petitioner's land.

Respondents assign as error certain of the court's instructions pertinent to determining whether the School House Road was a public road or a neighborhood public road.

The evidence most favorable to respondents was insufficient to support a finding that the School House Road was a public road but was sufficient to support a finding that it was a neighborhood public road within the meaning of G.S. 136-67. It may be conceded the court's instructions bearing upon what constitutes a public road or a neighborhood public road were inexact and did not sufficiently apply the law to the evidence. However, it does not appear these instructions prejudiced respondents. Indeed, the court's instructions implied petitioner could use the School House Road, if he could get to it, as a means of access to the highway.

Petitioner's land does not abut the School House Road. Assuming the School House Road was available for petitioner's use as a matter of right or by permission, petitioner would have access thereto only if a cartway were laid off from A to C or (for a greater distance) over lands of Cora Hubbard Smith, Riggs or Gaskins. It is 2,057 feet from C to the highway. There was plenary evidence the School House Road was unsatisfactory and at times hazardous or impassable. Too, there was plenary evidence the area between A and C was lower and wooded and that it would be difficult and expensive to construct and maintain a road thereon.

Upon consideration of all the evidence, it appears there was not a public road or other adequate means of transportation affording necessary or proper means of ingress to or egress from petitioner's land. The crucial issue was whether it was necessary, reasonable and just to lay off a cartway across the Leamon Smith land as determined by the jury of view rather than lay off a cartway from A to C across the Riggs and the Gaskins land or both and thereby provide access to a point on the School House Road 2,057 feet from the highway. In the circumstances, respondents' said assignments of error are overruled.

Each of respondents' other assignments of error has been given careful consideration. Suffice to say, none discloses error deemed prejudicial to respondents to such extent as to justify a new trial.

No error.

STATE v. NATHANIEL E. HARGETT.

(Filed 22 May 1963).

1. False Pretense § 1—

Under the decisions of this State, in order to constitute false pretense there must be a misrepresentation of some subsisting fact, and while there need not be any token, promises of future action, even though unfulfilled, cannot be made the basis of a prosecution. G.S. 14-100.

2. False Pretense § 2—

An indictment charging that defendant, who owned a casket, a box in which it was to be placed, and a cemetery used for burial purposes, promised to bury the son of the prosecuting witness in the casket shown and to give the body a decent burial, and that defendant did not bury the child in the casket shown and in a separate grave, *held* fatally defective, since the averments other than those in regard to existing facts relate to promises for future fulfillment, which are insufficient basis for a prosecution for false pretense.

PARKER, J., concurring in result.

APPEAL by defendant from *Armstrong, J.*, November 26, 1962 Term, GUILFORD Superior Court, Greensboro Division.

Criminal prosecution for the felony of false pretense. Upon arraignment and before plea, the defendant challenged the sufficiency of the indictment by motion to quash. The court denied the motion. The defendant excepted. The defendant challenged the sufficiency of the evidence by timely motions for a directed verdict of not guilty, and excepted to the court's refusal to allow them. From a verdict of guilty and judgment of imprisonment for a term of three to ten years, the defendant appealed.

T. W. Bruton, Attorney General, James F. Bullock, Asst. Attorney General for the State.

Adams, Kleemeier, Hagan & Hannah by Charles T. Hagan, Jr., for defendant appellant.

HIGGINS, J. The indictment in the case was drawn under G.S. 14-100: "If any person shall knowingly and designedly, by means of any forged or counterfeit paper . . . or by any false token, or other false pretense whatsoever, obtain from any person . . . money, goods, property, or thing of value . . . with intent to cheat or defraud any person or corporation . . . such person shall be guilty of a felony . . ."

The indictment in this case is of extreme length. In factual averments it attempts to allege certain of the defendant's acts in the past tense, especially as to his state of mind. Nevertheless, when fairly analyzed, the indictment charges that for $42.50 paid to the defendant, he agreed with Willie Poole to remove the body of Poole's infant son from the hospital to the defendant's funeral home, prepare it for burial, furnish a casket which was shown to the father, place the casket in a wooden box, and give the body a decent burial in a suitable graveyard; and that in truth and in fact the body of the infant son was not buried in the casket shown, not placed in a separate grave space in a suitable graveyard, was not given a decent burial; and that the defendant never intended to carry out the promises by means of which he obtained from Poole the sum of $42.50.

The arrangements for the burial were made on July 7, 1961. The State offered evidence that members of the Guilford County Sheriff's Department on December 18, 1961, discovered the body of the Poole infant wrapped in a plastic bag and buried in a delapidated pine box with two other colored infants in the defendant's graveyard near Pleasant Garden.

The only evidence of the actual burial was offered by defendant whose witness testified he dug the grave, fitted the wooden box into it, and assisted the defendant in placing the casket and the body in the grave.

The question presented by the appeal is the sufficiency of the indictment to charge "false pretense." The statute under which the indictment was drawn does not define false pretense. Hence, for definition, we must look to the courts. Our leading authority on the subject is *State v. Phifer,* 65 N.C. 321: "It is settled that a *promise* is not a *pretense.* No matter what the form, or however false the promise, to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact; but there need not be any token."

In *State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705, this Court had this to say: "The constituent elements of false pretense as defined by the statute, and expressed in the *Phifer* case, *supra,* have been repeated without variation in numerous decisions of this Court, among which are: *S. v. Dixon,* 101 N.C. 741, 7 S.E. 870; *S. v. Mangum,* 116 N.C. 998, 21 S.E. 189; *S. v. Matthews,* 121 N.C. 604, 28 S.E. 469; *S. v. Whedbee,* 152 N.C. 770, 67 S.E. 60; *S. v. Claudius,* 164 N.C. 521, 80 S.E. 261; *S. v. Carlson,* 171 N.C. 818, 89 S.E. 30; *S. v. Roberts,* 189 N.C. 93, 126 S.E. 161."

"It is a well-established rule of criminal law that a false pretense or representation to be indictable must be an untrue statement of a past or an existing fact. False representations amounting to mere promises or statements of intention have reference to future events and are not criminal within false pretense statutes, even though they induce the party defrauded to part with his property." 22 Am. Jur., False Pretense, §14, p. 452; 168 A.L.R. 835.

In this case the Attorney General's brief contains the following frank statement: "The State does not concede that the bill of indictment is insufficient when tested by the above rules. (Referring to liberal construction of indictments.) However, the State recognizes that the language of the indictment raises a serious question as to whether or not the false representation of a past or subsisting fact has been sufficiently alleged." . . . "Although this Court has held that a 'state of mind' is a subsisting fact and will support actionable fraud in a civil action, we do not understand that this rule has been applied to criminal actions for false pretense."

In this case, at the critical time the defendant obtained the money, he had on hand the casket selected; likewise, the box in which it was to be placed. He also owned a cemetery used for burial purposes. All

other material averments consisted of promises for future fulfillment—not of existing facts. Under the authorities cited, the indictment failed to charge false pretense as defined by the courts. In these definitions a "state of mind" does not seem to have been considered a subsisting fact. Because of the fatal defect in the bill, this Court is required to arrest the judgment. *State v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480.

Judgment arrested.

PARKER, J., concurring in result. I am of opinion that the bill of indictment in this case as drawn is defective. However, I believe that upon the facts here a valid indictment could have been drawn under G.S. 14-100, charging false pretense. I agree with the authorities that hold "that a state of mind is a fact, and that, therefore, a false statement as to the intention of accused is a false pretense as to an existing fact* * *." 35 C.J.S., False Pretenses, sec. 10, p. 819. Lord Justice Bowen said in *Edgington v. Fitzmaurice* (1885), Law Reports, 29 Chancery Div. 459, a classic statement which has been quoted with approval since by many courts: "There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." I realize there is authority to the contrary. C.J.S., op. cit., p. 819.

See also the quotation from 35 C.J.S., False Pretenses, sec. 9, in *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762.

STATE v. LILLIE ANDERSON.

(Filed 22 May 1963.)

1. Indictment and Warrant § 9—

A warrant or indictment is sufficient if it expresses the charge against defendant in a plain, intelligible, and explicit manner and contains sufficient matter to enable the court to proceed to judgment and bar a subsequent prosecution for the same offense, and it is not required that it be couched in the language of the statute or refer to the statute upon which it is based, and reference to an inapposite statute will not vitiate it.

2. Gambling § 5—

A warrant charging that defendant did operate a house in which various types of gambling "is continuously carried on" and did permit named

persons to engage in a game of cards in which money was bet, *held* sufficient to charge defendant with operating a gambling house.

APPEAL by defendant from *Armstrong, J.*, 5 November Term 1962 of Guilford (Greensboro Division).

The defendant appealed to the Superior Court of Guilford County from an order of the Municipal-County Court of the City of Greensboro, which court put into effect a suspended sentence theretofore imposed upon the defendant because she had breached a condition upon which the sentence had been suspended. The breach consisted of a subsequent gambling violation and such breach is not contested. The defendant contends, however, that the original warrant to which she pleaded guilty and as a result of which the suspended sentence was imposed, was fatally defective in that it failed to charge all the essential elements of a criminal offense.

The pertinent portion of the warrant contained in the affidavit is as follows:

"The undersigned affiant, being duly sworn, deposes and says that the above named defendant, on or about the 23 day of July, 1961, with force and arms, at and in Guliford County except High point, Deep River and Jamestown townships, did unlawfully and willfully violate the North Carolina gambling laws of the General Statutes of North Carolina, to wit, did operate, keep and maintain a house in which various types of gambling is continuously carried on at 613 Douglas Street, Greensboro, North Carolina, and did then and there at 3:00 P.M., allow, permit, John R. Vaughn, LeRoy Stokes, Jesse Thompson, and Robert Lee Hearnes, to engage in a game of cards in which money was bet, won or lost, they the aforesaid being in violation of Chapter 14, Section 282, General Statutes of North Carolina, against the statutes in such cases made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter ....., Section ....., Code of City of Greensboro."

The Superior Court affirmed the judgment entered by the Municipal-County Court activating the suspended sentence, and the defendant appeals, assigning error.

Attorney General Bruton; Asst. Attorney General Harry W. McGalliard for the State.

Elreta Melton Alexander for defendant appellant.

DENNY, C.J. The sole question presented on this appeal is whether or not the warrant to which the defendant pleaded guilty to operating

a gambling house was sufficient in form to charge the offense of operating such a house.

If a warrant avers facts which constitute every element of an offense, it is not necessary that it be couched in the language of the statute. *S. v. Tickle,* 238 N.C. 206, 77 S.E. 2d 632; *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654.

Reference to a specific statute upon which the charge in a warrant is laid is not necessary to its validity. Likewise, where a warrant charges a criminal offense but refers to a statute that is not pertinent, such reference does not invalidate the warrant. Strong, North Carolina Index, Indictment and Warrant, section 9, page 561, *et seq.*

All that is required in a warrant or bill of indictment since the adoption of G.S. 15-153 is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense.

In our opinion, the charge of operating a gambling house set out in the warrant hereinabove set forth, is sufficient to meet the requirements of the statute. *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, and cited cases. This conclusion is supported by our decisions in *S. v. Webster,* 218 N.C. 692, 12 S.E. 2d 272, *S. v. Morgan,* 133 N.C. 743, 45 S.E. 1033; *S. v. Black,* 94 N.C. 809. See also Joyce on Indictments, Second Edition, section 499, page 592, and Wharton's Criminal Law and Procedure, Vol. 4, section 1758, page 548, *et seq.*

In *S. v. Black, supra,* the Court said: "(I)f a person shall keep a house, a room, or other like place, for the purpose of inducing or allowing other persons to frequent the same, in small or large numbers, to bet on the result of games played and engaged in, at cards or other like devices, for money or other thing of value, such person will be guilty of keeping a gaming house. It is the keeping — using — the house, or like place, for gaming purposes, that determines its character."

The ruling of the court below is

Affirmed.

STATE OF NORTH CAROLINA v. KATHERINE MOCK.

(Filed 22 May 1963.)

1. Searches and Seizures § 1—

Consent eliminates the necessity for a search warrant.

2. Searches and Seizures § 2—

The deputy clerk of the Municipal Court of the City of High Point has authority to issue a search warrant for illegal liquor, G.S. 7-198. The effect of G.S. 15-27.1 was not to nullify G.S. 18-13 but merely to make the requirements of G.S. 15-26 and G.S. 15-27 applicable to search warrants obtained under G.S. 18-13.

APPEAL by defendant from *Crissman, J.*, September 24, 1962 Criminal Term of GUILFORD (High Point Division).

On December 8, 1961, in Case No. 13839, the High Point Municipal Court found defendant guilty of the possession of nontaxpaid whiskey and sentenced her to a term in the County Workhouse. By and with the consent of the defendant, this sentence was suspended for five years upon condition that during that time (1) she not have any intoxicants in her home or on her person and (2) that she permit officers to search her home at any reasonable time without a search warrant. There was no appeal from this sentence.

Thereafter on March 30, 1962, as the result of evidence obtained by police officers under a search warrant issued by the deputy clerk of the High Point Municipal Court, a warrant charging the defendant with the transportation, possession, and sale of nontaxpaid whiskey was issued the same day. On July 12, 1962, in Case No. 13838, she was tried upon this warrant. The judge of the High Point Municipal Court found her guilty as charged and sentenced her to twelve months in the County Workhouse. He again suspended the prison sentence upon condition that for five years she not violate the prohibition law, possess any whiskey or allow anyone else to possess intoxicants in her house. However, the judge found that defendant had violated the terms upon which the sentence in Case No. 13839 had been suspended and, in this case, ordered an active sentence of four months.

The defendant appealed from both sentences to the Superior Court where, upon a trial *de novo* in Case No. 13838, she objected to the evidence obtained by the officers on the ground that a deputy clerk of the High Point Municipal Court had no authority to issue a search warrant. The objection was overruled. The jury found defendant guilty as charged. The judge imposed an active prison sentence of six months and affirmed the revocation of the suspended sentence in Case No. 13839. From these judgments defendant appealed to this Court.

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

Morgan, Byerly, Post, Van Anda & Keziah for defendant appellant.

SHARP, J. The defendant concedes that if the search warrant was valid the evidence obtained under it was sufficient to sustain the sentences imposed. She limits the question on this appeal to the authority of the deputy clerk of the High Point Municipal Court to issue the search warrant. Defendant has apparently overlooked the fact that on December 8, 1961, in Case No. 13839, as a condition for remaining out of prison, she had consented that police officers of High Point might search her home for intoxicants at any reasonable time during the five years her prison sentence was suspended. Consent eliminates the necessity for a search warrant. *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912; *State v. Brown; State v. Jones,* 247 N.C. 539, 101 S.E. 2d 418; 79 C.J.S., Searches and Seizures, section 62. Nevertheless, we think it proper to point out that the deputy clerk of the Municipal Court of High Point had authority to issue the search warrant. G.S. 18-13 (rewritten by Section 3, Chapter 1235, Session Laws of 1957, ratified June 10, 1957) provides in part:

> "Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized *by the law to issue warrants,* that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information. . . ." (Emphasis added.)

The High Point Municipal Court is a court inferior to the Superior Court; it is included within that portion of G.S. 7-198 which provides:

> "The summons, warrant of arrest, and every other writ, *process, or precept* issuing from a recorder's court or *other court inferior to the superior court,* except justices of the peace, *may be signed* by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy." (Emphasis added.)

Prior to the enactment of G.S. 15-27.1 (Chapter 496 of the 1957 Session Laws, ratified May 1, 1957) this Court held that search warrants for illegal liquor were governed by G.S. 18-13 and that G.S. 15-27 was not applicable. *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d

537; *State v. Brady,* 238 N.C. 404, 78 S.E. 2d 126. G.S. 15-27.1 makes Article 4 of Chapter 15 of the General Statutes applicable to all search warrants with specific reference to those issued under G.S. 18-13. Defendant contends that G.S. 7-198, insofar as it had applied to search warrants issued under G.S. 18-13, is now in conflict with Article 4 and was therefore within the repealing clause of Chapter 496 of the 1957 Session Laws. We do not so hold. G.S. 15-27.1 did not nullify G.S. 18-13. Indeed, it recognized it as specifically applying to intoxicants just as G.S. 15-25 applies to narcotic drugs, stolen property and lottery, gambling, and counterfeiting equipment, and just as G.S. 15-25.1 applies to barbiturates. The former authorizes any justice of the peace, mayor or chief magistrate of any incorporated town, or the clerk of any court inferior to the Superior Court to issue a search warrant; the latter, any judge of any court of record, any clerk or assistant clerk of the Superior Court, and any justice of the peace to issue it. G.S. 18-13 permits any officer authorized to issue warrants to issue a search warrant for the liquor therein specified. The deputy clerk had this authority under G.S. 7-198. The effect of G.S. 15-27.1 was to make the requirements of G.S. 15-26 and G.S. 15-27, which were not included in G.S. 18-13, applicable to search warrants obtained under that section.

We hold that the deputy clerk of the High Point Municipal Court had the authority to issue the warrant.

No error.

IN RE LAST WILL AND TESTAMENT OF DORA C. JONES, DECEASED.

(Filed 22 May 1963.)

APPEAL by caveators from *Paul, J.,* November 19, 1962, Term of LENOIR.

Dora C. Jones, a resident of Lenoir County, North Carolina, died March 3, 1961. A paper writing dated June 18, 1960, purporting to be her last will and testament, was probated in common form on March 6, 1961. A caveat was filed on March 20, 1961, and the cause was transferred to the superior court for trial.

Upon trial, the jury answered the issues raised by the caveat as follows:

> "1. Was the paper-writing dated June 18, 1960, and now offered for probate, executed by the said Dora C. Jones with the formalities required by law? ANSWER: Yes.

"2. Did the said Dora C. Jones, on June 18, 1960, at the time of the execution of said paper-writing, lack, that is, was she without, sufficient mental capacity to execute a Will? ANSWER: No.

"3. Was the execution of the paper-writing dated June 18, 1960, procured through the undue influence of Clifton C. Jones and Cecil Jones, or either of them? ANSWER: No.

"4. Is the paper-writing dated June 18, 1960, and now offered for probate, and each and every part thereof, the Last Will and Testament of Dora C. Jones? ANSWER Yes."

Thereupon, the court adjudged "that the paper-writing propounded as the Last Will and Testament of Dora C. Jones, deceased, dated June 18, 1960, and each and every part of the said document, constitutes the Last Will and Testament of Dora C. Jones, deceased."

Caveators excepted and appealed.

Fred W. Harrison for caveator appellants.

C. E. Gerrans and Wallace & Wallace for propounder appellees.

PER CURIAM. Evidence was offered by the propounders and by the caveators. The issues were submitted under a full, clear and correct charge; and the verdict is in all respects supported by plenary evidence. Particular discussion of the questions presented by caveators' (four) assignments of error is deemed unnecessary. Suffice to say, caveators' assignments do not show prejudicial error and are overruled.

No error.

MRS. MYRTLE PORTER, BY AND THROUGH HER NEXT FRIEND, GRADY PORTER v. MARY WILLIAMS JARRELL.

(Filed 22 May 1963.)

APPEAL by defendant from *Copeland, S.J.*, October, 1962 Civil Term, ROCKINGHAM Superior Court.

Civil action to recover damages for personal injury plaintiff sustained as a result of being hit by the defendant's automobile at the intersection of east-west Highway No. 158 and north-south Highway No. 2351 in Rockingham County. The plaintiff, a pedestrian, with an armful of groceries, attempted to cross from the southwest to the northwest corner of the intersection. The evidence favorable to the plaintiff

tended to show the defendant saw, or should have seen, the plaintiff, a partial cripple, in the act of crossing the intersection; nevertheless, negligently ran over her, proximately causing serious injury.

Issues of negligence, contributory negligence, and damages were submitted to the jury. All were answered in favor of the plaintiff. From the judgment in accordance with the verdict, the defendant appealed.

Gwyn & Gwyn, by Allen H. Gwyn, Jr., for plaintiff appellee.

Jordan, Wright, Henson & Nichols, Karl N. Hill, Jr., by Karl N. Hill, Jr., for defendant appellant.

PER CURIAM. The evidence, though conflicting in part, nevertheless was sufficient to go to the jury on the simple issues presented. The court sufficiently charged with respect to the rights and duties of the parties. The jury's resolution of the disputed facts is conclusive. The record discloses neither valid reason to send the case back, nor liklihood that another hearing would produce a substantially different result.

No error.

ED RICE, PLAINTIFF v. WILLIAM RIGSBY, DEFENDANT. DONALD STINES, INTERVENOR, AND BILL ROBERTS, CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY; HILLIARD TEAGUE, REGISTER OF DEEDS OF SAID COUNTY, AND E. Y. PONDER, SHERIFF OF SAID COUNTY, ADDITIONAL INTERVENORS.

AND

CHARLES DAVIS, BY HIS NEXT FRIEND, ROBERT ALLEN, PLAINTIFF v. WILLIAM RIGSBY, DEFENDANT. DONALD STINES, INTERVENOR, AND BILL ROBERTS, CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, HILLIARD TEAGUE, REGISTER OF DEEDS OF SAID COUNTY, AND E. Y. PONDER, SHERIFF OF SAID COUNTY, ADDITIONAL INTERVENORS.

(Filed 14 June 1963.)

1. Statutes § 4—

Constitutional questions are of great importance, and therefore a person attacking the constitutionality of a statute must address his objections in clear and direct language to a specific article, section and clause of the State or Federal Constitution, and further it is not the

practice of the courts to adjudicate merely that a statute contravenes the State or Federal Constitution, but the courts ordinarily will point out specifically the constitutional provisions violated.

2. Appeal and Error § 2—

Where the lower court holds the statute attacked by defendant to be unconstitutional, the Supreme Court, in the exercise of its supervisory jurisdiction over the inferior courts, may consider the constitutional questions notwithstanding that defendant failed properly to present them in the lower court, but even so the Supreme Court will ordinarily consider only the specific constitutional questions discussed in the brief. Constitution of North Carolina, Art. IV, § 8.

3. Statutes § 2; Jury § 3—

Chapter 359 of the Session Laws of 1955, amending G.S. 9-1 by providing for the selection of jurors in Madison County by a jury commissioner appointed by the resident judge, is not a statute dealing with the establishment of a court inferior to the Superior Court or any other subject designated in Article II, § 29, of the State Constitution, and therefore the fact that the statute is a local act does not render it unconstitutional under this section.

4. Statutes § 7—

Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same meaning and effect that they had before the amendment. G.S. 12-4.

5. Jury § 3—

The fact that the act amending G.S. 9-1 provides that the jury commissioner of Madison County should select persons "who are known to be of good moral character and are known to have sufficient intelligence to serve" instead of providing for the selection of persons "who are of good moral character and have sufficient intelligence to serve" does not render the amendment unconstitutional as leaving an arbitrary decision to the jury commissioner as to the persons to be selected, the distinction being a mere exercise in semantics.

6. Same; Constitutional Law §§ 19, 24— Act providing jury commissioner for Madison County held constitutional.

Chapter 359 of the Session Laws of 1955, amending G.S. 9-1, requires the jury commissioner of Madison County to comply with provisions of G.S. 9-2 in respect to putting the names on the jury list in the box, and rquires him to comply with the requirements of G.S. 9-3 in respect to the manner of drawing the panel for the term from the box, and therefore the local act does not contravene Section I of the Fourteenth Amendment to the Federal Constitution or Sections 7, 17, and 19 of Article I of the Constitution of North Carolina, since the act does not discriminate in the selection of jurors because of race, color, or sex, or bestow upon any person exclusive emoluments or privileges or deny to any person the right to trial by fair and impartial jury.

7. Constitutional Law § 24—

The words "the law of the land" as used in § 17, Art. I, of the State Constitution are equivalent to the words "due process of law" as used in § 1 of the Fourteenth Amendment to the Federal Constitution.

8. Public Officers § 5; Appeal and Error § 1; Jury § 3—

Where the trial court dismisses the panel of jurors, the questions whether the jury commissioner in selecting the panel was disqualified because he had vacated the office of jury commissioner by accepting another public office, and whether the jury commissioner had failed to observe the alleged mandatory requirements of the statute in drawing the jury panel, become academic since this particular panel is *functus officio.*

9. Constitutional Law § 24—

A fair jury in jury cases and an impartial judge in all cases are basic to due process of law.

10. Same; Jury § 3—

Where an act imposes the duty upon the resident judge to appoint a properly qualified person as jury commissioner of a county, the duty devolves upon the resident judge to appoint a duly qualified person who will discharge his duties in substantial compliance with the statute and to instruct him as to his duties under the act and to see that his appointee performs his duties so that there may be trials on the merits by fair and impartial juries in jury cases in the county.

APPEAL by plaintiff Ed Rice and by Donald Stines, Intervenor, and appeal by plaintiff Charles Davis, by his next friend Robert Allen, and by Donald Stines, Intervenor, from *Riddle, S. J.,* 4 February 1963 Civil Session of MADISON.

Civil action by plaintiff Ed Rice to recover damages for personal injuries allegedly caused by the actionable negligence of defendant William Rigsby in the operation of his automobile, plaintiff being a passenger therein.

Defendant William Rigsby in his answer denied negligence, and, *inter alia,* pleaded conditionally contributory negligence of plaintiff as a bar to recovery.

Plaintiff Charles Davis, by his next friend Robert Allen, instituted a similar action against defendant Rigsby. In the *Davis* case defendant Rigsby filed a similar answer as in the *Rice* case.

At 10 December 1962 Regular Civil Session of Madison, Riddle, S.J., entered an order consolidating these two cases for trial, and setting them as the first cases for trial at the next session of Madison County superior court.

When these two cases were called for trial at 4 February 1963 Civil Session, defendant Rigsby challenged the array of jurors returned by the sheriff to serve at that session of court on the following grounds:

(1) Chapter 358, 1955 Session Laws of North Carolina, providing for the selection of jurors by a jury commissioner in Madison County and for the appointment of said commissioner by the resident judge, is unconstitutional; and (2) the array of jurors returned by the sheriff to serve at that session of court was improperly drawn and not a legally constituted array of jurors, in that the panel had been selected and drawn by one Donald Stines, who was not in fact the jury commissioner for Madison County. Judge Riddle heard the challenge to the array of jurors upon the testimony of Donald Stines, who was subpoenaed by defendant Rigsby, and after argument of counsel, entered one order wherein he found the following facts:

Donald Stines was appointed jury commissioner for Madison County, pursuant to Chapter 358, 1955 Session Laws of North Carolina, took the oath of office required by the statute in May 1955, and has served continuously under this appointment to the present time. About three years ago Stines, while serving as jury commissioner, was appointed to and took the oath of office as a member of the Walnut School Board, which is a part of Madison County Public School System. He served on such school board until the Walnut and Marshall Schools were consolidated, and since such consolidation he has served as a member of the consolidated school board, and was so serving when the panel of jurors for this session of court was drawn. Stines has not preserved the list of jurors whose names are contained in the jury boxes, and has not revised the jury list every two years. Chapter 358, 1955 Session Laws of North Carolina, makes no provisions for the qualifications of person to be appointed jury commissioner, for the qualifications of persons whose names are to be placed in the jury box, for safeguarding the names in the jury box, and for the manner of drawing names from the jury box and the number to be drawn.

Upon the facts found by him Judge Riddle drew the following conclusions of law:

One. Chapter 358, 1955 Session Laws of North Carolina, is in contravention of the provisions of the Constitutions of the United States and of the State of North Carolina.

Two. When Donald Stines accepted office as a member of the Walnut School Board, he immediately vacated the office of jury commissioner for Madison County, because both are public offices.

Three. The provisions of Chapter 358, 1955 Sessions Laws of North Carolina, in respect to the preserving of a jury list and the revising of the list are mandatory, and Stines' failure to comply with these statutory requirements makes the jury panel drawn for this session of court unlawful.

Whereupon, Judge Riddle adjudged and decreed that the panel of jurors returned by the sheriff was not lawfully constituted, that Chapter 358, 1955 Session Laws, was unconstitutional, and dismissed the panel of jurors.

From this order both plaintiffs appealed to the Supreme Court.

On 13 February 1963 J. Frank Huskins, resident judge of Madison County, entered an order allowing Donald Stines' petition to intervene in these two cases, to file exceptions to Judge Riddle's order of 4 February 1963, and to appeal to the Supreme Court. Donald Stines has a number of assignments of error in the record, and has appealed to the Supreme Court.

On 13 February 1963 Judge Huskins entered an order allowing the petition of Bill Roberts, Chairman of the Board of County Commissioners of Madison County, Hilliard Teague, Register of Deeds of Madison County, and E. Y. Ponder, Sheriff of Madison County, to become parties and intervene in these two cases that they may take such action as they are advised with reference to Judge Riddle's order of 4 February 1963. Mr. Bill Roberts, Mr. Hilliard Teague, and Sheriff E. Y. Ponder have no assignments of error in the record, and have not appealed.

A. E. Leake for plaintiffs, appellants.

A. E. Leake and William J. Cocke for intervenor Donald Stines, appellant.

Marshburn and Huff by Joseph B. Huff, and Williams, Williams and Morris by William C. Morris, Jr., for defendant appellee.

Uzzell and Dumont by T. A. Uzzell for intervenors Bill Roberts, Hilliard Teague and E. Y. Ponder, appellees.

PARKER, J. Both plaintiffs and the intervenor Donald Stines assign as error Judge Riddle's conclusion of law in his order that Chapter 358, 1955 Session Laws of North Carolina, providing for the selection of jurors by a jury commissioner in Madison County, is in contravention of the Constitutions of the United States and of the State of North Carolina, and his adjudication in his order that this statute is unconstitutional.

William Rigsby is defendant in two actions pending in Madison County which were consolidated for the purposes of trial, in which plaintiffs seek to recover from him damages for personal injuries allegedly caused by his actionable negligence. When these two cases were called for trial at 4 February 1963 Civil Session of Madison County Superior Court, he challenged the array of jurors summoned to

attend that session of court as jurymen, on the ground that the jury panel was drawn from a jury list in the jury box prepared by a jury commissioner in Madison County pursuant to the provisions of the above-named statute, and that this statute is unconstitutional. There is nothing in the record to show that Rigsby pointed out to the trial judge the specific constitutional provision or provisions, either federal or state, that he contends is violated by this statute: he merely contended it is unconstitutional.

"One who alleges that a statute is unconstitutional must ordinarily point out the specific constitutional provision that is violated by it." 16 C.J.S., Constitutional Law, p. 336, where a legion of cases is cited from many jurisdictions to support the text.

Constitutional questions are of great importance and should not be presented in uncertain form. In *Gradilone v. Superior Court,* 79 R.I. 256, 87 A. 2d 497, the Court said:

> "Upon examination of the record sought to be reviewed we are of the opinion that the constitutionality of P. L. 1948, chap. 1986, sec. 2, is not before us since it was not properly raised on the record in the superior court. We have previously held that a party attempting to raise the question of the constitutionality of a statute has the duty to make his objections *on the record* in clear and direct language, stating separately each specific article, section and clause in federal or state Constitutions that is allegedly violated. *Creditors' Service Corp. v. Cummings,* 57 R.I. 291, 190 A. 2; *Haigh v. State Board of Hairdressing,* 74 R.I. 106, 58 A. 2d 925. Since that was not done *on the record sought to be reviewed here,* we cannot now consider the question of constitutionality brought before us for the first time by the instant petition."

This Court said in *Hudson v. R.R.*, 242 N.C. 650, 667, 89 S.E. 2d 441, 453: "Suffice it to say, we will not undertake to determine whether an Act of Congress is invalid because violative of the Constitution of the United States except on a ground definitely drawn into focus by plaintiffs' pleadings."

However, in the exercise of the constitutional power vested in the Supreme Court "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts," (North Carolina Constitution, Article IV, sec. 8), we have decided to overlook defendant Rigsby's failure to designate the specific constitutional provisions that he contends the Act violates, and to consider the question even though the procedure prescribed by the rules of

practice as necessary to present such question has not been followed (*Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587), because Judge Riddle held the Act unconstitutional without specifying the specific constitutional provision or provisions that the Act violated, thereby rendering a decision of vast public importance concernng the proper administration of justice in Madison County, and because counsel have so fully presented their arguments and authorities in respect to the constitutionality or unconstitutionality of this Act in their briefs (*Gorham v. Robinson,* 57 R.I. 1, 186 A. 832). Our leniency in this instance, however, is not to be taken as a precedent.

It is not after the practice of the courts to adjudicate merely that a statute contravenes the provisions of the Constitutions of the United States and of the State of North Carolina without specifying which constitutional provisions are violated. "In any event, the court will ordinarily inquire into the constitutonality of a statute only to the extent required by the case before it, and will not formulate a rule broader than that necessitated by the precise situation in question." 16 C.J.S., Constitutional Law, pp. 321-22.

In *United States v. Spector,* 343 U.S. 169, 96 L. Ed. 863, the Court said: "But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary." See *United States v. Petrillo,* 332 U.S. 1, 91 L. Ed. 1877.

In *Simmons v. Simmons,* 186 Ind. 575, 116 N.E. 49, the Supreme Court of Indiana said: "A person who assails an act of the Legislature on the ground that it is unconstitutional must point out the particular provision of the Constitution which it is claimed the act violated. Courts will not search the Constitutions to find authority to overthrow a legislative enactment." To the same effect *Haun v. State,* 183 Ind. 153, 108 N.E. 519; *Clark v. Beamish,* 313 Pa. 56, 169, A. 130.

Defendant Rigsby contends in his brief that the statute here challenged violates sections 7, 17, and 19 of Article I, and section 29 of Article II of the North Carolina Constitution, and section 1 of the Fourteenth Amendment to the United States Constitution. Defendant states in his brief: "Article I, section 13 [of the State Constitution] is not directly involved, but it is important." We shall consider only the specific constitutional provisions that Rigsby in his brief contends the statute violates. We shall not *sua sponte* search for new and different constitutional questions, which are not raised by Rigsby in his brief.

Chapter 358, 1955 Session Laws of North Carolina, is entitled: AN ACT AMENDING CHAPTER 9 OF THE GENERAL STATUTES OF NORTH CAROLINA, AND CHAPTER 1122, SESSION LAWS OF NORTH CAROLINA OF 1951, SO AS TO PROVIDE FOR THE SELECTION OF JURORS BY A JURY COMMISSIONER IN MADISON COUNTY AND FOR THE APPOINTMENT OF SAID COMMISSIONER BY THE RESIDENT JUDGE. This statute, except when summarized, reads:

"The General Assembly of North Carolina do enact:

"Section 1. That G.S. 9-1, as the same appears in Volume 1B of the General Statutes, be and the same is amended by adding at the end thereof the following:

" 'Provided that in Madison County there shall be created the office of jury commissioner for said county. The Resident Judge of the Superior Court of the judicial district which includes said county shall have the authority, and it shall be his duty, to make all appointments to said office and to fill all vacancies arising therein. Immediately after the passage of this Act, said judge shall appoint a jury commissioner who shall serve for four years and until his successor is appointed and qualified. All successors to the office of jury commissioner thereafter appointed under the provisions of this Act shall be appointed by the said resident judge and shall serve at the pleasure of said judge. Every such appointment shall be certified by the resident judge to the Clerk of the Superior Court, who shall enter the same on the minutes of the court. The jury commissioner, before entering upon the discharge of his duties, shall take an oath or affirmation before some official authorized to administer oaths that he will honestly, without favor or prejudice, perform the duties of jury commissioner during his term of office.

" 'It shall be the duty of the jury commissioner to prepare the jury list prior to the first Monday in July, 1955, and every two years thereafter. A list of the names thus selected by the jury commissioner shall be made out by the jury commissioner and shall constitute the jury list of the county and shall be preserved as such. The jury list shall consist only of those persons, not exempt by law from jury service, who are residents of the county, over twenty-one years of age, and who are known to be of good moral character and are known to have sufficient intelligence to serve as members of grand and petit juries. The names for the

jury list shall be selected by the jury commissioner from any and all sources of information deemed by him to be reliable.'

"Sec. 2. The said jury commissioner when appointed and qualified shall have vested in him all the powers, duties and authority heretofore generally exercised throughout North Carolina by the boards of county commissioners under the provisions of Chapter 9 of the General Statutes, and in addition thereto all those powers, duties and authority heretofore exercised and vested in the Madison County jury commission under the provisions of Chapter 1122, Session Laws of 1951, and the said jury commissioner shall have full and complete control over the jury box or boxes of Madison County and over the drawing of jurors, both grand and petit."

"Sec. 3, which we summarize, makes provision for the payment of compensation for services of the jury commissioner and for payment for services of clerical assistance for the jury commissioner as deemed necessary by the county commissioners, to be paid from the general fund of Madison County upon certificate of the resident judge.

"Sec. 4. This Act shall apply to Madison County only.

"Sec. 5. All laws and clauses of laws in conflict with the provisions of this Act are hereby repealed."

Rigsby contends that the challenged statute offends against the provisions of section 29, Article II of the State Constitution in that it is the enactment of a local, private or special act by the repeal or partial repeal of a general law. The challenged statute does not deal with any of the subjects designated concerning which this constitutional section inhibits the enactment of local, private or special acts, *S. v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297, even as it was before the last general election on 6 November 1962, for it is clear beyond peradventure the challenged statute did not establish, or undertake to establish, a court inferior to the superior court. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *S. v. Horne,* 191 N.C. 375, 131 S.E. 753. At the last general election by a majority vote of the qualified voters of the State, this constitutional section was amended by striking from Article II, section 29 thereof the words "relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace;" which follow immediately the word "resolution" in the former constitutional provision. This contention is without merit.

G.S. 9-1 is amended by adding at the end thereof Chapter 358, 1955 Session Laws of North Carolina. All portions of G.S. 9-1, not in conflict with the provisions of Chapter 358, 1955 Session Laws of North Carolina, remain in force, with the same meaning and effect they had before the amendment. G.S. 12-4; *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105; *S. v. Moon*, 178 N.C. 715, 100 S.E. 614; *Nichols v. Edenton*, 125 N.C. 13, 34 S.E. 71; 82 C.J.S., Statutes, p. 903.

G.S. 9-1 provides in effect that the board of county commissioners for the several counties or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as jurors. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such. The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure such lists from such sources of information as deemed reliable, which will provide the names of the persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*.

Chapter 358, 1955 Session Laws of North Carolina, changes G.S. 9-1 by providing that the jury list shall be prepared by a jury commissioner to be appointed by the resident judge, who serves at the judge's pleasure. This Act in section 3 provides that the county commissioners of Madison County may employ such clerical assistance for the jury commissioner as they may deem necessary and set the compensation of such assistant or assistants. This Act does not repeal the provisions of G.S. 9-1 to the effect that the jury commissioner in preparing the jury list every two years after the first Monday in July 1955 shall cause his clerk to lay before him the tax returns for the preceding year for Madison County, and a list of the names of persons who do not ap-

pear upon the tax list, who are residents of the county and over twenty-one years of age. The qualifications of persons to be selected for jury service as set forth in the challenged Act are practically identical with the qualifications of persons to be selected for jury service as set forth in G.S. 9-1.

Defendant Rigsby contends that G.S. 9-1 provides that those selected for the jury box shall be persons "who are of good moral character and have sufficient intelligence to serve" as jurors, that the challenged Act provides for the selection only of those persons "who are known to be of good moral character and are known to have sufficient intelligence to serve" as jurors, and that the challenged Act leaves an arbitrary decision to the jury commissioner, without any fixed rule, so that he can leave out of the jury box many persons on the pretext that they are not known by him to be of good moral character and to have sufficient intelligence to serve as jurors. Such persons as are entrusted with the power and duty by virtue of G.S. 9-1 to select the names of persons to be placed in the jury box are derelict in their duty, if they select the names of persons to be placed in the jury box who are not known by them to be of good moral character, and are not known by them to have sufficient intelligence to serve as jurors. By reason of such dereliction of duty the names of persons who are felons, are of bad moral character, and lack sufficient intelligence to serve as jurors have been placed at times in the jury box. Defendant Rigsby's contention is an ingenious exercise in semantics, but it is not convincing.

The challenged Act in section 2 provides that the "jury commissioner when appointed and qualified shall have vested in him all the powers, *duties* and authority heretofore generally exercised throughout North Carolina by the boards of county commissioners under the provisions of Chapter 9 of the General Statutes." (Emphasis supplied.) That requires him to comply with the provisions of G.S. 9-2 in respect to putting the names on the jury list in the box and to complying with the requirements of G.S. 9-3 in respect to the manner of drawing the panel for the term from the box. However, this Act repeals the provision of G.S. 9-2 in respect to the keys to the jury box and provides that the jury commissioner shall have full and complete control over the jury box of Madison County.

At common law the panel of jurors was selected by the sheriff from his list of freeholders. Most of the American states, if not all, have long since taken the selection of jury lists out of the hands of the sheriff and placed it in the hands of other officers or bodies, such as jury commissions, the selectmen of the towns, town supervisors, county

commissioners, county courts, or certain officers constituting a board for the specific purpose. 31 Am. Jur., Jury, sec. 75, p. 71. In the federal courts (not applicable to the District of Columbia), Title 28, sec. 1864, U.S.C.A., provides that the jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court. This statute provides qualifications for the commissioner. Title 28, sec. 751, U.S.C.A., provides that the clerk of each district court shall reside in the district for which he is appointed, with an exception of the clerk of two district courts, that the clerk may appoint, with the approval of the court, necessary deputies, etc., but this statute does not provide any qualifications for the deputy. See exhaustive and scholarly opinion in *United States v. Brookman,* 1 F. 2d 528, which holds that the requirements of the federal statute as to the qualifications for the jury commissioner to be appointed by the district judge are advisory, and not mandatory. Chapter 711, 1959 Session Laws of North Carolina, authorizes the appointment of a jury commissioner for Beaufort County. "It is competent for the Legislature at any time to change the general law previously in force as to how the jury list shall be selected, as long as no constitutional right is abrogated or impaired." 50 C.J.S., Juries, p. 876.

The Court speaking by Ervin, J., now United States Senator, in *Miller v. State,* 237 N.C. 29, 47, 74 S.E. 2d 513, 525-526, said:

> "A state may prescribe such relevant qualifications as it deems proper for jurors without offending the Fourteenth Amendment to the United States Constitution as long as it takes care that no discrimination in respect to jury service is made against any class of citizens solely because of their race. Hence, a state statute may restrict eligibility for jury service in a county to adult citizens and residents who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries, and confer upon county commissioners the discretionary power to select for jury service in the county without regard to their race or color those adult citizens and residents who in their judgment possess these qualifications. [Citing voluminous authority from the United States Supreme Court.] The North Carolina statute does not contravene the Fourteenth Amendment. It prescribes relevant qualifications for jurymen, and does not discriminate against any persons because of race or color. G.S. 9-1."

The challenged Act prescribes relevant qualifications for jurors, and does not discriminate against any person because of race, color or sex. The challenged Act does not contravene section 1 of the Fourteenth

Amendment to the United States Constitution or section 17, Article I of the North Carolina Constitution. The words "the law of the land" as used in section 17, Article I of the North Carolina Constitution are equivalent to the words "due process of law" required by section 1 of the Fourteenth Amendment to the United States Constitution. *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563.

It is manifest that the challenged Act is not repugnant to the provisions of section 7, Article I of the North Carolina Constitution, because it bestows upon no person or set of persons exclusive or separate emoluments or privileges from the community, and that it is not repugnant to section 19, Article I of the North Carolina Constitution, in that it denies no person the right of trial by a fair and impartial jury and excludes no person from jury service on account of sex.

Judge Riddle's conclusions of law that when Donald Stines accepted office as a member of the Walnut School Board, he immediately vacated the office of jury commissioner for Madison County, because both are public offices, and that the provisions of the Act in respect to the preserving of a jury list and the revising of the list are mandatory, and Stines' failure to comply with these statutory requirements makes the jury panel drawn for this session of court unlawful, now present questions for mere academic discussion, because if Judge Riddle's above conclusions of law are erroneous *in toto,* this panel of jurors cannot be recalled to serve as jurors at any future session of court. It is not after the manner of appellate courts to decide moot or academic questions. *Walker v. Moss,* 246 N.C. 196, 97 S.E. 2d 836; *In re Will of Johnson,* 233 N.C. 576, 65 S.E. 2d 16. The challenged Act here does not have the constitutional infirmity of Chapter 177, Public-Local Laws 1931, providing that the chairman of the board of education, the chairman of the board of health, and the superintendent of public schools of Madison County should serve as the jury commission of the county, thereby violating section 7 of Article XIV of the North Carolina Constitution. *Brigman v. Baley,* 213 N.C. 119, 195 S.E. 617.

The Act here imposes upon the resident judge the duty of appointing the jury commissioner. The act further provides the jury commissioner shall serve for four years, and until his successor is appointed and qualified, and that he shall serve at the judge's pleasure. It appears from Stines' testimony that he was appointed in 1955, and has not since been reappointed. It further appears from Stines' testimony that he lacks knowledge of the requirements of the Act as to his duties as jury commissioner. The Act requires the jury commissioner to pre-

pare the jury list prior to the first Monday in July 1955 and every two years thereafter.

A fair jury in jury cases, and an impartial judge in all cases are a basic requirement of due process. *Ponder v. Davis,* 233 N.C. 699, 65 S.E. 2d 356; *Re Murchison,* 349 U.S. 133, 99 L. Ed. 942.

The challenged Act imposes upon the resident judge, and upon him alone, the duty of appointing a properly qualified person as jury commissioner, who will discharge his duties in substantial compliance with the requirements of the Act. Doubtless, the able resident judge, when this opinion is certified down, will appoint as jury commissioner a person whose integrity and qualifications no fair-minded person can question, a person whom no one can challenge as holding two offices, and a person who, after being instructed by him as to his duties as jury commissioner under the Act and as to safeguarding the jury box, will discharge his duties as jury commissioner in substantial compliance with the requirements of the Act, and that the resident judge will see that his appointee performs this duty, to the end that there may be trials on the merits by fair juries in jury cases in Madison County, and that appeals like the one here, except on the constitutional question, will be obviated. It is a truism that justice delayed is frequently justice denied. Wolfe, J., in *Haslam v. Morrison,* 113 Utah 14, 190 P. 2d 520, said: "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts."

The intervenors E. Y. Ponder, Hilliard Teague, and Bill Roberts in their brief take the position of the plaintiffs that the challenged act is constitutional. They further contend that if it should be held that the Act is unconstitutional, then Chapter 1122, Session Laws of North Carolina of 1951, is in full force and effect and that these intervenors constitute the lawful jury commission for Madison County.

The Act challenged here is not repugnant to the specific sections of the Federal and State Constitutions as set forth and contended by defendant Rigsby in his brief. The order of the lower court holding the Act unconstitutional as in contravention of the Constitutions of the United States and of the State of North Carolina is

Reversed.

N. H. GODWIN, TRUSTEE FOR ANGIER AVENUE BAPTIST CHURCH; ASBURY METHODIST CHURCH, MRS. MILLIE R. AUSTIN, MRS. ERNESTINE JOHNSON FARESMAN, WILLIAM GILES, GEORGE FARESMAN, DR. R. G. FLEMING, LOLA LEE JOHNSON FOUSHEE, LOIS JOHNSON SILLS, WILLIAM R. AUSTIN JOHNSON AND ESSIE LENORA GRIFFIN STEVENSON v. WACHOVIA BANK & TRUST COMPANY, EXECUTOR UNDER THE PURPORTED LAST WILL AND TESTAMENT OF FRANK C. GRIFFIN, DECEASED; CHARLIE C. GRIFFIN AND ESSIE LENORA GRIFFIN STEVENSON.

(Filed 14 June 1963.)

1. Principal and Agent § 3—

A power of attorney to sell specified realty which stipulates that the agent should be the principals' attorney in fact irrevocably and forever, is not an agency coupled with an interest and is terminated by the death of the principals.

2. Wills § 6.1—

Husband and wife executed a trust agreement and on the same day executed reciprocal wills devising and bequeathing the property of each respectively to the trustee to be disposed of as provided in the trust agreement. *Held:* The wills incorporate the trust agreement by reference so that the trust agreement takes effect as a part of each will respectively, even though the trust agreement itself be void because not executed in conformity with G.S. 52-12.

3. Wills § 7—

Husband and wife executed a trust agreement and then executed their respective reciprocal wills incorporating the trust agreement and disposing of property held by the entireties and personalty owned respectively by each. After the wife's death, the husband executed another will making a different disposition of the property. *Held:* It being apparent that the respective wills were executed pursuant to an agreement entered into by the husband and wife, their mutual agreement is sufficient consideration to bind them, and equity will impress a trust on the estate of the husband in order to enforce the agreement and prevent him from defeating his obligation.

4. Evidence § 11—

If a witness is a party to or is pecuniarily interested in the event of an action against the personal representative of a deceased or against a person deriving title or interest through such deceased, he is incompetent to testify in his own behalf as to a personal transaction or communication with the deceased. G.S. 8-51.

5. Same—

In an action by a trustee against the personal representative of one of the settlors to recover possession of the *res* of the trust, testimony of the trustee in regard to instructions given him by the settlor for the preparation of the instruments in suit is incompetent.

6. Costs § 3—

The taxing and apportionment of costs and the fixing of reasonable attorney fees in apposite instances rests in the sound discretion of the trial court, G.S. 6-21(2), and in such instance it is error for the court to rule as a matter of law that the request for allowance of attorney fees should be denied.

APPEAL by plaintiff from *McKinnon, J.*, Regular November Civil Term 1962 of DURHAM.

This is a civil action, instituted on 26 June 1959 by N. H. Godwin, as Trustee of a purported trust agreement executed by Frank C. Griffin and his wife, Nell J. Griffin, and N. H. Godwin, Trustee, on 13 October 1956, against the Wachovia Bank and Trust Company, executor of the last will and testament of Frank C. Griffin, deceased, and Charlie C. Griffin and Mrs. Essie Lenora Griffin Stevenson, brother and sister of the late Frank C. Griffin. In this action the plaintiff seeks in the alternative (a) specific performance of an alleged contract between Nell J. Griffin and her husband, Frank C. Griffin, whereby it is alleged each entered into a contract with the other that his or her property would be distributed in accordance with separate wills dated 13 October 1956; or (b) that the defendants be declared constructive trustees for the plaintiff N. H. Godwin, as Trustee, of all the property owned by Frank C. Griffin, deceased, on the date of his death on 7 April 1959.

On 9 October 1956, Frank C. Griffin and his wife, Nell J. Griffin, executed a power of attorney to N. H. Godwin, which, among other things, authorized the said N. H. Godwin "To sell and convey all or any part of our real estate located in Durham County, State of North Carolina, known and designated as house and lot at 1115 Miami Boulevard, Durham, North Carolina, one vacant lot at 1113 Miami Boulevard, Durham, North Carolina, one duplex house and lot located at 1831 Liberty Street, Durham, North Carolina, and house and lot located at 1858 Newton Road, Durham, North Carolina, the descriptions of the above four tracts or lots are more particularly described in deeds recorded in the Durham County Register of Deeds Office, wherein we as husband and wife are named as grantees, either jointly, individually, or by the entirety. * * *

"Our said attorney in fact may execute in our names and stead by himself as attorney in fact deeds in fee simple and general warranty of title that we have in said real estate. This Power of Attorney shall include any and all personal property that we or either of us own including any automobile and the restaurant equipment located at 1104 Broad Street, Durham, North Carolina.

"We now declare, constitute, appoint N. H. Godwin, attorney, our attorney in fact and in our stead irrevocably and forever, and we do hereby ratify and confirm all things so done by our said attorney in fact as fully and to the same extent as if by us personally done and performed."

In the trial of this action the plaintiff did not offer any evidence that Mr. Godwin ever exercised any powers under and pursuant to the aforesaid power of attorney.

On 13 October 1956, Frank C. Griffin and his wife, Nell J. Griffin, and N. H. Godwin, Trustee, executed a purported trust agreement, the pertinent parts of which are as follows:

"That whereas, the Settlors have heretofore given the Trustee power of attorney to sell real estate (belonging to them individually, jointly, or as tenants by the entirety); and whereas Trustee is to dispose of said real estate as hereinafter provided; and whereas, the Settlors have this day delivered to Trustee the sum of ..... Dollars in savings account, or cash.

ARTICLE I

"NOW, THEREFORE, in consideration of the premises set forth above and in consideration of the mutual promises and mutual covenants as herein expressed, and in consideration of One Dollar ($1.00) paid to Settlors by Trustee, the receipt of which Settlors hereby acknowledge; the Settlors have and do hereby convey, deliver, assign and transfer to the Trustee, the sum of ..... Dollars, together with all investments, re-investments, proceeds from same, income from same, and such other sums of cash money, and/or other securities, and/or other properties of every sort, kind or description, both real and personal, which may be added to the principal sum from time to time by the Settlors or either of them or their executor, shall be held in Trust by the Trustee, his successors, transferees, assigns, upon the terms and conditions as herein expressly provided.

"A. The Trustee shall retain the duplex house designated as 1115 Miami Blvd., Durham, North Carolina, for and during the natural lives of Settlors and Settlors shall occupy and/or receive the rents and profits from the said duplex house for and during their natural lives. At the death of the surviving Settlor, the Trustee shall permit Gattis W. Johnson, brother of Settlor, Nell J. Griffin, to occupy one side of duplex house at 1115 Miami Blvd., Durham, N. C., for and during his natural life, rent free, and then dispose of said duplex house as herein provided."

Paragraphs B and C authorize the Trustee to sell all the remaining real estate referred to in the trust agreement and directs that the pro-

ceeds received from the sales of real estate shall be disposed of as provided in the agreement.

Paragraph D provides that all personal property of the settlors coming into the hands of the Trustee shall likewise be disposed of as provided in the agreement.

ARTICLE II

"The purpose of this Trust is to provide for the safekeeping of the income and corpus of this trust and to provide for the health, care, welfare of Settlors during their natural lives, and to provide a residence for Gattis W. Johnson, brother of Settlor, Nell J. Griffin, during his natural life.

"A. At the death of either Settlor, the surviving Settlor shall give the deceased Settlor a Christian funeral and shall not be limited in the expenses thereof, except that the Trustee shall determine that the corpus of this Trust shall not be unreasonably depleted thereby and the Trustee shall pay out of the corpus and income of this Trust reasonable funeral expenses for both Settlors."

Paragraphs B, C and D direct the disposition of certain items of personal property to designated persons upon the death of Nell J. Griffin.

Paragraphs E, F and G direct the disposition of certain items of personal property to designated persons upon the death of Frank C. Griffin.

"H. At the death of the surviving Settlor, after all funeral expenses, taxes, and all other expenses have been paid, the remaining corpus of this Trust, except duplex house at 1115 Miami Blvd., Durham North Carolina, shall be disposed of as follows:

"1. One-fifth of the remaining funds in the Trust shall be held in the Trust for the use and benefit of Lola Lee Johnson Foushee, or her children, if she be dead, and shall be disbursed by the Trustee at $40.00 per month.

"2. One-fifth of the remaining funds in the Trust shall be held in the Trust for the use and benefit of Lois Johnson Sills and shall be disbursed by the Trustee at $40.00 per month.

"3. One-fifth of the remaining funds in the Trust shall go to Willie R. Austin Johnson at the death of the surviving Settlor, in fee simple.

"4. One-fifth of the remaining funds in the Trust shall go to Essie Lenora Griffin Stevenson, sister of Settlor, Frank C. Griffin, at the death of the surviving Settlor, in fee simple.

"5. One-fifth of the remaining funds in the Trust shall be equally divided between Angier Avenue Baptist Church, Durham, North Carolina, and Asbury Methodist Church, Durham, North Carolina, for general church purposes by the Board of Trustees of said churches.

ARTICLE III

"This Trust is to continue as herein provided and shall terminate after the death of Gattis W. Johnson and at the termination of the subsidiary Trusts, as provided for herein.

ARTICLE IV

"At the death of Gattis W. Johnson, the Trustee is to sell the duplex house and lot at 1115 Miami Blvd., Durham, North Carolina, and divide the proceeds as provided in Article Two above."

Articles V, VI, VII and VIII deal with the powers purportedly granted to the Trustee.

ARTICLE IX

"The Settlors declare that they are fully advertent to the legal effect of the execution of this agreement, and that they have given consideration to the question whether this Trust indenture shall be revocable or irrevocable, and that they now declare it shall be irrevocable forever, except that they may hereafter bring other funds or properties within the operation of this agreement, to provide for the Settlors during their natural lives."

The foregoing instrument was executed by the Griffins and by N. H. Godwin, as Trustee. Its execution was acknowledged before a notary public. It was not acknowledged, nor was the separate examination of Mrs. Griffin taken, in compliance with the requirements of G.S. 52-12.

There is no evidence tending to show that the Trustee received any personal property from either of the settlors during their joint lives, or that the Trustee ever exercised any control over the property, real or personal, of the settlors until after the death of Nell J. Griffin.

On the same day the trust agreement was executed, each of the Griffins executed a last will and testament. The wills were identical except for the names of the makers thereof. After making provision for the payment of debts and funeral expenses, each will disposed of their respective estates as follows: "I hereby will, devise, bequeath all my property of every sort, kind, description to N. H. Godwin, Attorney, as Trustee, to be disposed of as provided in a Trust Agreement executed by me and my beloved husband, Frank C. Griffin." (Frank C. Griffin's will was identical except that it read "to be disposed of as

provided in a Trust Agreement executed by me and my beloved wife, Nell J. Griffin.")

The plaintiff offered evidence tending to show that the Griffins operated a restaurant in Durham, North Carolina, for many years; that Mrs. Griffin worked in the restaurant and managed its business affairs, while Mr. Griffin worked in the kitchen and supervised the preparation of food. In October 1956 Mrs. Griffin was bedridden at her home with cancer. The Griffins employed a Durham attorney, N. H. Godwin, to prepare their wills and the other instruments referred to herein, all four of which were introduced in evidence by the plaintiff.

According to the allegations of the complaint, at the time of the death of Nell J. Griffin she was the beneficial owner as tenant by the entirety with her husband, Frank C. Griffin, of real estate of an approximate value of $36,000, and was the owner of personal property of an approximate value of $3,200.

Nell J. Griffin died on 4 November 1956. Her will, dated 13 October 1956, was admitted to probate and administered under its terms, including the terms of the trust agreement.

On 8 April 1958, Frank C. Griffin executed a new will revoking his will of 13 October 1956 and bequeathing and devising all his property to his brother, Charles C. Griffin, and his sister, Essie Lenora Griffin Stevenson.

Frank C. Griffin died on 7 April 1959. His will of 8 April 1958 was admitted to probate and the Wachovia Bank and Trust Company has qualified as executor.

At the close of plaintiff's evidence the court sustained defendants' motion for judgment as of nonsuit.

The plaintiff appeals, assigning error.

Bryant, Lipton, Bryant & Battle for plaintiff appellant.
Spears, Spears & Barnes for defendant appellees.

DENNY, C.J. It is universally recognized in this country that a power of attorney, unless coupled with an interest, is terminated by the death of the principal. The power of attorney involved in this case was not coupled with an interest and was revoked upon the death of Nell J. Griffin. *Fisher v. Trust Co.*, 138 N.C. 90, 50 S.E. 592; *Bank v. Grove*, 202 N.C. 143, 162 S.E. 204; *Dowling v. Winters*, 208 N.C. 521, 181 S.E. 751; *Julian v. Lawton*, 240 N.C. 436, 82 S.E. 2d 210.

The execution of the trust agreement under consideration was not acknowledged as required by G.S. 52-12. Even so, Chapter 1178 of the 1957 Session Laws of North Carolina purports to cure this defect. The

Act, which became effective 10 June 1957, provides: "Any contract between husband and wife coming within the provisions of G.S. 52-12 executed between July 1, 1955 and the effective date of this Section which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband."

Our decisions have been to the effect that an attempted conveyance by a wife to the husband, directly or indirectly, without the private examination and certificate as required by G.S. 52-12, is absolutely void. *Foster v. Williams,* 182 N.C. 632, 109 S.E. 834; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624, and cases cited therein; *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165.

We have also expressed doubt as to whether or not such defective acknowledgment could be rendered valid by a subsequently passed statute. *Foster v. Williams, supra.* Be that as it may, conceding but not deciding that this trust agreement was void as an *inter vivos* or active trust during the lifetime of the Griffins, such agreement was incorporated in the respective wills of the Griffins by reference and made an integral part thereof as effectively, in our opinion, as if the trust agreement had been set out in full in each of the Griffins' wills.

In the case of *Watson v. Hinson,* 162 N.C. 72, 77 S.E. 1089, Hoke, J., speaking for the Court said: "It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper referred to shall be in existence at the time the second will be executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained. The principle is sometimes referred to as 'The doctrine of incorporation by reference,' and is very well stated by Chief Justice Gray in *Newton v. Seaman's Friend Society,* 130 Mass. 91, as follows: 'If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such.'

While there are some discrepancies in the application of the principle to the facts of the different cases, this statement is in accord with the great weight of authority here and in other jurisdictions in this country and in England, where the subject has been very much considered."

In 94 C.J.S., Wills, section 163, page 952, *et seq.*, it is said: "The doctrine of incorporation by reference, as applied to wills, is followed in many jurisdictions. Under this doctrine, and subject to certain conditions and limitations, a properly executed will incorporates in itself by reference any document or paper not so executed, so as to take effect as part of the will, whether such document or paper be in the form of a will, codicil, contract, deed, or other written form of conveyance of realty, mere list, schedule, or memorandum. If the document is incorporated by reference it makes no difference whether or not the document of itself was valid at law."

In *Montgomery v. Blankenship,* 217 Ark. 357, 230 S.W. 2d 51, 21 A.L.R. 2d 212, the Court said: "As stated in 1 Page on Wills (Lifetime Ed.), Sec. 266, p. 522: 'If incorporated by reference it makes no difference whether the original document of itself was valid at law or not. A deed invalid because it never was delivered, may be in corporated in a will. A prior defectively executed will, or the will of another person, or a part of the will of another person, may thus be incorporated. * * * The incorporated document may be treated as part of the will for the purpose of ascertaining the beneficiaries and the share to be given to each.' "

In the case of *Fifth Third Union Trust Co. v. Wilensky,* 79 Ohio App. 73, 70 N.E. 2d 920, the Court said: "A deed, a contract, or any other instrument may be incorporated in a will by reference, and its terms employed as testamentary clauses, although such instrument may have lost its force as to the peculiar original purpose of the document."

Likewise, in *In re Sciutti's Estate,* 371 Pa. 536, 92 A. 2d 188, it was held that "an extrinsic writing, having no validity in itself as a will, nevertheless may be incorporated by reference as part of a valid will."

In the case of *Clark v. Citizens National Bank of Collingswood,* 38 N.J. Super. 69, 118 A. 2d 108, the Court held, contrary to the above views, to the effect that where no valid trust existed, the trust instrument could not be incorporated by reference in a will. However, this seems to be the minority view.

The evidence in this case is to the effect that the Griffins first executed the trust agreement on 13 October 1956 and then immediately thereafter executed their respective wills.

Furthermore, the Griffins were not responsible for the failure of their attorney to have the trust agreement properly executed in accordance

with the provisions of G.S. 52-12. Even so, as stated in *Lawrence v. Ashba,* 115 Ind. App. 485, 59 N.E. 2d 568, "it is apparent however that their minds did meet on a particular testamentary disposition of the property to accomplish a particular purpose, and that they intended the wills made pursuant thereto to remain unrevoked at their death. The mutual agreement of the makers of the wills was sufficient consideration to bind the promisors. Equity will enforce such an agreement when well and fairly founded, and will not suffer one of the contracting parties to defraud and defeat his obligation, but will fasten a trust upon the property involved. *Plemmons v. Pemberton, supra* (1940, 346 Mo. 45, 139 S.W. 2d 910); *Sample v. Butler University,* 1937, 211 Ind. 122, 4 N.E. 2d 545, 5 N.E. 2d 888, 108 A.L.R. 857; *Brown v. Johanson,* 1921, 69 Colo. 400, 194 P 943; 69 C.J., p. 1302, section 2725."

The appellant assigns as error the refusal of the court below to permit the plaintiff to testify regarding the instructions given him by the Griffins in connection with the preparation of the power of attorney, the trust agreement, and the wills involved herein, as well as to conversations with the Griffins in respect thereto. This evidence was excluded by reason of the provisions of G.S. 8-51.

The testimony of a witness is incompetent under the provisions of the above statute when it appears (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest. *Collins v. Covert,* 246 N.C. 303, 98 S.E. 2d 26; *Sanderson v. Paul,* 235 N.C. 56, 69 S.E. 2d 156; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043.

Since the plaintiff is a party to this action, this assignment of error must be overruled.

It is stated in Anno. — Joint, Mutual, and Reciprocal Wills, 169 A.L.R., page 22: "The general rule is that a will jointly executed by two persons, being in effect the separate will of each of them, is revocable at any time by either one of them, at least where there is no contract that the joint will shall remain in effect," citing *Ginn v. Edmundson,* 173 N.C. 85, 91 S.E. 696. See also *Walston v. College,* 258 N.C. 130, 128 S.E 2d 134

In *Ginn v. Edmundson, supra,* where a husband and wife made a joint will disposing of property held as tenants by the entireties, it was held that the survivor could revoke the will at pleasure and take the

property free of the will. The Court said: "A joint or conjoint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other. " * * *(I)n the absence of contract based upon consideration, such wills may be revoked at pleasure. * * *"

In the case of *In re Davis' Will,* 120 N.C. 9, 26 S.E. 636, 38 L.R.A. 289, 58 Am. St. Rep. 771, which involved what purported to be a joint will, this Court said: "There is nothing from which it can be implied even that there was any agreement that if one should devise to these devisees the other would do so, or that if one should afterwards revoke, the other would do so. Either had the right to do so, and without notice to the other. It is not like the case of a mutual will, in which after the husband's death, by which event the wife's estate was much increased, she makes another will and diverts the husband's property from the course intended and agreed upon by them at the execution of the joint will. In such case the probate court was unable to control and prevent the wrong, but a court of equity takes hold on the ground of preventing a fraud."

It is equally well settled that where a husband and wife make an agreement for the disposition of their respective estates, in a particular manner, and execute either a joint will or separate wills providing for the disposition of their estates in accordance with the agreement, such agreement may be upheld by specific performance. *Turner v. Thiess,* W.Va., 38 S.E. 2d 369; *Underwood v. Myer,* 107 W.Va. 57, 146 S.E. 896; *Deseumeur v. Rondel,* 76 N.J. Eq. 394, 74 A. 703; *Ohms v. Church of the Nazarene,* Weiser, Idaho, 64 Idaho 262, 130 P 2d 679; 57 Am. Jur., Wills, Section 718, page 488, *et seq.*; 97 C.J.S., Wills, Section 1367, page 307, *et seq.*

In 97 C.J.S., Wills, section 1367 (d), page 305, it is said: "The rights and obligations of the parties to an agreement to make a joint or mutual will are determined by the terms of the agreement; where the intent of the contracting parties is expressed in clear and unambiguous language, the court is relieved of the necessity of resorting to rules of construction, but has the duty to give the contract effect according to its terms. In ascertaining the contract, the situation of the parties and the surrounding circumstances may properly be considered, as in the case of contracts generally; and the contract, or agreement, must be construed in the light of the joint will executed

simultaneously therewith. Where the makers of mutual wills make a contract as to the disposition of property, the court will give effect to the contract as made, rather than attempt construction by implication or insertion by reference."

In *Thompson on Wills* (Second Edition), section 153, page 200, it is said: "As a general rule, a mutual or joint will may be revoked by either of the comakers, provided it was not made in pursuance of a contract. But where such will has been executed in pursuance of a compact or agreement entered into by the testators to devise their separate property to certain designated beneficiaries, subject to a life estate or other interest in the survivor, it is generally held irrevocable when, upon the death of one, the survivor avails himself of the benefits of the devise in his favor.

"In the absence of a valid contract, however, the mere concurrent execution of the will, with full knowledge of its contents by both testators, is not enough to establish a legal obligation to forbear revocation. On the other hand, mutual wills executed in pursuance of a contract are not irrevocable in such sense that one of the makers can not make a subsequent will which will be entitled to probate, although the remedy for breach of such contract may be enforceable in a court of equity. A joint and mutual will is revocable during the joint lives by either party, so far as relates to his own disposition, upon giving notice to the other party; but it becomes irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other."

In our opinion, when the wills of the Griffins are considered in light of the provisions contained in the trust agreement, which agreement was incorporated by reference in both wills as containing the provisions for the disposition of their respective estates, the wills themselves establish the existence of the contract and the plaintiff is entitled to specific performance for the benefit of the beneficiaries named in the mutual wills, and we so hold.

The appellant assigns as error the refusal of the court below, as a matter of law, to make allowance of attorney fees for his counsel, and in the discretion of the court to tax the costs against the defendant Wachovia Bank & Trust Company.

G.S. 6-21, as amended by Chapter 1364 of the 1955 Session Laws of North Carolina, and codified as G.S. 6-21 (2) in the 1961 Cumulative Supplement, leaves the taxing of court costs and the apportionment thereof to be made in the discretion of the court. Moreover, the fixing of reasonable attorney fees in applicable cases is likewise a matter within the sound discretion of the trial court. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689; *Hoskins v. Hoskins*, post, 704.

We think there was error in ruling as a matter of law that the petition for counsel fees should be denied.

In view of the conclusion we have reached, the appellant's assignment of error to the sustaining of the defendants' motion for judgment as of nonsuit is upheld, and the judgment entered below is

Reversed.

DEWEY C. SWANEY v. PEDEN STEEL COMPANY.

(Filed 14 June 1963.)

1. Master and Servant § 18; Sales § 16—

A company designing and fabricating a steel truss for use in the erection of an edifice may be held liable by an employee of the contractor injured as the result of the collapse of the truss through faulty design while is was being erected by methods which could have been reasonably anticipated, since the manufacturer of a chattel is liable to those whom he should expect to use the chattel, or to be in the vicinity of its probale use, for injury caused by defects in the chattel in its use in the manner for which the chattel was supplied.

2. Same—

The evidence in this case to the effect that plaintiff worker was injured while "riding the load" in erecting a steel truss fabricated by defendant when the truss collapsed at its apex because of defect in design, that the truss would have collapsed even though the workmen had not "ridden the load," and that the erection of the truss in the manner directed by plaintiff's employer was a customary manner that should have been anticipated by defendant, *held* to take the issue of defendant's negligence to the jury.

3. Statutes § 1; Evidence § 36—

The Safety Code for Building Construction is not referred to in the North Carolina Building Code and does not have the force of law through enactment by reference. G.S. 143-138, and therefore the safety code is not admissible in evidence.

4. Master and Servant §§ 18, 23—

The violation of a rule issued by the Department of Labor under G.S. 95-11 for the purpose of protecting construction employees from dangerous methods of work may not be asserted by a third person tort feasor as contributory negligence of the employee so as to relieve itself of liability for injury to the employee proximately caused by its negligence.

5. Negligence § 11—

Where a statute fixes a standard of conduct and provides that its violation should be a criminal offense, its violation is negligence *per se* in

a civil action instituted by a person who has sustained injury proximately resulting from such violation, but where no statute fixes a standard of conduct, whether the injured person's conduct amounts to contributory negligence must be determined by the rule of the reasonably prudent person under the circumstances.

6. Same; Master and Servant § 29—

An employee will not be held contributorily negligent as a matter of law in obeying an order of his superior unless the order is so obviously dangerous that a reasonably prudent man, under similar circumstances, would have disobeyed the order and quit the employment rather than incur the hazard.

7. Negligence § 12—

Assumption of risk will not bar recovery when the factor causing the injury cannot be considered to have been included in the risk to which plaintiff exposed himslf in taking the position of peril, since assumption of risk is founded on knowledge.

8. Negligence § 26—

Contributory negligence become a question of law only when plaintiff's evidence so clearly establishes it that no other reasonable inference may be drawn therefrom.

9. Master and Servant § 18—

Evidence that a construction worker "rode the load" in erecting a truss and was seriously injured when the apex of the truss collapsed, that "riding the load" was usual and customary in such work, and that the worker had no means of knowing that the truss had not been designed to withstand the stress of erection in such manner, *is held* not to disclose contributory negligence as a matter of law on the part of the worker in his action against the designer and fabricator of the truss.

APPEAL by defendant from *Olive, J.*, at the February 1962 Term of RANDOLPH. This appeal was docketed in the Supreme Court as Case No. 527 and argued at the Fall Term 1962.

Plaintiff, a steel erector, instituted this action to recover for personal injuries he sustained when a truss, which defendant had designed and fabricated, collapsed during the process of erection.

Plaintiff alleges in substance (1) that the defendant negligently designed and constructed the truss in that the connection of its two members was too weak to sustain the load and stress of erection; (2) that although defendant knew, or should have known, the manner in which the truss would be erected, it failed to warn plaintiff's employer that the usual method could not be safely employed; and (3) that defendant's negligence thereby proximately caused his injury. The defendant denied all allegations of negligence and alleged that plaintiff's injuries were caused solely by the negligence of his employer in

that he attempted improper erection methods and thereby put the ultimate stress on the truss. Defendant further alleged that plaintiff himself was guilty of contributory negligence in that he rode the end of one of the truss members in the course of erection contrary to safety rules and regulations, thereby incurring a prohibited risk and placing a stress upon the truss which it was not designed to carry. Other allegations of the answer are not pertinent to this appeal.

The jury answered the issues of negligence and contributory negligence against defendant and awarded plaintiff substantial damages. From judgment on the verdict, the defendant appealed. On the argument before us defendant abandoned all assignments of error except those relating to the denial of its timely made motions for nonsuit.

The evidence in the case, taken in the light most favorable to the plaintiff, discloses:

In 1957, the Edenton Street Methodist Church in Raleigh was being rebuilt after a disastrous fire. The defendant, Peden Steel Company, had the contract to furnish the steel. George Newton, sole proprietor of Newton Construction Company, had the contract to erect the steel structure of the building. Plaintiff was an employee of Newton.

The church building (sanctuary) consists of the nave (auditorium) and the chancel (alter and choir area) which are separated by a masonry arch faced with limestone. The roof line of the chancel is two feet lower than the roof line of the nave. The plans for the church called for a masonry wall on each side of and above the arch. This wall was to extend from the foundation to the roof and carry the purlins which would support the roof structure at this point. In March, Newton began to erect the perpendicular steel columns which are attached to the foundation and to which are fastened the rigid frame trusses which carry the purlins. He had located his crane in the basement to the rear of the church so that the crane could work itself out of the building as it set the columns, trusses, and purlins from the back forward There was a delay in getting the limestone facing for the arch in the partition wall between the nave and the chancel. The wall was only about ten or twelve feet out of the ground when Newton was ready to erect the purlins it was intended to carry. If the erection of the church was not to be unduly delayed, some temporary support for the roof purlins had to be designed and erected.

About March the 27th, the church architect and the building superintendent requested Donald E. Shreffler, the chief engineer and designer of Peden Steel Company, to design a steel structure which would temporarily do the work of the wall and eventually be enclosed by it. He designed an A-type framework which was supposed to bear the

load of the purlins and the roof structure for about two months. On adverse examination he testified that he made computations of the load its various members would be required to carry *after* erection, the exact weights to go into it, and decided what bolts were to be used in the connections. He said he gave no consideration to the method of erection because he did not consider it an unusual problem. The framework designed consisted of two upright columns, each a ten-inch wide H section, approximately thirty-eight feet long and welded to a twelve-inch base plate about three inches larger than the column itself. These plates were bolted, approximately twenty-seven feet apart, to the two-foot partition wall at the floor level.

A truss in the shape of an inverted V was to be fitted down over the top of the two steel columns. The design of this truss was very unusual. None of the expert witnesses for plaintiff or defendant had ever seen one like it before. It was composed of four principal steel members. Each side, or rafter, of the V was made up of two channels each approximately thirty-seven feet long and twelve inches wide with a three-inch flange on one side. They were bolted back to back to five ten-inch flanges or beams, called spacers or separators, which maintained the two channels in a parallel position two feet apart. The channels were thus separated because the chancel purlins were two feet lower than the auditorium purlins. The truss portion of this framework weighed 4,147 pounds.

The two sides of the truss were connected to a wide flange separator at the apex by six threaded, ¾ x 2-inch machine bolts, three through each channel. One side was bolted to the center separator at the apex in the defendant's shop. These bolts are referred to as shop bolts. The two sections had to be finally connected at the site of construction because the assembled truss would have been too broad to transport across Raleigh. The steel for the columns and the two sections of the frame arrived at the job on April 4, 1957, the date it was to be erected. The paint on it was not dry. No strut for the truss came with these parts, and defendant sent no directions for its erection.

Working in the basement of the church, Newton's crew bolted the other side of the truss to the spacer at the apex with bolts furnished by the defendant for the purpose. These bolts are referred to as field bolts. The two sides were connected on a bias to form an obtuse angle. It was the customary and approved practice for erectors to make such connections on the ground. After the truss was assembled, ⅝-inch steel cables, called chokers, were placed around each member at the second separator down from the apex, approximately one-third of the distance from the center to the bottom. Then spreaders (hooks) from

the crane were attached to the chockers. Another piece of cable was fastened in a ring at the top with two hooks on each end of the half which was, in turn, hooked into the choker. Newton and his son, the foreman on the job, were in charge of this particular erection. After the truss had been hooked to the boom of the crane, it was raised from the basement to an upright position and moved as close to the wall as possible. While it was hanging perpendicularly, two men got on each end and shook or bounced it to make certain that it was firmly based and would not tip over during erection.

When the truss had been lifted about two feet from the ground the foreman gave the order, "You high erectors, all aboard." The plaintiff, who weighed about 190 pounds, and his teammate Wright, who weighed from 160 to 165 pounds, each mounted the truss on opposite sides at the second separator from the end. Plaintiff's foot was against the second member and he was holding to the top channel. The engineer operating the crane was directed to raise the truss slowly and to keep it going. The upward movement was not stopped until the truss got about level with the top of the columns when there was a snap. The six shop bolts at the apex had sheared and the truss "scissored." Wright jumped off onto a column wet with paint. He could not hold and slid down it, receiving comparatively minor injuries. When the two halves came together plaintiff was knocked off. He fell to the ground on a pile of brick and rubbish in the basement sustaining permanent and tragic injuries. His left arm was amputated and he is now a paraplegic.

In order to erect the truss, it had to be lifted above and brought down over the tops of the two columns so that the truss holes were aligned with the column holes. To do this the men had to be on top of the truss so that they could align the holes with a spud wrench, then reach under, put the bolt in and draw it up tight. Newton, who had been in the business fifty years, considered this the only safe method of erecting this truss. On the column there was no place for a man to stand except on one end of the lugs at the top. If the boom should hit the column, the man might fall off; if the truss should hit the man, it might decapitate him. One-half could not be set at a time because so much weight would twist the small column, and a man would still have had to get on top to make the connection. A welding platform was not feasible because there was not enough space on top of the ten-inch wide flange column to tie or hook to. It would tip over and throw a man into the hole below. Furthermore, from the top of the platform, below the connection, it would not have been possible to guide the truss down. It is not customary or approved practice in the erection business to use ladders to make a connection of the height

and size of this one. A thirty-six foot ladder is as high as is ever used. A forty to forty-five foot ladder set in the basement would have been required to erect this truss and would have put too much pressure on the column in addition to putting the man beneath the load.

It was the consensus of plaintiff's witnesses, including the experts, that steel erection at its best is hard, rigorous, and dangerous work; that it is not the practice for steel erectors to ride the load unless they feel it is the safest way to make a connection; that the method Newton chose was in accordance with the custom and practice in the industry and was the safest way.

R. C. Craven of the Craven Steel Erecting Company, who has been in the business since 1910, testified: "As to the custom in the erection trade, we would either climb the column or hook a man on and set him up there, or let him ride the load, whichever we thought was the safest. . .All of the accident prevention manuals have regulations against erectors riding the load but, as a practical matter in the field, we let them ride the load." Other experts in the erection business testified to the same effect. "The practice is that if it is necessary they ride the load."

While ordinarily the erector chooses the methods of erection, it is the responsibility of the designer to provide directions in extraordinary situations. If no directions are provided, the erector will assume that the members and connections have been designed so that the piece will hold together safely under ordinary methods of erection.

The day after the accident in which plaintiff was injured, an angle iron, ten to twelve feet long, was welded on the low members of each half of the truss and on the high members of each half with a strut between. The truss was also welded at the apex. It was then attached to the crane in the same manner as on the day before, and the connection was made in the manner which had been attempted the previous day. Two men again rode the load up. One was Leonard C. Newton, the son of George Newton and the foreman on the job.

John D. Watson, an expert structual engineer who had examined the drawings and specifications for the truss which collapsed, testified that there were recognized procedures for determining the weights and strains which bolts will bear. In answer to a hypothetical question, he expressed the opinion that the bolts sheared because the connection was thirty-seven per cent deficient in design to withstand erection in the manner attempted; that the dead load of the truss itself caused the bolts to shear and it would have collapsed while being lifted had the two men not been on it; that instead of machine bolts, high strength bolts not threaded all the way, rivets or welding might have been used.

In his opinion the truss was bound to fail during erection even had the spreaders not been attached to the second separators and if all force had been applied vertically; even if the men had not bounced up and down on it before erection was attempted, and regardless of the rate of its acceleration. He said Newton was entitled to assume that he could test the connection and erect it as he attempted to do; that steel erectors lack the knowledge and cannot make calculations on the job as to stresses and strains on bolts. Responsibility rests on the designer to prepare a structure that will be stable through erection and afterwards.

Defendant likewise offered the testimony of expert structual engineers. One of them, Donald H. Kline, testified that, based on calculations which had taken him a day and a half, it was his opinion the truss was satisfactory in every way; that its collapse was not caused by its design or construction but might have been caused by faulty erection procedures such as bouncing the truss with four men on it before hoisting it. He said, however, if it were known in advance that men would test the connection and then attempt to erect it in the manner which Newton did, the design would have been grossly defective and he would have anticipated that the connection would fail. His figures indicated to him that the truss would not have failed from its own dead weight and that of the two men. Other experts testifying for the defendant concurred. In their opinion, the collapse was caused by mishandling the structure in the field — either bouncing or improperly placing the chokers.

All the experts agreed, however, that in designing steel, erection loads and stresses should be taken into consideration. Defendant's witnesses suggested that either of the following methods could have been used to get the truss safely into place: The rafters could have been erected one at a time; a ladder or a scaffold could have been put up; a temporary strut could have been tack-welded to the underside of the rafter about five or six feet down from the peak; a special rigging or spreader bar could have been used with guy lines to pick the load straight up; or the spreaders could have been attached at the third separator or lower, using a third sling.

Defendant introduced in evidence the North Carolina Building Code, 1953 Edition, with particular reference to Sections 900 and 914, and the North Carolina Department of Labor's Rules and Regulations Governing the Construction Industry with particular reference to Articles I, II, and Section 18 of Article XXV.

Plaintiff testified that he was not familiar with either the North Carolina Building Code, the Rules and Regulations Governing the Construction Industry of the Department of Labor, or the American

Standard Safety Code for Building Construction, and that he took his orders from either Mr. George Newton or his son.

McLendon, Brim, Holderness & Brooks by Hubert Humphrey, Wilson & Clark for plaintiff appellee.

T. Lacy Williams, J. Ruffin Bailey, Miller and Beck for defendant appellant.

SHARP, J. Was the foregoing evidence sufficient to go to the jury on the alleged negligence of the defendant and, if so, does plaintiff's evidence establish his contributory negligence as a matter of law? These are the two questions for decision.

The defendant, as the designer and fabricator of the truss which collapsed during erection, was under the duty to exercise reasonable care not only to furnish a framework which would sustain the load it was intended to carry after erection, but which would also withstand the ordinary stresses to which it would be subjected during erection by methods reasonably to be anticipated. If a negligently designed truss were furnished, a workman on the construction job was within the foreseeable zone of danger and, if it proximately caused him injury, the designer would be liable under the principle which imposes liability upon a manufacturer who puts into the circulation a product which, if not carefully made, is likely to cause injury to those who lawfully use it for its intended purpose. *Person v. Cauldwell-Wingate Co.*, 176 F. 2d 237; *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170, 78 A.L.R. 2d 588; *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302; *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21; *International Derrick & Equipment Co. v. Croix*, 241 F. 2d 216.

The general rules of law applicable to the question of defendant's alleged negligence have been stated in the following sections of the Restatement, Torts:

> "A manufacturer of chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design." § 398. He is also liable if he supplies a "chattel for another's use knowing that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect to be put," § 389.

> "One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so." § 388. This section applies to "the manufacturer of a chattel which he knows to be, or to be likely to be, dangerous for use," § 394.

When defendant delivered the truss and the columns which were to support it to the Edenton Street Methodist Church job, it knew that steel erectors like the plaintiff would attempt to hoist and set the truss on the perpendicular columns. Its engineer who designed the truss was the one who knew, or should have known, both its strength and the erection stresses its bolts would be required to withstand. These were matters beyond the knowledge and ability of an ordinary steel erector to divine. Unless the truss had been so obviously defective that an erector of ordinary prudence would not have attempted to erect it, Newton was justified in assuming that it could be erected in the customary way. *Ryan v. Fenney and Sheehan Bldg. Co.*, 239 N.Y. 43, 145 N.E. 321; *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 95 N.W. 2d 497; *International Derrick & Equipment Co. v. Croix, supra; Babylon v. Scruton*, 215 Md. 299, 138 A 2d 375. If the defendant knew, or in the exercise of proper care should have known, that the design of the truss made it unsafe to attempt erection by the usual and ordinary methods, it was the defendant's duty to warn Newton of these facts. It does not contend that it gave any information or instruction with reference to erection. Defendant contends that Newton attempted the erection in an unusual manner and that it cannot be held liable for an injury which occurred from a use it could not reasonably have anticipated. *Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868; Anno. Products Liability — Building Supplies, 78 A.L.R. 2d 696, 701; *International Derrick & Equipment Co. v. Croix, supra.*

The evidence in this case, although conflicting, was sufficient for the jury to find (1) that Newton attempted to erect the truss in the customary manner and in a way which defendant should reasonably have

anticipated; (2) that in designing the truss, defendant's engineer did not take into account the stresses of erection and that the dead-weight of the truss itself, without the weight of the two men on it, would have caused the bolts to shear; and (3) that the steel erectors had no way of knowing its weakness unless informed of it by defendant which failed to perform this duty.

If the jury found these facts against the defendant the conclusion that its negligence was at least a proximate cause of plaintiff's injury necessarily followed. The jury exonerated Newton of any negligence proximately causing injury to the plaintiff, and no assignment of error challenges the trial on that issue.

We come now to the question of plaintiff's contributory negligence, the defense upon which defendant relies most heavily. It contends that when plaintiff rode the load upward to attach the truss to the upright columns he was guilty of contributory negligence as a matter of law because (1) riding the load was so obviously dangerous it was plaintiff's duty to refuse to obey the order to do so and he assumed all the risks incident thereto when, instead of refusing, he knowingly placed himself in a position of danger; and (2) in riding the load, plaintiff violated both a standard safety rule of the industry incorporated in the North Carolina Building Code and a regulation of the Department of Labor having the force of law.

Defendant did not specifically plead any of the safety rules upon which it now depends. However, in its brief, it relies upon § 18 of Article XXV of the Rules and Regulations Governing the Construction Industry issued by the Department of Labor and the American Standard Safety Code for Building Construction, No. A10.2-1944, approved June 7, 1944 by the American Standards Association which, it contends, § 914 of the North Carolina Building Code incorporated. The General Assembly has given the North Carolina Building Code the force of law. Therefore, the National Electrical Code which it *incorporated* with the approval of the legislature also has the force of law. G.S. 143-138; *Lutz Industries v. Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767.

However, this Safety Code for Building Construction which defendant stresses so forcibly and from which it purports to quote in the brief, is not referred to anywhere in the North Carolina Building Code. § 914 refers to two other named publications, neither of which has been filed with the Secretary of State as required by G.S. 143-195. Apparently they relate to *specifications* for the design, fabrication and erection of structual steel itself — not rules safeguarding steel erectors.

Furthermore, this Safety Code for Building Construction was not offered in evidence at the trial nor would it have been competent if offered. *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822.

North Carolina is in accord with the majority view that advisory codes which have not been given compulsory force by the legislative body, whether issued by governmental agencies or voluntary safety councils, are not admissible in evidence in civil actions. *Sloan v. Light Co., supra;* 38 Am. Jur., Negligence, § 170; Anno: Evidence — Safety Codes — 75 A.L.R. 2d 778; 1962 Cumulative Supplement to 20 Am. Jur., Evidence, p. 175, addenda to footnote 8, p. 815 of the Text. For a discussion of the problem, see the article entitled "The Role of Administrative Safety Measures in Negligence Actions," 28 Texas Law Review 143.

Defendant introduced in evidence the following sections from the "Rules and Regulations Governing the Construction Industry" issued by the Department of Labor under G.S. 95-11:

> "No employee shall be allowed to ride at any time upon any material elevator or hoist. Nor shall they be permitted to ride upon the sling, load, hook, ball or block of any derrick or crane or in the bucket of any hoist, except when deemed necessary for making repairs or oiling overhead sheaves; provided that this section shall not apply to stacks or caissons nor to the dismantling of hoist, derricks, cranes and towers." Article XXV, § 18. (Hereinafter referred to as Rule 18)
>
> "Every employee shall use all safeguard and safety appliances or devices furnished for his protection and shall be responsible for carrying out all rules and regulations which may concern or affect his conduct." Article II, § 1.

The charge of the court is not in the record, but presumably these rules were received as evidence tending to establish contributory negligence on the part of the plaintiff. The defendant received whatever benefit was to be derived from the introduction of these rules and assigns no error with reference to their use. It now contends they establish plaintiff's contributory negligence as a matter of law. This contention is untenable.

The legislature has not given the rules governing the construction industry promulgated by the Department of Labor the same force of law which it gave the North Carolina Building Code. G.S. 143-138, which ratified and adopted the Building Code of 1953, made any violation of its provisions a misdemeanor and therefore, negligence *per se* in any civil action instituted by a person who has sustained in-

juries proximately caused thereby. However, the legislature imposed no criminal penalty for a violation of the Department of Labor's construction regulations. G.S. 95-13 provides that if any person, firm, or corporation shall, after notice from the Commissioner of Labor, violate the rules promulgated under G.S. 95-11 relating to safety devices or measures, the Attorney General may take proper *civil* action to enforce them. Obviously, since the rules were formulated for the protection and welfare of the employees, such action for injunctive relief would be taken only against the employer. It is noted that regulations made by the Department of Labor to carry out the provisions of the Child Labor Law are, by statute, given the force of law and criminal penalties imposed for their violation. G.S. 110-20.

When noncompliance with an administrative regulation is criminal, the rule that in the trial of a civil action the violation of a criminal statute, unless otherwise provided, is negligence *per se*, is applicable. *Jenkins v. Electric Co., supra; Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585. The General Assembly could specifically provide that the violation of an authorized administrative rule fixing reasonable standards of conduct would be either negligence *per se* or evidence of negligence in specified instances. "Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted. . . ." 2 Am. Jur. 2d, Administrative Law, Section 289.

However, neither the legislature, when it authorized the Division of Standards and Inspection of the Department of Labor to promulgate rules and regulations to protect "the health, safety and general well-being of the working classes of the State" (G.S. 95-11), nor the Division when it wrote the rules, intended to create a criterion for negligence in civil damage suits. The rule in question is a prohibition upon the employer, and does not prohibit riding the load in all instances. It recognizes the necessity in the enumerated exceptions. The purpose of these rules was to require employers to provide safe working conditions for employees in order to minimize the risk of injury to them; it was not to establish a standard of care by which to judge an employee in his action against a third party whose negligence has injured him.

Even had the legislature given these rules the force of law, and if it be conceded *arguendo* that plaintiff had violated Rule 18 above, such violation would not necessarily be contributory negligence barring his recovery against a third party whom the rule was not intended to protect. 1962 Cumulative Supplement to 20 Am. Jur., *supra*; 38 Am. Jur., Negligence, § 196; 5 Am. Jur., Automobiles, § 409; *Town of Remington v. Hesler,* 111 Ind. App. 404, 41 N.E. 2d 657; *Watts v. Montgomery Traction Co.,* 175 Ala. 102, 57 So. 471; *Bateman v.*

Doughnut Corp. of America, 63 C. A. 2d 711, 147 P. 2d 404; *Rampon v. Washington Water Power Co.,* 94 Wash. 438, 162 P. 514; *Flynn v. Gordon,* 86 N.H. 198, 165 A. 715. See also *Wright v. So. R.R. Co.,* 80 F. 260; *Huckabee v. Grace,* 48 Ga. App. 621, 173 S.E. 744.

Rule 18 could not be applied to the facts in this case without doing violence to fundamental principles and to the purpose of the rule. To do so would turn a regulation designed as a shield to protect a workman from an overreaching employer into a sword with which a third person tortfeasor, after he had negligently injured the employee, would administer the *coup de grace.*

We hold that plaintiff violated no law which would make him guilty of negligence *per se.* However, where no statute fixes the standard of conduct, it is that of the reasonably prudent person under the circumstances. We now measure plaintiff's conduct by that rule.

The plaintiff in this case was covered by the Workmen's Compensation Act, but let us assume that prior to its enactment in 1929 Newton had promulgated a rule against employees riding the load; that in violation of his rule he had ordered plaintiff to go up with the truss; that plaintiff obeyed and because of a defect in the hoisting crane he fell to the ground and was injured. A plea of contributory negligence would not have availed Newton unless the order plaintiff obeyed was so obviously dangerous that a reasonably prudent man under similar conditions would have disobeyed it and quit the employment rather than incur the hazard. *Noble v. Lumber Co.,* 151 N.C. 76, 65 S.E. 622; *West v. Mining Corp.,* 198 N.C. 150, 150 S.E. 884.

The law governing suits by servants against masters in common law actions ordinarily bars recovery when a servant's injuries are proximately caused by his violation of a known safety rule promulgated by the employer for the employee's protection and safety. However, if a rule has been habitually violated to the employer's knowledge, or violated so frequently and openly for such a length of time that in the exercise of ordinary care he should have ascertained its nonobservance, the rule is waived or abrogated. *Biles v. R.R.,* 139 N.C. 528, 52 S.E. 129; *Haynes v. R.R.,* 143 N.C. 154, 55 S.E. 516, *Smith v. R.R.,* 147 N.C. 448, 61 S.E. 266; *Tisdale v. Tanning Co.,* 185 N.C. 497, 117 S.E. 583; *Byers v. Hardwood Co.,* 201 N.C. 75, 159 S.E. 3.

Certainly the defendant in this case who knew of the universal custom of steel workers to ride the load, like the master in common law actions, should not be allowed to defeat plaintiff's recovery for injuries which its negligence proximately caused by relying upon a rule promulgated for the employee's protection, the violation of which would have been harmless but for defendant's negligence.

Plaintiff had no means whatever of knowing that the truss had not been designed to withstand the stress of erection. He obeyed a usual and customary order of his employer with no knowledge that an administrative agency had issued a rule against it or that advisory safety codes prescribed it. The day after the truss collapsed with him, Newton erected the reinforced framework in the same manner he had attempted the day before, his son riding the load in plaintiff's stead. Logically, it might be argued that when plaintiff mounted the truss he assumed the risk that he would lose his grasp on it, become dizzy, or that his foot would slip during the upward ride, but he did not assume a risk he could not have anticipated. Assumption of risk is founded on knowledge. *Batton v. R.R.*, 212 N.C. 256, 193 S.E. 674; *Womble v. Grocery Co.*, 135 N.C. 474, 47 S.E. 493.

When a plaintiff has put himself in a dangerous situation, and while there is injured by the negligence of another, it is not always easy to determine whether his physical presence at the time and place was one of the proximate causes contributing to his injury or merely the opportunity or occasion for it. Sometimes a court solves the problem in favor of the injured plaintiff by putting the ultimate stress on the doctrine of proximate cause. *Lerette v. Director General of Railroads*, 306 Ill. 348, 137 N.E. 811. Of course, the specific accident would rarely happen to a particular plaintiff but for the fact that he was where he was at the time and place it occurred. However, mere presence at a place is not usually determinative. *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 A. 240; *Bonnier v. Chicago, B. & Q. R. Co.*, 2 Ill. 2d 606, 119 N.E. 2d 254; *Cosgrove v. Shusterman*, 129 Conn. 1, 26 A. 2d 471. The fact that the injured person placed himself in a dangerous position will defeat his recovery only when the negligence which injured him can reasonably be considered as having been included in the risk to which his position exposed him. *McFadden v. Pennzoil Co.*, 341 Pa. 433, 19 A. 2d 370.

"The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery unless the plaintiff's harm results from a hazardous cause to which his conduct was negligent." Restatement, Torts, § 468.

Contributory negligence becomes a question of law only when plaintiff's evidence so clearly establishes it that no other reasonable inference may be drawn therefrom. *Dalrymple v. Sinkoe*, 230 N.C. 453, 53 S.E. 2d 437; *Graham v. R.R.*, 240 N.C. 338, 82 S.E. 2d 346. "Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it

falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as a matter of law." *Cooke v. Balt. Traction Co.*, 80 Md. 551, 31 A. 327; *Bethlehem Steel Co. v. Variety Iron and Steel Co.*, 139 Md. 313, 115 A. 59, 31 A.L.R. 1021; *Dennis v. Gonzales*, 91 C. A. 2d 203, 205 P. 2d 55. This was such a case. It was ably and fairly tried by both judge and counsel. The jury, after considering all the surrounding circumstances, found that plaintiff's injuries were proximately caused by the negligence of the defendant and that plaintiff did not by his own negligence contribute to them.

In the trial below we find

No error.

LILLIAN H. WHALEY, ADMINISTRATRIX OF THE ESTATE OF WILLIAM CHARLES WHALEY, DECEASED, AND FIRESTONE TIRE AND RUBBER COMPANY v. GREAT AMERICAN INSURANCE COMPANY AND INSURANCE COMPANY OF NORTH AMERICA.

(Filed 14 June 1963).

1. Insurance § 65.1—

A party discharging the liability of insured's estate under an agreement that it should be subrogated to all claims of the estate against insurer stands in the same position as the personal representative of the estate in an action to recover against insurer.

2. Insurance § 54—

The provisions of a policy of liability insurance extending coverage to the use of other automobiles by insured without the payment of extra premium usually excludes coverage of other cars owned by insured or by members of his household, and also cars furnished for regular use of the insured, the purpose of the extension being to provide coverage for the occasional and infrequent driving by insured of an automobile other than his own.

3. Same— Policies held not to cover non-owned vehicle furnished insured by his employer for business purposes.

Policies of insurance covering an individually owned motor vehicle were issued to insured. The accident causing loss occurred while insured was operating a vehicle owned by his employer and regularly furnished insured solely for company business, but which was habitually used by the insured for his personal pleasure without the actual notice or knowledge of the employer. Insurer was the local manager for the employer and as such had final authority in the locality with reference to the use of the employer's vehicle. *Held:* The employer's vehicle was furnished insured for regular use so as to be excluded from coverage under the provisions of the policy relating to casual use by insured of non-owned vehicles.

APPEALS by plaintiffs and by defendant Great American Insurance Company from *Morris, J.*, January-February 1963 Civil Session of WAYNE.

Civil action to determine the liability, if any, of each defendant to plaintiffs under automobile liability insurance policies.

The cause was submitted for decision on the following stipulated facts:

"1. William Charles Whaley, a resident of Wayne County, was on the 13th day of June 1959, and had been for several years manager of the Goldsboro store of Firestone Tire & Rubber Company, the district office under which this store was operated being in Charlotte, North Carolina.

"2. That during the year 1959, and prior thereto, the plaintiff, Firestone Tire & Rubber Company, owned a 1957 Ford automobile motor number B 7 CG 129548, which had 1959 North Carolina license plates number AW-1538 on it, and that the same was stationed at the Firestone Tire & Rubber Company, Goldsboro, North Carolina, for the regular use of its manager, William Charles Whaley, and five other employees in the conduct of the company's business.

"3. That during 1959, William Charles Whaley was the owner of a 1957 Plymouth automobile motor number 16226194, and William Charles Whaley and his family resided at 600 South Madison Avenue, Goldsboro, North Carolina.

"4. That William Charles Whaley had been employed by Firestone Tire & Rubber Company as manager of its Goldsboro store since on or about the first day of February 1949.

"5. That on or about January 8, 1959, the Great American Insurance Company issued and delivered its liability policy number 4-36-56-81 to William Charles Whaley, whereby it agreed to protect the said William Charles Whaley against liability for damage to third parties with policy limits of $5,000 property damage, $5,000 personal injury to any one person, and $10,000 for any one accident, upon the terms and conditions set forth in the policy, and for a period of one year from and after January 8, 1959, and that the same was in force and effect in accordance with its terms on June 13th, 1959, and said policy is hereby incorporated and made a part of this statement of facts; said policy was not an assigned risk policy.

"6. On the 19th day of February 1959, the defendant, Insurance Company of North America, issued its automobile public

liability policy covering William Charles Whaley's 1957 Plymouth two-door automobile, motor number 16226194 — it was an assigned risk policy, and limits were $5,000 for one person, $10,000 for any one accident in personal injuries or wrongful death, and $5,000 limit for property damage, whereby it agreed to protect the said William Charles Whaley against liability for damages to third parties as set out in the policy which is incorporated and made a part of this statement.

"7. The Insurance Company of North America's policy was issued through Denning Insurance & Realty Company as producer of record under an application to it made February 6, 1959, for liability insurance under the North Carolina automobile assigned risk plan; the Denning Insurance & Realty Company was not at the time of the application a representative of or agent for the defendant Insurance Company of North America; the Denning Insurance & Realty Company was at the time of the application a representative or agent for the defendant Great American In surance Company on January 8, 1959.

"8. That following the issuance of the said policy William Charles Whaley was furnished his S. R. 22 certificate and F. S. 1 form, which were filed with the proper authorities, being mailed on February 18, 1959, to the Department of Motor Vehicles, indicating a policy effective February 19, 1959.

"9. That on June 12, 1959, shortly after the Firestone Tire & Rubber Company, Goldsboro, N. C., had closed for the day, William Charles Whaley announced that he was going fishing and sought the companionship of one or two other employees of Firestone Tire & Rubber Company; that said employees declined to go and William Charles Whaley stated, 'I know someone who will go with me,' and following this statement he made a telephone call and left the premises of Firestone Tire & Rubber Company in the automobile owned by Firestone Tire & Rubber Company, hereinabove identified as a 1957 Ford; that William Charles Whaley was next seen on June 13, 1959 at about 5:30 a.m., at a point located approximately six miles southeast of Goldsboro, N. C., on N. C. Highway 111, and that from the investigation of the highway patrolman it appeared that said vehicle was traveling in a northward direction toward Goldsboro on said highway when it was involved in a collision with a car owned by Franklin Delano Burgess, and being operated by Hampton Burgess, and that the bodies of William Charles Whaley and Ruth Lamm were located

on the ground near the Ford car owned by Firestone Tire & Rubber Company, which was a total wreck, and that fishing tackle was located on the ground at the scene and in the Firestone automobile; that further investigation revealed that the Burgesses were going fishing and headed in a Southward direction. Said Ruth Lamm was not an employee of the Firestone Tire & Rubber Company and was not a member of the Whaley family.

"10. In consequence of said automobile accident, the said Franklin Delano Burgess instituted a civil action in Wayne County Superior Court against Firestone Tire & Rubber Company and Lillian H. Whaley, Administratrix of the Estate of William Charles Whaley; that at the trial of said cause at the October 1960 term of the Superior Court of Wayne County a consent judgment was entered into, the terms and conditions of which are set forth in a copy of said judgment and incorporated herein by reference.

[The Burgess (consent) judgment provided that plaintiff have and recover a total of $9,000.00, $8,230.00 for personal injuries and $770.00 on account of property damage, and adjudged that the liability of the estate of Whaley was primary and that of Firestone was secondary. It provided further that the liability, if any, of each defendant to the estate of Whaley was to be determined in a separate action; that Firestone, upon payment of the Burgess judgment, would be subrogated to the rights, if any, of the estate of Whaley against defendants herein; and that each defendant herein would pay to Firestone the amount, if any, for which it would be liable to the estate of Whaley if it had paid the Burgess judgment.]

"11. That in consequence of said judgment Firestone Tire & Rubber Company paid to the said Franklin Delano Burgess the sum of $770.00 representing property damage, and the sum of $8,230.00 for personal injuries, loss of salary, hospital bills, etc. Hampton Burgess, hereinabove referred to, had not at the October 1960 Term of Civil Court for Wayne County filed suit for personal injuries and the parties in the case, Franklin Delano Burgess v. Lillian H. Whaley, Administratrix of the Estate of William Charles Whaley, and Firestone Tire & Rubber Company agreed by contract that Firestone Tire & Rubber Company would pay the sum of $2,000 to Hampton Burgess in full settlement of all claims he might have arising out of this wreck for personal injuries, and that said payment would be made under the same

terms and conditions as set out in the consent judgment entered in that case; that pursuant thereto Firestone Tire & Rubber Company paid $2,000 to Hampton Burgess as agreed.

"12. This suit was instituted for the purpose of determining the liability of the defendants, if any, on the policies of insurance set out in the complaint and as agreed to in the consent judgment hereinbefore set forth.

"13. It is agreed that in the application for an assigned risk policy prepared by Denning Insurance & Realty Company, and signed by William Charles Whaley, there is a question number 19, which reads as follows:

'Has applicant tried and failed to obtain automobile liability insurance within 60 days prior to date of this application? Answer: Yes.'

and the application is dated February 6, 1959.

"14. That the 1957 Ford automobile which Whaley was driving at the time of the wreck of June 13, 1959, was not owned by Whaley and he had no interest in it; that this 1957 Ford automobile was not a temporary substitute automobile as that term is used in the policies issued by the defendants to William Charles Whaley in this case.

"15. When William Charles Whaley was employed by Firestone Tire & Rubber Company in 1941 he signed a card entitled 'NOTICE TO ALL COMPANY EMPLOYEES,' a copy of which is attached and made a part of this stipulation.

"16. And at the time of the automobile accident, June 13, 1959, and for sometime prior thereto the Company's regulations with reference to the use of the company vehicles were as follows:

'USE OF COMPANY VEHICLES — Following policies apply to usage of company vehicles at all locations:

1. Company vehicles are to be driven only by qualified and legally licensed company employees.

2. Use only in the conduct of necessary company business. No one, under any circumstances, is to use or operate company vehicles for personal affairs or pleasure. Except in unusual cases, store vehicles should not be operated other than during regular store hours.

3. Do not carry passengers except when both driver and passenger are on company business.

4. Do not permit operation by persons under 18 years of age.

5. Vehicles must not be driven faster than legal speed limits.'

A book containing a copy of these regulations was in the custody of William Charles Whaley as manager of the Goldsboro store of Firestone Tire & Rubber Company.

"17. Notwithstanding these regulations, Mr. Whaley did, on numerous occasions between January 8, 1959 and June 13, 1959, and prior thereto, use the Ford automobile referred to for his own personal business and pleasure.

"18. The Firestone Tire & Rubber Company had no actual notice or actual knowledge of this use of its automobile by Whaley for his own personal business and pleasure until the trial of the *Burgess* case hereinbefore referred to in October 1960.

"19. At the time of the accident on June 13, 1959, William Charles Whaley was using the Firestone Tire & Rubber Company's automobile for his own personal business or pleasure without the knowledge, permission or consent of the Firestone Tire & Rubber Company."

On these facts, together with the insurance policies, the consent judgment and the (1941) card referred to in the stipulation, the court entered judgment as follows:

"IT IS THEREUPON CONSIDERED, ORDERED, DECREED and ADJUDGED that the plaintiffs have and recover of Great American Insurance Company the sum of $7,770.00 together with interest thereon from November 1, 1960, until paid, together with the costs of this action.

"IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the plaintiffs have and recover nothing of the defendant, Insurance Company of North America."

Plaintiffs *and* Great American Insurance Company excepted and appealed.

Taylor, Allen & Warren, Scott B. Berkeley and John H. Kerr, III, for plaintiffs.

Braswell & Strickland for defendant Great American Insurance Company.

T. Lacy Williams for defendant Insurance Company of North America.

BOBBITT, J. In the *Burgess* (consent) judgment it was agreed that, upon payment thereof by Firestone, "an action may be brought by it, as subrogee of the William Charles Whaley estate, or in the name of Lillian H. Whaley, Administratrix of the estate of *William Charles Whaley v. Great American Insurance Company and North American Insurance Company (sic),* to determine their liability on the policies referred to." Firestone paid the judgment. This action was instituted solely for its benefit. It is not an insured under either policy. It must recover, if at all, as subrogee. It stands in the same position as that in which the administratrix of Whaley's estate would stand if she had paid the judgment and were the plaintiff and real party in interest herein.

PLAINTIFFS' APPEAL

Plaintiffs' appeal is from the portion of the judgment providing that they "have and recover nothing of the defendant Insurance Company of North America."

When the accident occurred, Whaley was driving Firestone's Ford. He was not driving the automobile specifically described in the policy, to wit, his Plymouth.

The liability, if any, of Insurance Company of North America must be based on Paragraph V ("Insuring Agreements") of its policy, which, in pertinent part, provides:

> "V. Use of Other Automobiles: If the named *insured* is an individual or husband and wife and if during the policy period such named *insured,* or the spouse of such individual if a resident of the same household, owns a private passenger automobile covered by this policy, such insurance as is afforded by this policy under coverages A, B, division 1 of coverage C and E with respect to said automobile applies with respect to any other automobile, subject to the following provisions:
>
> "(a) . . .
>
> "(b) . . .
>
> "(c) . . .
>
> "(d) This insuring agreement does not apply:
>
> (1) to any automobile owned by or furnished for regular use to either the named *insured* or a member of the same household other than a private chauffeur or domestic servant of such named *insured* or spouse; . . ."

Was Firestone's Ford "furnished for regular use to" Whaley within the intent and meaning of (d) (1)?

The "Use of Other Automobiles" clause "extends the driver's regular insurance to casual driving of automobiles other than his own without the payment of an extra premium, and usually excludes from coverage other cars owned by the insured or by members of his household as well as cars furnished for regular use of the insured or used in his business." 7 Am. Jur. 2d, Automobile Insurance § 105; Annotations: 173 A.L.R. 901, 83 A.L.R. 2d 926, 86 A.L.R. 2d 937; 7 Appleman, Insurance Law and Practice, § 4455.

"The obvious purpose of the 'other car' provisions, with the exceptions, is to provide coverage to a driver without additional premiums, for the occasional or infrequent driving of an automobile other than his own. They are not to take the place of insurance on automobiles which are furnished for the regular use of the insured. (Citations) The purpose is not to insure more than one car on a single policy." *Wyatt v. Cimarron Insurance Company,* 10 Cir., 235 F. 2d 243; *Home Insurance Company v. Kennedy* (Del.), 152 A. 2d 115.

In *Campbell v. Aetna Casualty and Surety Co.*, 4 Cir., 211 F. 2d 732, the Court of Appeals, in opinion by Soper, J., quotes with approval, as in accord with the great weight of authority, the following from the opinion of Chesnut, J., in *Aler v. Travelers Indemnity Co.*, 92 F. Supp. 620, *viz.*: "The general purpose and effect of this provision of the policy is to give coverage to the insured while engaged in the only infrequent or merely casual use of an automobile other than the one described in the policy, but not to cover him against personal liability with respect to his use of another automobile which he frequently uses or has the opportunity to do so." In *Leteff v. Maryland Casualty Company* (La.), 91 So. 2d 123, the court, after an exhaustive review of earlier decisions, approves the interpretation given in Judge Chesnut's opinion in *Aler.* Later decisions of like import include *Home Insurance Company v. Kennedy, supra; O'Brien v. Halifax Insurance Co. of Massachusetts* (Fla.), 141 So. 2d 307.

"No absolute definition can be established for the term 'furnished for regular use.' Each case must be decided on its own facts and circumstances." *Home Insurance Company v. Kennedy, supra; Miller v. Farmers Mutual Automobile Insurance Co.* (Kan.), 292 P. 2d 711.

During 1959 and prior thereto, Firestone's Ford "was stationed" at its place of business at Goldsboro "for the regular use of its manager, William Charles Whaley, and five other employees in the conduct of the company's business." Clearly, the policy on Whaley's own individual car, the Plymouth, would provide no coverage if Whaley, when the

accident occurred, had been engaged "in the conduct of the company's business." *Farm Bureau Mut. Automobile Ins. Co. v. Boecher* (Ohio), 48 N.E. 2d 895; *Farm Bureau Mutual Automobile Ins. Co. v. Marr,* 128 F. Supp. 67; *Voelker v. Travelers Indemnity Company,* 260 F. 2d 275; *Home Insurance Company v. Kennedy, supra.* Of like import, but relating to medical payments coverage rather than liability coverage: *Dickerson v. Millers Mutual Fire Ins. Co. of Texas* (La.), 139 So. 2d 785; *Moore v. State Farm Mutual Automobile Ins. Co.* (Miss.), 121 So. 2d 125; *O'Brien v. Halifax Insurance Co. of Massachusetts, supra.*

When the accident occurred, Whaley was using the Ford "for his own personal business or pleasure without the knowledge, permission or consent" of Firestone. Firestone's regulations provided, *inter alia,* that "(n)o one, under any circumstances, (was) to use or operate company vehicles for personal affairs or pleasure." When employed by Firestone in 1941, Whaley agreed (in writing) to comply with Firestone's instructions concerning the use of company cars by an employee, including the following: "Under no circumstances is the Company car to be used or operated by you in the interest of your personal affairs or pleasure and not upon the business of the Company and the carrying out of Company duties you were employed to perform."

Whaley had, "*on numerous occasions* between January 8, 1959 and June 13, 1959, and prior thereto," used the Ford, "for his own personal business and pleasure." (Our italics) Firestone had no actual notice or knowledge of Whaley's use of its Ford for his own personal business and pleasure until the trial of the *Burgess* case in October, 1960. Whaley was manager of Firestone's Goldsboro store; and, as manager, Whaley's authority *in Goldsboro* with reference to the use of Firestone's Ford was final. In fact, Firestone's Ford was available for Whaley's use for his own personal business and pleasure and was so used by him "on numerous occasions."

The contention that the policy provides coverage *because,* when the accident occurred, Firestone's Ford was being used by Whaley for his own business and pleasure rather than "in the conduct of the company's business," is untenable. The fact that Whaley was using the Ford in violation of Firestone's regulations and instructions cannot enlarge the coverage provided Whaley by the policy on his own individual car, a Plymouth. To hold otherwise would permit Whaley to benefit from his own wrongful conduct. A different basis of decision must be found.

In *Iowa Mutual Insurance Company v. Addy* (Colo.), 286 P. 2d 622, the "Use of other automobiles" clause under consideration pro-

vided, *inter alia,* it did not apply to any other automobile furnished for regular use to the named insured. The question was whether the policy, which specifically described an Oldsmobile owned by the insured, provided coverage to the insured with reference to a liability he incurred while operating his employer's Chevrolet. The employer, a casualty company, had provided the Chevrolet for the insured's use as a claim adjuster. The insured used the Chevrolet daily in his employer's business and, with his employer's knowledge and consent, kept it at his home overnight. On Thanksgiving Day the insured was involved in an accident while en route to the home of friends "across the City of Denver," with whom the insured, his wife and their children were to have dinner. The court held the policy did not cover the insured's liability and reversed the judgment the plaintiff (insured's wife) had obtained in the trial court. The opinion of Holland, J., states: "It is undisputed and undenied that the automobile in which plaintiff was riding was furnished her husband for his regular use in his employment. Such automobile by a provision of paragraph V(b) (1) of the policy is excluded, because the provisions are clear that the insuring agreement did not apply to any automobile 'furnished for the regular use to the named insured.'" This Colorado decision is discussed in *Ransom v. Casualty Co.,* 250 N.C. 60, 108 S.E. 2d 22, with particular reference to the "Temporary Substitute Automobile" clause. Here it was stipulated Firestone's Ford "was not a temporary substitute automobile as that term is used in the policies issued by the defendants" to Whaley.

In our view, coverage depends upon the *availability* of the Ford *for use* by Whaley and the *frequency of its use* by Whaley. *Rodenkirk v. State Farm Mut. Automobile Ins. Co.* (Ill.), 60 N.E. 2d 269; *Vern v. Merchants Mut. Casualty Co.,* 118 N.Y.S. 2d 672. It was "furnished" to Whaley by Firestone in the sense it was placed and continued under Whaley's authority and control. It was available for use by Whaley over an extended period and was used by him "on numerous occasions." The stipulated facts dispel any suggestion that Whaley's use of the Ford "for his own personal business and pleasure," was casual, occasional or infrequent. The stipulated facts establish that Whaley regularly used the Ford "for his own personal business and pleasure" as well as "in the conduct of the company's business." It is our opinion, and we so decide, that Firestone's Ford was "furnished for regular use to" Whaley within the meaning of the policy.

The factual situation is quite different from those considered in *Miller v. Farmers Mutual Automobile Insurance Co., supra,* and *Comunale v. Traders & General Ins. Co.* (Cal.), 253 P. 2d 495, where

it was held the evidence sustained the trial court's findings that the car the insured was driving at the time of the accident was not furnished for his regular use.

Decisions cited and stressed by plaintiffs, discussed below, are factually distinguishable. We perceive no conflict between these decisions and our present decision. In this jurisdiction, the question appears to be one of first impression.

In *Pacific Automobile Ins. Co. v. Lewis* (Cal.), 132 P. 2d 846, the accident occurred when Wells, by express permission of the sales manager, was driving his employer's car from San Diego to Pomona to make a personal visit. Wells, a salesman for a San Diego automobile agency, had been permitted to use his employers' cars as demonstrators and at times for personal purposes in the San Diego area. He had not on any previous occasion taken an automobile belonging to his employers away from the vicinity of San Diego. It was held that Wells' liability to Lewis, an injured party, was covered under the "drive other cars" provision in policies which provided principal coverage for automobiles not involved in the accident. The basis of decision is indicated by this excerpt from the opinion: ". . . But when a car thus furnished for such a use is driven to a distant point *on one occasion,* with the *special permission* of the one furnishing the car, that *particular use* would hardly seem to be a 'regular use' of the car. It cannot be said, as a matter of law, that such a use on *a particular occasion,* which is a departure from the customary use for which the car is furnished, is *a* regular use within the meaning of these clauses of the policies. . . ." (Our italics)

In *Palmer v. Glens Falls Insurance Company* (Wash.), 360 P. 2d 742, the opinion, referring to *Pacific Automobile Ins. Co. v. Lewis, supra,* states: "There, a salesman, who regularly drove a company automobile in his employment, was held not to be engaged in the regular use of it on a special occasion when, by special permission for one occasion only, he was permitted to take it for a private purpose on a personal visit." In accord with *Pacific Automobile Ins. Co. v. Lewis, supra,* it was held: "An agreement for a regular use of an automobile does not, in fact, preclude *a special use of a different nature* if it is *specifically authorized for one occasion only.*" (Our italics)

In *Schoenknecht v. Prairie State Farmers Ins. Ass'n.* (Ill), 169 N.E. 2d 148, the policy involved specifically insured the plaintiff's Buick. The accident occurred May 2, 1957, about 11:00 p.m., when plaintiff was driving his employer's Chevrolet. The employer furnished plaintiff the Chevrolet for use in the performance of the duties of his employment. When the accident occurred plaintiff, in violation of his

duty to return the Chevrolet to his employer's shop at the conclusion of each day's work, was using the Chevrolet for personal purposes. It was held the plaintiff's liability was covered by the "Use of Other Automobiles" clause in his policy. This excerpt from the opinion indicates the basis of decision: "Plaintiff was furnished this car (the Chevrolet) for his sole use in connection with the business of his employer during his working hours. He had never used the car to take him anywhere except upon the business of his employer and during his working hours. The only time he had ever used it was during his working hours and in furtherance of his employer's interest except on the occasion in question. The use of this car at this time was under the authorities, an isolated, casual, unauthorized use of an automobile other than his own and comes within the insuring agreements of this policy designated 'use of other automobiles.'"

In *Sperling v. Great American Indemnity Company,* 7 N.Y. 2d 442, 199 N.Y.S. 2d 465, 166 N.E. 2d 482, the policy issued to Mrs. Nystrom specifically covered her Buick. A Chevrolet, parked on a public street, was stolen by Christine, Mrs. Nystrom's 16-year-old daughter; and an accident occurred while Christine was operating the stolen car. In a wrongful death action, the plaintiff recovered a judgment against Christine for approximately $125,000.00. The plaintiff contended Christine was an insured under the following provisions (under the heading "Persons Insured") of the policy:

"The following are insureds under Part I (Liability):

"(a) With respect to the owned automobile, (1) the named insured and any resident of the same household, (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

"(b) With respect to a non-owned automobile, (1) the named insured, (2) any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative."

The term "non-owned automobile" was defined as meaning "an automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile."

The Court of Appeals, in a four to three decision, held the judgment debtor was covered while operating a stolen car because she was a relative and driving a private passenger car not regularly furnished for her use. As stated by Hastie, J., in *Home Indemnity Company v. Ware,* 3 Cir., 285 F. 2d 852, ". . . the dissenters derived a contrary

meaning from the language of the policy. In their view the expression 'not regularly furnished' for the use of a relative means 'occasionally furnished' for his use, and no more than that. Under this analysis a stolen car, which is not 'furnished' at all, is excluded entirely from the coverage of the policy." The majority view was that the manner in which Christine acquired the Chevrolet was irrelevant. The majority opinion states: "The *exclusion* of coverage for relatives driving nonowned automobiles was, by its terms, concerned with *regularity* of use, not *permissiveness* of use, and was designed to protect the company from being subjected 'to greatly added risk without the payment of additional premiums' (*Vern v. Merchants Mut. Cas. Co.*, 21 Misc. 2d 51, 52, 118 N.Y.S. 2d 672, 674)."

Whatever the correct view with reference to the policy provisions and facts considered in *Sperling*, the stolen (Chevrolet) car was operated by Christine only on one occasion. It had not been regularly used by her nor had it been available for her use. It would seem such a policy would not provide coverage if the "non-owned automobile," although a stolen car, had been available for regular use and had been so used.

Upon the stipulated facts it is our opinion, and we so decide, that the policy issued by the Insurance Company of North America to Whaley, providing principal coverage for Whaley's Plymouth, did not cover the liability incurred by Whaley while operating Firestone's Ford on the occasion of the collision. Hence, the portion of the judgment providing that plaintiffs "recover nothing of the defendant Insurance Company of North America," is affirmed.

GREAT AMERICAN'S APPEAL

Great American's appeal is from the portion of the judgment providing that plaintiffs "have and recover of Great American Insurance Company the sum of $7,770.00," together with interest and costs.

The liability, if any, of Great American must be based on the following provisions of its policy:

"Persons Insured. The following are insureds under Part I:

"(a) With respect to the owned automobile,

(1) . . .

(2) . . .

"(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer,

provided the actual use thereof is with the permission of the owner;

"(c) . . ."

The term "non-owned automobile," as used in (b) under "Persons Insured," and as defined in the policy, "means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile." It was stipulated Firestone's Ford "was not a temporary substitute automobile."

The "owned automobile" referred to in (a) was Whaley's Plymouth. The policy provided coverage if, but only if, Firestone's Ford operated by Whaley was a "non-owned automobile" *as defined in the policy. Kirk v. Insurance Co.,* 254 N.C. 651, 655, 119 S.E. 2d 645, and cases cited. A "non-owned automobile" was an automobile "not . . . furnished for the regular use" of Whaley.

Upon the stipulated facts, and for the reasons stated in connection with our consideration of plaintiffs' appeal, we are of opinion, and so decide, that Firestone's Ford was furnished for the regular use of Whaley within the intent and meaning of the policy; and that Great American's policy, providing principal coverage for Whaley's Plymouth, did not cover the liability incurred by Whaley while operating Firestone's Ford on the occasion of the collision. Hence, the portion of the judgment providing that plaintiffs recover from Great American must be and is reversed.

In view of the conclusion(s) reached, we do not discuss other defenses asserted by defendants or the evidence pertinent thereto.

On plaintiffs' appeal: Affirmed.

On Great American's appeal: Reversed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. TIDEWATER NATURAL GAS COMPANY AND CITY OF ROCKY MOUNT.

(Filed 14 June 1963.)

1. Utilities Commission § 6—

A proceeding in which a utility seeks an increase in rates for classes of customers providing its major source of revenue in order to provide

funds assertedly necessary for continued operation is a general rate case and not a complaint proceeding, even though the increase is not requested for all classes of customers. G.S. 62-72.

2. Same—

In a general rate case the function of the Utilities Commission is to determine whether a general increase or decrease in rates is warranted, and therefore in such proceeding the Commission has broad discretionary power to limit and exclude evidence relating to alleged discrimination between classes of customers, since the question of such discrimination properly pertains to a complaint proceeding which may be thereafter instituted by the class of customers asserting discrimination.

3. Utilities Commission § 9—

Where petitioner in a general rate case has introduced evidence showing its assets and liabilities, actual and adjusted income, average number of customers and quantity of gas used by each type of customer, the revenue provided by each type of user, etc., which evidence is plenary to support the crucial findings of fact, the denial of a protestant's request that the Commission reopen the case to require petitioner to furnish additional evidence relating to aspects which could not affect the result will not be held prejudicial, protestant having had the right to subpoena records and cross-examine during the hearing to develop such facts as it deemed necessary for the presentation of its case.

4. Same—

Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. G.S. 62-26.10.

APPEALS by Tidewater Natural Gas Company and City of Rocky Mount from *Copeland, S.J.*, February 4, 1963 Civil Term of WAKE.

North Carolina Natural Gas Corporation (hereafter Carolina) was incorporated in October 1955. It applied to and on 7 December 1955 received from the Utilities Commission (hereafter Commission) a certificate authorizing it to transport and distribute natural gas in the eastern part of the State. On 1 March 1957 the Federal Power Commission authorized Transcontinental Pipeline Corporation (hereafter Transco) to serve Carolina, allocating to it 39,780 MCF of natural gas per day. Carolina was unable to complete necessary financial arrangements until 15 October 1958; construction of its system of lines to transport and distribute gas was begun promptly and completed in September 1959. Carolina then began selling gas in accordance with rate schedules previously filed with and approved by the Commission.

It has 655 miles of transmission lines which enable it to sell gas to: the municipalities of Greenville, Monroe, Rocky Mount, and Wilson;

Tidewater Natural Gas Company (hereafter Tidewater), which distributes and sells gas in Fayetteville, Kinston, New Bern, Washington, and Wilmington; Riegel Paper Company in the operation of its business of producing pulp and paper; Carolina Power & Light Company, for use in its plants for generating electricity; U. S. Army at Fort Bragg; some farmers for use in curing tobacco; and brick kilns and ceramic plants. In addition to the 655 miles of transmission pipeline, it has some 283 miles of distribution lines distributing natural gas to citizens in the municipalities of Albemarle, Aberdeen, Benson, Clinton, Dunn, East Laurinburg, Farmville, Goldsboro, Hamlet, Laurinburg, Lillington, Lumberton, Norwood, Raeford, Red Springs, Rockingham, Roseboro, Salemburg, Southern Pines, St. Pauls, Tarboro, Wadesboro, and the unincorporated community of Erwin.

Carolina operates on a fiscal year basis beginning 1 October. It experienced a substantial loss during the first year of operation, i.e., the year which began 1 October 1959 and ended 30 September 1960. On 19 December 1960 it filed a petition with the Commission seeking an increase in rates to provide it with funds assertedly necessary for continued operation. Attached to its petition were schedules of proposed rates intended to produce the necessary funds. Tidewater, Riegel, Greenville, Rocky Mount, Wilson, the Secretary of the Army on behalf of the Executive Agencies of the United States, and certain brick plants intervened. They protested the proposed increases. The Commission suspended the proposed new rates but permitted Carolina to put these rates in effect under bond.

The increases proposed by Carolina related principally to the rates charged customers to whom it distributed gas, the municipalities purchasing for resale to citizens, and Tidewater purchasing for resale to citizens in the municipalities served by it. (The petition was amended at the hearing so as to eliminate increases affecting Riegel and the Army.)

The Commission held hearings in April and May 1961. It issued an order in September 1961 approving the proposed increases. The order contains a summary of the evidence, findings of fact, and conclusions. Tidewater and Rocky Mount excepted to the findings, conclusions, and order, and appealed to the Superior Court. The Superior Court, finding competent, material, and substantial evidence to support the Commission's findings which justified its order, approved the order of the Commission.

J. Melville Broughton, Jr., and Robert B. Broughton, by J. M. Broughton, Jr., for appellant Tidewater Natural Gas Company.

Spruill, Trotter, Biggs & Lane, by James R. Trotter, for appellant City of Rocky Mount.

McCoy, Weaver, Wiggins & Cleveland, by Donald W. McCoy and John E. Raper, Jr., for appellee North Carolina Natural Gas Corporation.

RODMAN, J. While Carolina proposes to raise most of the money allegedly needed for the continuing and successful operation of its business from two classes, (a) its own customers to whom it distributes gas, and (b) municipalities and utilities who purchase for resale to their customers, this is nonetheless a general rate case and not a complaint proceeding provided for in G.S. 62-72. *Utilities Comm. v. Light Co.*, 250 N.C. 421, 109 S.E. 2d 253.

The Commission's findings, stated summarily in part and quoted in part, are: Carolina must pay for all the gas which it can demand and which Transco is obligated to furnish irrespective of whether Carolina uses the gas or not. This is denominated a demand charge. In addition to the demand charge it must pay a fixed rate per MCF for all gas actually used. This is denominated a commodity charge. "For the fiscal year 1959-60 the gross operating revenue of the company, adjusted, was $5,285,242. Total operating revenue deductions were $5,718,930, resulting in an operating loss of $433,688. Other income in the amount of $25,713 reduced the loss to $407,975. Income deductions in the way of interest on long-term debt, amortization of debt discount and expense and other items amounted to $1,080,566. Thus, the company experienced for the fiscal year a loss of $1,488,541.

"In an effort to reduce expenses the company has released a part of its allocated gas, thereby reducing its demand charge." (When the petition was heard, the demand had by contract been reduced from 39,780 to 20,000 MCF per day.) Transco has twice increased its rates since Carolina began operating. The latest increase became effective under bond on 17 April 1961. "Based on the proposed increased rates and the price of purchased gas under present rates the gross revenue of Carolina for the fiscal year 1960-61 will be $7,096,118. Operating revenue deductions will be $6,751,008, resulting in an operating income of $354,110. Income deductions for interest, amortization of debt discount and expense and other items will amount to $1,190,263 for a net loss of $835,990." (The figures for the year 1960-61 were based on actual experience for a three-month period and estimates for the remainder of the fiscal year. The estimate included an estimated increase in the number of customers and the amount of gas used per customer.) The estimated income for the fiscal year 1960-61 included

the sum of $218,000 estimated to be produced by the proposed rates. Carolina is going through the first stages of development and is experiencing large losses. "As of December 31, 1960, average utility plant in service, less average contributions in aid of construction and without any allowance for working capital, was $20,681,414." "Actually, it is not earning a rate of return at all but is operating at a deficit." Prior to the time Carolina began providing natural gas, its customers were using liquid petroleum. Appliances intended to use liquid petroleum had to be converted to use natural gas. Carolina was having to contribute substantially to these conversion costs. Transco's increase in rates, put in effect on 17 April 1961 under bond, would cost Carolina on its estimated use of gas for the fiscal year 1960-61 $269,000. Carolina's witness testified that he did not anticipate Federal Power Commission would approve Transco's proposed increase in full. (His estimate in that respect proved to be correct. Federal Power Commission actually allowed only a part of the increase sought by Transco. Nonetheless the part so allowed was substantial.)

The original schedule under which Tidewater purchased had an escalator clause providing for an increase or decrease in the rates charged it dependent upon increases or decreases in the cost of gas to Carolina. The new schedule applicable to Carolina omitted this clause. This omission and the asserted discrimination in the rate charged it as compared with rates charged other customers of Carolina form the basis of Tidewater's appeal.

Similar escalator clauses in other schedules were deleted from the new schedules. These clauses are advantageous to patrons when gas is in over supply and the producers reduce their price to dispose of their entire product; but the reverse is true when the product is scarce and the price goes up. Whether such a clause should or should not be incorporated in a particular rate schedule is more appropriate to a complaint case than to a general rate case.

In a complaint case the field of inquiry is limited to the comparatively narrow question of fair treatment to a group or to a class. Necessarily the Commission must be given broad discretion with respect to the extent which it will hear evidence relating to a particular schedule when the basic question for consideration is: Does the utility need an increase in rates to function effectively or, conversely, can the utility continue to operate, provide efficient service to its customers, and make a fair return to the owners of its properties, or may it so function after a reduction in rates? *Utilities Comm. v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325; *Utilities Comm. v. Light Co., supra.*

To require the Commission in a general rate case to go into minute details with respect to each of the proposed increases and the possible inequalities which might be created thereby would distract its attention from the crucial question, namely: What is a fair rate of return on company's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise? *Utilities Comm. v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469; *Utilities Comm. v. S.*, 239 N.C. 333, 80 S.E. 2d 133.

The other reason assigned by Tidewater for a reversal is an asserted discrimination in the rate which it pays under Schedule 2 and the rate charged under Schedule ME. Schedule 2 fixes the following rates:

Gas resold-interruptible 36¢ per MCF (an increase of 1.5%)

Gas resold-air conditioning 36¢ per MCF (a decrease of 25%)

All other gas 79.5¢ per MCF (an increase of 6.5%)

Schedule ME fixes the price of gas sold to the United States Government for military purposes and for military housing. It is not sold for resale. The rates charged under that schedule are:

Gas-interruptible 33.5¢ per MCF

Gas-air conditioning 50.73¢ per MCF

All other gas 70.73¢ per MCF

The company proposed no change in this schedule.

The rate charged for "all other gas" sold under Schedule ME is nearly 9¢ less than charged for "all other gas" sold under Schedule 2, but it will be observed that gas sold for air conditioning costs nearly 15¢ more when purchased under Schedule ME than when purchased under Schedule 2.

Several reasons might be suggested justifying these differences in rates. Whether the differences discriminate against Tidewater can be determined in a complaint hearing. The order which has been entered does not estop Tidewater from applying to the Commission for a modification, if in fact the order is discriminatory and to the detriment of Tidewater.

The questions presented by Rocky Mount's appeal, unlike the questions presented by Tidewater, are directed to the sufficiency of the evidence and findings to support a rate increase so as to provide a fair and reasonable return for the services furnished. It says in its brief: "The City acknowledges that the evidence shows that North Carolina

Natural has and is likely to continue to experience losses. However, its position is that this does not authorize the Commission to disregard the rate-making procedures required by law. Whether it does is the underlying question presented by this appeal."

Rocky Mount, after the hearing had concluded, asked the Commission to reopen the case and require Carolina to furnish evidence of (1) the original cost of Carolina's property, (2) replacement cost, (3) "trended cost" of the property, (4) income statement for the period beginning 1 January 1960 and ending 31 December 1960, (5) details with respect to the manner of computing depreciation, (6) a detailed showing with respect to the portion of the rate base allocated to the transmission system and the portion allocated to the distribution system of the business, and (7) similar breakdowns with respect to Carolina's income.

The request was denied. The parties, of course, had a right on cross-examination during the hearing to develop such facts as they deemed necessary for presentation of their case. They had a right to subpoena the company's records, but when the hearings had concluded and the parties had been given full opportunity to present their cases, it was a question for the Commission whether it had sufficient evidence to determine the issues raised by the petition and answers. It had the discretionary power to take additional evidence, but was not required to do so. *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708. Certainly there is nothing in this record to indicate the Commission acted capriciously.

Petitioner's exhibits included statements showing (1) its assets and liabilities, (2) actual and adjusted income for the fiscal year beginning 1 October 1959 and ending 30 September 1960, (3) average number of customers billed for gas used for differing purposes such as residential, commercial, industrial, interruptible, military, etc., (4) the quantity of gas used by each type of customer, (5) the amount of revenue provided by each type of user under the old and proposed rates, (6) the amount of gas used by Rocky Mount and the other municipalities purchasing for resale with a statement of the cost under the old and proposed rates, (7) a statement of the amount paid Transco for gas purchased under its old rate for the months of October, November, and December 1959 and January, February, and March 1960, with an estimate of the amounts to be paid for the remainder of the year under the higher rate charged by Transco, (8) estimates of gas to be sold each month during the year to begin 1 October 1960 and end 30 September 1961, and the income which would be received under the old and new rates, (9) the amount actually in-

vested in plant and working capital providing a rate base on 31 December 1960 in excess of $20,000,000, (10) estimated cash flow for the period 1 February through 30 September 1961, (11) the capital structure consisting of capital stock, mortgages, and income debentures.

The several schedules were explained in detail by witnesses for petitioner. On 31 December 1960 its mortgage and debentures represented 91.16% of its capital structure. When the application for an increase in rates was filed, the plant was a new one. It was not completed and put in operation until September 1959. Appellants offered no evidence indicating the work of construction was not carried out in an economical manner. There is nothing to suggest that replacement cost or "trended cost" differs materially from the cost of construction. In this situation it would seem unreasonable and unjust to Carolina to require it to make substantial expenditures for cost studies which could in no way affect the result.

Carolina did not base its application on a desire to provide a fair and reasonable return to its stockholders. It merely asked for funds sufficient to permit it to live until it has developed its business to a point where it can hope to make some, if not a fair, return to its owners. If and when that date arrives, appellant may file its petition with the Commission for a re-examination of the capital structure and what the company should be permitted to earn for the services which it renders.

We find nothing in the evidence indicating rate discriminations requiring Rocky Mount to charge its customers a higher rate than Carolina charges its customers for similar service. If Rocky Mount feels that the rate charged it necessarily results in a discrimination between those who buy from it for use and those similarly situated in other municipalities of the State who purchase from Carolina, Rocky Mount may, by complaint, request the Commission to correct that inequality.

Our examination of the record leads to the conclusion that the Commission had plenary evidence to support its findings, hence binding on appeal, G.S. 62-26.10, and these findings justify its order. It follows that the judgment of the Superior Court must be and is

Affirmed.

IN THE MATTER OF SADIE H. MARKHAM, PETITIONER.

(Filed 14 June 1963.)

1. Administrative Law § 4—

Certiorari lies only to review the judicial or quasi-judicial action of an inferior tribunal, commission or officer.

2. Municipal Corporations § 25—

A municipal planning and zoning commission has no legislative, judicial or quasi-judicial power, and the city council acts in the exercise of its legislative function in determining whether the commission's recommendations in regard to the enactment of zoning ordinances should be followed. G.S. 160-22 *et seq.*, G.S. 160-177, G.S. 160-175.

3. Same; Administrative Law § 4; Courts § 7—

Certiorari is improperly granted to review the refusal of a city council to amend the municipal zoning ordinance with respect to petitioner's lands, since the courts will not attempt to control the exercise of legislative power.

APPEALS by petitioner and respondents from *McKinnon, J.*, December Civil Session 1962 of DURHAM.

The appeals involve petitioner's request that her property in Durham, North Carolina, be rezoned.

Petitioner's property consists of four undeveloped tracts or parcels of land, all north of Club Boulevard and south of U.S. 70 By-pass and between Watts Street and Guess Road. Tract 1 (0.8 acre) and Tract 3 (3.5 acres), between Watts Street and Buchanan Boulevard (Extension), are now classified in R-8 (One Family Residence) Zone. Tract 2 (0.6 acre) and Tract 4 (1.2 acres), between Buchanan Boulevard (Extension) and Guess Road, are now classified in RA-16-24 (Apartment Residence) Zone. (Note: A lot or parcel of land now owned by petitioner lies between Tract 1 and Tract 3 and another such lot or parcel lies between Tract 2 and Tract 4.) At all times since the adoption in 1926 of the Durham Zoning Ordinance petitioner's said land has been zoned for residential purposes.

On June 28, 1960, petitioner, by letter to the City Planning and Zoning Commission (Commission), requested that her property be rezoned and classified in C-1 (Local Community Commercial) Zone. (Note: Thereafter she amended her request and asked that her property be classified in either C-1 Zone or in C-1A (Shopping Center Commercial) Zone. After consideration thereof at it meeting on July 19, 1960, the Commission recommended to the City Council of Durham (Council) that petitioner's request be denied. Thereafter, the Commission granted petitioner's motion for a reconsideration of her request.

On October 18, 1960, after a further hearing, the Commission again recommended to the Council that petitioner's request be denied.

On November 7, 1960, notwithstanding the Commission's recommendation, the Council voted to call a public meeting to hear and act upon petitioner's request. At this meeting, held November 21, 1960, petitioner amended her request by asking, in the alternative, that only Tract 3 be rezoned. Arguments in favor of petitioner's request were presented. Petitioner's request was opposed by an attorney appearing on behalf of Northgate Shopping Center, Inc., owner of adjacent property. At the conclusion of the hearing, the Council "denied petitioner's request for an ordinance rezoning her property."

On November 29, 1960, Clark (Heman R.), J., upon petitioner's application therefor, issued a writ of *certiorari* to the City Clerk reciting that petitioner had applied for such writ "to review the action of the City Council of the City of Durham in denying her requested amendment to the City Zoning Ordinance reclassifying her property on Watts Street to a commercial zone." The City Clerk was directed "to certify or cause to be certified and return to this Court the record in the said matter and to include in such record the minutes of the meeting of the City Council of November 21, 1960, and all affidavits, maps, plats, and all other evidence presented." A notice that petitioner would apply for such writ and a copy of the petition therefor were served on the Mayor.

On December 8, 1960, "the City of Durham, the City Council of the City of Durham, and the City Clerk of the City of Durham, appearing specially only for the purpose of the Motion and for no other purpose," moved that the proceeding be dismissed on the ground the Council's decision "not to pass an ordinance amending its zoning ordinance is not reviewable by the Courts by means of a Writ of Certiorari as a substitute for an appeal." This motion is signed by C. V. Jones as "Attorney for Respondents." It was denied October 20, 1961, by order of Clark (Heman R.), J., and respondents excepted. Thereafter, "the respondents, City of Durham, E. J. Evans, Mayor, Luther Barbour, Bascom Baynes, Walter Biggs, Mrs. R. O. Everett, Vance Fisher, Floyd Fletcher, James R. Hawkins, Charles Steele and J. S. Stewart, members of the City Council of the City of Durham, and Elsie N. Jones, City Clerk of said City," expressly reserving "all rights under their Motion to Dismiss Proceeding heretofore filed in this proceeding, and under the Exception duly noted to the action of the Court in overruling said motion and signing the order dated October 20, 1961," answered the allegations of the petition for writ of *certiorari*.

The cause was heard by McKinnon, J., "upon the record certified to this Court by the City Clerk of the CITY OF DURHAM pursuant to

a writ of Certiorari issued by Judge Heman Clark upon Petition for Writ of Certiorari heretofore filed as appears in the record, and upon stipulations of Counsel and facts included in such stipulations . . ." The judgment recites, *inter alia,* the following: "The Court being of the opinion that this case is properly to be considered upon the record of proceedings before the Planning and Zoning Commission of the City of Durham, and the record of proceedings before the City Council of the City of Durham, including the attached exhibits and the stipulations of Counsel, . . ." Again: "And the Court being of the opinion that upon the record the question of whether the decision of the City Council of the City of Durham in refusing to amend its zoning ordinance as requested by Petitioner is an unreasonable, arbitrary, or unequal exercise of power, or is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, or contravenes the North Carolina or United States Constitutions, is fairly debatable and that the clear invalidity of the action of the City Council has not been shown . . ."

Judge McKinnon entered judgment as follows: "IT IS THEREFORE ORDERED that the Writ herein be dismissed and the action of the City Council is affirmed."

Petitioner excepted to said judgment and appealed. Her specific exception is in these words: "To the conclusion of the Court that upon the record as certified by the City Clerk of the City of Durham the question of whether the decision of the City Council of the City of Durham in refusing to amend its Zoning Ordinance as requested by the petitioner is an unreasonable, arbitrary, or unequal exercise of power, or is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, or contravenes the North Carolina or United States Constitutions, is fairly debatable and that the clear invalidity of the action of the City Council has not been shown, THE PETITIONER OBJECTS AND EXCEPTS."

Respondents excepted and appealed. Their specific exception is in these words: "Respondents except to so much of the Judgment signed by the Court as holds that this case is properly considered upon the Writ of Certiorari and that the Court has jurisdiction to hear and determine the case upon such Writ. EXCEPTION OVERRULED, AND RESPONDENTS APPEAL to the Supreme Court of North Carolina from such ruling and from the Judgment of Heman Clark, Judge Superior Court, from which an exception was preserved as appears in the record."

Blackwell M. Brogden and Charles B. Markham for petitioner.
Claude V. Jones for respondents.

BOBBITT, J. The question presented by respondents' appeal, as stated in the briefs, is this: "May a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance so as to change certain property located in Residence and Apartment Residence Zones to a Commercial Business Zone, be reviewed directly by the Superior Court by means of Certiorari directed to the City Council, in the absence of statutory provision for such procedure?"

"At common law and under the practice in most jurisdictions, the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature. It does not lie to review or annul any judgment or proceeding which is legislative, executive, or ministerial rather than judicial. The writ does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions." 10 Am. Jur., Certiorari § 10; 14 C.J.S., Certiorari § 18(b).

The writ of *certiorari* issues only to review the judicial or quasi-judicial action of an inferior tribunal, commission or officer. *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 312, 22 S.E. 2d 896; *Belk's Department Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *S. v. Simmington,* 235 N.C. 612, 613, 70 S.E. 2d 842; *Realty Co. v. Planning Board,* 243 N.C. 648, 655-656, 92 S.E. 2d 82.

The General Assembly has delegated to "the legislative body" of cities and incorporated towns the power to adopt zoning regulations and, from time to time, to amend or repeal such regulations. G.S. 160-172 *et seq.*; *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880; *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189.

The "legislative body" of the City of Durham is its City Council. "Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function . . ." *S. v. Freshwater,* 183 N.C. 762, 111 S.E. 161. "In enacting a zoning ordinance, a municipality is engaged in legislating . . ." *Marren v. Gamble, supra.* It may amend or repeal such ordinance only by acting legislatively. *Paliotto v. Harwood,* 217 N.Y.S. 2d 864. When acting upon a request for amendment of its zoning ordinance, the City Council of Durham acts in its legislative capacity and not in a judicial or quasi-judicial capacity.

In *Rheinhardt v. Yancey,* 241 N.C. 184, 84 S.E. 2d 655, the plaintiffs sought to restrain the members of the City Council of Gastonia from passing an ordinance relating to annexation. This Court, in ordering the temporary restraining order dissolved, said: "Ordinarily, equity deals with conduct, actual or threatened, not with how the members of legislative bodies vote. In reaching the conclusion stated, we are mindful of the importance of keeping in proper relation and in

careful balance the power and authority vested in our distinct, coordinate departments of government, legislative, executive and judicial; for, whatever may be the merits of plaintiffs' cause, a contrary rule would open the door to suits to restrain the adoption of ordinances to such extent as to interfere seriously with the proper functioning of the legislative body. Too, a contrary rule, if carried to its logical conclusion, would warrant, if sufficient facts were alleged, judicial restraint of members of the General Assembly from the passage of legislation alleged to be in conflict with provisions of our organic law. This cannot be done." It was held in *State v. Hardy* (La.), 157 So. 130, the court had no jurisdiction to hear a suit to restrain a city council from passing an amendment to its zoning ordinance reclassifying certain property in such manner as to permit its use for commercial purposes.

The legal principles stated in the quotation from *Rheinhardt* apply equally where the plaintiff seeks by mandamus or mandatory injunction to compel a municipal "legislative body" to enact, amend or repeal an ordinance relating to zoning. *Northwood Properties Co. v. Perkins* (Mich.), 39 N.W. 2d 25; *Paliotto v. Harwood, supra.* In *Northwood, the action* was for a writ of mandamus directing the defendant city inspector to issue to the plaintiff a building permit for the erection of multiple dwellings on certain property owned by the plaintiff and directing the defendant city, mayor, and city commissioners to amend the city zoning ordinance by changing said property from a residence "A" classification, in which single residences only were permitted, to a residence "B" classification where the erection of multiple dwellings was permitted. On the defendants' appeal, the judgment of the lower court ordering issuance of such writ was reversed. The court, in opinion by Dethmers, J., said: "While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. (Citations) The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance."

"The courts may not interfere with or control a municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended." 101 C.J.S., Zoning § 323, pp. 1115-1116; *Randall v. Township Board of Meridian Township* (Mich.), 70 N.W. 2d 728; *Northwood Properties Co. v. Perkins, supra; Paliotto v. Harwood, supra; Schoenith v. City of South Miami* (Fla.), 121 So. 2d 810; *State v. Hardy* (La.), *supra; People v. City of Rockford* (Ill.), 87 N.E. 2d 660; *Dunbar v. City of Spartanburg* (S.C.), 85 S.E. 2d 281; *Lang v.*

Town Council (R.I.), 108 A. 2d 166; *Beauregard v. Town Council* (R.I.), 107 A. 2d 283; *Herzog v. City of Pocatello* (Idaho), 363 P. 2d 188; *Edward H. Snow Const. Co. v. City of Albuquerque* (N.M.), 333 P. 2d 877; *State v. City of Raytown* (Mo.), 289 S.W. 2d 153. In *Herzog*, after the Board of Commissioners had denied the owner's request that his property be rezoned, the owner (plaintiff) instituted "this action seeking to compel appellant city to permit respondents to use their said property for the purpose of constructing and maintaining an automobile service station thereon."

"In the absence of statutory authority therefor, certiorari usually is not a proper remedy to test the legislative action of a municipality as to zoning." 101 C.J.S., Zoning § 335. Specifically, it has been held that the refusal by a city council to amend the zoning ordinance to change the classification of specific property in accordance with the request of the owner was an exercise of its legislative function and not subject to judicial review on *certiorari*. *Dunbar v. City of Spartanburg, supra; Lang v. Town Council, supra; Beauregard v. Town Council, supra.* Upon like ground, it has been held that the enactment by a municipal legislative body of an ordinance rezoning property is not subject to judicial review on *certiorari*. *Edward H. Snow Const. Co. v. City of Albequerque, supra; State v. City of Raytown, supra.*

We are advertent to decisions in New Jersey in which it is held that *certiorari* is the appropriate remedy to test the reasonableness of a zoning ordinance. *Brown v. Terhune* (N.J.), 18 A. 2d 73. The New Jersey procedure as set forth in *Payne v. Borough of Sea Bright* (N.J.), 187 A. 627, is approved in *Eastern Boulevard Corporation v. Board of Com'rs of Town of West New York* (N.J.), 11 A. 2d 832. See also *Cliffside Park Realty Co. v. Borough of Cliffside Park* (N.J.), 114 A. 797. It would serve no useful purpose to discuss the distinctive features of the New Jersey procedure.

We have considered the decisions referred to in the excellent briefs filed in behalf of petitioner. However, we find no decision in New Jersey or elsewhere in which the failure of a city council to enact a proposed amendment to a zoning ordinance has been successfully challenged by *certiorari* or otherwise.

The Planning and Zoning Commission (G.S. 160-22 *et seq.* and G.S. 160-177) had no legislative, judicial or quasi-judicial power. Its report (recommendation) did not restrict or otherwse affect the legislative power of the City Council. The hearings before the Planning and Zoning Commission as well as the hearings before the City Council (G.S. 160-177 and G.S. 160-175) are required in order to afford "parties in interest and citizens" an opportunity to be heard with

reference to *proposed legislation.* Whether the zoning ordinance should be amended as requested by petitioner was for determination by the City Council in the exercise of its purely legislative function.

The Planning and Zoning Commission is separate and distinct from the Board of Adjustment appointed in accordance with G.S. 160-178. The Board of Adjustment "is clothed, if not with judicial, at least with *quasi*-judicial power, it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature." *Harden v. Raleigh,* 192 N.C. 395, 135 S.E. 151; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1. Even so, it "is not a law-making body" and may not disregard zoning regulations adopted by the "legislative body," to wit, the City Council. "It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardship.'" *Lee v. Board of Adjustment, supra.* "Every decision of such board shall, however, be subject to review by proceedings in the nature of certiorari." G.S. 160-178; *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1; *Lee v. Board of Adjustment, supra; Chambers v. Board of Adjustment,* 250 N.C. 194, 198, 108 S.E. 2d 211; *Jarrell v. Board of Adjustment,* 258 N.C. 476, 480, 128 S.E. 2d 879.

The statute (G.S. Chapter 160, Article 14) contains no provision for judicial review by *certiorari* or otherwise of the action of the "legislative body" of cities and towns with reference to the enactment, amendment or repeal of zoning regulations.

We have not overlooked *Bryan v. Sanford,* 244 N.C. 30, 92 S.E. 2d 420, where this Court, as stated correctly in the third headnote in our Reports, held: "Mandamus will lie to compel a municipality to zone one of four corners at an intersection in the same manner as it had zoned two other corners at the intersection, such action being a ministerial duty of the city under G.S. 160-173." In the specific factual situation described therein, G.S. 160-173 expressly deprives a city council of its legislative discretion and authority.

Pursuant to petitioner's request, hearings were held in accordance with statutory procedure. No action was instituted by petitioner against the City of Durham or against its Mayor or against the members of its City Council. Until the City Council refused to enact the (specific) ordinance submitted by petitioner, relating solely to petitioner's said property, petitioner sought to invoke the legislative powers of the City Council. Neither the City of Durham nor its Mayor nor the members of its City Council were in the position of adverse litigant. They were cast in this new role when the motion (under special appearance) to dismiss the writ of *certiorari* was overruled and

they were required to answer the allegations of the petition for *certiorari.*

For the reasons stated, we are of opinion, and so decide, that the court had no jurisdiction to review on *certiorari* or otherwise the City Council's failure to amend the zoning ordinance as requested by petitioner. The said motion of "respondents" should have been allowed. The court was in error in undertaking to pass upon the "merits" of petitioner's asserted grievance. Hence, the judgment affirming *the action* (in refusing to enact the requested ordinance) of the City Council is vacated; and the proceeding is remanded to the superior court for entry of an order dismissing the writ of *certiorari* and the petition therefor.

The real controversy would seem to be whether the zoning ordinance now in effect is invalid as to petitioner's property. Appropriate procedures are available for a judicial determination thereof. *Clinard v. Winston-Salem,* 217 N.C. 119, 6 S.E. 2d 867, 126 A.L.R. 634; *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870; *Penny v. Durham,* 249 N.C. 596, 107 S.E. 2d 72; *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817.

Error and remanded.

J. B. McCALLUM, JR., ADMINISTRATOR OF THE ESTATE OF MRS. MAY McCALLUM v. OLD REPUBLIC LIFE INSURANCE COMPANY.

(Filed 14 June 1963.)

1. Insurance § 7—

Insurance contracts, like other written instruments, may be reformed by equity for mutual mistake, inadvertence, or the mistake of one party superinduced by the fraud or inequitable conduct of the other.

2. Insurance § 10—

The parties may agree upon the effective date of a policy of insurance, and if a policy is dated the contract ordinarily takes effect from such date unless a different date is specified therein, but the date is not conclusive and equity may reform the policy to specify a different date in proper instances to make the instrument conform to the intent of the parties or to prevent fraud.

3. Pleadings § 12—

A pleading will be liberally construed on demurrer, and the demurrer admits for its purposes the truth of factual averments well stated and

the relevant inferences of fact reasonably deductible therefrom, but does not admit inferences or conclusions of law.

4. Insurance §§ 7, 10— Complaint held to state cause of action to reform policy in regard to the term of coverage.

A certificate of insurance under a group policy was issued for a term of twelve months to a borrower in the amount of the loan which was to be repaid in ten months. The lender's draftsman typed the figures "12/31/58" as the effective date and "12/31/59" as the expiration date of the certificate, but the papers executed by the borrower were not returned to the lender until the first or second of the following January and the loan was not made until the third. Plaintiff alleged that the borrower intended the effective date of the certificate to be the date of the loan and that the dates inserted in the certificate were inserted through mutual mistake or mistake induced by fraud. *Held:* The amended complaint states a cause of action for reformation and it was error to sustain demurrer thereto.

5. Same; Reformation of Instruments § 2—

The failure of an 83 year old insured, in feeble health, to read her certificate of term insurance as to its effective date and expiration date, *held* not to bar as a matter of law an action to reform the certificate to make it conform with the intention of the parties as to the effective and expiration dates.

APPEAL by plaintiff from *Bickett, J.*, August Civil Term 1962 of ROBESON.

Civil action to reform and enforce a certificate of insurance issued under a Creditor's Group Insurance Policy, heard upon a demurrer to an amended complaint.

From a judgment sustaining the demurrer, plaintiff appeals.

King & Cox by Jennings G. King for plaintiff appellant.
Henry & Henry and Vance B. Gavin for defendant appellee.

PARKER, J. This is a summary of the essential allegations of the amended complaint, except when quoted:

The defendant, Old Republic Life Insurance Company, under the terms of a Creditor's Group Insurance Policy issued by it to Lumberton Production Credit Association, agreed to insure the lives of certain debtors of such association, and this association was authorized, under the terms of this master policy, to furnish to certain of its debtors individual certificates of insurance describing the indemnities to which such debtors were entitled, as set out in the master policy. A certificate of insurance so issued was payable, upon the death of the insured, to the Lumberton Production Credit Association as beneficiary as its

interest might appear, to be applied by the association to the discharge of the indebtedness then owing by the debtor to the association. Insurance proceeds remaining after the payment of such indebtedness, if any, were payable in the event of death of the debtor to the estate of the debtor or in lieu thereof, at the option of defendant, to certain specified persons by reason of their having incurred expenses occasioned by support, illness, or burial of the insured debtor.

On 30 December 1958 Mrs. May McCallum and her son, J. B. McCallum, Jr., requested the Lumberton Production Credit Association to make them a loan in the amount of $3,000 to be repaid on 1 October 1959, which was to be secured in part by a certificate of insurance upon the life of Mrs. May McCallum in the amount of $3,000, to be issued by defendant to the association under its Creditor's Group Insurance Policy. In response to their request, employees of the association in its office in Lumberton typed and delivered to J. B. McCallum, Jr., an insurance application form which they dated 30 December 1958, together with a note and crop lien and chattel mortgage dated 30 December 1958, so that he might take these instruments to Maxton to be executed and delivered by his mother at a later date.

Mrs. May McCallum, on the night of 30 December 1958, signed and acknowledged these instruments before a notary public, and they were returned to the association on 1 or 2 January 1959.

On 3 January 1959 the Lumberton Production Credit Association accepted these instruments, and made to Mrs. May McCallum and her son a loan in the amount of $3,000. The crop lien and chattel mortgage were filed for recordation on 6 January 1959, and were duly registered that day in the Robeson County Registry.

On 3 January 1959, the day the loan was made, defendant executed and delivered to Mrs. May McCallum, under its Creditor's Group Insurance Policy, certificate of insurance PLD No. 520,909, a copy of which is attached to the amended complaint and made a part thereof, and the association deducted from the proceeds of its loan to the McCallums and remitted to defendant the sum of $150 representing the premium paid to defendant for its certificate of insurance insuring the life of Mrs. May McCallum for one full year in the amount of $3,000 from the date upon which its certificate of insurance was issued and delivered, payable as provided by the terms of its Creditor's Group Insurance Policy and certificates of insurance issued pursuant thereto, as set forth above.

The certificate of insurance issued to Mrs. May McCallum on 3 January 1959 contained the following words and figures:

"Effective date: 12-31-58

Expiration date: 12-31-59

Months: 12 Mo."

The words before the colons were parts of the printed form; the figures and "Mo." after the colons were inserted by the use of a typewriter.

"* * *all parties intended that the certificate of insurance should be issued and dated at the time that the loan was actually made; and that it was not their intention that the certificate should be dated prior to the time when it was actually issued and delivered. The true agreement between the parties, as the plaintiff is informed and believes, was that the effective date of the certificate should be January 3, 1959; that the expiration date should be January 3, 1960, and that the term should be 12 months. The certificate, as written, did not truly and correctly embody the agreement between Mrs. May McCallum and the defendant, in that the effective date was recited to be 12/31/58, and the expiration date was recited to be 12/31/59.

"* * *the figures '12/31/58' and the figures '12/31/59' were inserted in the certificate through inadvertence upon the part of the draftsman who filled out the printed form and by mutual mistake upon the part of the defendant and Mrs. May McCallum; or, if the figures were not inserted by mistake on the part of the defendant, then that the defendant caused them to be inserted with the intent to defraud plaintiff's intestate by dating the policy back to a time when it could not possibly have been in force and effect."

When the certificate of insurance was issued, Mrs. May McCallum was 83 years old and very feeble, and this was well known by defenddant's agent. By reason of her age and condition, she did not read the certificate of insurance, and did not know the certificate of insurance had a date prior to its issuance and delivery, and such was not known by her during her life.

The loan by the association to Mrs. May McCallum and her son was paid in full on 4 December 1959.

Mrs. May McCallum died on 2 January 1960, and under the terms of defendant's certificate of insurance, the amount of the insurance is payable to her estate. Plaintiff is the administrator of her estate. Defendant refuses to pay any part of its certificate of insurance.

Defendant demurred to the amended complaint on the ground that it alleged no facts constituting mutual mistake of the parties, and no facts constituting a mistake on the part of Mrs. May McCallum induced by fraud on the part of the defendant, and no facts constituting fraud on the part of the defendant, which would entitle plaintiff to reform and enforce the certificate of insurance sued upon.

The Court said in *Insurance Co. v. Lambeth,* 250 N.C. 1, 15, 108 S.E. 2d 36, 45, quoting from *Williams v. Insurance Co.,* 209 N.C. 765, 769, 185 S.E. 21, 23, and citing additional authorities in support of the quotation from that case: " 'It is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for mutual mistake, inadvertence, or the mistake of one superinduced by the fraud of the other or inequitable conduct of the other.' *Williams v. Insurance Co.,* 209 N.C. 765, 769, 185 S.E. 21; 29 Am. Jur., Insurance § 241; 44 C.J.S., Insurance §§ 278, 279; 7 Appleman, Insurance Law and Practice, § 4256." To the same effect, 76 C.J.S., Reformation of Instruments, sec. 30; 45 Am. Jur., Reformation of Instruments, sec. 62.

In 76 C.J.S., Reformation of Instruments, sec. 29, b, (1), pp. 371-2, it is said: "Fraud or inequitable conduct, to warrant relief by way of reformation, has been held to consist in doing acts, or omitting to do acts, which the court finds to be unconscionable, as * * * in drafting, or having drafted, an instrument contrary to the previous understanding of the parties and permitting the other party to sign it without informing him thereof* * *."

As a general rule, the parties may agree as to the terms and conditions and effective date of a policy of insurance, provided, of course, that they do so voluntarily, and are not influenced by fraud, misrepresentation or similar elements, and that the terms and conditions are not in violation of legal rules and requirements. *Lentin v. Continental Assurance Co.,* 412 Ill. 158, 105 N.E. 2d 735, 44 A.L.R. 2d 463; 29 Am. Jur., Insurance, sec. 310; 44 C.J.S., Insurance, sec. 223. The parties may expressly agree that a policy of insurance be antedated and take effect from that date. *Mutual Life Ins. Co. v. Hurni Packing Co.,* 263 U.S. 167, 68 L. Ed. 235, 31 A.L.R. 102; Couch on Insurance, 2d Ed., Vol. 1, sec. 8:2, Dating Policy. In this section of Couch it is stated: "It is customary, but not necessary, to date policies. If the policy is dated, however, the contract of insurance is deemed to have been made as of that date, and takes effect therefrom, unless a different day is specified therein, or it is apparant from the construction of the contract that another day was intended. * * *The date is not conclusive evidence of the fact that a contract of insurance was completed and was to become effective as of the date written in the policy, and is not necessarily the effective date of the policy."

G.S. 1-151 requires us to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. In passing on defendant's demurrer, we are confined to a consideration of the amended complaint, and the certificate of insurance made a part

thereof. *Moore v. W O O W, Inc.*, 253 N.C. 1, 116 S.E. 2d 186; *Little v. Oil Corp.*, 249 N.C. 773, 107 S.E. 2d 729. The demurrer to the amended complaint admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deductible therefrom. But it does not admit inferences or conclusions of law asserted by the pleader. *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129; Strong's N. C. Index, Vol. 3, Pleadings, pp. 625-627. The admissions inherent in a demurrer are not absolute, because the conditional admissions made by a demurrer forthwith end if the demurrer is overruled. *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384.

The demurrer admits all the allegations of fact in the amended complaint in respect to the time and manner in which Mrs. May McCallum and her son applied for a $3,000 loan from Lumberton Production Credit Association to be paid within ten months, and for insurance upon the life of Mrs. May McCallum, an 83-year-old woman in very feeble health, whose age and physical condition were well known to defendant's agent, to secure in part the requested loan, and also in respect to the dates and other transactions alleged therein. That Mrs. McCallum executed a note and crop lien and chattel mortgage to secure in part the requested loan, and applied for insurance to secure in part the requested loan, and all these instruments were returned to the association on 1 or 2 January 1959. That on 3 January 1959 the association accepted these instruments and made Mrs. McCallum and her son the requested loan, and on this same day, 3 January 1959, Mrs. McCallum paid to defendant a premium of $150 for the certificate of insurance insuring her life for one year in the amount of $3,000. The agreement and intention of the parties were that the certificate of insurance should be dated and issued at the time when the loan by the association was actually made, but in spite of this agreement and intention of the parties, through inadvertence upon the part of the draftsman and by mutual mistake of the parties, the effective date of the certificate of insurance was written therein to be 31 December 1958 and its expiration date 31 December 1959, which does not express the real agreement and intention of the parties. We consider these allegations as to the agreement and intention of the parties to be allegations of subsisting facts, and not mere conclusions. In *Finishing and Warehouse Co. v. Ozment*, 132 N.C. 839, 44 S.E. 681, the Court held that in an action to reform a deed for mistake it was competent for a witness to testify as to the intention of the parties. That the loan was paid in full on 4 December 1959, and that Mrs. May McCallum died on 2 January 1960. That Mrs. McCallum by reason of her age and con-

dition did not read the certificate of insurance, and died without knowing that its effective date as written in the certificate of insurance was 31 December 1958.

This Court speaking by Brown, J., in *Shook v. Love,* 170 N.C. 99, 86 S.E. 1007, said:

> "The power of a court of equity to reform written instruments so as to speak the real contract of the parties is beyond question, but the power is exercised along well-known lines. An instrument will not be reformed because of the mistake of one of the parties unless brought about by the fraud of the other, but will be reformed where the mistake is mutual upon the part of all the parties, or when it is the mistake of the draftsman who is entrusted to prepare the instrument."

The amended complaint alleges sufficient allegations of fact for reformation of the certificate of insurance on the ground of mutual mistake of the parties or a mistake of Mrs. McCallum superinduced by inequitable conduct on the part of defendant in drafting or having drafted the effective date and the expiration date in the certificate of insurance contrary to the previous agreement and intention of the parties to constitute a cause of action for reformation, and to survive the challenge of defendant's demurrer, unless, as defendant contends, Mrs. May McCallum's failure to read the certificate of insurance bars the action for reformation.

The conclusion we have reached is sustained by *Kentucky Home Mut. Life Ins. Co. v. Marshall,* 291 Ky. 120, 163 S.W. 2d 45, as modified on denial of rehearing 9 June 1942. This was an action to reform a certificate issued under a group policy by Sylvia Marshall, beneficiary of a certificate of insurance issued to John Marshall, deceased, against Kentucky Home Mutual Life Insurance Company. From a judgment for plaintiff, defendant appealed. The judgment was affirmed. In its opinion, the Court said:

> "We turn now to the question of the Company's demurrer to Mrs. Marshall's petition. It is insisted that an insurance contract can be reformed only because of mutual mistake of the parties, or mistake, inadvertence or accident on one side, and fraud or negligible conduct on the other, *Flimin's Adm'x v. Metropolitan Life Ins. Co.,* 255 Ky. 621, 75 S.W. 2d 207, and that Mrs. Marshall's petition did not allege facts sufficient to meet either proposition. We think otherwise. The petition set forth the time and manner in which Marshall applied for membership in the As-

sociation, and for insurance, and all the dates and transactions which we have heretofore reviewed in connection with the policy. It was alleged also that the policy became effective on February 23, 1939, the date it was issued by the Company and delivered to the Association, and that the Company wrongfully and without legal right postdated the certificate to March 9th. The Company insists that the allegations just mentioned were only conclusions of the pleader, and also that at most the petition shows only a unilateral mistake on the part of Marshall. Such a mistake is not a ground for reformation. *Kentucky Title Company v. Hail,* 219 Ky. 256, 292 S.W. 817. We are not in accord, however, with the Company's interpretation of the petition to the effect that it is impossible to determine whether Mrs. Marshall sought a reformation of the contract on the ground of a mutual mistake, or on the ground of fraud or inequitable conduct on the part of the Company. It is our view, when the petition is examined as a whole, that there was a charge of inequitable conduct on the part of the Company in postdating the certificate. We have already pointed out that the Company had no right to do this, under the circumstances, though it must be admitted that the master policy could be so amended or changed as to permit the postdating of certificates in the future. We do not mean to say that the Company maliciously singled out Marshall and deliberately perpetrated a fraud upon him, but rather that the mistaken belief on the part of the Company that it could postdate policies brought about an inequitable result in so far as new members were concerned. This constituted inequitable conduct on the part of the Company, and, as indicated, we think the petition alleged facts which warranted the reformation of the certificate. We have already indicated that Marshall had every right to believe, and certainly he did believe, that his insurance would become effective upon the approval of his application and the payment of his advance premium. As we have noted, the master policy provided, 'Upon the approval of such application by the Company and payment of the advance premium to cover, new members will be insured hereunder.' "

The conclusion we have reached is also sustained by the following cases: *Kansas City Life Ins. Co. v. Cox,* 104 F. 2d 321; *Flickinger v. Farmers' Mut. Fire & Lightning Ins. Ass'n. of Story County, Iowa,* 136 Iowa 258, 113 N.W. 824; *Bleam v. Sterling Ins. Co.,* 360 Mich.

208, 103 N.W. 2d 466; *Prudential Fire Ins. Co. v. Stanley,* 191 Okla. 506, 131 P. 2d 88.

The Court said in *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135:

> "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."

We have held in *Bank of Union v. Redwine,* 171 N.C. 559, 88 S.E. 878, and in *Finishing and Warehouse Co. v. Ozment, supra,* that a person's failure to read an instrument before signing it does not necessarily or always prevent reformation. To the same effect see 45 Am. Jur., Reformation of Instruments, sec. 79; 29 Am. Jur., Insurance, p. 712; Anno. 81 A.L.R. 2d, pp. 16-18; 76 C.J.S., Reformation of Instruments, pp. 399-400; Malone, "The Reformation of Writings under the Law of North Carolina," 15 N.C. L.R. 155, 174-6. On page 176 Malone, after reviewing a number of our decisions, states: "Certainly the rule that failure to read is a positive bar to recovery cannot be accepted at its face value."

In *Coppersmith v. Insurance Co.,* 222 N.C. 14, 21 S.E. 2d 838, which is cited in *Setzer v. Insurance Co., supra,* in support of the part we have quoted, it appeared that plaintiff requested his agent to obtain a policy of fire and marine insurance; that defendant issued a policy which provided that $1,000 should be deducted from the total amount of any claim, whereas plaintiff contended that the deduction clause should not have applied to a loss by fire; that the defendant sent the policy to plaintiff's insurance agent, who retained it; and that plaintiff's officers did not see it until a loss by fire occurred 20 days after it was issued. The court denied reformation because there was no mutual mistake. The court then said that plaintiff had full opportunity to read the policy but did not do so, and that equity will not afford relief to those who sleep on their rights or whose plight is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man.

On 3 January 1959 Mrs. McCallum paid defendant a premium of $150 for a certificate of insurance upon her life for one year. It would seem that no reasonable and prudent person exercising due diligence would anticipate that when the insurance was issued to secure in part her loan from the association it would bear an effective date several

days before the loan was actually made to her and several days before the certificate of insurance was issued. No rights of innocent third parties are involved. Defendant will not be prejudiced by reformation of the effective date and the expiration date of the certificate of insurance so as to conform to the agreement and intention of the parties, because it will merely be required to pay what it contracted to pay, and for which insurance it has been paid a premium of $150. Considering the admissions made by the demurrer of all well-pleaded facts and all reasonable inferences to be drawn therefrom, and that when the certificate of insurance was issued Mrs. McCallum was 83 years old and very feeble, which condition was well known to defendant's agent, and indulging the reasonable inference that her very feeble condition did not improve before her death on 2 January 1960, it is our opinion that Mrs. May McCallum did not have a fair opportunity to read the certificate of insurance. Consequently, a court of equity should not bar its doors to this action for reformation on the ground that Mrs. McCallum did not read the certificate of insurance.

The amended complaint on its face shows no ratification or waiver or estoppel as a matter of law by Mrs. McCallum so as to bar the action. 45 Am. Jur., Reformation of Instruments, sec. 75; 76 C.J.S., Reformation of Instruments, secs. 31, 32.

We are concerned here only with pleadings. The Creditor's Group Insurance Policy issued by defendant to the association is not in the record.

The demurrer was improvidently sustained.

Reversed.

WINSTON-SALEM FIRE FIGHTERS CLUB, INC. v. STATE FARM FIRE AND CASUALTY COMPANY.

(Filed 14 June 1963.)

1. Insurance § 7—

Allegations and evidence to the effect that at the time the policy was issued insured's agent advised insurer's agent to the effect that at some future time the property would be converted from a dwelling to a club house, does not make out a cause of action to reform the policy to describe the premises as a club house, there being neither allegation nor evidence of mutual mistake or mistake induced by fraud.

2. Insurance § 5—

Insurer who has knowledge at the time of the issuance of the policy of the existence of conditions avoiding the policy under its terms will be held

to have waived the policy provisions so far as they relate to the then existing defects.

3. Insurance § 74—

Provisions of a fire insurance policy relieving insurer of liability for loss occurring while the property is vacant are reasonable and enforceable.

4. Same; Insurance § 5—

Where the premises do not become vacant until after the issuance of the policy, the knowledge of insurer's agent of the vacancy cannot waive the provisions of the policy suspending the insurance if the premises should become vacant for a period in excess of sixty days, and the evidence in this case *is held* insufficient to show that the premises were vacant at the time the policy was issued.

5. Same—

The premises in question were described in the policy as a dwelling, but insured contended that at the time the policy was issued insurer's agent was advised that the insured had purchased the property for use as a club house. The evidence disclosed that at the time of the fire the premises had not been occupied for any purpose for a period in excess of sixty days. *Held:* Nonsuit was proper, since vacancy for a period in excess of sixty days suspended the insurance regardless of whether the premises were used as a dwelling or a club house.

6. Insurance § 74—

The term "occupied" as used in a policy of fire insurance imports a practical and substantial occupancy and does not include a mere trivial or transient use.

APPEAL by plaintiff from *Gambill, J.*, October 1962 Term of FORSYTH.

Plaintiff brings this action to recover the insured value of its building destroyed by fire on 6 May 1961. The Building was insured by defendant by policy in the statutory standard form, G.S. 58-176, to which was attached Form 256-2, "DWELLING AND CONTENTS FORM (For Use in Writing Fire or Fire With Extended Coverage)." The building was described in the policy as "THE TWO STORY, APPROVED ROOF, FRAME, ONE FAMILY DWELLING. . ." The policy was dated 19 July 1960 and insured for a term of five years.

To relieve it of liability, defendant alleged the building had been vacant and unoccupied for more than ninety days at the time of the fire and by the express language of the policy and endorsement such nonoccupancy and vacancy suspended its obligation and relieved it of liability for loss occurring when so vacant or unoccupied.

After defendant answered, plaintiff amended its complaint. It alleged: The building was not occupied as a dwelling when the policy

was issued and was not intended to be used as a dwelling, but was purchased for use as a club house; defendant knew these facts when it issued the policy; delivery of the policy with knowledge of the vacancy and purpose to which property was to be put constituted a waiver of the policy provisions relating to occupancy and use of the building as a dwelling.

Plaintiff stipulated the building had not, when the fire occurred, been occupied as a private dwelling within the time required by the policy.

At the conclusion of plaintiff's evidence the court sustained defendant's motion for nonsuit.

White and Crumpler by James G. White, Leslie G. Frye, and Harrell Powell, Jr., for plaintiff appellant.

Deal, Hutchins and Minor by Roy L. Deal for defendant appellee.

RODMAN, J. The policy as prescribed by statute, G.S. 58-176, provided: "**Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring** (a) while the hazard is increased by any means within the control or knowledge of the insured, or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days. . ." The endorsement "DWELLING AND CONTENTS FORM (For use in Writing Fire or Fire With Extended Coverage)," attached to the policy, granted permission "(a) For such use of premises as is usual or incidental to the *described occupancy* (emphasis supplied); (b) to be unoccupied for not exceeding 90 days at any one time (including 60 days allowed in policy), the term 'unoccupancy' being construed to mean a building that is entirely furnished but with personal habitants temporarily removed, provided premises are secured against intrusion during such period. . ."

The policy was delivered to plaintiff and the premium paid shortly after 19 July 1960, the effective date of the policy. Plaintiff retained the policy without suggesting a misdescription until it brought this suit. It alleged as a basis for reformation that when it applied for insurance it notified defendant's agent the building had been used as a dwelling, but plans were being made to change the building so as to adapt it to use as a club and with this information defendant's agent mistakenly described the building as a dwelling instead of a club house. It prayed that the policy be reformed so as to insure a club house instead of a dwelling.

Plaintiff does not allege fraud or mutual mistake; it merely alleges it gave defendant notice of an intent to remodel, at some future but not specified date, the building to fit it for service as a club house rather than as a private dwelling. There is neither allegation nor evidence to show what services the club would render its members. Would it provide quarters where members or guests could sleep? Would it serve meals? Would some member or employee of the club live there? Whatever the intent of the club might have been, the evidence discloses that nothing had been done to execute that intent when the fire occurred some ten months later. Plaintiff, when it received the policy, knew better than defendant whether the description of the building as a dwelling was then correct.

Plaintiff has neither alleged nor shown facts justifying a reformation of the policy sued on. *Setzer v. Ins. Co.*, 257 N.C. 396, 126 S.E. 2d 135, and cases there cited. We do not understand plaintiff now contends it is entitled on its allegations and evidence to a reformation of the policy.

Plaintiff, by amendment to its complaint, pleaded a waiver of the policy provision which suspends the insurance if the property is continuously vacant or unoccupied for a period greater than that fixed by the policy or endorsement.

If an insurer, notwithstanding knowledge of facts then existing which by the language of the policy defeats the contract of insurance, nevertheless insures property, it will be held to have waived the policy provisions so far as they relate to the then existing conditions. *Cato v. Hospital Care Assoc.*, 220 N.C. 479, 17 S.E. 2d 671; *Aldridge v. Ins. Co.*, 194 N.C. 683, 140 S.E. 706; *Greene v. Ins. Co.*, 196 N.C. 335, 145 S.E. 616; *Midkiff v. Ins. Co.*, 197 N.C. 139, 147 S.E. 812; 29A. Am. Jur. 193-194.

The contract provision relieving an insurer for liability for property destroyed by fire while "vacant or unoccupied" is a reasonable and enforceable provision. *Greene v. Ins. Co., supra; Alston v. Ins. Co.*, 80 N.C. 326; 29A. Am. Jur. 109; 45 C.J.S. 298.

Historically, provisions protecting an insurer against the extra hazard created by vacancy have been incorporated in fire insurance policies for many years — first by contract without statutory sanction, *Alston v. Ins. Co., supra,* and later with statutory approval. The earliest statutory provisions rendered the policy void if vacant or unoccupied for more than ten days. See sec. 43, c. 54, P.L. 1899, Rev. 1905, sec. 4760. The first modification in the statutory provisions was to change the provision from one voiding the policy to one suspending the insurance during the period of nonpermitted vacancy. C.S. 6437.

Not until 1945 was the period of permissive vacancy extended from ten to sixty days as presently provided. See c. 378, S.L. 1945.

Policy provisions relating to vacancies which occur after the policy has issued cannot be waived by the issuing agent. *Greene v. Ins. Co., supra;* 29 A. Am. Jur. 197-198.

The courts are not in agreement in the interpretation and effect to be given to policy provisions and the waiver thereof when a vacancy exists to the knowledge of the insurer at the time the policy is issued. Some hold that a vacancy known to insurer when it issues the policy constitutes a waiver of the policy provision with respect to that vacancy. See *Bledsoe v. Farm Bureau Mutual Ins. Co.,* 341 S.W. 2d 627. A few cases hold that a waiver created by knowledge of an existing vacancy is not limited to that vacancy but to any subsequent vacancy which may occur during the life of the policy. See *McKinney v. Providence Washington Ins. Co.,* 109 S.E. 2d 480. Others, recognizing the recent change in policy provisions which merely suspend the insurance during a nonpermitted vacancy period, hold that a vacancy existing at the time the insurance issues is not a waiver of the policy provisions. The insured has sixty days, or such other time as may be fixed by the policy and endorsements, in which to occupy the property. *Old Colony Ins. Co. v. Garvey,* 253 F 2d 299; *Connelly v. Queen Ins. Co.,* 76 S.W. 2d 906, 96 A.L.R. 1255, and annotations 1259 *et seq.*

Counsel has not called our attention to a decision by this Court, nor have we found any, applying the present policy provisions to a vacancy existing when the policy issues. The conclusion reached in *Old Colony Ins. Co. v. Garvey, supra,* accords with the interpretation given a policy provision by this Court in *Johnson v. Ins. Co.,* 172 N.C. 142, 90 S.E. 124.

Plaintiff alleged, and it had the burden of proving, defendant issued the policy of insurance with knowledge that the building was not then occupied. Without such knowledge there could be no waiver of the policy provision. *Swartzberg v. Ins. Co.,* 252 N.C. 150, 113 S.E. 2d 270; *Gouldin v. Ins. Co.,* 248 N.C. 161, 102 S.E. 2d 846.

The evidence relating to occupancy when the policy issued comes from plaintiff's witness who purchased the insurance. He testified that he informed defendant's agent the property was purchased with the intent of converting the building into a club house. The building was occupied when plaintiff purchased in the latter part of 1959. The tenant had promised to surrender possession on 1 January 1960 but had not done so because of serious illness in her family. The witness further testified: "I believe it was in the first part of February her son was in an accident, he was in a coma for several months, and we

didn't feel like setting the people out; and at the time I was over there I advised him (defendant's agent) I didn't know whether the house was empty at that time or not. About whether the house would be empty, I told him the house would be — when it did become empty plans was being made to remodel the house, and it would be something similar to the Police Pistol Club, would be used for the Club only. . . At the time that I talked with Mr. Enscore (defendant's agent), I didn't know whether the building was actually occupied or not at that time. . . .I hadn't been there in two or three months prior to going to Enscore's office. . . I told Mr. Enscore that it was a one-family, two-story dwelling house, is what it was at the time, whether it was occupied or unoccupied. . .BY THE COURT: Q. Let me ask you this. When did the parties get out? When did you first know they were out? A. It was some time after we taken the policy out. I don't recall — Q. How long before the house was burned? A. I couldn't give it specific. It would just be an estimate as to the time. Q. How many months? A. I'd say three to four months. Q. All right. Now, after they got out, what was in the house by way of furniture or anything? Was anything in there? A. There was nothing in the house. I went to the house one time after they moved out and locked all the doors. Q. And from then on there was nothing in the house to use; it wasn't even used by the Club for any purpose? A. Some of the committees had went out there on the Building Committee and had met, and a group from Wake Forest College had wanted it one night, and we let them use it for one night some time prior to the fire. Q. There was no furniture in there, and no equipment, or anything else; just a vacant house during the time? A. That is right, yes sir."

The evidence is not sufficient to show that defendant issued its policy with knowledge that the building was vacant. The evidence doesn't even establish the fact that the building was not then occupied as a dwelling. Plaintiff concedes it was not so occupied at the time of the fire and had not been so occupied for a period greater than that permitted by the policy.

Plaintiff's present contention is not, as asserted in the complaint, that defendant had knowledge of the vacancy of the dwelling when it issued the policy. Plaintiff now argues defendant issued the policy with knowledge that the building, when vacated, would not be used as a dwelling but as a club house and because of such knowledge waived the provision with respect to occupancy.

Defendant's denial of liability is not based on the theory that the hazard would be increased by using the property for club purposes. Its position is that its liability was suspended while the property was

vacant and not occupied for any purpose. Conceding without deciding that the information given defendant was sufficient to waive occupancy as a dwelling, it does not follow that defendant waived occupancy for the purpose for which plaintiff intended to use the building.

"Occupancy" must be construed with reference to the type of property insured and the use intended. The provision is not limited to dwellings; it applies alike to stores, warehouses, restaurants, club houses, and innumerable other types of buildings which one may desire to insure. Application of the provision to buildings not used for human habitation is well illustrated by *Corlies v. Westchester Fire Ins. Co.*, decided by the Supreme Court of New Jersey in 1918, reported 108 A. 152. There the defendant insured a barn owned by plaintiff. The policy contained an occupancy provision. Defendant contended it was relieved of liability because of noncompliance with that provision of the policy. The Court said: "Of course, the occupation of a barn necessarily and radically differs from a dwelling house. In order to occupy a barn within the meaning of the policy it does not require the insured to live or sleep in it. It is a sufficient compliance with the terms of the policy if the property insured is put to the use contemplated by the parties, as expressed in the contract of insurance." This statement of the law was quoted with approval by Browning, J., speaking for the Supreme Court of Appeals of Virginia in *Aldridge v. Piedmont Fire Ins. Co.*, 33 S.E. 2d 634, 158 A.L.R. 892. It is said in the annotations to the *Aldridge* case: "It appears to be a fundamental rule that conditions in a fire insurance policy against allowing the insured premises to become vacant or unoccupied are to be construed with reference to the species of property insured and the use contemplated for this particular type of property." Numerous cases applying the rule to many kinds of buildings such as barns, hog houses, stores, and other places of business, elevators, ice houses, factories, mills, schools, churches, and sanitariums, are listed in the annotation.

The Supreme Court of Pennsylvania in *United Cerebral Palsy Assoc. v. Zoning Board*, 114 A. 2d 331, 52 A.L.R. 2d 1093, said: "A 'club,' of which there are many different types, is, in substance, merely an organization or association of persons who meet or live together for the purpose of social intercourse or some other common object such as the pursuit of literature, science, politics or good fellowship."

A club house is defined in Webster's 3rd International Dictionary as "A house occupied by a club or commonly used for club activities." Plaintiff's evidence negatives any use of the building for club purposes. It does show that the building committee went to the property, presumably for the purpose of preparing plans to alter the building so as

to make it suitable for club purposes. The only other use which plaintiff made of the property after the tenant left was to permit a group from Wake Forest to use it for one night. The purpose for which the Wake Forest group used it is not shown. As said by Ervin, J., in *Cuthrell v. Ins. Co.*, 234 N.C. 137, 66 S.E. 2d 649: "The term 'occupied' implies a continuing tenure for a period of greater or less duration, and does not embrace a mere transient or trivial use. *Society of Cincinnati v. Exter,* 92 N.H. 348, 31 A. 2d 52; *Lacy v. Green,* 84 Pa. 514. A building is occupied when it is put to a practical and substantial use for purposes for which it is designed. 67 C.J.S. 84."

We reach the conclusion that the evidence affirmatively shows that the building was not used or occupied either as a dwelling or as a club house. Hence, because of the vacancy and unoccupancy extending beyond the period fixed by the policy, the insurance was suspended and defendant is not liable to plaintiff for any loss it may have sustained by the fire.

The policy names plaintiff as the insured and C. C. Cooper as mortgagee. Nowhere in the pleadings or evidence is reference made to Cooper as mortgagee. There has been no adjudication which affects his rights if the debt owing him had not been paid when the building was burned.

Affirmed.

IN THE MATTER OF THE ASSESSMENT OF ADDITIONAL SALES AND USE TAXES AGAINST HALIFAX PAPER COMPANY, INC., FOR THE PERIOD FROM JULY 1, 1956, THROUGH JUNE 30, 1959.

(Filed 14 June 1963.)

1. Administrative Law § 4; Appeal and Error § 3; Courts § 7—

There is no inherent or inalienable right of appeal from an inferior court to the Superior Court or from the Superior Court to the Supreme Court, and appeals from administrative agencies of the State or special statutory tribunals whose proceedings are not according to the course of the common law are purely statutory.

2. Same; Criminal Law § 142—

The State cannot appeal in either civil or criminal cases except on statutory authority.

3. Administrative Law § 4; Taxation § 35—

The Tax Review Board is an administrative agency of the State within the purview of G.S. 143-306 and the Commissioner of Revenue is entitled

to appeal under G.S. 143-307 from a decision of the Board reversing in part an assessment of taxes made by the Commissioner. G.S. 105-241.3 does not impliedly amend the prior statute so as to preclude the right of the Commissioner to appeal, but the two statutes must be contrued together and effect given the provisions of both.

4. Statutes § 11—

The repeal of a prior statute by implication is not favored, and the silence of a later statute in regard to a matter in which a prior statute has spoken in express terms will not effect a repeal in regard to such matter but both statutes will be construed together and effect be given the provisions of both.

5. Appeal and Error § 4—

The term "party aggrieved" within the meaning of various statutes authorizing appeals has no technical meaning and must be construed in light of the attendant circumstances, and the term includes one who is affected in only a representative capacity in discharging duties owed the public.

6. Same; Administrative Law § 4; Taxation § 35—

The Commissioner of Revenue is a party aggrieved by a decision of the Tax Review Board reversing in part a tax assessed by the Commissioner, since the decision affects the duties and responsibilities of the Commissioner in assessing and collecting taxes due the State.

7. Administrative Law § 4—

The courts have been given authority to review by *certiorari* the action of any administrative agency whenever its actions affect personal or property rights, but such writ is discretionary and does not lie as a substitute for appeal when a statute provides an orderly procedure for appeal, and in such instance it will lie only when the party aggrieved, through no fault of his own, cannot effect his appeal within the time limited.

APPEAL by W. A. Johnson, Commissioner of Revenue, from *Clark, J.*, December 1962 "A" Term of WAKE.

Proceeding by the State Commissioner of Revenue to assess against Halifax Paper Company, Inc., additional sales and use taxes allegedly due the State.

Attorney General Bruton and Assistant Attorneys General Pullen and Barham for appellant.

Allsbrook, Benton & Knott, and Dwight L. Cranford for appellee.

MOORE, J. Halifax Paper Company, Inc., (Halifax) is engaged in the manufacture of paper pulp, paper products and by-products, and owns woodlands as a source of wood for its manufacturing operations.

IN RE ASSESSMENT OF SALES TAX.

On 19 August 1959 the State Commissioner of Revenue (Commissioner) notified Halifax in writing that he intended to assess against it $19,725.05, plus penalty and interest, for unpaid sales and use taxes on account of certain machinery and equipment purchased by Halifax during the period from 1 July 1956 to 30 June 1959. G.S. 105-241.1 (a), (b). A portion of the machinery and equipment in question was purchased for use in the regular and systematic planting, cultivating and harvesting of trees for pulp on the woodlands belonging to Halifax. In apt time Halifax requested a hearing before the Commissioner. G.S. 105-241.1(c). After hearing, the Commissioner affirmed the assessment. Halifax appealed to the North Carolina Tax Review Board (Review Board). G.S. 105-241.2. On 20 September 1962 the Review Board entered its administrative decision No. 56, affirming the assessment in part and reversing it in part. G.S. 105-241.2 (c). The decision declared that the machinery and equipment used in the regular and systematic planting, cultivating and harvesting of trees for pulp were being used in "the planting, cultivating, harvesting or curing of farm crops" within the meaning of the sales and use tax exemption provision contained in G.S. 105-164.13(8), and that Halifax was a "farmer" within the purview of that provision. The Commissioner excepted to this portion of the Review Board's decision.

On 18 October 1962 the Commissioner filed a petition in the Superior Court of Wake County, under Article 33 of Chapter 143 of the General Statutes of North Carolina, seeking judicial review of the decision of the Review Board with respect to its interpretation of the meaning of G.S. 105-164.13(8) as applied to the facts in this case. Halifax demurred to the petition on the ground that the Superior Court "had no jurisdiction of the subject matter of the action, in that the . . . Commissioner . . . has no standing under the provisions of Article 33 of Chapter 143 of the General Statutes . . . to appeal . . . from an administrative decision of the Tax Review Board." The court below sustained the demurrer, and the Commissioner appeals to this Court.

The question for decision is whether the Commissioner may, under the provisions of G.S. Ch. 143, Art. 33, appeal from the decision of the Review Board to the Superior Court.

The General Assembly created the Tax Review Board at the 1953 session. S.L. 1953, Ch. 1302, s. 7(b). As originally established its purposes were very limited. It was authorized and required (1) to hear and determine petitions of foreign corporations relating to the allocation of capital, surplus and undivided profits for franchise tax purposes and net income for income tax purposes, and (2) to make and

promulgate all rules and regulations for the collection of State taxes under Schedules A to H, inclusive. It had no other powers and duties. The Act contained no provisions for appeals from its decisions. The board was composed of the Commissioner of Revenue (who was designated as chairman), the Director of the Department of Tax Research, and the State Treasurer.

The 1953 Act was rewritten at the 1955 session. S.L. 1955, Ch. 1350 (codified as G.S. 105-241.2 to G.S. 105-241.4). 1957 amendments are not pertinent to this appeal. By the 1955 act the Chairman of the Utilities Commission was made a member, replacing the Commissioner of Revenue. The State Treasurer was designated as chairman. The Commissioner of Revenue is a member only when the Board makes allocations for corporate franchise and income tax purposes. The Commissioner is required to prepare administrative regulations for the collection of taxes, to be effective when approved by the Review Board. When a tax assessment has been made by the Commissioner, and the taxpayer has obtained a hearing before the Commissioner thereon, and the Commissioner has rendered a final decision with respect to the taxpayer's liability, the taxpayer may file a petition (with a copy to the Commissioner) requesting the Board to review the assessment. The Board, after notice to the taxpayer and the Commissioner, must grant a hearing if the petition is *prima facie* meritorious. The Board must confirm, modify, reverse, reduce or increase the assessment or decision of the Commissioner. Any taxpayer aggrieved by the decision of the Review Board may appeal to the superior court under the provisions of G.S., Ch. 143, art. 33. The Act makes no provision for an appeal by the Commissioner to the superior court, nor does it expressly prohibit such appeal. However, it provides that either the taxpayer or the Commissioner may appeal from the superior court to the Supreme Court.

There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court. No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. *In re Employment Security Com.*, 234 N.C. 651, 68 S.E. 2d 311. The State cannot appeal in either civil or criminal cases except upon statutory authority. *In re Stiers*, 204 N.C. 48, 167 S.E. 382. The Commissioner of Revenue has no right to appeal from the decision of the Review Board pursuant to any provision of G.S. 105-241.3. If he has a right of appeal it is by virtue of G.S., Ch. 143, art. 33.

The Employment Security opinion, *supra*, was filed by the Supreme Court on 12 December 1951. The General Assembly at its next session (1953) passed an Act entitled "Judicial Review of Decisions of Certain Administrative Agencies." S.L. 1953, Ch. 1094 (codified as G.S., Ch. 143, art. 33; G.S. 143-306 to G.S. 143-316). This act was ratified prior to the passage of the Act creating the Tax Review Board. The Judicial Review Act provides that "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, unless adequate procedure for judicial review is provided by some other statute, . . ." G.S. 143-307. It provides further: "(1) 'Administrative agency' or 'agency' shall mean any State officer, committee, authority, board, bureau, commission, or department authorized by law to make administrative decisions, except those agencies in the legislative or judicial branches of government, and except those whose procedures are governed by chapter 150 of the General Statutes (Uniform Revocation of Licenses), or whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor. (2) 'Administrative decision' or 'decision' shall mean any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing." G.S. 143-306.

The Tax Review Board is an "Administrative Agency" within the purview of G.S. 143-306. It is an agency of the Executive branch of the State government, has no authority or duties with respect to the granting or revocation of licenses, and its decisions are not subject to review under any statute or statutes other than G.S., Ch. 143, art. 33. It will be noted that G.S. 105-241.3 grants the *taxpayer* the right of appeal only "under the provisions of article 33 of chapter 143 of the General Statutes." In the instant case all administrative remedies have been exhausted. The "legal rights, duties or privileges of specific parties" are affected by the decision here in question; it involves the legal interpretation of a statute, not merely rule-making. The decision was required by law to be made after an opportunity for an agency hearing.

Clearly the Commissioner is entitled under G.S. 143-307 to appeal from the decision of the Review Board in the instant case, unless (1) G.S. 105-241.3 impliedly amends G.S. 143-307 so as to exclude the Commissioner from those entitled to appeal under the latter section, or

(2) the Commissioner is not a "party aggrieved" by the decision of the Review Board.

Though G.S. 105-241.3 was passed subsequent to the enactment of G.S. 143-307, we are of the opinion that it does not amend the latter section so as to repeal any provisions thereof granting right of appeals to the Commissioner of Revenue. G.S. 105-241.3 does not expressly deny the right of the Commissioner to appeal from decisions of the Review Board. The General Assembly in the passage of G.S. 105-241.3 was dealing with the subject of appeals from administrative agencies only collaterally. An amendment or repeal by implication is not favored. *Power Co. v. Bowles*, 229 N.C. 143, 48 S.E. 2d 287; *McLean v. Board of Elections*, 222 N.C. 6, 21 S.E. 2d 842. "Ordinarily, the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together." 82 C.J.S., Statutes, s. 252, pp. 419-420. In respect to related statutes, ordinarily they should be construed, if possible by reasonable interpretation, so as to give full force and effect to each of them, it being a cardinal rule of construction that where it is possible to do so, it is the duty of the courts to reconcile laws and adopt the construction of a statute which harmonizes it with other statutory provisions. *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433. The *Cab Company* case involves statutes relating to taxicabs. Acting under G.S. 160-200(36a), providing that the governing body of a municipality "may grant franchises to taxicab operators on such terms as it deems advisable," the City of Charlotte imposed a franchise fee of $50.00. A prior statute, G.S. 20-97, limited the levy to $15.00. This Court in an opinion delivered by Johnson, J., said: ". . . (I)t would seem that the *silence* of the 1945 Act as to a matter to which the 1943 Act had spoken in express terms indicates a legislative intent to preserve the *status quo*, and negatives the theory of implied repeal of the former Act. . . ." (Emphasis added).

In the case at bar the silence of G.S. 105-241.3 as to the rights of the Commissioner to appeal may not be construed as a repeal of any such rights which may have been granted to him under G.S. 143-307.

G.S. 105-241.3 and G.S. 143-307 are *in pari materia* and it is our duty to give effect to both if possible. The presumption is always against an intention to repeal an earlier statute. *Cab Co. v. Charlotte, supra.* There is no express intention to deprive the Commissioner of any right of appeal he might have by virtue of G.S. 143-307, and there is no such inconsistency or repugnancy between the statutes as to create an implication of amendment or repeal to which we can consistently give effect under the rules of construction of statutes.

We now come to the crucial question whether the Commissioner is aggrieved by the decision of the Review Board. The decision interprets G.S. 105-164.13(8) as exempting from sales and use taxes the purchases of machinery and equipment used by Halifax in the systematic planting, cultivating and harvesting of trees for pulp, on the theory that such activity is farming. The Commissioner contends that the interpretation is erroneous and, if permitted to stand, will deprive the State of revenues to which it is entitled. The decision involves a question of law and affects the duties of the Commissioner.

The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: "Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." 3 C.J.S., 350. An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative reviewing agency. 73 C.J.S., Public Administrative Bodies and Procedure, s. 176, pp. 519, 520. One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. *Town of Milford v. Commissioner of Motor Vehicles,* 96 A. 2d 806 (Conn. 1953); *State v. Hix,* 54 S.E. 2d 198 (W. Va. 1949).

The *Hix* case is closely analagous to the case at bar. It involved the West Virginia Director of Unemployment Compensation. A ruling of the Director on claims filed for payment was reviewed and overruled by a Board of Review. A statute provided for appeal from decisions of the Board of Review by "any party aggrieved." The Supreme Court of West Virginia ruled that the Director was authorized to prosecute an appeal from the decision of the Board of Review and commented: "The Director is responsible for the administration of the Department, and of the Fund committed to his care; and just as he would have the right to prosecute appeals in order to protect the Fund, he is, we think,

entitled to prosecute appeals to bring about what he believes to be a fair and correct interpretation of the statutes under which he operates."

The Commissioner is charged with the duty and responsibility of assessing and collecting taxes due the State. *Duke v. Shaw, Commissioner of Revenue,* 247 N.C. 236, 100 S.E. 2d 506. These duties entail the administration of the Revenue Department. The State revenues constitute a fund upon which the support and existence of the State government depends. The decision of the Review Board is contrary to what the Commissioner believes is a fair and correct interpretation of a law upon which the performance of a portion of his duties depends. It prohibits the collection of the assessment in question and, if permitted to stand, prohibits the collection of all similar assessments. The decision of the Review Board is not a mere factual determination or a rule-making order; it is a legal interpretation vitally affecting the duties of the Commissioner and the fund he is charged with raising. We express no opinion as to the correctness of the Review Board's ruling; this question is not before us. The Commissioner serves in a representative capacity, is charged with an important public trust, and is aggrieved by the opinion adverse to what he considers is a fair and correct interpretation of law affecting his duties and affecting the public interest with which he is charged.

It is the uniform holding of this Court that no person may appeal from a judgment unless he is aggrieved thereby. In many cases we have entertained appeals by the Commissioner of Revenue. *Sale v. Johnson, Commissioner,* 258 N.C. 749, 129 S.E. 2d 465; *Boylan-Pearce, Inc. v. Johnson, Commissioner,* 257 N.C. 582, 126 S.E. 2d 492; *Moye v. Currie, Commissioner,* 253 N.C. 363, 117 S.E. 2d 30; *Campbell v. Currie, Commissioner,* 251 N.C. 329, 111 S.E. 2d 319; *Distributors v. Shaw, Commissioner,* 247 N.C. 157, 100 S.E. 2d 334, and many others. The right of the Commissioner to appeal was not called into question in these cases, but if he had had no standing to appeal this Court would have dismissed the appeals *ex mero motu.*

Cases from other jurisdictions respecting the rights of public officials and administrative bodies to appeal from decisions of administrative agencies are in irreconcilable conflict. This is due to the great variety of statutory and constitutional provisions or lack of statutory authority. Usually no appeal is permitted in the absence of some statutory authority therefor. But where statutes exist permitting appeals by persons aggrieved, appeals by public officials and governmental units are usually allowed in cases involving questions of law relating to

taxation and public funds. See: 117 A.L.R., Anno. — Appeal by Public Officer or Board, pp. 216-222; 5 A.L.R. 2d, Anno. — Underassessment for Taxation, pp. 576-582.

It is true that courts have inherent authority to review the actions of any administrative agency whenever such actions affect personal or property rights, upon a *prima facie* showing, by petition for *certiorari*, that such agency has acted arbitrarily, capriciously or in disregard of law. *Pue v. Hood, Commissioner of Banks,* 222 N.C. 310, 22 S.E. 2d 896. But *certiorari* is a discretionary writ. *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1. Where a statute provides an orderly procedure for appeal, *certiorari* will not lie as a substitute for an appeal, but is proper only when the aggrieved party cannot perfect his appeal within the time limited and such inability is not due to any fault on his part. *McDowell v. Kure Beach,* 251 N.C. 818, 112 S.E. 2d 390. Thus, the Commissioner was well advised to prosecute the appeal in this case.

The judgment below is reversed and the case is remanded to the superior court for the hearing of the Commissioner's appeal on the merits.

Error and remanded.

MURPHY LEE KINLAW v. WALTER MAYNARD WILLETTS AND HORACE T. KING, TRADING AND DOING BUSINESS AS NEW HANOVER IRON WORKS.

(Filed 14 June 1963.)

1. Negligence § 24a—

Evidence which establishes nothing more than an accident and an injury is insufficient to go to the jury, but plaintiff must introduce competent evidence tending to show defendant's failure to exercise that degree of care which a reasonably prudent person would have exercised under like circumstances and that such failure was the proximate cause or one of the proximate causes of the injury.

2. Trial § 21—

On motion to nonsuit, the evidence and the legitimate inferences therefrom must be considered in the light most favorable to plaintiff.

3. Automobiles §§ 24, 41l— Evidence held insufficient to show negligence of defendant as proximate cause of injury to plaintiff pedestrian.

The evidence tended to show that plaintiff was engaged with other workmen in erecting a highway sign at the beginning of a median between the highway and an access road connecting another highway at an overpass, that defendant drove his truck, which had tool boxes flush with the fenders, past the locus and that as the truck passed, plaintiff sustained a wound about the size of a fifty-cent coin between the elbow and wrist, penetrating to the bones and breaking them. *Held:* In the absence of evidence that any object protruded beyond the fenders of the truck, or of any actual contact between plaintiff and any part of the truck, or what actually inflicted the wound, nonsuit was proper.

4. Negligence § 24a; Trial § 25—

The inference of negligence may be drawn from facts in evidence but such inference may not be based on other inferences.

PARKER, J., dissenting.

APPEAL by plaintiff from *Bickett, J.*, October, 1962 Term, ROBESON Superior Court.

The plaintiff instituted this civil action to recover damages for personal injury alleged to have been proximately caused by the defendants' negligence. At the time of the injury the plaintiff and another prisoner, Charles Tew, were serving road sentences for violations of the criminal law. They were at work under the direction of two State Highway employees, H. W. Clemmons and J. W. Carter. These four men were engaged in replacing a traffic sign on a short cutoff or access road connecting north-south State Highway No. 132 and east-west U. S. Highway No. 17 near Wilmington. The access was made necessary by reason of the fact that No. 132 crosses No. 17 on an overpass.

The access road was divided by a plaza or median about five feet wide and elevated about six inches above the asphalt surface. This median or plaza began on the east margin of 132 south of the overhead bridge and extended some distance along its center towards the joinder with No. 17. The sign which the four men were replacing was in the western end of the median near the eastern edge of 132. Clemmons was holding the wooden post supporting the sign in place. The plaintiff, the employee Carter, and the other prisoner, Tew, were using shovels and were replacing dirt, broken pieces of concrete, and asphalt around the post. The four workers were within a few feet of each other.

According to the evidence, the defendant Willetts, driving north in the Ford pickup truck of his employer, New Hanover Iron Works, approached the point where the men were at work about 10:30 on the morning of May 9, 1961. The weather was clear and the road was dry, straight, and level to the south for several hundred yards. As Willetts approached the men at work, he slowed down and at the time he passed the men he was driving about 15 miles per hour. So much of the evidence is not in conflict.

Quoted here is the pertinent part of the plaintiff's testimony. On direct examination: "I was standing at the northernmost part of the plaza between the plaza and the yellow line with a shovel in my hand, shoveling the concrete stuff to go around the post. I was facing South, my face about half and half toward the plaza and toward the highway. My back was toward the highway, I didn't see any motor vehicle approaching from any direction, I did hear one, but I didn't pay any attention to it. Highway No. 132 is a two-lane highway, cars traveling both North and South on that highway. As I heard the motor vehicle approaching, I was shoveling and did not move in any direction in order not to back out of the yellow line surrounding the plaza. When it hit me I was shoveling and I grabbed my arm and turned around and the man driving the truck backed up saying he would carry me to the hospital. After my arm was hit I first saw the truck about 75 yards away, there was no other motor vehicle on the highway at that time. It was a pickup truck, but I do not know what make or model. There was a box built on each side of the truck where they carry tools.

"Question. Do you or do you not know what hit you?

"Answer: No, Sir, I do not.

"There was a hole knocked in my right forearm midway between my elbow and my wrist as big around as a half dollar, I could see pieces of spattered bone."

On cross-examination: "All of us were around that post within three feet of each other. Four or five automobiles or other motor vehicles while we were there working had passed. I heard one just before I was hit. I didn't see anything but I knowed it hit me. I didn't see any motor vehicle when it hit me but when it did I turned around. When I was hit I was shoveling up pieces of concrete bending over. I had to shovel down the side of the plaza to get up the gravel to put it in the hole. My arm wouldn't have been extended out enough to get hit there where I was standing. I don't know how much of the truck or what part of the truck had passed me. I did not see it when it hit me. I did not look at any traffic. . . . My shovel did not go under the wheel and the wheel

did not throw my arm against the truck. When it hit my arm my shovel fell right down side of my arm. At the time of the impact I was facing toward the plaza so I could put the stuff in the hole around the post. I was standing something around two feet from the raised plaza. . . . My right arm hit it, the right side of the truck. I made a statement in the presence of the Superintendent, in the presence of the superintendent of the prison camp. I said I did not know what part of the truck made contact with my arm. I said I felt a sharp pain, dropped the shovel and grabbed my arm. I didn't know what hit me."

Mr. Clemmons, Highway employee, testified: "At the time Murphy Lee Kinlaw was picking up the stuff that had been knocked out when the post was knocked down and putting around the post where I had it. He was on the 132 side of the post and he was shoveling rock and debris right down side of the island. I was holding the post and was standing on top of the island. I was facing in a Northwesterly direction, facing the end of the island. Murphy Lee Kinlaw was putting dirt around the post and I was packing it down around there. When the truck came along he came across holding his arm out across in front of me and said the truck hit my arm. I didn't see it when it hit nor didn't hear it. I saw a truck from where I was standing on the island, going on up the road North on 132. The truck stopped and backed up."

Mr. Carter, of the Highway Department, testified: "I had a shovel in my hand, Murphy Lee Kinlaw had a shovel in his hand and the other prisoner had a shovel in his hand. I think Mr. Clemmons, the foreman, had some equipment with him. I didn't hear Murphy Lee Kinlaw say anything about being hit, but I did see him holding his arm after it happended, when whatever it was, a truck, or something, struck him. At the time I was facing in the direction from which the truck was approaching and didn't notice the truck as it approached."

The defendant testified: "As I approached this elevation, which is approximately 300, 400, or 500 yards from the bridge, I saw three or four men standing on the traffic circle. I was traveling at approximately forty miles an hour. I immediately slowed down and as I approached the people in the island I pulled over to the center line which was white with two yellow lines. My left wheel was over next to the line. I passed these people standing on the traffic island, whether there were more or less than three of them I don't know, for I didn't count them. I couldn't tell what they were doing because it wasn't pertaining to me, wasn't out on the highway and there was no reason for me to observe them standing on the plaza.

"As I passed these people I heard a thud, sounded like a car ran over a rock or stick or something in the road. Sounded like the wheel

of the car hit something. At that time I was going approximately 15 miles an hour. Upon hearing this slight thud, I looked back in the mirror and saw this fellow holding his arm running across the road. Some gentlemen ran across the road backward and forward; that is, the ramp road. The other people, other men were still performing their duties not paying any attention to the man running around."

For the defendant, J. C. Taylor, Highway Patrolman, testified: "I checked the truck, Mr. Willett's truck, to see if I could find any place on the truck to give indication where his arm struck the truck, and I found none, nor did I find any marks on the truck where the shovel came in contact with the side of the truck."

Medical evidence of the injury by stipulation was entered in the record. The plaintiff's only injury consisted of a circular depression wound about the size of a fifty-cent coin, penetrating to, and shattering the bones in the right forearm about half-way between the elbow and the wrist. The wound was sufficiently deep to disclose fragments of the broken bones. The evidence of Carter and the defendant disclosed that immediately after Willetts passed the entrance of the access road the plaintiff was standing in the east traffic lane of 132 holding his injured forearm.

At the close of all the evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Barrington & Britt by J. H. Barrington, Jr., for plaintiff appellant.
Ellis E. Page for defendants, appellees.

HIGGINS, J. In order to escape nonsuit in a negligence case, a plaintiff must offer evidence either direct, circumstantial, or a combination of both, tending to show that the defendant failed to exercise that degree of care for the plaintiff's safety which a reasonably prudent man under like circumstances would exercise when charged with a like duty; and that the defendant's failure was the cause, or, under certain circumstances, one of the causes of the injury. The defendant's failure may consist of a negligent act or acts; or of a negligent failure to act if under legal duty to do so. *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727; *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598; *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. The evidence, and the legitimate inferences from it, must be considered in the light most favorable to the plaintiff. *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743. Evidence, however, which establishes nothing more than an accident and an injury is insufficient

to go to the jury. *Robbins v. Crawford,* 246 N.C. 622, 99 S.E. 2d 852; *Pack v. Auman,* 220 N.C. 704, 18 S.E. 2d 247.

The evidence of the parties in this case is not in serious conflict. The plaintiff testified he was working with three others, erecting a road sign at or near a point where an access road entered from the east into State Highway No. 132. The defendant, driving a Ford pickup truck north on the State highway, passed the point where the men were at work. As the truck passed, the plaintiff sustained an injury to his right forearm which consisted of a penetrating wound about the size of a fifty-cent coin, breaking both bones of the forearm. The plaintiff said the truck hit him. He also said he didn't know what hit him but the injury occurred when the truck passed. The evidence indicated there were tool boxes on the pickup truck. The investigating officer examined the truck at the scene. He testified there was nothing on the truck indicating recent contact with any object. Neither was there any protrusion beyond the truck's fenders and the body which was in line with the fenders. The plaintiff testified he did not actually see the truck until after it passed. Neither Clemmons nor Carter saw or heard any contact between the truck and any object, although the three men and another prisoner, Tew, were within two or three feet of each other. Immediately after the truck passed, the plaintiff was in the road holding his arm and exhibiting the fresh puncture wound. The defendant testified as he passed the men he was driving at or near as possible to the marked middle line of 132; that he felt one of his wheels run over some object — he thought a rock — and looking back in his rear-view mirror, he saw the plaintiff standing in the road holding his arm. The plaintiff testified: "I don't know how much of the truck or what part of the truck had passed me. I did not see it when it hit me. . . . My shovel did not go under the wheel."

From the plaintiff's testimony it is obvious the statements the truck hit him are his conclusions based on the fact the injury occurred as the truck passed. The evidence permits the inference that something connected with the moving truck inflicted the plaintiff's injury. What actually inflicted the round, penetrating wound into the plaintiff's middle forearm without leaving so much as another scratch on his body, is undisclosed. It seems obvious that such a wound inflicted on a man standing or working on the side of a road could only be inflicted by a spear or some small shaft, or by a missile hurled directly against the mid-forearm. Nothing of such a character protruded from the truck.

How did the accident happen? The defendant, driving at 15 miles per hour in his traffic lane, so far as the evidence discloses, felt one

of his wheels run over something like a rock. Broken pieces of concrete and broken asphalt and rocks were scattered on the road by the force which had knocked down the sign. Four men, three with shovels, were placing the material around the post. All were within three feet of each other. Clemmons held the post in place. He doesn't know what happened. Carter was at work with a shovel. He doesn't know what happened. The plaintiff thinks some part of the truck hit him, but obviously doesn't know what part, and frankly so states. But what about Tew? He was there at work with a shovel. He was not in court. The truck did not strike either Carter's or the plaintiff's shovels. However, no one has testified or apparently knows what happened to Tew's shovel. Whether the truck hit Tew's shovel, driving the end of the handle into the plaintiff's arm, or whether one of the truck wheels propelled a small stone, piece of broken concrete or asphalt, inflicting the injury, are material questions in this case. The evidence does not answer them. Not only the object which inflicted the injury, but where it came from and how it was propelled, are left to speculation and guess. Legal inferences may be drawn from facts; but inferences may not be based on other inferences. The chain of causation permits inferences to be drawn from facts, but if they are based on other inferences the chain of proof is broken. *Lane v. Bryan, supra.*

The concluding paragraph in *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598, disposes of the legal questions involved in this case:

> " 'Negligence is not presumed from the mere fact that plaintiff's intestate was killed in the collision.' *Williamson v. Randall,* 248 N.C. 20, 25, 102 S.E. 2d 381; *Robbins v. Crawford,* 246 N.C. 622, 628, 99 S.E. 2d 852. However, direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances. *Etheridge v. Etheridge,* 222 N.C. 616, 618, 24 S.E. 2d 477. But in a case such as this, the plaintiff must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendants. *Robbins v. Crawford, supra; Whitson v. Frances,* 240 N.C. 733, 737, 83 S.E. 2d 879; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. In *Parker v. Wilson,* 247 N.C. 47, 53, 100 S.E. 2d 258; *Parker, J.,* speaking for the Court, said: 'Such inference cannot rest on conjecture or surmise. *Sowers v. Marley, supra.* "The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff." *Whitson v. Frances, supra.* "A cause of action

must be something more than a guess." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. A resort to a choice of possibilities is guesswork not decision. *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392. To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.' See also *Stegall v. Sledge,* 247 N.C. 718, 722, 102 S.E. 2d 115."

The judgment of involuntary nonsuit entered at the conclusion of all the evidence is

Affirmed.

PARKER, J., dissenting. Walter Maynard Willetts, one of the defendants, testified in part on direct examination as follows: "I was operating a red, 1957 Ford pickup with two boxes on the side mounted for the purpose of carrying tools and parts, sitting up on top of the fender but not protruding over the fender at all. The truck was the same width from front fenders to back fenders. The tool boxes were four feet from the bound mounted on top of the body which came out flush with the fenders.* * *As I passed these people I heard a thud, sounded like a car ran over a rock or stick or something in the road. Sounded like the wheel of the car hit something. At that time I was going approximately 15 miles an hour. Upon hearing this slight thud, I looked back in the mirrow and saw this fellow holding his arm running across the road.* * *Upon observing the gentleman running across the road, I mashed on the gas to go ahead, then looked back through the mirror and decided I'd better stop; so I immediately pulled over to the shoulder, backed up, stopped the truck and walked back. The man that was hurt had sat down at that time on the plaza. I said, 'Fellow, what happened?' He said, 'You hit me with that truck.' " On cross-examination, he testified: "In my tool box I had parts for furnaces, airconditioners, hand wrenches, screwdrivers, pliers, things like that.* * *The tool box is approximately twelve inches wide and extends inside to the bed of the truck, flush with the body. It is flush on the inside of the truck and extends ten or twelve inches on the outside. The fenders of the truck extend beyond the bed of the truck at least ten or twelve inches flush with the tool boxes on the outside."

Considering the summary of the evidence set forth in the majority opinion, and also the testimony of defendant Willetts set forth verbatim above, it is my opinion that the judgment for motion of nonsuit should be overruled and the case submitted to the jury, and I so vote.

HORTON *v.* REDEVELOPMENT COMMISSION.

W. W. HORTON, A. G. WHITENER, WHITENER REALTY CO., INC., WOODWORKERS SUPPLY CO., INC., ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS OF THE CITY OF HIGH POINT v. REDEVELOPMENT COMMISSION OF HIGH POINT, P. HUNTER DALTON, JR., JAMES H. MILLIS, FRED W. ALEXANDER, DALE C. MONTGOMERY, CLARENCE E. YOKELEY, AND CITY OF HIGH POINT, A MUNICIPAL CORPORATION, CARSON C. STOUT, MAYOR, ARTHUR G. CORPENING, JR., ROY B. CULLER, R. D. DAVIS, J. H. FROELICH, H. G. ILDERTON, B. G. LEONARD, F. D. MEHAM, LYNWOOD SMITH.

(Filed 14 June 1963.)

1. Pleadings § 12—

A pleading will be liberally construed upon demurrer and the demurrer admits for the purpose of testing the sufficiency of the pleading the truth of the factual averments well stated and relevant inferences of fact reasonably deductible therefrom, but it does not admit inferences or conclusions of law.

2. Taxation § 6—

What is a necessary expense within the meaning of Article VII, § 7, of the State Constitution is a question of law for the courts.

3. Same—

Necessary expenses of a municipality within the purview of Article VII, § 7, of the State Constitution are expenses incurred by a municipality in the maintenance of the public peace, the administration of justice, and the discharge of functions of a governmental nature in the exercise of a portion of the State's delegated sovereignty.

4. Same; Municipal Corporations § 4—

An urban redevelopment plan is not a necessary expense of a municipality within the meaning of Article VII, § 7, of the State Constitution, and therefore a municipality may be enjoined from spending *ad valorem* taxes or levying taxes and issuing bonds for an urban redevelopment project until and unless such project is approved by a majority of the qualified voters of such municipality, and any provisions of G.S. 160-466 (d) and G.S. 160-470 authorizing a municipality to levy taxes and issue bonds for such purpose without a vote are unconstitutional. G.S. 160-463.

5. Constitutional Law § 10—

A statute which is repugnant to a provision of the Constitution is void.

6. Constitutional Law § 7; Municipal Corporations § 4—

The Urban Redevelopment Law is a constitutional delegation of power by the State to municipal corportions. Constitution of North Carolina, Article II, § 1.

APPEAL by plaintiffs from *Walker, S.J.*, 7 January 1963 Regular Civil Session of Guilford—High Point Division.

Civil action brought by plaintiffs, all taxpayers of the city of High Point, in behalf of themselves and all other taxpayers of said city adversely and directly affected, against the city of High Point, a municipal corporation, its mayor, the members of the City Council, the Redevelopment Commission of High Point, a North Carolina corporation, and its members, for the purpose of permanently restraining the defendants from contracting any debt, pledging their faith or loaning their credit, or levying any taxes or collecting any taxes by any officers of the same for the purpose of proceeding with, or using money derived from such sources for, a redevelopment plan for the city of High Point, known as East Central Urban Renewal Area, Project No. N.C. R-23, until and unless such plan is approved by a majority vote of those qualified voters of the city of High Point, who shall vote thereon in an election held for the purpose, heard upon a demurrer to an amended complaint.

From a judgment sustaining a demurrer to the amended complaint, filed by all the defendants, except F. D. Mehan, a member of the City Council, and dismissing the action as to all defendants, except F. D. Mehan, and that the demurring defendants recover of plaintiffs their costs, plaintiffs appeal.

Harriss H. Jarrell for plaintiff appellants.

Knox Walker and Haworth, Riggs, Kuhn and Haworth by John Haworth for defendant appellees.

PARKER, J. This is a summary of the crucial allegations of the amended complaint, necessary for a decision of this appeal:

The City Council of the city of High Point enacted an ordinance approving the creation of the Redevelopment Commission of High Point. Thereafter, a certificate of incorporation was issued by the Secretary of State of North Carolina for the Redevelopment Commission of High Point, in which its members were named.

This Redevelopment Commission has prepared and caused to be prepared a redevelopment plan for East Central Urban Renewal Area, Project No. N.C. R-23, which has been approved and adopted by the City Council of the city of High Point.

The City Council of the city of High Point did not have in existence a legal plan or method of financing the acquisition of the renewal area in the urban renewal plan, Project No. N.C. R-23, at the time of approving said plan as required by G.S. 160-463, and has no legal plan now for financing the project.

The plan, as approved, is too broad in scope to qualify as slum clearance, in that the plan includes the construction of a million dollar

pedestrian plaza, and some of the city of High Point's best commercial and business districts, namely, East High Street, South Wrenn Street, and East Commerce Street.

The City Council of the city of High Point has agreed that the city of High Point will provide an amount in cash, streets, utilities, etc., which will not be less than one-third of the net cost of this redevelopment plan, and the city of High Point has paid the salary of the Urban Renewal Director out of *ad valorem* tax money.

In pursuance of this plan, the Redevelopment Commission of High Point is proceeding with the plan, and that *ad valorem* tax monies have been spent, and will be spent in carrying out this plan, and that this plan cannot be finished without the expenditure of substantial sums of money. That the expenditure of this money derived from taxation, spent and to be spent, for carrying out the purpose of this plan is not a necessary expense of the city of High Point within the purview of Article VII, section 7, of the North Carolina Constitution. That no vote by the citizens of High Point has been had on the question of expending money derived by taxation for putting this plan into effect. To carry out this plan will require the city of High Point, and its agencies, to levy taxes and issue bonds, and that to do this to carry out this plan without the approval of the majority of those who shall vote in an election held for such purpose contravenes Article VII, section 7, and Article V, sections 3 and 4, of the North Carolina Constitution.

G.S. 160-466 (d) and 160-470 contravene Article VII, section 7, of the North Carolina Constitution. There is an unlawful delegation of authority by the General Assembly to the Redevelopment Commission of High Point in violation of Article II, section 1, of the North Carolina Constitution.

The City of High Point, and its agencies, are contracting debts, pledging its faith, lending its credit, levying *ad valorem* taxes, and spending *ad valorem* tax money for the consummation of this redevelopment plan, even though the expense of carrying into effect this plan is not a necessary expense of the city of High Point. The city of High Point has appropriated $5,000 in *ad valorem* tax monies for urban renewal purposes.

G.S. 1-151 requires us to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. The demurrer to the amended complaint admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deductible therefrom. But it does not admit inferences or conclusions of law asserted by

the pleader. *Little v. Oil Corp.,* 249 N.C. 773, 107 S.E. 2d 729; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; Strong's N. C. Index, Vol. 3, Pleadings, pp. 625-627.

The demurrer admits, for the purpose of challenging the sufficiency of the amended complaint, allegations of fact therein alleged to this effect: The City of High Point, and its agency the Redevelopment Commission of High Point, have prepared or caused to be prepared a far-reaching urban renewal project requiring the expenditure of large sums of money in that the project or plan includes the construction of a million dollar pedestrian plaza, and also includes in the project some of the city's best commercial and business districts on East High Street, South Wrenn Street, and East Commerce Street. The City Council of the city of High Point has agreed that the city of High Point will provide an amount in cash, streets, utilities, etc., which will not be less than one-third of the net cost of this redevelopment plan. These allegations of fact permit the reasonable inference that the total cost of completing East Central Urban Renewal Area, Project No. N.C. R-23, will amount to several millions of dollars. The city of High Point has paid the salary of the Urban Renewal Director out of *ad valorem* tax money, and has appropriated $5,000 in *ad valorem* tax monies for urban renewal purposes. The city of High Point, and its agencies, are contracting debts, pledging its faith, lending its credit, levying *ad valorem* taxes, and spending *ad valorem* tax money for the consummation of this redevelopment plan. No vote has been had on the question of expending money derived by taxation for putting this plan into effect, or for the city's contracting debts, pledging its faith and lending its credit, and levying taxes for putting this plan into effect.

Article VII, section 7, of the North Carolina Constitution reads:

> "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose."

The necessity of a rigid observance of this constitutional provision has been pointed out and reiterated in our decisions, and emphasized by G.S. 160-62, which reads:

> "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except for

> the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

This Court in *Redevelopment Commission v. Bank*, 252 N.C. 595, 114 S.E. 2d 688, has determined that lands acquired for the purposes and in the manner set forth in G.S. Chapter 160, Subchapter VII, Article 37, Urban Redevelopment Law, meet the public purpose test. To the same effect, *Redevelopment Commission v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391. The question of whether such an acquisition is for a *necessary* purpose relating to some phase of municipal government so as to enable a municipality to carry on the work for which it was organized and given a portion of the State's sovereignty, and necessitating the ordinary and usual expenditures reasonably required to enable a municipality to perform its duties as a part of the State Government was expressly reserved for determination in the *Hagins* case. See also the concurring opinion by *Bobbitt, J.*, in the *Bank* case.

"Our decisions uniformly hold that what are necessary expenses for a municipal corporation for which it may contract a debt, pledge its faith, or loan its credit and levy a tax without an approving vote of a majority of those who shall vote thereon in an election held for such purpose, is a question for the Court." *Wilson v. High Point*, 238 N.C. 14, 20, 76 S.E. 2d 546, 550.

In *Henderson v. Wilmington*, 191 N.C. 269, 277, 132 S.E. 25, 29, the Court held that the acquisition of free wharves and terminals that may be of advantage to the city's local business interests was not a necessary governmental expense, and without the approval of its voters the city is inhibited by Article VII, section 7, of the State Constitution from issuing bonds for such acquisition. In its opinion, the Court said:

> "In defining 'necessary expense' we derive practically no aid from the cases decided in other States. We have examined a large number of such cases apparently related to the subject and in each one we have found some fact or feature or constitutional or statutory provision antagonistic to or at variance with the section under consideration. We must rely upon our own decisions."

At page 278 the Court further said: "The cases declaring certain expenses to have been 'necessary' refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary."

In *Jones v. Commissioners*, 137 N.C. 579, 599, 50 S.E. 291, 298, Hoke, J., gives the following definition of necessary expenses: "They involve and include the support of the aged and infirm, the laying out

and repair of public highways, the construction of bridges, the maintenance of the public peace, and administration of public justice—expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty." In a subsequent decision the same learned judge observes that the term "necessary expense" more especially refers "to the ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State Government." *Keith v. Lockhart,* 171 N.C. 451, 456, 88 S.E. 640, 642. This feature is again stressed in *Ketchie v. Hedrick,* 186 N.C. 392, 119 S.E. 767, in which Clark, C.J., delivering the opinion of the unanimous Court said: "But all these cases extending the meaning of the words, 'necessary expenses,' were due to the enlarged scope of governmental expenses, causing a broader vision and a very proper growth in the recognized needs and requirements of municipal government. They were not based upon any idea that 'necessary expenses' would take in matters which were not required as necessary governmental expenses." In *Green v. Kitchin,* 229 N.C. 450, 457, 50 S.E. 2d 545, 550, Ervin, J., speaking for a majority of the Court said: "This Court has uniformly held that where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within the Constitution, and may be incurred without a vote of the people."

Approved as "necessary expenses" for a municipal corporation within the purview of Article VII, section 7, of the State Constitution have been the following: Repairing, maintaining and paving public streets, *Jones v. New Bern,* 152 N.C. 64, 67 S.E. 173; providing a city with a waterworks plant, a sewerage system, and for grading and paving its streets, *Greensboro v. Scott,* 138 N.C. 181, 50 S.E. 589; *Bradshaw v. High Point,* 151 N.C. 517, 66 S.E. 601; a market house, *Swinson v. Mount Olive,* 147 N.C. 611, 61 S.E. 569; a municipal building, *Hightower v. Raleigh,* 150 N.C. 569, 65 S.E. 279; a municipal power plant, *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; special training of a policeman, *Green v. Kitchin, supra.* For a list of many more cases to the same effect see G.S. Vol. 4A, pp. 105-106 of an annotation to Article VII, section 7, of the State Constitution; and also 18 N.C. L.R. p. 93 *et seq.*

The following have been held not as "necessary expenses" within the purview of Article VII, section 7, of the State Constitution: a swimming pool, *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486;

municipal parks and recreational facilities, *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702; support and maintenance of James Walker Memorial Hospital, *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; a hospital, *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418; *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668; *Burleson v. Board of Aldermen,* 200 N.C. 30, 156 S.E. 241; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634; a public library, *Westbrook v. Southern Pines,* 215 N.C. 20, 1 S.E. 2d 95; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; an airport, *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803; a chamber of commerce, *Ketchie v. Hedrick, supra;* a drill tower for firemen, *Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306. See also, *Wilson v. High Point, supra.*

The ultimate result, which our Urban Redevelopment Law, G.S. 160-454 *et seq.,* seeks to achieve, is to eliminate the injurious consequences caused by a blighted area in a municipality and to substitute for them a use of the area which it is hoped will render impossible future blight and its injurious consequences. This is in its broad purpose a preventive measure. As the Court said in *Redevelopment Commission v. Bank, supra:* "It may be that the measure [urban redevelopment project] may prove eventually to be a disappointment, and is ill advised, but the wisdom of the enactment is a legislative and not a judicial question." In our opinion, and we so hold, the expenses incurred, or to be incurred, by a municipality in putting into effect an urban redevelopment plan, pursuant to the authority vested in it by our Urban Redevelopment Law, are not expenses incurred, or to be incurred, by a municipality in the maintenance of public peace or administration of justice, do not partake of a governmental nature, and do not purport to be an exercise by a municipality of a portion of the State's delegated sovereignty, and consequently are not "necessary expenses" within the purview of Article VII, section 7, of the North Carolina Constitution. Any provisions of G.S. 160-466 (d) and 160-470 to the effect that bonds may be sold and issued by a redevelopment commission for the purpose of carrying out the provisions of an urban redevelopment plan or project under the provisions of our Urban Redevelopment Law, or that any municipality located within the area of such a commission may appropriate funds to a redevelopment commission for the the purpose of aiding such a commission in carrying out any of its powers and functions under our Urban Redevelopment Law, and to obtain funds for this purpose, the municipality may levy taxes, and may in the manner prescribed by law issue and sell its bonds, without the approval of a vote of the qualified voters in the municipality, are repugnant to the provisions of Article VII, section 7, of the

North Carolina Constitution. "Statutory requirements, in all events, must be made to square with the provisions of the organic law, or else disregarded." *Sessions v. Columbus County, supra.* The trial court erred in sustaining the demurrer to the amended complaint.

The amended complaint alleges there is an unlawful delegation of authority by the General Assembly to the Redevelopment Commission of High Point in violation of Article II, section 1, of the North Carolina Constitution. In *Redevelopment Commission v. Bank, supra,* the Court affirmed the constitutionality of our Urban Redevelopment Law. In this case the Court said: "In our opinion, and we so hold, the Urban Redevelopment Law does not confer any illegal delegation of legislative power upon petitioners in violation of Article II, section 1, of the North Carolina Constitution, as contended by respondent."

In our opinion the allegations in the amended complaint to the effect that the City Council of the city of High Point did not have in existence a legal plan or method of financing the acquisition of the renewal area in the urban renewal plan, Project No. N.C. R-23, at the time of approving said plan as required by G.S. 160-463, and has no legal plan now for financing the project, are conclusions of law. For the necessity of having such a plan in order to proceed with the project, see *Redevelopment Commission v. Hagins, supra.*

The order of the lower court sustaining the demurrer to the amended complaint is

Reversed.

GEORGE E. MOTLEY AND THELMA B. MOTLEY v. JAMES THOMPSON, JAMES I. ESSA AND JOSEPH ESSA.

(Filed 14 June 1963.)

1. Appeal and Error § 49—

Where there is no request for findings of fact, it will be presumed that the court found facts sufficient to support its order, notwithstanding that no findings appear of record.

2. Ejectment § 8—

The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants file a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond is properly set aside when plaintiffs file a reply to the counterclaim and raise no objection based

on want of bond until some weeks thereafter when, without notice to plaintiffs, they move for default judgment before the clerk. G.S. 1-111.

3. Pleadings § 19—

Conflicting allegations in a pleading neutralize each other.

4. Ejectment § 8—

G.S. 1-111 and G.S. 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when motion to strike a cross-action on ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession.

5. Trespass § 1.1—

The basis of trespass to personalty is injury to possession, and therefore the owner of a house may be liable for trespass if he unlawfully removes and damages chattels in the house in possession of another, and the denial of trespass in such instance raises an issue of fact for the jury.

6. Pleadings § 30—

Judgment on the pleadings is correctly denied when the pleadings raise an issue of fact on any single material proposition.

APPEAL by defendants from *Crissman, J.*, 7 January 1963 Session of GUILFORD—Greensboro Division.

Civil action to recover damages for trespass *quare clausum fregit,* heard upon defendants' motion to strike plaintiffs' reply and for judgment on the pleadings, and upon plaintiffs' motion to strike a judgment by default final heretofore signed by the assistant clerk of the superior court on 9 August 1962.

The motions were heard upon the pleadings and the argument of counsel of the parties.

From an order denying defendants' motion and allowing plaintiffs' motion, defendants appeal.

J. Kenneth Lee for defendant appellants.
Wm. E. Comer for plaintiff appellees.

PARKER, J. The complaint verified by plaintiffs' counsel alleges in substance: Plaintiffs, husband and wife, on 24 February 1962 were residing in a house at 517 High Street, Greensboro, North Carolina, in which they had household furniture and furnishings and typesetting equipment of which they were joint owners. On that day while they were not in the house, defendant James Thompson, an employee of the defendants James I. Essa and Joseph Essa acting under the orders

of his employers, drove a truck to this house. The door was locked. He knocked the front door down with a sledge hammer and crowbar, entered, demolished the house in part, loaded the truck with some of their furniture and furnishings of the value of $1,600, and hauled it away to some place still unknown to them. Defendants also hauled away $1,000 of their typesetting equipment, which has never been returned. When Thelma B. Motley returned to the house, Thompson in the presence of James I. Essa was loading the truck again with their furniture and furnishings and part of the typesetting equipment. She asked them to stop and get off the premises. They refused. She obtained a warrant against them for trespass. Whereupon, they dumped the furniture and furnishings and typesetting equipment in the truck on the ground and drove off. Plaintiffs carried this back in the house, where it was damaged in the amount of $650 by rain coming into the partly demolished house. Joseph Essa claimed to be the owner of the house, but had never obtained possession. By reason of defendants' willful and malicious acts of trespass, they are entitled to recover from defendants jointly and severally actual damages in the amount of $3,250 and punitive damages in the amount of $2,500.

All the defendants filed a joint answer verified by their counsel, which we summarize: They deny that plaintiffs resided in the house at 517 High Street and had any articles of household furniture and furnishings and typesetting equipment therein at the times complained of in the complaint, and deny that they ever removed any property of plaintiffs therefrom. They aver the house was owned by defendant Joseph Essa, and was unfit for human habitation. They admit that James Thompson at the time was acting under the instructions of the defendant Joseph Essa. They deny all other allegations of the complaint. The answer contains a counterclaim and cross-action which we summarize: By deed dated 8 November 1950, and properly recorded, plaintiffs conveyed the house and premises involved in this action in fee simple to Clarence M. Winchester and wife. Defendant Joseph Essa by *mesne* conveyances became the owner in fee simple of this property on 8 February 1961, and has been such owner since that time. If plaintiffs did occupy the house, such occupancy was illegal. Plaintiffs by threats and the issuance of malicious criminal processes have prevented defendants from taking possession of the premises, and such actions on their part "constitute at least constructive possession of the plaintiffs." Pursuant to the instructions of Joseph Essa, defendant Thompson began taking down sheet rock in one room of the house and loaded it on a truck to haul away, and before the truck was moved, plaintiffs arrived, and by threats of violence caused him to stop. By

reason of plaintiffs' acts Joseph Essa has been deprived of the use and possession of his property, which has a rental value of $50 a month for parking purposes. That plaintiffs refused to vacate the premises thereby depriving defendant of the rents and profits therefrom. That plaintiffs are insolvent and a judgment against them for damages would be worthless. Wherefore, defendants pray that plaintiffs' action against them be dismissed, that the defendant Joseph Essa have judgment for the possession of the property, and a judgment for rents and profits of said property against them resulting from their retention and possession of same. The answer with its counterclaim and cross-action was served on plaintiffs on 27 April 1962.

On 9 May 1962 plaintiffs demurred to the counterclaim and cross-action. On 13 June 1962 Phillips, J., entered an order overruling the demurrer. Plaintiffs did not except to the ruling.

On 16 July 1962 plaintiffs filed a verified reply to defendants' counterclaim and cross-action, in which they deny Joseph Essa is the owner of the house and premises, and deny that they conveyed the house and premises to Clarence M. Winchester and wife, and aver the signatures on the Winchester deed are not their signatures. They further deny the house was unoccupied and unfit for human habitation, and aver that the male plaintiff has been in possession of the house and premises at all times.

On 9 August 1962 Esther R. Burch, assistant clerk of the superior court of Guilford County, entered a judgment by default final stating that it appeared that defendants' cross-action was an action in ejectment, which was served on plaintiffs on 27 April 1962, that plaintiffs before filing their reply thereto did not execute and file an undertaking as required by G.S. 1-111, and did not comply with the requirements of G.S. 1-112 so as to file the reply without a bond, and decreeing that plaintiffs be removed from the premises described in the pleadings, and that Joseph Essa be put in possession thereof.

On 4 December 1962 defendants filed a motion, in which they allege in part "that because of the very technical nature and manner in which the judgment by default final was obtained, defendant Joseph Essa did not seek to have incorporated in that judgment any other relief except the right to be put in possession of the premises here in controversy." That by reason of failure on plaintiffs' part to comply with the requirements of G.S. 1-111 and 1-112 Joseph Essa is entitled to have plaintiffs' reply stricken from the record. Wherefore, defendants pray that plaintiffs' reply be stricken from the record; that judgment on the pleadings be granted in favor of the defendants; and that in the event the court does not see fit to grant the relief requested in their

motion, that a pre-trial conference be set by the court to determine the issues of fact arising out of the pleadings so that a trial by jury may be had on those issues.

On 20 December 1962 plaintiffs filed a motion answering defendants' motion, admitting the defendants filed a cross-action in ejectment and claim for rents but that the cross-action does not allege that the plaintiffs are in the actual possession of the premises, but only that "they were in constructive possession" and, therefore, no bond was required by the provisions of G.S. 1-111. In their motion plaintiffs further aver that the defendants raised no question about their not filing a bond before filing the complaint, and that later the attorney for the defendants without any notice had the assistant clerk of the superior court of Guilford County to enter the judgment by default final appearing in the record. They further aver that if the court should find that the judgment by default final was proper, it would in nowise end this litigation in that a judgment as to the right of Joseph Essa to the possession of the property would not determine their original cause of action for trespass *quare clausum fregit*, even if plaintiffs were not the owner of the property. That even if defendants owned the property they had no right to destroy and remove plaintiffs' personal property therefrom, they being in possession. Wherefore, plaintiffs pray that the motion of defendants be disallowed, and that the judgment by default final heretofore signed without notice to the parties or their attorney of record be stricken.

Judge Crissman entered an order denying defendants' motion and allowing plaintiffs' motion. Defendants excepted to the order, and appealed to the Supreme Court.

Defendants' assignments of error are based on one exception, and that one exception is to Judge Crissman's order.

Defendants assign as error that Judge Crissman found no facts to support his order. This contention is not tenable. The record does not show that defendants requested Judge Crissman to do so, and in the absence of a request that a finding of facts be made by him in this proceeding, it is presumed that the judge upon proper evidence found facts sufficient to support his order. *Morris v. Wilkins*, 241 N.C. 507, 85 S.E. 2d 892.

Defendants further assign as error that Judge Crissman erred in vacating the judgment by default final entered on 9 August 1962. It appears in Judge Crissman's order that he heard the two motions on the pleadings and on argument of counsel. The record consists of the pleadings: it contains no other evidence. We indulge the presumption that Judge Crissman found from the pleadings the following facts,

about which it would seem there can be no dispute: That plaintiffs filed their reply on 16 July 1962 without filing a bond, and that defendants' attorney and defendants did nothing in respect to the filing of plaintiffs' reply until August 1962, when without any notice to plaintiffs or their counsel and without any demand that a bond be filed, they secured the judgment by default final on the ground that plaintiffs had not complied with the requirements of G.S. 1-111 and 1-112.

We have held that the provisions of G.S. 1-111 and 1-112 are subject to be waived unless seasonably insisted upon by the plaintiff. *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796; *McMillan v. Baker,* 92 N.C. 110. In the *McMillan* case the Court held that an order of the superior court striking an answer in an action of ejectment for want of a bond by defendant is reviewable, where the defendant has been led to assume that plaintiff has waived the bond. Plaintiffs having filed their reply on 16 July 1962, and no objection to its filing having been made by defendants until 9 August 1962, and no demand for a bond having been made at any time, it was error for the assistant clerk of the superior court, after it had been on file since 16 July 1962, on 9 August 1962, without any notice to plaintiffs of defendants' motion for a judgment by default final, to give a summary judgment against plaintiffs decreeing "that the plaintiffs be removed from said premises and that the defendant Joseph Essa be put in possession thereof," and Judge Crissman properly reviewed the judgment by default final and vacated it. *McMillan v. Baker, supra; Cooper v. Warlick,* 109 N.C. 672, 14 S.E. 106; *Becton v. Dunn,* 137 N.C. 559, 50 S.E. 289; *Gill v. Porter,* 174 N.C. 569, 94 S.E. 108; *Shepherd v. Shepherd,* 179 N.C. 121, 101 S.E. 489; *Moody v. Howell,* 229 N.C. 198, 49 S.E. 2d 233; *Rich v. R.R.,* 244 N.C. 175, 181, 92 S.E. 2d 768, 773.

The bond required by G.S. 1-111 of defendants in all actions for the recovery or possession of real property is not for costs only, but secures to plaintiff such damages as he may recover in the loss of rents and profits. G.S. 1-112 sets forth the circumstances when in such a case the defendant may defend without a bond. We have held that the provisions of these two statutes do not apply to a defendant who is not in possession of the land in controversy. *Morris v. Wilkins, supra; Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155; *Carraway v. Stancill,* 137 N.C. 472, 49 S.E. 957.

Defendants in their answer deny plaintiffs were in possession of the property in controversy, and aver the house was unfit for human habitation. In their counterclaim and cross-action they allege in substance that if plaintiffs did occupy the premises, it was unlawful, and

further that plaintiffs' actions constituted "at least constructive possession of the plaintiffs." These repugnant allegations of fact destroy and neutralize each other. *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876; *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5. Further, in a part of defendants' counterclaim and cross-action which was ordered by the court stricken from the record, but which is in the record before us, it is alleged in substance that the city of Greensboro on 9 February 1962 served notice upon defendant Joseph Essa that the building here in controversy was unsafe and unfit for human habitation, and commanded him to have it demolished on or before 1 March 1962, that a notice to that effect was placed on the building by the city of Greensboro, and that before any work of demolition was done by defendant Thompson on 24 February 1962 a building inspector of the city of Greensboro entered the house through an unlocked or open door, and instructed Joseph Essa to begin its demolition. It is true that plaintiffs in their reply aver the male plaintiff was in actual possession of the premises. It would seem that this house has been demolished. With such conflicting allegations in the pleadings, and with the probability that plaintiffs are not in possession of the property in controversy here now, we deem it inadvisable here to decide whether the requirements of G.S. 1-111 and 1-112 are applicable to the filing of plaintiffs' reply.

The court below properly denied defendants' motion to strike plaintiffs' reply, for the reason we indulge the presumption that Judge Crissman found the facts to be as asserted in defendants' answer and counterclaim and cross-action that plaintiffs were not in possession of the property in controversy, even if G.S. 1-111 is applicable as contended by defendants.

Defendants assign as error the denial of their motion for judgment on the pleadings. The gist of trespass to personalty is the injury to possession, and possession alone is sufficient to maintain trespass against a wrongdoer. *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804; *Frisbee v. Town of Marshall,* 122 N.C. 760, 30 S.E. 21; *Dougherty v. Stepp,* 18 N. C. 371; *Myrick v. Bishop,* 8 N.C. 485; 87 C.J.S., Trespass, sec. 19. Even if Joseph Essa owned the house in controversy as he alleges, defendants are liable in damages, if they unlawfully took, removed and damaged plaintiffs' chattels in their possession in the house, as alleged by them. Defendants alleged in their answer they did not commit a trespass on plaintiffs' chattels.

"The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition." *Erickson v. Starling,* 235 N.C. 643, 71

S.E. 2d 384. *Ita lex scripta est,* and applying the rule to the complaint and answer, it is manifest that Judge Crissman correctly denied defendants' motion for a judgment on the pleadings.

Defendants' assignments of error are overruled, and the order of Judge Crissman below is

Affirmed.

JESSIE LEE McCURDY, ADMRX. BRUCE EUGENE McCURDY, DECEASED v. DEAN SMITH ASHLEY.

AND

JESSIE LEE McCURDY, ADMRX. BRADLEY EUGENE McCURDY, DECEASED v. DEAN SMITH ASHLEY.

AND

TONY McCURDY, BY HIS NEXT FRIEND JESSIE LEE McCURDY v. DEAN SMITH ASHLEY.

(Filed 14 June 1963.)

1. Witnesses § 1—

The competency of a boy who at the time of trial was some six years and five or six months old, and at the time of the accident in suit was some four years and four months old, is addressed to the sound discretion of the trial court, and where the record shows that upon the *voir dire* the court inquired into the child's intelligence and understanding of the obligation of an oath and admitted his testimony upon evidence supporting the conclusion of competency, the discretionary action of the court in admitting his testimony will not be disturbed.

2. Evidence § 55—

Where the testimony of a six and one-half year old child has been properly admitted in evidence, testimony of the child's grandfather and aunt as to statements made by the child to them separately to the same effect as his testimony upon the trial, is competent for the purpose of corroboration.

3. Automobiles § 41p—

Competent evidence of a six and one-half year old witness that defendant was driving at the time of the accident in suit, which evidence is corroborated by statements made by the witness to others prior to the trial, *held* sufficient to be submitted to the jury on the issue of the identity of the defendant as the driver, and nonsuit is properly denied.

4. Same; Evidence § 11—

Testimony of a surviving occupant in a car to the effect that he was not driving but that one of the other occupants killed in the accident

was driving at the time of the accident comes within the provisions of G.S. 8-51 in actions against the surviving occupant for wrongful death.

5. Evidence § 11—

Adverse examinations of defendant in regard to transactions with a decedent, which examinations were taken in prior actions nonsuited and are not offered in whole or in part in either of the actions in suit, nor even referred to in the presence of the jury in the instant trials, do not operate as a waver of G.S. 8-51 so as to render competent defendant's testimony in the instant trials in regard to such transactions.

6. Same—

Where an action to recover for injuries to one passenger is consolidated with two actions for wrongful deaths of two other passengers against the same defendant, the admission of testimony of plaintiff passenger in regard to a transaction between defendant and one of the deceased passengers does not constitute a waiver of G.S. 8-51 in regard to the two actions for wrongful death.

APPEAL by defendant from *Gwyn, J.*, November-December 1962 Civil Session of IREDELL.

Three civil actions, two to recover damages for wrongful death, and one to recover damages for personal injuries, allegedly caused by the actionable negligence of defendant in the operation of his automobile, which by consent of the parties were consolidated for trial.

The court submitted to the jury separate issues in each case, and the jury answered the issues in each case in each plaintiff's favor, and awarded damages to each plaintiff. From judgments in each case in favor of each plaintiff, defendant appeals.

Land, Sowers & Avery by Neil S. Sowers, and W. R. Battley for defendant appellant.

Hendren & West by L. Hugh West, Jr., for plaintiff appellees.

PARKER, J. After midday on 9 October 1960 Bruce Eugene McCurdy and his two sons, Bradley Eugene McCurdy nearly six years old and Tony McCurdy about four years and five or six months old (he testified he was six in June 1962), met defendant at a radio station near the town of Mooresville, and all three got in defendant's 1953 Oldsmobile to go to the Lincolnton drag strip. A short time thereafter Adrian Settlemeyer was driving an automobile 40 miles an hour west on Highway 150 near the town of Terrell, in Catawba County. When a black automobile was passing him on his left, defendant's Oldsmobile passed the black automobile on its left, went sliding across the highway in front of Settlemeyer's automobile, slid crosswise into

the abutment of a bridge on the highway across a creek, made a half turn, jumped over the creek, hit the ground square on its top, made another half turn, and landed on its wheels. When the 1953 Oldsmobile was in the air after it landed on its top, Bruce Eugene McCurdy was thrown out of it, his body going higher than the Oldsmobile, then hitting the Oldsmobile and landing in a side ditch. When the 1953 Oldsmobile came to rest, Bradley Eugene McCurdy was lying near it, Tony McCurdy was lying under it with his feet protruding, and defendant was lying near the creek. When the Oldsmobile was in the air, it hit a pine tree 12 feet up from the ground.

As a result of his injuries Bradley Eugene McCurdy died at the scene, and his father, as a result of his injuries, died 14 October 1960 without regaining consciousness. In the wreck Tony McCurdy was injured and defendant sustained a broken leg, fractures of all ribs on his left side, and a cut on the back of his head.

There is plenary evidence of actionable negligence on the part of the operator of the 1953 Oldsmobile. The crucial question is who was driving it at the time of the wreck.

Tony McCurdy, who was six years old in June 1962, testified that the defendant Dean Ashley was driving his Oldsmobile when the wreck occurred. Defendant assigns as error the court's holding Tony McCurdy was a competent witness, permitting him to testify as above stated, and not striking out his testimony. These assignments of error are overruled. This little boy's competency to testify as a witness in these consolidated cases was a matter resting in the sound discretion of the trial judge. *S. v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. Satterfield,* 207 N.C. 118, 176 S.E. 466; *S. v. Edwards,* 79 N.C. 648.

Speaking to the identical question in *Artesani v. Gritton,* 252 N.C. 463, 113 S.E. 2d 895, *Rodman, J.,* delivering the opinion of the Court said:

> "The test of competency is not age but capacity to understand and relate under the obligation of an oath a fact or facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide. [Citing numerous authority.]"

In *Wheeler v. United States,* 159 U.S. 523, 40 L. Ed. 244, the defendant was adjudged guilty of the crime of murder and sentenced to be hanged. In this case in holding that a boy nearly five and a half years old, a son of the deceased, is competent as a witness the Court said:

"That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities."

"Competency is to be determined at the time the witness is called to testify." *Artesani v. Gritton, supra.*

Tony McCurdy, in reply to questions put to him on his *voir dire,* said, among other things, that his mother taught him to say his prayers, and he repeated part of his prayers, that bad boys go down in the ground to the "boogerman," that when boys tell lies Jesus does not like them, that he is a good boy and tells the truth, that he goes to school and to church on Sundays. The record shows that in response to the question, "Do you know the difference between telling the truth and telling stories?" he replied, "Uh, huh." After this examination on the *voir dire,* the court held he was a competent witness.

We see no abuse of discretion on the part of the trial court in holding Tony McCurdy a competent witness and permitting him to testify. The conclusion we have reached is sustained by the following cases, which hold that children of the ages indicated were competent to testify: *S. v. Merritt, supra,* the prosecutrix was a child, who at the time of her ravishment on 6 April 1952 was four years ten months and five days of age, and the time of the trial was the May Term 1952 of Pitt (the date of the time of ravishment is taken from the indictment in the record in the office of the clerk of this Court); *S. v. Gibson, supra,* the prosecutrix was not quite six years of age; *S. v. Satterfield, supra,* a witness was a child seven years old; *S. v. Edwards, supra,* a witness was a child six and one-half years of age at the time of the trial; *Whitaker v. Commonwealth,* 297 Ky. 279, 179 S.W. 2d 448, a witness was a boy five and one-half years of age; *Jackson v.*

State, 239 Ala. 38, 193 So. 417, a witness was a four-year-old boy; *Hill v. Skinner* (Ohio), 79 N.E. 2d 787, a witness was a four-year-old child; *State v. Juneau* (Wis.), 59 N.W. 580, the prosecutrix was a little girl who at the time the offense was committed was about four years and nine months old and about five years and five months at the time of the trial; *State v. Ridley* (Wash.) 378 P. 2d 700, a witness was a girl who at the time of the trial was five years and four months of age; *Lewis v. State* (Tex. Crim. App.), 346 S.W. 2d 608, a witness was a five-year-old girl. See note—competency of a child as a witness—to *Wheeler v. United States, supra,* in 40 L. Ed. pp. 244-246. It is interesting to note that in *S. v. Merritt, supra,* the record on file in the clerk's office shows that the little girl, who was prosecutrix, when asked, "What will happen to you if you tell a story?" replied, "The boogie man will get me."

Defendant assigns as error that the court permitted the grandfather and aunt of Tony McCurdy to testify in effect, for the purpose of corroborating Tony McCurdy, that he told them separately that Dean Ashley was driving the automobile at the time of the wreck. As Tony McCurdy was competent to testify as a witness, this testimony of his grandfather and aunt in corroboration is competent. *Artesani v. Gritton, supra.*

Jessie McCurdy, mother of Tony, testified without objection: "* * * he [Tony] wanted to know why his daddy and his little brother had to die, and he said 'Mama,' he said, 'Dean was driving the car,'* * *."

Troy Howard was a witness for plaintiffs and testified in substance, except when quoted: He lives near the scene of the wreck. It happened about 2:30 p.m. He went to the scene after the wreck. He saw a man lying near the creek groaning, and stayed with him until the ambulance came. After about 20 minutes of groaning, the man smoked two cigarettes he gave him, and began to relax and was not in such a shock. Howard testified:

> "I said to him, 'If you will show me who you are, I will try to get in touch with your family, let your family know.' He said, 'I am Ashley from Statesville.' I asked him what in the world happened. He said, 'I don't know.' I said 'Who is the man out there in the ditch?' He said 'I don't know,' said, 'There wasn't anybody with me, I was driving by myself'; then I said, 'There is two little boys up there on the bank, too.' He said, 'Are they hurt?' I said, 'Yes'; he says, 'They wasn't with me, either.' Then I said 'Tell me your wife's name and address,' and he told me a certain street in Statesville, and I wrote it down, borrowed a piece of paper and a pencil from some of the men standing around, and an

> ambulance came about that time, he took the paper with him when he took the body and said he would notify his family."

Howard was then asked on direct examination, "This was the defendant Dean Smith Ashley?" He replied, "I guess it was, he don't look the same now, but I guess that was him." Howard was asked on cross-examination, "Then at the time he was talking to you, you don't think the man knew what he was talking about?" He replied, "You heard what he said."

There was sufficient competent evidence that the defendant was driving his 1953 Oldsmobile at the time of the fatal wreck, and of his actionable negligence in driving his automobile at the time to carry the case to the jury. The court properly overruled the defendant's motion for judgment of nonsuit made at the close of all the evidence.

Dean Smith Ashley was a witness in his own behalf and testified in substance as follows: He first saw Bruce McCurdy on 9 October 1960 on the dirt road off Highway 150 driving a Ford. He then went to the radio station at Mooresville. Bruce parked his automobile, and he and his two little boys got in defendant's automobile to go to Lincolnton. Bruce got in on the driver's side and the two little boys got in the back. He remembers telling Bruce he had to pull it hard to get it in low gear; Bruce started to pull out on the highway, and that is the last he remembers. Bruce drove his automobile away from the radio station. It is about eight miles from the radio station to the scene of the wreck. The next thing he remembers is that later that evening or night his wife and brother came to the hospital in Newton. He did not drive his autmobile away from the radio station.

Upon objections made by plaintiffs the court excluded this testimony of defendant in the case of Jessie Lee McCurdy, administratrix of Bruce Eugene McCurdy, deceased, against defendant, and in the case of Jessie Lee McCurdy, administratrix of Bradley Eugene McCurdy, deceased, against defendant, but admitted it for the consideration of the jury in the case of Tony McCurdy, by his next friend, Jessie Lee McCurdy, against defendant. The court instructed the jury as follows:

> "In those cases, gentlemen, where an objection has been sustained, you will not consider the evidence at all, you will not consider or permit your verdict to be affected in the least by the evidence in those cases to which it has been objected and where the objection has been sustained. You will not consider it in the two death cases, the law being that where death has closed the

mouth of one, the law will not permit the other to speak as to personal transactions, and our Supreme Court has held that where a person comes to his death in an accident, that such an accident involves a personal transaction as it relates to the driver of a vehicle."

Defendant assigns as error the exclusion of this testimony of the defendant in the two death cases.

The trial court properly excluded this testimony of defendant in the two death cases by authority of *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832; *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Tharpe v. Newman,* 257 N.C. 71, 125 S.E. 2d 315, construing the provisions of G.S. 8-51, unless the provisions of this statute do not apply to exclude this testimony in the two death cases.

This appears in the record:

"IT IS STIPULATED that there was an adverse examination of Mr. Ashley on December 21, 1960, in which he was asked questions by the plaintiff as to whether or not he was driving the car, but that the records have been lost; and that this was in prior actions which were nonsuited."

Defendant contends that the adverse examination of defendant by one of the unnamed plaintiffs in prior actions which were nonsuited operates as a waiver of the incompetency of defendant by reason of G.S. 8-51 to testify in the two death cases and makes his excluded testimony in the two death cases competent, which two death cases and the personal injury action of Tony McCurdy by consent of the parties, or at least without any objection on the part of any of the parties, were consolidated for trial. Defendant in support of his contention relies upon the following statement in Annotation to 33 A.L.R. 2d 1441:

"The rule appears to be well established that the examination of one witness incompetent under the dead man statute operates as a waiver of incompetency of adverse witnesses, at least where the testimony of such adverse witnesses is offered after the examination of the first witness, and as to matters testified to by such first witness."

In the instant trials the testimony of defendant taken at an adverse examination in prior actions, which were nonsuited, was not offered in whole or in part by plaintiffs, or any one of them, or even referred

to in the presence of the jury in the instant trials, so far as the record discloses. In fact, the stipulation states "the records have been lost." In our opinion this rule as stated in the annotation to A.L.R. has no application here, and the mere taking of this adverse examination, and no more, does not operate as a waiver of G.S. 8-51 to make the excluded testimony of defendant here competent in the two death cases. This is not a case where a pre-trial examination of a witness under G.S. 1-568.1 *et seq.* in regard to a transaction or communication with a deceased operates as a waiver of the provisions of G.S. 8-51 to the extent either party may use it upon the trial of the case in which it was taken or in a subsequent trial of the same case. *Andrews v. Smith,* 198 N.C. 34, 150 S.E. 670; *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540.

Defendant's contention, that because Tony McCurdy, who was a plaintiff in one of these three cases, consolidated for trial by consent of the parties, or at least consolidated for trial without objection, testified in his own behalf that defendant was driving the automobile at the time of the wreck made competent the excluded testimony of defendant in the two death cases, is not tenable. *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801, relied on by defendant, is easily distinguishable.

Defendant has no exceptions to the court's charge. His remaining assignments of error are formal. All defendant's assignments of error are overruled. In the trial below we find

No error.

IN THE MATTER OF THE ESTATE OF HALLIE M. CULLINAN, DECEASED.

(Filed 14 June 1963.)

1. Domicile § 2—

The domicile of the wife becomes that of her husband upon marriage, and upon his death does not revert automatically to her domicile prior to the marriage.

2. Domicile § 1—

Domicile remains until another is acquired and is not lost by mere change of residence, but in order to acquire a new domicile it is necessary that there be a change of residence to a new *locus* coupled with the intention of making it a permanent home.

3. Same; Wills § 8— Evidence of change of domicile held insufficient to support an affirmative finding upon the issue.

The wife of a nonresident continued to live in the city of her husband's residence after his death. The evidence disclosed that thereafter she made visits to her mother who lived on the farm in this State where she was born and raised, that after her mother's death she made visits to this State on business and for family conferences, and during her last illness entered a hospital in a county adjacent her childhood home. *Held:* The evidence is insufficient to sustain an affirmative answer to the issue as to whether she had re-established her domicile in the county of her childhood home, notwithstanding testimony of expressions of her intent or desire to return to her childhood home at some future time and that she was permitted to vote by absentee ballot there.

APPEAL by Philip M. Carden, movant, from *Hobgood, J.*, January Civil Term 1963 of GRANVILLE.

Mrs. Hallie M. Cullinan died on 31 October 1960 in Watts Hospital, Durham, North Carolina. She was born in Stem, Granville County, North Carolina, on 11 May 1893, where she lived and taught school until sometime in 1918, at which time she accepted employment as a government worker with the Federal government in Washington, D. C. While in Washington as a government worker she was married to Charles H. Cullinan in 1927, whereupon they moved to New Jersey. The next year, 1928, they returned to Washington, D. C. and Mrs. Cullinan resumed her employment with the government. Mr. Cullinan was never a resident of North Carolina. After his death in 1945, Mrs. Cullinan continued her employment with the government.

The last will and testament of Mrs. Hallie M. Cullinan was probated before the Clerk of the Superior Court of Granville County in common form on 21 January 1961, and letters testamentary were issued to the persons named in said will as co-executrices, Emma Moore Summers of Durham, North Carolina, and Grace L. Moore of Washington, D. C. (sisters of testatrix).

The executrices entered upon their duties and filed inheritance tax returns in the State of North Carolina and with the proper authorities in the District of Columbia, and inheritance taxes were paid to the State of North Carolina on the entire estate of the testatrix and to the District of Columbia only on personal property belonging to the estate of the testatrix which was located in the District of Columbia at the time of her death.

Thereafter, Grace L. Moore filed a claim and later brought an action against the estate for expenses incurred on behalf of Mrs. Cullinan for nurses in January 1959. She resigned as co-executrix, and judgment was entered by consent of co-executrix Mrs. Emma Moore Summers and paid at the request of the majority of the devisees and legatees.

The evidence tends to show that the estate has been administered except as to the final distribution of assets.

In October 1962, Philip M. Carden, a nephew and beneficiary under the last will and testament of Hallie M. Cullinan, filed a petition before the Clerk of the Superior Court of Granville County praying that the proceeding be vacated and that letters testamentary theretofore issued be revoked on the ground that the jurisdiction in the matter lies in the appropriate courts of the District of Columbia.

The matter was heard before the Clerk, and the Clerk held that the movant is estopped from questioning the validity of the probate of the will of Hallie M. Cullinan by reason of his having participated in the settlement of the estate by signing a release for household and kitchen furniture, and participating in a meeting of the legatees and devisees, at which time it was agreed as to which corporate stocks each would take as a partial distributive share in said estate in the event such stocks were not sold to create assets, and by various and sundry acts, and entered an order accordingly.

The movant appealed to the Superior Court of Granville County where the matter was heard before a judge and jury.

The record further tends to show that the movant, about the time he filed the above petition, filed an application for letters of collection in the District of Columbia where certain moneys belonging to the estate of the testatrix were on deposit in a bank in Washington, D. C., and $1,500.00 in United States Treasury Bonds were held by the United States Treasury Department, which belonged to the testatrix.

In the hearing in the Superior Court, the issue submitted to the jury was as follows: "Was the deceased, Hallie M. Cullinan, at the time of her death on October 31, 1960, domiciled in Granville County, North Carolina?"

The evidence is to the effect that prior to Mrs. Cullinan's death she owned a one-fifth interest in a farm at Stem, in Granville County, North Carolina, the farm on which she was reared. There was a cottage located on this farm where her mother lived many years prior to her death in 1953. This cottage was in addition to the old farm house. After the death of Mrs. Cullinan's husband, in 1945, she visited her mother about four times a year; she spent her vacation there in 1953. At the time of her mother's death, the evidence tends to show, Mrs. Cullinan owned the major portion of the furniture in the cottage at Stem. Mrs. Emma Moore Summers testified: "When I refer to Stem, North Carolina, I refer to the frame house as the 'cottage' and the old homeplace as the 'farm house.' The furniture to which I referred was located in the cottage. She owned the bedroom suit in my

mother's room, the rugs, venetian blinds, and the draperies in that bedroom. In the living room she owned a bookcase, the rug, some pictures, lamps, and a desk. She owned a settee and two rockers in the front hall and also the rug in the front hall, the lamps, table * * *. In the front bedroom she owned a day-bed. In the kitchen she owned some kitchen utensils, the step-stool, the curtains, the venetian blinds, and she owned porch furniture. She paid a large portion toward installing the bathroom." Her furnishings were later stored, in 1954, and the house rented thereafter.

After her mother's death, in 1953, the evidence tends to show that Mrs. Cullinan came back to North Carolina only once or twice a year, on business or for family conferences, but that she spent only one night in the cottage at Stem, North Carolina, after her mother's death.

The evidence further tends to show that Mrs. Cullinan and Mrs. Emma Moore Summers and her husband considered remodeling the cottage as a home for Mr. and Mrs. Summers and for Mrs. Cullinan when she retired. The plans involved the purchase of the interest of the other heirs in the land at Stem, North Carolina. Approval of a loan from a local bank in Granville County was obtained for this purpose. The loan was never consummated, and Mr. and Mrs. Summers later purchased a home in Durham, North Carolina.

At the request of Mrs. Cullinan, her furniture, which had been stored in Stem in 1954, was removed to the home of Mr. and Mrs. Summers in Durham in 1958 and used in their home but remained the property of Mrs. Cullinan.

About the time Mrs. Cullinan retired in 1958, she had an operation which later turned out to be a malignancy and from which she never recovered.

The Chairman of the Board of Elections of Granville County testified that he had been Chairman of the Board for twenty years and that at the time of her death Mrs. Cullinan was a registered voter in North Carolina in the Stem precinct; that the last time she voted was in the general election in 1952. Other evidence is to the effect that she also voted in Stem in 1950.

According to the respondents' evidence, the testatrix always referred to Stem, North Carolina, as her home, and to her apartment in Washington, D. C., where she resided, as her apartment but never as her home. She authorized the transfer of the lease on the Washington apartment to her sister, Grace L. Moore, in July 1960.

The movant offered testimony tending to show that the testatrix had no plans to return to North Carolina upon her retirement, but had discussed prior to her illness the intention to enter the Eastern Star Home in Arlington, Virginia.

For several years prior to her retirement in 1958, Mrs. Cullinan spent her vacations on trips to Puerto Rico, Bermuda, Havana, and Jamaica. These trips were under the sponsorship of the Arthur Murray Dancing Studio or the Educational Credit Bureau of said studio.

It further appears that from 22 June 1949 until 27 June 1959 the testatrix spent with the Arthur Murray Dancing Studio in Washington a total amount of $12,265.80. And there is further testimony to the effect that prior to her retirement she planned to open a dance hall of her own in Washington and had the particular site in mind where she planned to conduct her dances.

The jury answered the above issue in the affirmative and judgment was entered accordingly.

The question of estoppel was not passed upon in the Superior Court.

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

Watkins & Jarvis; Winders & Mitchell for movant.

William T. Watkins, Robert D. Holleman for respondents.

DENNY, C.J. The only question for determination on this appeal is whether or not the finding of the jury to the effect that Mrs. Hallie M. Cullinan, at the time of her death on 31 October 1960, was domiciled in Granville County, North Carolina, is supported by competent evidence.

The parts of G.S. 28-1 applicable to the facts in this case are as follows, including subsections 1 and 4: "The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration, in cases of intestacy, in the following cases: (1) Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened. * * *(4) Where the decedent, not being domiciled in this State, died in the county of such clerk, leaving assets in the State, or assets of such decedent thereafter come into the State."

Our decisions are to the effect that if the testatrix herein was not domiciled in Granville County, North Carolina, at the time of her death, the letters testamentary issued in this proceeding are absolutely void. *Collins v. Turner,* 4 N.C. 541; *Johnson v. Corpening,* 39 N.C. 216, 44 Am. Dec. 106; *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240, 5 A.L.R. 284.

It follows that, if the testatrix was not domiciled in Granville County, North Carolina, at the time of her death, since she died in

Watts Hospital in Durham, North Carolina, the Clerk of the superior Court of Durham County is empowered by the above statute to probate the will of the testatrix if properly presented for probate, and to issue valid letters to the presently acting executrix of the last will and testament of Mrs. Cullinan. G.S. 28-1; *In re Franks,* 220 N.C. 176, 16 S.E. 2d 831; *Vance v. R.R.,* 138 N.C. 460, 50 S.E. 860

"Domicile is of three sorts — domicile by birth or of origin, by choice, and by operation of law. The first is the common case of the place of birth, *domicilium originis;* the second is that which is voluntarily acquired by a party, *proprio motu;* the last is consequental, as that of the wife arising from marriage." *Reynolds v. Cotton Mills, supra.*

Therefore, when Mrs. Cullinan married Charles H. Cullinan in 1927, his domicile became her domicile by operation of law, and continued so for the next eighteen years or until his death in 1945. It clearly appears from the record that whereever his domicile was it was never in North Carolina. Consequently, if Mrs. Cullinan was domiciled in North Carolina at the time of her death, she had to established such domicile by choice after her husband's death in 1945. Her domicile was not automatically re-established in North Carolina as the result of her husband's death.

In 17A Am. Jur., Domicil, section 5, page 199, it is said: "In a sense 'home' is synonymous with 'domicile.' Indeed, it has been said that no other word is more nearly synonymous; 'home' is the fundamental idea of domicil. However, 'home' and 'domicil' are not always of equal meaning. They may, and generally do, mean the same thing; but a home may be relinquished and abandoned while the domicil of the party, upon which depend many civil rights and duties, may in legal contemplation remain. Incidental references to a place as 'my home' are not conclusive against the existence of the domicil of the declarant in another place."

Ordinarily, a domicile continues and does not necessarily require actual residence to retain it after it is once acquired, but actual residence is required to establish it.

In *Horne v. Horne,* 31 N.C. 99, this Court said: "The term domicil, in its ordinary and familiar use, means the place where a person lives or has his home; in a large sense, it is where he has his true, fixed and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove. Two things, then, must occur to constitute a domicil: first, residence, and second, the intention to make it a home — the fact and the intent."

In the case of *In re Martin,* 185 N.C. 472, 117 S.E. 561, Stacy, C.J., said: "Domicile is a question of fact and intention. Hence, to effect

a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence at another place, or within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. * * *"

The Court, in *Mitchell v. United States,* 88 U.S. 350, 22 L. Ed. 584, said: "A domicile once acquired is presumed to continue until it is shown to have been changed. * * * To constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. * * * These principles are axiomatic in the law upon the subject."

There is no evidence in this record tending to show that Mrs. Cullinan ever resided in North Carolina after 1945 with the intent to establish her domicile in this State and to abandon her former domicile. In fact, there is no evidence tending to show that she ever came to North Carolina after 1945 except for the following purposes: (1) to visit her mother; (2) on business or for family conferences; and (3) to enter Watts Hospital during her last illness. After her husband's death, she continued to reside in the apartment where they had lived for many years until 1957, when she moved to another apartment at 4117 Davis Place, N. W. In her last will and testament which she executed on 18 March 1960, in Durham, North Carolina, she said: "I, Hallie M. Cullinan, of 4117 Davis Place, N. W., Washington, D. C., being of legal age and sound mind and memory, do make, publish and declare this my last will and testament * * *."

The further fact that she may have expressed an intent or desire to return to North Carolina at some future time, and that she was permitted to vote by absentee ballot in North Carolina in 1950 and 1952, were not sufficient to establish her domicile in Granville County, North Carolina, unaccompanied by actual residence there. *Burrell v. Burrell,* 243 N.C. 24, 89 S.E. 2d 732.

The evidence in the hearing below is insufficient to sustain an affirmative answer to the issue submitted to the jury, and the judgment based thereon is reversed and this cause is remanded for further proceeding in accordance with this opinion.

Remanded.

DR. CLARENCE N. STONE v. DR. RICHARD CULPEPPER PROCTOR.

(Filed 14 June 1963.)

1. Physicians and Surgeons § 11—

A physician is required to possess that degree of professional knowledge and skill which others similarly situated ordinarily possess, to exercise reasonable care and diligence in the application of his knowledge and skill for the patient's care and to use his best judgment in the treatment and care of the patient, and may be held liable by the patient for injury resulting from failure in any one of these respects.

2. Physicians and Surgeons § 15; Evidence § 15—

In an action against a psychiatrist to recover for injuries resulting from the repetition of electroshock treatment after the first such treatment had caused pain of which plaintiff had complaind and given notice to defendant, plaintiff is entitled to introduce in evidence the "Standards for Electroshock Treatment" prepared by the American Psychiatric Association, of which defendant was a Fellow, setting forth a standard of practice, with which defendant was familiar, to make X-ray examination if a patient complained of pain after electroshock treatment.

3. Physicians and Surgeons § 17— Evidence that psychiatrist repeated shock treatments without examination after patient complained of pain held to take issue of negligence to jury.

Evidence tending to show that plaintiff, after receiving an electroshock treatment administered by defendant or under his control, complained of pain in his back, that further shock treatments were administered without X-ray examination of plaintiff to ascertain if he had suffered accidental injury as the result of the first, that such X-ray examination was standard practice in such instance, and that shortly thereafter X-ray examination by another physician disclosed that plaintiff had suffered a compressed fracture of recent date of the ninth thoracic vertebra, *is held* sufficient to overrule nonsuit in an action for malpractice.

APPEAL by plaintiff from *Copeland, S.J.*, November 19, 1962, Civil Term, GUILFORD Superior Court (Greensboro Division).

The plaintiff instituted this civil action against the defendant, his physician, to recover damages for personal injury allegedly caused by the defendant's negligence in the course of administering electroshock therapy on five occasions during the course of treating the plaintiff for a mental disorder.

The plaintiff does not contend the defendant was in any way deficient in the special knowledge and skill required for the practice of psychiatry; nor does he contend the defendant was negligent in the administration of the first treatment. He does contend, however, that the first treatment produced a compression fracture of the ninth thoracic vertebra which the defendant negligently failed to discover

and continued further treatments, greatly aggravating the injury and increasing the damage.

The foregoing is a partial outline of the plaintiff's allegations. His evidence tended to show the physician-patient relationship of the parties. In the course of treatment the defendant had the plaintiff admitted to Graylyn Hospital in Winston-Salem. The defendant was Graylyn's Assistant Director and a member of its psychiatric staff. He prescribed and caused to be administered to the plaintiff the following electroshock treatments: February 10th, 130 volts for four-tenths of a second; February 12th, 120 volts for three-tenths of a second; February 16th, 140 volts for five-tenths of a second; February 20th, 150 volts for six-tenths of a second; February 23rd, 150 volts for six-tenths of a second; all in the year 1954.

After the first treatment the plaintiff immediately suffered and complained of severe pains in his lower back. The pain manifested itself immediately after the plaintiff regained consciousness. Heat treatments and injections for pain were administered. These were repeated daily and shown on the hospital chart which the defendant examined. At no time did he prescribe X-ray or other means by which the cause of the persisting pains might be determined. Notwithstanding the symptoms of back injury manifested immediately after the first treatment, the defendant continued to increase both the intensity and duration of the electroshock treatments.

On his adverse examination which was read into the evidence, the defendant stated: "I know the usual voltage or amperage administered in ordinary shock treatment; it is 120 volts. . . . generally . . . for two-tenths to four-tenths of a second."

Dr. Proctor was graduated as a doctor of medicine in 1945. During his course of study and during his internship he had training in surgery. However, after extensive training he became a specialist in the field of psychiatry. "I am a Fellow in the American Psychiatric Association . . . They have a publication; it is the Journal of The American Psychiatric Association. . . . I subscribe to the American Journal of Psychiatry."

The plaintiff offered for the purpose of having it identified as his Exhibit No. 7, a document entitled: "Standards for Electroshock Treatment," prepared by the Committee on Therapy and approved by the Council of the American Psychiatric Association, May, 1953. In reply to a question by plaintiff's counsel, the defendant stated he was familiar with the contents of the publication and with that part referred to as "Standards for Electroshock Treatment" in 1953. The defendant's objection to the question was sustained. If permitted, the

defendant would have answered, "Yes, sir, I am familiar with it." "Question: Were the standards that are set forth by the American Psychiatric Association the same as those which you as a practicing physician could observe in your practice in this area?" The answer, if admitted, would have been, "Yes, generally."

Among the standards was the following: "(e) . . . If the patient should complain of pain or impairment of function, he should receive a physical examination, including X-ray, to ascertain whether he has suffered accidental damage." The court refused to admit the questions and answers, including (e) of the standards offered.

While he was still suffering pain in the lower part of his back, the plaintiff was discharged from the hospital on February 25, 1954. Two days later, Dr. Apple, a radiologist, examined plaintiff and by X-ray discovered the ninth vertebra showed a compressed fracture. "I have an opinion satisfactory to myself as to the nature and extent of the fracture. . . . I would classify it as severe or moderately severe." The witness expressed the opinion the fracture was recent and had occurred within the last two or three weeks.

Dr. Register, an orthopedic surgeon, examined the X-ray taken by Dr. Apple, prescribed hospital treatment, a Taylor brace, and confinement in bed for six weeks.

The plaintiff testified the pain in his back began immediately following the first treatment and complaints were made to the defendant and to the nurses and daily recorded in the hospital record. The defendant did not resort to X-ray to determine the nature of the back injury.

At the conclusion of the plaintiff's evidence, the court entered judgment of involuntary nonsuit. The plaintiff excepted and appealed.

Cooke & Cooke by William Owen Cooke for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Irving E. Carlyle, Sapp and Sapp, by Armistead W. Sapp for defendant appellee.

HIGGINS, J. "A physician who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. (citing many cases) If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the

proximate cause of injury and damage, he is liable." *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762.

In this case the plaintiff concedes the defendant possessed the requisite degree of professional learning, skill, and ability properly to diagnose and to treat the plaintiff's ailment. The plaintiff challenges neither the diagnosis made, nor the the treatment prescribed. He does allege, however, that the first shock treatment of 130 volts for four-tenths of a second, given on February 10, 1954, caused a compression fracture of his ninth vertebra, producing severe pain which should have, and did, put the defendant on notice that a fracture was probable. Notwithstanding this notice, the defendant continued to administer shock treatments of increased intensity. These successive treatments added to the plaintiff's injury and increased his damages. Disregarding ample notice of a potential fracture, the defendant negligently failed to make proper examination to determine whether a fracture actually existed. In so doing he failed to exercise due care and his best judgment in the treatments which he had undertaken. *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Gower v. Davidian,* 212 N.C. 172, 193 S.E. 28; *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

The defendant's adverse examination tended to show that usual shock treatment consisted of 120 volts for two-tenths of a second to four-tenths of a second. The first treatment administered to the plaintiff was 130 volts for four-tenths of a second; the second was 120 volts for three-tenths of a second; the third was 140 volts for five-tenths of a second; the fourth and fifth were each 150 volts for six-tenths of a second. According to the defendant's own admission, all except the second were in excess of that usually administered. "After each one, he (the plaintiff) complained of this pain in his back. I gave him something to relieve the pain. . . . I never made an X-ray picture of him while he was there."

Defendant was a Fellow in the American Psychiatric Association. He was familiar with its "Standards of Electroshock Treatment," prepared by the Committee on Therapy and approved by the Council of the Association. These "Standards" were "noncontroversial and reflect the consensus of those who practice electroshock therapy." The "Standards" set are the same as those which a practicing physician could observe in his practice in this area. Among the standards appeared the following: "(e) . . . If the patient should complain of pain or impairment of function, he should receive a physical examination, including X-ray, to ascertain whether he suffered accidental damage."

The defendant was familiar with the standards above referred to. They were fixed by the Association to which he belonged and in which

he was a Fellow. They applied directly to his specialty and to the safety of patients undergoing shock treatment. His acknowledgment of their authenticity and their applicability to the Winston-Salem area were sufficient to warrant their admission in evidence. 32 C.J.S., § 625; *Sanzari v. Rosenfeld,* 34 N.J. 128, 167 A. 2d 625; 20 Am. Jur., § 912, p. 769. "The failure of a physician dealing with an injury involving a potential fracture or dislocation to resort to X-ray views in order to determine the existence and nature of such an injury has frequently been noted as supporting, under the evidence in the particular cases, a finding of negligence in the diagnosis." 54 A.L.R. 2d § 9, p. 297; *Wilson v. Corbin,* 241 Iowa 593, 41 N.W. 2d 702.

The defendant has stressfully argued that nonsuit was required for the reason that *only* the medical evidence of specialists in psychiatry is sufficient to make out a case, and that no specialist in this field was called to testify. Without admitting the soundness of the contention, it overlooks the fact that in this case the "Standards" fixed by the Committee of the American Psychiatric Association with which he was familiar, and which he could have observed, specifically required an X-ray examination in case of pain "to determine whether he has suffered accidental damage." This examination the defendant failed to make. *Hazelwood v. Adams,* 245 N.C. 398, 95 S.E. 2d 917; *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443.

The evidence offered, in combination with that which was improperly excluded, was sufficient to support these conclusions: The plaintiff suffered injury as a result of the first shock treatment. He made immediate complaint of intense pain in his lower back. The subsequent treatments intensified the pain and aggravated the injury. The defendant knew of the persistent sufferings. In these circumstances the evidence of injury was sufficient to put the defendant on notice of a potential fracture. Notwithstanding this notice which X-ray would evidently have disclosed, the defendant made insufficient effort to discover whether a fracture in fact existed. The "Standards" with which the defendant was familiar and which he could and apparently should have observed, required X-ray investigation. This requirement the defendant failed to observe, although he knew that fractures result in 15 to 30 per cent of the cases in which the treatment is administered. The foregoing are permissible inferences which the jury may or may not draw from the evidence. For the court to draw the inferences would invade the province of the jury.

This case was carefully briefed and ably argued. In this opinion the Court has adhered to its rule that in cases in which nonsuit is reversed, the evidence is recited only to the extent necessary to show

the basis for decision. For the reasons discussed, we conclude that the judgment of nonsuit in the court below should be, and is

Reversed.

ROBERT A. MURRAY v. BENSEN AIRCRAFT CORPORATION.

(Filed 14 June 1963.)

1. Courts § 20—

Plaintiff instituted this action to recover for injuries sustained when an gyroglider manufacturd by defendant fell while it was being operated by plaintiff in another state. *Held:* While the cause of action in tort is governed by the laws of the state in which the accident occurred, in the absence of allegation that the contract of sale was made in the state of plaintiff's residence, or indeed that plaintiff himself had purchased the gyroglider from defendant, the laws of this State will be applied in determining whether plaintiff has alleged a cause of action *ex contractu.*

2. Sales § 5—

A stranger to a contract of sale may not recover against the seller for breach of warranty, and in the absence of allegation by plaintiff that he purchased the chattel from defendant, demurrer is properly sustained in his action for breach of warranty, notwithstanding allegations pertinent to a cause of action for negligence that the chattel failed to comply with Federal statutes designed to promote safety and that plaintiff was injured as the result of such failure.

3. Pleadings § 19—

Where a pleading is defective in omitting allegations essential to plaintiff's cause of action, demurrer thereto is properly sustained, but the action should not be dismissed without giving plaintiff an opportunity to amend.

APPEAL by plaintiff from *Heman Clark, J.,* November 1962 Regular Civil Term of WAKE.

Plaintiff seeks compensation for injuries sustained in the fall of a gyroglider. The complaint alleges defendant manufactured and sold the parts used to construct the glider. Plaintiff bases his right to recover on two theories: The first cause of action is based on the theory of negligence in designing gliders and in producing the parts purchased by plaintiff to assemble the glider. The second cause of action is based on allegations that defendant warranted the design and materials sold by it to be suitable for the construction of a glider which could be operated with safety and that the warranty so given was false.

Defendant demurred to each of the causes of action for that neither stated facts sufficient to impose liability on it. The demurrer was overruled as to the first cause of action and sustained as to the second, and that action was dismissed. Plaintiff appealed.

Warren C. Stack by James L. Cole for plaintiff appellant.
Purrington & Culbertson by John K. Culbertson for defendant appellee.

RODMAN, J. The basic facts on which plaintiff relies to support his claim for damages are stated in his first cause of action and restated in his second cause.

Summarized, the facts stated in the second cause of action are:

Defendant, a domestic corporation has its place of business in Wake County, N. C.; it is "engaged in the business of designing, manufacturing and selling various aeronautical machines, devises, crafts and products associated with the aviation industry"; it designed, manufactured, and sold "a rotary-wing, one-man rotor-craft under the nomenclature and trade name of Bensen Model B-7 'Gyro-glider' "; on 1 June 1961 plaintiff purchased a new gyroglider in the original carton in which it was shipped from defendant's plant. It was packaged in two sections, one containing the glider body, and the other containing the rotor blades designed for attachment to the body. "Prior to the purchase by the plaintiff of the particular Bensen Model B-7 'Gyro-glider,' the corporate defendant issued express representations and warranties by advertisement in national publications that the plaintiff and others of the consumer public could purchase and use the Bensen Model B-7 'Gyro-glider' for the intended purpose of rotary flight and in complete safety to the plaintiff and other members of the consumer public." (Attached to the complaint is an exhibit consisting of a statement signed in defendant's name by its president and a writing captioned: "QUESTIONS AND ANSWERS ABOUT BENSEN MODEL B-7M GYRO-COPTER." He relies on this exhibit to establish the asserted warranties.)

Plaintiff, a resident of Los Angeles County, California, on 3 June 1961, transported the gyroglider to El Mirage, Dry Lake, California, where he assembled the parts in accordance with written instructions prepared by the manufacturer.

Plaintiff explains how the glider operates: It must be towed at a minimum speed of 20 m.p.h.; when that speed has been reached, the rotor blades begin operating; the tow line is then released; lateral movement of the glider is by means of rudders; vertical movements

are produced by an overhead control stick in the shape of an inverted T.

Following the assembly of the parts by plaintiff, he made three airborne flights. The first two such flights were completely successful. On the third flight he "ascended to the altitude of approximately 100 feet, at which time the tow line was released and the plaintiff proceeded with his flight with the rotor blades section furnishing the means of flight potential; and suddenly and without warning the 'Gyro-glider' rapidly lost 25 feet of altitude in what is generally referred to as a nosedive, following which the glider continued in a line vertical to the ground and proceeded to nosedive into the ground, striking the ground with force and violence resulting in the 'Gyro-glider' being demolished and the plaintiff sustaining painful, critical and permanent injuries."

Plaintiff is an experienced aviator and "has logged over 200 hours in various types of airplanes plus approximately four hours' instruction in gliders." The published statements amounted to "express warranties as to the mechanical fitness of the 'Gyro-glider' . . . that the particular Model B-7 'Gyro-glider' purchased by the plaintiff was not air-worthy as the defective materials or defective design, or both, in the rotor blade section would bind or freeze with use causing the plaintiff or other users of the 'Gyro-glider' to lose all control over the 'Gyro-glider' while it was airborne."

What laws should be applied to the alleged facts to determine defendant's liability for the asserted breach of warranty? Plaintiff contends the law of California is controlling. He bases this contention on two grounds: First, the law of the state where the injury occurred determines whether an act is a tort or breaches a contract; second, we should infer from the facts alleged, i.e., his residence, the date of purchase, 1 June 1961, and use of the purchased article at Dry Lake, California, that the parts were purchased in California.

Plaintiff correctly states the law with respect to acts assertedly tortious. *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288, and cases there cited. But the rule is different with respect to the interpretation of contracts and what constitues a breach thereof. *Roomy v. Ins. Co.,* 256 N.C. 318, 123 S.E. 2d 817; *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592; *Bundy v. Commercial Credit Co.,* 200 N.C. 511, 157 S.E. 860.

We are not willing in this day and time, when an experienced aviator such as plaintiff can travel from Los Angeles to any part of the continental United States in a few hours, to assume a fact which plaintiff has not alleged and may not be willing to allege. In the

absence of factual allegations calling for the application of a different rule of law, we think it proper in a suit brought in this state to apply the law of this state in determining whether or not plaintiff has alleged a cause of action.

What is that law? The word "warranty" by definition implies a contractual relation between a party making a warranty and the beneficiary of the warranty. *Bobbitt, J.,* said in *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21: "A warranty, express or implied, is contractual in nature. Whether considered collateral thereto or an integral part thereof, a warranty is an element of a contract of sale." Applying the definition he said: "Absent privity of contract, there can be no recovery for breach of warranty except in those cases where the warranty is addressed to an ultimate consumer or user. Ordinarily, the rule that a seller is not liable for breach of warranty to a stranger to the contract of warranty is applicable to an employee of a buyer. (citation) Negligence is the basis of liability of a seller to a stranger to the contract of warranty. *Enloe v. Bottling Co.,* 208 N.C. 305, 180 S.E. 582, and cases cited; *Caudle v. Tobacco Co.,* 220 N.C. 105, 16 S.E. 2d 680."

It was urged in *Ward v. Sea Food Co.,* 171 N.C. 33, that a consumer having no contractual relationship with the manufacturer or producer could, when injured because of a defect in the use of the article, maintain an action *ex contractu* against the producer or manufacturer on the theory of an implied warranty of fitness; but defendant was held liable because of its negligence. The rule then applied has been consistently adhered to and the claim of warranty running to a remote purchase repudiated in subsequent decisions. *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30; *Daniels v. Swift & Co.,* 209 N.C. 567, 183 S.E. 748; *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705; *Walston v. Whitley & Co.,* 226 N.C. 537, 39 S.E. 2d 375; *Wyatt v. Equipment Co., supra; Prince v. Smith,* 254 N.C. 768, 119 S.E. 2d 923.

The rule announced and applied in the cases cited above is supported by the great weight of authority. Many cases are assembled in 75 A.L.R. 2d 46 *et. seq.* Under the heading "Necessity of privity where breach of warranty is asserted."

Was there a contractual relationship between plaintiff and defendant which contained a warranty as to fitness? Nowhere in his complaint, either in the first cause of action based on negligence or on the second cause of action based on breach of contract has plaintiff said where, when, and from whom he purchased the parts which he assembled to make a gyroglider. It may be inferred that he did not

purchase from defendant because in his brief he argues that he may maintain an action for breach of contract (warranty) notwithstanding the fact that he never had any contractual relationship with defendant.

Plaintiff incorporates in both his first and second causes of action allegations that defendant, in manufacturing and putting on the market gliders and parts to be assembled as gliders, failed to comply with Federal statutes designed to promote safety. The violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable. *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 377; *Lyday v. R.R.*, 253 N.C. 687, 117 S.E. 2d 778; *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560; *Reynolds v. Murph*, 241 N.C. 60, 84 S.E. 2d 273. This is an appropriate allegation on the first cause of action based on negligence and not on the second based on breach of contract.

The court correctly concluded plaintiff failed to state facts sufficient to impose liability on defendant for breach of contractual obligations to him. The other allegations therein stated are not material to that cause of action and relate to the first cause of action.

The court was in error, however, in ordering the second cause of action dismissed. The cause of action as stated was defective for failure to state sufficient facts, not because the facts stated affirmatively showed that plaintiff did not have a cause of action. The court should have allowed plaintiff an opportunity to amend so as to state, if he can, facts necessary to show defendant breached its contract with plaintiff.

The portion of the judgment sustaining the demurrer is affirmed, but the portion thereof dismissing the action is erroneous and should be stricken therefrom. It is so ordered. As so modified, the judgment is affirmed. *Walker v. Nicholson*, 257 N.C. 744, 127 S.E. 2d 564.

Modified and affirmed.

DONALD SCOTT v. ROSLYN KERN SCOTT.

(Filed 14 June 1963.)

1. Judgments § 2; Trial § 29—

Under G.S. 7-65 as amended, a resident judge has jurisdiction to hear and determine in chambers, motion for judgment of voluntary nonsuit.

2. Trial § 29; Divorce and Alimony § 1—

The rule that plaintiff is entitled as a matter of right to take a voluntary nonsuit if defendant has not set up a counterclaim arising out of

the same transaction alleged in the complaint *is held* to apply to actions for divorce.

3. Trial § 29; Divorce and Alimony § 16—

Plaintiff in an action for absolute divorce is entitled as a matter of right to take a voluntary nonsuit upon paying costs and alimony *pendente lite* to the date of motion, notwithstanding he has notice of defendant's intention to file a cross action for alimony without divorce, and, the nonsuit having been taken, no action is pending in which defendant may amend her answer to assert such cross action.

APPEAL by defendant from *Johnston, J.*, Resident Judge of the twenty-first Judicial District at CHAMBERS on January 19, 1963.

This action for an absolute divorce on the grounds of two years separation was instituted on Sepember 19, 1961 by the husband against the wife, a resident of New York. Plaintiff alleged that he had been a resident of Forsyth County, North Carolina, for the preceding six months. Answering the complaint, defendant admitted the marriage, her residence in New York, and that one child had been born to the union. All other allegations defendant denied. She specifically alleged that plaintiff himself was a resident of New York and that the Superior Court of North Carolina had no jurisdiction of the parties. She averred further that the plaintiff had abandoned the defendant in New York without just cause or provocation, but she asked for no affirmative relief. She prayed that the plaintiff's action be dismissed and divorce be denied. On May 17, 1962, she filed a motion for alimony *pendente lite*. On June 28, 1962, Judge Walter E. Johnston, Jr., the Resident Judge of the Twenty-first Judicial District, heard the motion and ordered plaintiff to pay defendant $1,350.00 per month for the support of herself and the minor child pending the further orders of the court and to pay defendant's counsel fees to date.

On November 28, 1962, counsel for defendant, by letter, advised plaintiff's counsel that on December 10, 1962 at 10:00 a.m. she would move to be allowed to amend her answer to set up a cross action for alimony without divorce on the alleged grounds of plaintiff's adultery and willful abandonment of defendant. He enclosed a copy of the proposed amendment. On December 7, 1962, plaintiff's attorney requested defendant's attorney to continue the matter from December 10th so that he could confer with his client in New York. Counsel agreed to the continuance.

On December 17, 1962, plaintiff filed a written motion with the clerk of the Superior Court reciting that he had paid all counsel fees and alimony *pendente lite* ordered by Judge Johnston; that he desired to terminate this action and that he "hereby submits to a

voluntary judgment of nonsuit." He moved that a judgment of voluntary nonsuit be entered and the action be dismissed. On December 18, 1962, the defendant filed the motion to be allowed to amend her answer by setting up the cross action for alimony without divorce.

Plaintiff's motion came on to be heard before the clerk on January 8, 1963. Defendant's motion had not been heard. The clerk found the facts substantially as stated above and declined to pass on plaintiff's motion for a voluntary nonsuit. Plaintiff excepted and appealed to the Superior Court.

Judge Johnston, over the objection of the defendant that plaintiff's motion for judgment of voluntary nonsuit could not be considered by the resident judge out of term but only by the judge presiding at term, heard the appeal in chambers on January 19, 1963. He allowed plaintiff to take a nonsuit but refused to dismiss the action. His judgment was signed "January 26, 1963 for January 19, 1963."

The record states: "The defendant's amendment to answer was again filed of record on January 26, 1963 and served on plaintiff's attorney of record on January 26, 1963."

Defendant appealed to this Court assigning as error the action of the resident judge: (1) in allowing plaintiff's motion for judgment of nonsuit in chambers and (2) in allowing the motion after defendant had filed her motion for leave to allege her cross action.

McLennan & Surratt and Weidlich & Rogers for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and Erdheim & Armstrong for defendant appellant.

SHARP, J. Defendant's first assignment of error raised the question, does a resident judge have jurisdiction to pass upon a motion of nonsuit in chambers?

Since the enactment of Chapter 142, Public Laws of 1945, (now the first proviso in G.S. 7-65) the answer has been YES. Prior thereto, it was NO. McIntosh, North Carolina Practice and Procedure, (1st ed.) Section 630; *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170; *McFetters v. McFetters*, 219 N.C. 731, 14 S.E. 2d 833.

Chapter 92, Public Laws of 1921, Extra Session (now G.S. 1-209) gave the clerks of the Superior Court authority to enter judgments of nonsuit and certain other judgments. Thereafter, the authority of the clerk to enter judgments of nonsuit was concurrent with that of the judge at term. *Hill v. Hotel Co.*, 188 N.C. 586, 125 S.E. 266; *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329; *Ward v. Agrillo*, 194 N.C. 321, 139 S.E. 451. However, since February 14, 1945 a resident judge's

jurisdiction to enter a voluntary nonsuit is not confined to term. By Chapter 78, Public Laws of 1951, the legislature amended G.S. 7-65 to give similar powers to any Special Superior Court Judge residing in the district.

G.S. 7-65 now provides, in part, as follows:

> "*Jurisdiction in vacation or at term.* — In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term: Provided, that in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time: . . . ."

As pointed out in 23 N.C.L.R. 329, 330, the 1945 Legislature added the proviso in the above excerpt in consequence of the suggestion of Barnhill, J., later C. J., in his dissent in *Distributing Corporation v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377 (1944). At that time, in the opinion of Justice Barnhill, a resident judge had no jurisdiction at chambers to hear a cause upon an agreed statement of facts. G.S. 7-65 then consisted only of the two sentences (minus the reference to special judges) preceding the proviso. Said Justice Barnhill:

> "It confers concurrent jurisdiction on the resident judge only in those matters in which the Superior Court has jurisdiction 'out of term.' Actions pending on the civil issue docket are not included. Hence, the resident judge has no jurisdiction, and the judgment is without force in law. . .
>
> "No doubt legislation giving the resident judge concurrent jurisdiction in all matters not requiring intervention of a jury or in which trial by jury has been waived would promote the prompt administration of justice and would be welcomed by the

profession. So far, however, the General Assembly has failed to take that course."

Since the 1945 and 1951 amendments to G.S. 7-65, this Court has held that a regular judge has jurisdiction to hear and determine in chambers an action involving title to a bank account in which the answer raised no issues of fact, *Westcott v. Bank,* 227 N.C. 39, 40 S.E. 2d 461; that a special judge in the county of his residence has jurisdiction to hear and determine a demurrer in chambers, *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765, and to hear and determine a controversy without action, *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748.

In all matters not requiring a jury, or in which a jury trial has been waived, the resident judge and any special judge residing in the district now not only have concurrent jurisdiction with the judge holding the courts of the district, but they may pass upon such matters in vacation, out of term or in term time.

G.S. 7-65 conferred upon Resident Judge Johnston jurisdiction to hear the plaintiff's motion for a voluntary nonsuit. He allowed the motion as a matter of right but refused to dismiss the action, presumably so that defendant might pursue her motion to amend her answer in order to assert an action against the plaintiff for alimony without divorce. Two questions now arise: (1) Was plaintiff entitled to take a voluntary nonsuit in his divorce action as a matter or right after notice that defendant intended to file a cross action for alimony without divorce but before it was actually filed; and (2) if so, the nonsuit having been entered, may defendant now amend her answer to assert such cross action?

The rule with reference to the right of a plaintiff to take a nonsuit is stated in McIntosh, North Carolina Practice and Procedure, (2d ed) Section 1645:

> "While the plaintiff may generally elect to enter a nonsuit, 'to pay the costs and walk out of court,' in any case in which only his cause of action is to be determined, . . . he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. If the defendant sets up a counter claim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect

to be nonsuited and allow the defendant to proceed with his claim."

McKesson v. Mendenhall, 64 N.C. 502; *Caldwell v. Caldwell, supra; Light Co. v. Manufacturing Co.,* 209 N.C. 560, 184 S.E. 48; *Sink v. Hire,* 210 N.C. 402, 186 S.E. 494.

The defendant concedes this to be the general rule, but she contends that in an action for divorce a plaintiff's motion for voluntary nonsuit is addressed to the sound discretion of the court.

This is the rule in some jurisdictions. 17 Am. Jur., Divorce and Separation, Section 378; Annotation, Divorce — Voluntary Dismissal, 138 A.L.R. 1100. Both these authorities, as well as McIntosh, North Carolina Practice and Procedure (1st ed. Section 626, 2d ed. Section 1645), include North Carolina in these jurisdictions on the basis of the dicta contained in *Caldwell v. Caldwell, supra.* Defendant relies upon this case. Caldwell was an action instituted by the husband for an absolute divorce. As in the instant case, the defendant by answer denied the allegations of the complaint, asked for no affirmative relief, but applied for alimony *pendente lite* which was allowed. About seven months later the clerk, upon plaintiff's motion, entered an order of voluntary nonsuit. On appeal to the Superior Court in term, the judge reversed the order of the clerk upon findings that the judgment was entered without notice and while plaintiff was in arrears in the payment of the sums ordered by the judge. He found, however, that plaintiff had tendered the amounts due to the defendant. Plaintiff appealed. He contended that he had the right to take a voluntary nonsuit, the defendant having set up no counterclaim in her answer.

The Court, noting that defendant's answer alleged no facts entitling her to affirmative relief and that she had prayed for none, said:

"Upon plaintiff's motion, a judgment dismissing the action upon voluntary nonsuit was, therefore, proper unless the principle stated in *McKesson v. Mendenhall* (64 N.C. 502) does not apply to an action for divorce.

"The question as to whether the plaintiff in an action for divorce is entitled as a matter of right to a judgment dismissing the action upon voluntary nonsuit does not seem to have been heretofore presented to this Court. . .

"The better rule seems to be that a motion by the plaintiff for judgment dismissing his action for divorce upon a voluntary nonsuit will not be allowed by the court as a matter of right, but is addressed to the sound discretion of the court, which will be

exercised in the interest not only of plaintiff, but of defendant and the State. . .

"There was no error in the entry of judgment of nonsuit without notice to defendant. This judgment could be entered at any time by the clerk upon motion."

Having said this, the Court reversed the action of the judge and affirmed the judgment of the clerk. Thus, it appears that in affirming the clerk and reversing the judge, this Court applied the rule of *McKesson v. Mendenhall* to actions for divorce and did not adopt the rule of discretion. Otherwise, having reversed the judge for errors of law, it would have remanded the case to the Superior Court for reconsideration and the exercise of judicial discretion since this Court could not exercise it. *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137. In the long view, we do not perceive that public policy requires that divorce actions be excepted from the general rule with reference to nonsuits. We hold that plaintiff was entitled to his motion for nonsuit as a matter of right.

G.S. 50-16 specifically authorizes the wife to assert a cause of action for alimony without divorce as a cross action in the husband's suit for divorce. Had defendant done this prior to plaintiff's motion for nonsuit, his failure thereafter to prosecute his own action could not have affected her own. Not having done so, when the judgment of nonsuit was signed, the action terminated. There is now no action pending in which defendant may assert her cross action.

In *Carpenter v. Hanes,* 167 N.C. 551, 83 S.E. 577, plaintiffs sued for a balance due on an alleged contract. The defendants denied the contract and set up three counterclaims. Plaintiffs demurred to the three and asked to be allowed to take a nonsuit. The Superior Court sustained two of the demurrers, overruled the third, and refused plaintiffs leave to take a nonsuit. On appeal this Court said: "The court should have sustained the demurrer throughout and then permitted the plaintiff to take the nonsuit, and this judgment will be entered in the court below, without permitting any amendment, as plaintiff had already asked for the nonsuit, and cannot now be deprived of it by any change in the answer. *He cannot be called back after once he has asked to depart and is entitled, at the time, to do so.*" (Emphasis added.)

For the reasons stated the case is remanded for a judgment dismissing the action.

Error and remanded.

MICHAEL FLYNN MANUFACTURING COMPANY, A CORPORATION v. J. L. COE CONSTRUCTION COMPANY, INC., CUTTER REALTY COMPANY, INC., EMERY INMAN, TRUSTEE AND NORTH CAROLINA NATIONAL BANK.

(Filed 14 June 1963.)

1. Laborers' and Materialmen's Liens § 3—

In order for a subcontractor to recover against the owner, the subcontractor must show its subcontract with the contractor, material furnished and labor performed in substantial fulfillment thereof, a balance due it, notice to the owner prior to payment of the contract price by the owner to the principal contractor, and a balance due the principal contractor by the owner. G.S. 44-6, G.S. 44-8, G.S. 44-9, G.S. 44-10.

2. Evidence § 20—

An admission in the answer of one defendant is not competent against an antagonistic co-defendant.

3. Laborers' and Materialmen's Liens § 3—

While there is no privity of contract between the subcontractor and the owner, the rights of a subcontractor to a lien arises under statutory provisions substituting it to the rights of the contractor as against the owner, G.S. 44-6, and therefore in a subcontractor's suit to enforce its lien the owner may set up as defenses the failure of the principal contractor to construct the building in accordance with the contract and the failure of the subcontractor to perform its contract with the principal contractor, and may contest the balance, if any, due the subcontractor on its contract with the principal contractor.

4. Pleadings § 8—

A counterclaim is substantially a cause of action which must be alleged with the precision and certainty required of a complaint, and when the allegations in a counterclaim are so vague, general, and indefinite as to be insufficient to constitute a cause of action it is not a basis for a judgment against plaintiff for damages and may amount only to a defense to plaintiff's recovery.

APPEAL by defendant Cutter Realty Company, Inc., from *Walker, S.J.*, 12 November 1962 "B" Special Civil Term of MECKLENBURG.

Civil action to enforce subcontractor's lien, G.S. 44-6 *et seq.*, heard upon plaintiff's motion for a judgment on the pleadings against Cutter Realty Company, Inc.

This is a summary of the material allegations of the complaint:

In the spring of 1960 Cutter Realty Company, Inc., hereafter designated as Cutter, and J. L. Coe Construction Company, Inc., hereafter designated as Coe, entered into a written contract, by the terms of which Coe, as principal contractor, engaged to construct an office building on premises in the city of Charlotte belonging to Cutter,

which property is now encumbered by a deed of trust in favor of North Carolina National Bank. Thereafter, on 30 May 1960 plaintiff and Coe entered into a written contract, which was amended and adjusted by subsequent change orders, by the terms of which plaintiff, as subcontractor, engaged to furnish all of the labor and materials in erecting an aluminum curtain wall in the construction of the office building for the total sum, as adjusted, of $450,520.00. Plaintiff has furnished all of the materials and performed all the labor and fully completed all the terms of its contract with Coe, and its work was accepted by the architect employed by Cutter on 18 August 1962.

Plaintiff has received payment of $401,535.90 from Coe, and has allowed Coe credit for back-charges in the sum of $2,817.96, which leaves a balance due it under its contract with Coe in the amount of $46,166.14. Coe has completed the office building, and Cutter has accepted it and has had a considerable part of it leased for many months.

On 18 April 1962 plaintiff furnished the last materials on this building, and did its last work on it. By reason of Coe's failure to pay plaintiff the amount due on its contract between them, plaintiff on 14 August 1962 gave Cutter notice thereof, and on the same day caused its notice of lien for materials furnished and labor performed to be filed in the office of the clerk of the superior court of Mecklenburg County in Lien Book 13, page 375. Cutter is still indebted to Coe in an amount in excess of $300,000.00, which is sufficient to pay plaintiff, and all other subcontractors, materialmen and laborers who have furnished materials or performed labor in the construction of the office building. Plaintiff seeks a judgment for the amount due, and a foreclosure of its statutory lien filed.

Coe filed an answer admitting all the essential allegations of the complaint.

Cutter filed an answer admitting the allegations of the complaint as to plaintiff's contract with Coe, as to the furnishing of certain materials and the performance of labor by plaintiff in the construction of the office building, and admitting that its architect, without its knowledge or consent, approved the aluminum curtain wall, subject to the conditions as set forth in the contract. Cutter in its answer further admits the amount plaintiff alleges it has been paid, its taking possession of the building, the giving of notice to it by plaintiff wherein is stated the amount due plaintiff from Coe, and that it owes Coe an amount sufficient to pay all claims for the construction of the building, but it denies it has accepted the building from Coe. Cutter in its answer denies that plaintiff has fully completed its contract with

Coe, and denies that there is due plaintiff on its contract the amount of $46,166.14.

Cutter in its answer alleges what it calls a counterclaim against plaintiff, in which it alleges in substance defective workmanship by plaintiff, and prays that it recover from plaintiff such amount as it may be able to show as damages resulting from plaintiff's breach of its contract with Coe.

Plaintiff filed a written motion for judgment on the pleadings against Cutter. Cutter filed a written reply thereto. Judge Walker entered a judgment wherein after reciting a summary of the allegations of the complaint and the admissions of Coe and Cutter, he found as a fact that plaintiff's contract was with Coe, and that there is no privity of contract between plaintiff and Cutter, and wherein after reciting that he was of opinion that the facts alleged in Cutter's counterclaim do not affect plaintiff's right to recover and raise no issues of fact for a jury to determine, and that plaintiff's motion for a judgment on the pleadings should be allowed, he ordered and adjudged that plaintiff have and recover of Cutter the sum of $46,166.14 with interest.

From this judgment Cutter appeals.

Osborne & Griffin by Wallace S. Osborne for defendant Cutter Realty Company, Inc., appellant.

Harkey, Faggart and Coira by Harry E. Faggart for plaintiff appellee.

PARKER, J. Defendant Cutter has one assignment of error based on one exception, and that is to the judgment.

Plaintiff's contract is not with the owner, Cutter, but with the principal contractor, Coe. In the Special Session, 1880, N.C. Laws, ch. 44, the General Assembly first made provision for a lien for subcontractors. The present statutes giving such a lien appear in G.S. 44-6 *et seq.*

In *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555, the Court said: "The claim of the subcontractor or materialman supplants that of the contractor, and the duty of the owner to pay is an independent and primary obligation created by statute."

In order for plaintiff to recover against the owner, Cutter, it must prove: (1) Its subcontract with Coe; (2) material furnished and labor performed in substantial fulfillment thereof; (3) a balance due it; (4) notice to owner, Cutter, as required by statute prior to payment of the contract price to the principal contractor, Coe; and (5) a bal-

ance due Coe by Cutter. G.S. 44-6, 44-8, 44-9. Upon such a showing the statute requires the owner, Cutter, to apply the unexpended contract price due the principal contractor, Coe, to the payment of the amount due plaintiff of whose claim Cutter has received notice. G.S. 44-8, 44-9, 44-10. The provisions of G.S. 44-11, payment *pro rata,* if necessary, seem from the pleadings to be inapplicable here. *Widenhouse v. Russ,* 234 N.C. 382, 67 S.E. 2d 287; *Schnepp v. Richardson, supra; Grier-Lowrance Construction Co. v. Winston-Salem Journal Co.,* 198 N.C. 273, 151 S.E. 631; *Atlas Powder Co. v. Denton,* 176 N.C. 426, 97 S.E. 372; *Charlotte Pipe & Foundry Co. v. Aluminum Co.,* 172 N.C. 704, 90 S.E. 923; *Orinoco Supply Co. v. Eastern Star Home,* 163 N.C. 513, 79 S.E. 964; *Clark v. Edwards,* 119 N.C. 115, 25 S.E. 794; 57 C.J.S., Mechanics' Liens, sec. 113, Subcontract and Performance Thereof. See *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324; *Mfg. Co. v. Holladay,* 178 N.C. 417, 100 S.E. 597.

Cutter in its answer, while admitting many allegations in plaintiff's complaint, denies that plaintiff has fully completed its contract with Coe, and denies that there is due plaintiff on its contract with Coe the amount alleged in the complaint of $46,166.14. The admissions in Coe's answer are not competent against Cutter. *Lupton v. Day,* 211 N.C. 443, 190 S.E. 722; 41 Am. Jur., Pleading, sec. 203.

Plaintiff seeks a judgment for the amount due, and a foreclosure of its statutory lien. "In general, anyone claiming an interest or who may be affected by the judgment enforcing a mechanic's lien may contest the right to the lien or the amount of the claim, as, for example, the owner either at the time the lien attached or at the time it is enforced* * *." 57 C.J.S., Mechanics' Liens, sec. 279.

In an action to enforce such liens the ordinary rules of pleading are generally applied to pleas or answers. 57 C.J.S., Mechanics' Liens, sec. 301; 36 Am. Jur., Mechanics' Liens, secs. 264, 265, and 266.

Widenhouse v. Russ, supra, was an action to recover for building materials furnished defendant W. B. Russ, Sr., for use in constructing a building for defendant Lelia L. Smart on her land and to declare a lien therefor. In its opinion, the Court said: "If the contractor were suing the owner for the balance of contract price for the construction of the building in question, the owner could set up as a defense, claim for damages arising out of the failure of the contractor to construct the building in accordance with the terms of the contract." In such a case there is privity of contract between the owner and the contractor.

Our statute does not establish privity of contract between plaintiff and Cutter. *Hardware Co. v. Schools,* 151 N.C. 507, 66 S.E. 583. How-

ever, where plaintiff's "lien arises under the provisions of G.S. 44-6 it does so by substituting the claimant to the rights of contractor [Coe] limited as therein stated." *Widenhouse v. Russ, supra.* Since plaintiff, so far as his claim is concerned, has been substituted to the rights of Coe limited as stated in G.S. 44-6, and since if Coe were suing Cutter for the balance of the contract price for the construction of the office building, Cutter could set up as a defense to Coe's action a claim for damages arising out of the failure of Coe to construct the building according to the terms of the contract, plaintiff who was a subcontractor under Coe is in no better position in respect to the question as to whether he has performed his contract with Coe, so far as Cutter is concerned, than Coe, with whom plaintiff contracted. Under such circumstances, Cutter has a right to set up as a defense against plaintiff the failure of plaintiff to perform its part in the construction of the building in accordance with the terms of its contract with Coe, and to contest the balance, if any, due plaintiff on its contract with Coe. To hold otherwise, when plaintiff seeks a foreclosure of its statutory lien, would seem to be inequitable and unjust, and would put the subcontractor in a better position than the general contractor.

In *Terrell v. McHenry,* 121 Ky. 452, 89 S.W. 306, it is said:

> "It is insisted that Miller, who did the work, is entitled to a lien as a subcontractor, although McHenry, under whom he worked, is not entitled to recover. We cannot concur in this construction of the statute. Miller was employed by McHenry, and, while McHenry says that he employed Miller at the request of Terrell, the evidence does not sustain him in this. Miller, having been employed by McHenry, must look to McHenry for his pay. If McHenry was entitled to any lien on the house, Miller would be entitled to the benefit of that lien; but if McHenry has no claim which he can enforce, and never had any, there is nothing for Miller's right to attach to. If McHenry had had a claim he could enforce against Terrell, and Terrell had paid McHenry, leaving Miller unpaid, a different question would be presented. But where a contractor fails to carry out his contract, and the owner of the property does not get what he contracted for, and in fact gets nothing of any value, so that he is in no way liable to the contractor, and never was liable, the subcontractor must look to the person with whom he contracted for his pay. McHenry was to get nothing for the roof if it leaked within 30 days, nor until

it was made to stop leaking. Miller, who was a subcontractor under McHenry, is in no better attitude, so far as Terrell is concerned, than McHenry, with whom he contracted."

See also *Holloman v. Britton* (Okla.), 346 P. 2d 941, rehearing denied 24 November 1959; Anno. 16 A.L.R. 981.

In *Perkins v. Perkins,* 249 N.C. 152, 105 S.E. 2d 663, the Court said:

"'It is well settled that the averments as to set-off or counterclaim must be definite and certain. Vague, general, and indefinite allegations are not sufficient. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with* * * precision and certainty.' *Bank v. Hill,* 169 N.C. 235, 85 S.E. 209; *Bank v. Northcutt,* 169 N.C. 219, 85 S.E. 210; G.S. 1-135."

A study of what Cutter terms a counterclaim shows allegations so vague, general, and indefinite that the so-called counterclaim amounts in effect to a defense of plaintiff's claim on the ground that plaintiff did not perform its contract with Coe according to its terms, and that it is not a counterclaim to secure a judgment against plaintiff for damages. Such being the case the question is not presented as to whether or not Cutter can maintain a counterclaim to recover damages against plaintiff when there is no privity of contract between them.

Cutter's denial in its answer that plaintiff has fully performed its contract with Coe, which is amplified in its so-called counterclaim, and its denial that there is due plaintiff on its contract with Coe the amount of $46,166.14 present issues of fact, because an issue of fact arises on the pleadings whenever a material fact is maintained by one party and controverted by the other. G.S. 1-196; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

"The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition." *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

Full liberty of consideration on the part of the jury would seem to be Cutter's due. *Suum cuique tribuere.*

Reversed.

ANN D. JONES v.
C. B. ATKINS COMPANY AND ROY FRANKLIN COLEMAN.
AND
JAMES O. JONES v.
C. B. ATKINS COMPANY AND ROY FRANKLIN COLEMAN.

(Filed 14 June 1963.)

1. Automobiles § 41a—

No presumption of negligence arises from the mere fact that there has been an accident and an injury, but in order to be entitled to go to the jury plaintiff must show that defendant was negligent in some respect and that such negligence was the proximate cause of injury.

2. Automobiles § 41f— Evidence held insufficient to show negligence on part of defendant driver in striking passing vehicle which skidded into spin.

Plaintiff's evidence tended to show that she passed defendant's tractor-trailer, completing the process within two-tenths of a mile without exceeding a speed of 50 to 55 miles an hour, that after passing and driving back to her right-hand side of the highway her car suddenly began to skid and went into a spin, that she regained control and proceeded westwardly at a reduced speed, and that about 350 feet beyond the point her car started to skid the tractor-trailer collided with the rear of her car. Plaintiff introduced a statement of defendant driver that after he saw the car skidding he did all he could to stop and drove off the road to his right in an attempt to keep from striking the car. *Held:* Plaintiff's evidence negatives excessive speed on the part of the tractor-trailer or that its driver determined the interval between the vehicles so that he could be guilty of following too closely, and there being no evidence of any defect in the brakes of the tractor-trailer, nonsuit should have been entered.

3. Same; Automobiles § 19—

The evidence tended to show that the driver of a tractor-trailer was confronted with an emergency when an automobile which had just passed him skidded into a spin on a wet highway and presented him with the alternatives of striking the car, applying his brakes with sufficient firmness to stop the vehicle if possible and risk skidding and jack-knifing, or slackening speed and driving off the road into a bank on the right in an effort to avoid collision. *Held:* The driver's decision in the sudden emergency to drive off the road to the right and into the bank cannot be held negligent.

4. Automobiles § 41f—

The rule that a collision with the preceding vehicle furnishes some evidence that the following motorist was negligent as to speed, or was following too closely or failed to keep a proper lookout, is not an absolute rule but the relative duty of motorists in such instances must be governed by the circumstances of each particular case, and when the evidence shows no negligence on the part of the following vehicle, the mere fact of collision with the preceding vehicle cannot supply evidence of negligence on this aspect.

APPEAL by defendants from *Johnston, J.*, December 3, 1962 session of FORSYTH.

Two actions to recover for personal injury and property damage, resulting from a collision of motor vehicles allegedly caused by the actionable negligence of defendants. The actions were consolidated for trial.

The jury answered the negligence and contributory negligence issues in favor of plaintiffs and awarded *feme* plaintiff $5000 for personal injury and male plaintiff $1000 for property damage. Judgments were entered in accordance with the verdicts.

W. Scott Buck and Carroll H. Matthews for plaintiffs.
Deal, Hutchins and Minor for defendants.

MOORE, J. The collision occurred about 4:45 P.M., 29 January 1960, on U. S. Highway 64 about 9 miles west of Mocksville, North Carolina. At the general location of the accident the highway is straight but hilly. It is paved with asphalt a width of 20 feet. It was raining and the highway was wet.

Plaintiffs' evidence tends to show the following state of facts: *Feme* plaintiff was driving an Oldsmobile passenger car belonging to her husband, the male plaintiff. *Feme* plaintiff's sister was a passenger. They were travelling westwardly and following a tractor-trailer combination, driven by defendant Coleman, an employee of defendant Atkins Company. The automobile followed the tractor-trailer 3 or 4 miles. They were approaching a dip or valley between the crest of two hills; the highway was straight and the hills were three-tenths to four-tenths of a mile apart. As they came to the crest of the first hill, the speed of the vehicles was 40 to 45 miles per hour. *Feme* plaintiff gave a left turn signal and pulled to the left to pass. She increased speed to pass, and the tractor-trailer "speeded up"; her passing speed did not exceed 50 to 55 miles per hour. When she was far enough ahead of the tractor-trailer that she saw its headlamps in her rear-view mirror, she pulled back into the right-hand lane. Neither she nor any of her witnesses saw the tractor-trailer again until after the collision. She had travelled two-tenths of a mile in passing. After she got back into the right-hand lane and had travelled 75 to 80 feet to the bottom of the dip, the automobile suddenly began to skid on the wet pavement and went into a spin. It spun completely around once or twice. She got it straightened out and proceeded westwardly at a reduced speed. At about 350 feet beyond the point the automobile had started skidding, and at or near the crest of the second hill, the automobile

was struck in the rear by the front of the defendant's tractor. The automobile was turned around and it came to a stop headed eastwardly on the south side of the highway. The tractor-trailer continued northwardly and stopped beyond the position of the automobile. Before the collision the tractor-trailer had run off the hardsurface and into a shallow ditch on the right-hand (north) side of the highway and into a bank. Male plaintiff, who arrived on the scene after the collision and after the tractor-trailer had been pulled away, observed a scrape mark 125 feet in length along the bank. The distance from the west end of the scrape mark to the point where *feme* defendant told him the collision occurred was 225 feet. Broken glass and other debris was found a little to the west of and on the opposite side of the road from the position of the automobile after the collision. The automobile was greatly damaged and *feme* plaintiff was injured. At the scene defendant Coleman told male plaintiff "that he did all he could to stop . . . he left the road to keep from hitting her. . . ."

Defendants' evidence tends to show in part: The tractor-trailer and its load had a gross weight of 47,000 pounds. It was loaded with paint and furniture finishing material. When the automobile pulled out to pass they were going downhill. When it began to straighten up in the right-hand lane, it went into a spin. It was spining clockwise. Coleman applied brakes, and as the automobile spun around the third time he "left the road and went over into the ditch and bank on the right side of the road." He ran off the highway into the bank to keep from hitting the automobile. The trailer scraped the bank a distance of 30 feet, and the tractor-trailer came to rest against the bank. The left front wheel of the tractor was on the hardsurface. As the automobile spun around a fourth time its left rear struck the left front light, fender and bumper of the tractor. The automobile came to rest on the south side of the highway slightly to the east of the tractor-trailer and headed back toward Mocksville. The scrape mark 125 feet along the bank (except 30 feet thereof) was made when a wrecker and lumber truck pulled the tractor-trailer out after the highway patrolman came to the scene.

R. C. Blalock, a highway patrolman, reached the scene at 5:10 P.M. He found the tractor-trailer on the north side of the highway headed west. It was leaning against the bank and its right wheels were in the ditch. The bank had been scraped a distance of 30 or 40 feet. The tractor-trailer was about 150 to 175 feet east of the crest of the hill. After it was pulled out the scrape mark along the bank was 100 to 125 feet long. The Oldsmobile was on the south side of the highway headed east, and it was slightly to the rear of the tractor-trailer.

Plaintiffs allege that defendant Coleman was negligent in that: (1) he operated the tractor-trailer at a speed greater than was reasonable and prudent under the circumstances; (2) he violated the reckless driving statute, G.S. 20-140; (3) he failed to keep a reasonable lookout; (4) he failed to keep the tractor trailer under proper control; (5) he followed too closely in violation of G.S. 20-152(a); and (6) he operated the tractor-trailer without having brakes thereon adequate to control it, G.S. 20-124(a). Plaintiffs also allege that this negligence proximately caused the collision and the resulting injuries and damage.

Defendants argue that their motion for nonsuit aptly made should have been sustained.

No presumption of negligence arises from the mere fact that there has been an accident and an injury. *Johns v. Day*, 257 N.C. 751, 127 S.E. 2d 543. "In order to establish actionable negligence plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury — a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable, under all the facts as they existed." *Heuay v. Construction Co.*, 254 N.C. 252, 253, 118 S.E. 2d 615.

Plaintiffs contend that the skidding and revolving of the Oldsmobile on the wet asphalt was pure accident, and not the result of worn tires or negligence on the part of the driver. For the purposes of the nonsuit motion we accept this theory. Even so, we find in the record no allegation of negligence supported by evidence indicating liability on the part of defendants. As Mrs. Jones turned to the left to pass, the speed of both vehicles was 40 to 45 miles per hour. She stated that she increased speed in passing and that the tractor-trailer "speeded up." These bits of testimony constitute the entire evidence as to the speed of the tractor-trailer. Mrs. Jones does not say that she sounded her horn before or in the process of passing, and plaintiffs do not allege and rely on a violation of G.S. 20-151 by defendant Coleman. Furthermore, plaintiffs' evidence negatives any material increase in speed by the tractor-trailer, for Mrs. Jones testified that she passed the tractor-trailer and was far enough in front to see its headlamps in her rear-view mirror before turning into the right-hand lane, did not exceed 50 to 55 miles per hour in passing, and completed the passing process within two-tenths of a mile. She began the passing movement

at the crest of the hill and it is reasonable to suppose that there was some natural acceleration in going downhill. Neither Mrs. Jones nor her sister saw the tractor-trailer again after Mrs. Jones started back into the right-hand lane, until after the collision. The conduct of defendant Coleman in the meanwhile is disclosed only by his statements and the physical evidence. Plaintiffs' evidence shows that Coleman stated to Mr. Jones at the scene that he did all he could to stop and left the road to keep from striking the Oldsmobile. There is no evidence that the tractor-trailer brakes did not meet legal requirements; there is no evidence at all concerning the condition of the brakes. With reference to lookout, there was nothing to put Coleman on notice of any peril until the Oldsmobile began to skid, and then, according to all the evidence he applied brakes and pulled off the road and into the bank to avoid a collision. Mrs. Jones' testimony cancels the suggestion that the tractor-trailer was following too closely; it was she who established the interval between the vehicles; she made the calculation as to the proper time and place to pull back into the right-hand lane in front of the tractor-trailer; she travelled only 75 to 80 feet thereafter before beginning to spin and rotate. There is a complete lack of evidence of reckless driving on the part of defendant Coleman within the purview of G.S. 20-140; if he was reckless it consisted in risking his own bodily wellbeing and his vehicle and cargo by turning off the highway into the bank to avoid striking the Oldsmobile and injuring its occupants.

Plaintiffs' main contention seems to be that Coleman failed to control the tractor-trailer after it ran off the hardsurface to avoid collision. Under the circumstances here presented we are of the opinion that this failure did not amount to negligence proximately causing injury. As the Oldsmobile began to skid and spin Coleman was faced with a sudden emergency brought on by what the plaintiffs characterize as a pure accident. It was raining, and the highway was wet and apparently slippery at the location of the skidding of plaintiffs' car. He was faced with immediate choices: to strike the Oldsmobile, to apply brakes with sufficient firmness to stop the vehicle if possible and risk skidding and jack-knifing, or to slacken speed and drive off the road and into a bank in an effort to avoid injuring the Oldsmobile and its occupants. In considering circumstances strikingly similar, we said, in part quoting 65 C.J.S., Negligence, s. 17, pp. 409-410, that where one acts in a sudden emergency not of his own making, if he exercises "such care as an ordinarily prudent man would exercise when confronted by a like emergency, he is not liable for an injury which resulted from his conduct, even though another course of

conduct would have been more judicious, or even though another course of conduct would have been safer, or might even have avoided the injury, as under such circumstances the injury is regarded as an inevitable accident." *Schloss v. Hallman,* 255 N.C. 686, 690, 122 S.E. 2d 513. Paraphrasing the conclusion in the *Schloss* case: There is no evidence on this record tending to show that the choice made by Coleman in his effort to avoid a collision with the Oldsmobile was not such a choice as a person of ordinary care and prudence would have made under similar circumstances. All that is required of the operator of a vehicle is reasonable care under the circumstances in which he is placed.

We have said that ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout. *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804. But this rule is not absolute. *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838. "The relative duties automobile drivers owe one another when they are travelling along a highway in the same direction, are governed ordinarily by the circumstances in each particular case." *Beaman v. Duncan,* 228 N.C. 600, 604, 46 S.E. 2d 707. Where plaintiffs' evidence shows there was no negligence as to speed, lookout and close following, or that negligence in these respects could not have been a proximate cause of the collision and damage, the rule stated in the *Clontz* case does not apply.

Though we do not deem it necessary to consider defendants' allegations of contributory negligence on the part of plaintiffs, we do not think it amiss to observe that, if Mrs. Jones, as her testimony tends to show, travelled at a reduced speed 350 feet after her car "straightened up" and before the collision, and if she was keeping a reasonable lookout, it is difficult to understand why she was oblivious to the tractor-trailer out of control.

Reversed.

W. A. WILSON v. LOWE'S ASHEBORO HARDWARE, INC. AND MICHIGAN LADDER COMPANY.

(Filed 14 June 1963.)

1. Appeal and Error § 19—

An assignment of error must be supported by an exception duly noted in the record.

2. Evidence § 48—

A witness with more than thirty years experience in working with woods, especially pine woods, and who is found by the court to be an expert craftsman in the use of wood for manufacturing purposes, is competent to testify that yellow pine is stronger than white pine.

3. Appeal and Error § 41—

The admission of testimony of a witness not qualified to speak on the particular subject is not prejudicial error when such testimony merely corroborates other evidence admittedly competent.

4. Sales § 16—

A manufacturer is not an insurer of the safety of chattels designed and manufactured by it but is under obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonably prudent man would use in similar circumstances.

5. Same—

Evidence tending to show that plaintiff was injured when a stepladder manufactured by defendant broke while he was using it, that the side rail that broke was made of wood specifically declared unfit for that purpose by the code voluntarily adopted by defendant as a guide and the groove or mortise was cut deeper than permitted by such code, and that these failures to comply with the code requirements could have been discovered upon reasonable inspection, is sufficient to overrule nonsuit on the issue of defendant's negligenec.

6. Negligence § 1; Evidence § 36—

A safety code voluntarily adopted by the manufacturer of a particular device as a guide to be followed for the protection of the public in the design and manufacture of such article is at least some evidence that a reasonably prudent person would have adhered to the requirements of such code.

HIGGINS, J., dissents.

APPEAL by defendant Michigan Ladder Company from *Johnston, J.*, November 1962 Term of RANDOLPH.

Michigan Ladder Company (hereafter Michigan) manufactures and sells stepladders. Lowe's Asheboro Hardware, Inc. (hereafter Hardware) purchased a quanity of ladders produced by Michigan. Plaintiff purchased one of these ladders. It broke when plaintiff was using it to take down some light bulbs. He was thrown to the ground. This action is to recover damages for injuries sustained in the fall.

Liability of Hardware was predicated on an alleged warranty of fitness. At the conclusion of plaintiff's evidence he submitted to a nonsuit as to Hardware.

Liability of Michigan is based on allegations of negligence in producing and selling a product dangerous to one using it in the customary manner. Issues of negligence, contributory negligence, and damages arising on the pleadings were submitted to a jury. It answered the issue of negligence in the affirmative, contributory negligence in the negative, and assessed damages.

Michigan appealed from the judgment rendered on the verdict.

Miller & Beck by Adam W. Beck for plaintiff appellee.

James H. Pou Bailey and George R. Ragsdale for defendant appellant.

RODMAN, J. Michigan has three assignments of error: The first two challenge the competency of evidence admitted over its objection; the third is to the refusal of the court to allow its motion to nonsuit.

Plaintiff charges Michigan with negligence in (1) manufacturing the ladder from coarse grained pine of insufficient strength for a ladder of its type; (2) constructing the steps and rails from wood of insufficient thickness; and (3) cutting the grooves for insertion of the steps in the rail deeper than necessary or proper in ladders of the kind and size purchased by plaintiff.

Plaintiff, without objection, offered in evidence "American Standard Safety Code for Portable Wood Ladders." The sponsors for this code are American Ladder Institute, American Society of Safety Engineers, and National Association of Mutual Casualty Companies. The ladder which plaintiff purchased is described in that code as type 3. The superintendent of production and purchasing agent for Michigan testified that Michigan "follows that code in the production of its type 3 ladder."

Table 1 of that code is a "Classification of Various Species of Wood Acceptable for Use in Ladders." It classifies timbers suitable for that purpose in four groups. Group 1 lists the strongest. Group 2 woods have less strength than group 1, but they are stronger than woods in groups 3 and 4. Yellow pine is in group 2. White pine is in group 4.

Hal Garner, witness for plaintiff, testified that since 1925 he had been engaged in using lumber, building various structures such as cabinets, door frames, window frames, and during that period had used differing kinds of lumber, mostly pine, some oak and fir. Prior to 1925 he was engaged in sawmilling and had "worked with wood all my adult life." The court found the witness to be "an expert craftsman in the use of wood for manufacturing purposes." That holding is

not now challenged. He was asked over defendant's objection if he knew what kind of wood the ladder was made of. He answered pine. The objection then made is not assigned as error. He then proceeded without objection to say that one of the rails was yellow pine. The other was known as white pine, also known as spruce pine or loblolly pine. "The side rail that is not broken is the piece that is made out of yellow pine. As between those two kinds of wood, the broken piece is what we term as a spruce pine. It is different from yellow pine. I know what the difference is between the yellow pine and spruce pine."

The first and second assignments of error read: "The admission of the testimony of Hal Garner as to the identity of the wood from which the ladder was made and the relative strength of the two rails of the ladder." "The failure of the Court to strike out the testimony of Hal Garner."

Presumably the assignments are intended to relate to the following questions and answers appearing on pages 64 and 65 of the record: "Q. By reason of your experience in the woodworking industry and based upon your examination of the ladder identified as Exhibit 'AA', do you have an opinion which is satisfactory to yourself as to which of the side rails of this ladder is constructed from the stronger wood? A. Yes sir, I'd say the one that is not broken is the stronger piece of wood. Q. Why do you say that? A. It is a finer grain wood. Yellow pine is a stronger wood than white pine, I have always found by my experience. Q. Do you know what that is? A. The white pine is a softer, more spongier, brittle wood than yellow pine."

These assignments of error are not sufficient to comply with the rules of this Court. *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634. But even if sufficient, prejudicial error does not appear. The finding that the witness was an expert craftsman in the use of woods for manufacturing purposes, having spent more than thirty years in that kind of work, mostly in the use of pine, was sufficient to permit him to express his opinion as to whether the wood exhibited to him was or was not pine. His testimony to that effect appears on page 62 of the record. That testimony is not now challenged. His testimony that yellow pine is stronger than white pine is based on more than thirty years' experience in working with pine wood and accords with the statement appearing in the safety code which appellant claims to use as its standard in manufacturing ladders. Even if the witness had not been qualified to speak, testimony from one not qualified, which merely corroborates other evidence admittedly competent, would at most be harmless error, not warranting a new trial. *Bullin v. Moore,* 256 N.C. 82, 122 S.E. 2d 765;

Hall v. Atkinson, 255 N.C. 579, 122 S.E. 2d 200; *In re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470.

Did the court err in refusing to allow Michigan's motion for nonsuit?

To answer the question it is necessary to ascertain the legal obligation, if any, which a producer owes to those whom he expects to use or consume his product.

The rule to measure the producer's responsibility has been declared in a multitude of cases decided by this Court and appellate courts of sister states. A producer is not an insurer. His obligation to those who use his product is tested by the law of negligence. He must operate with that degree of care which a reasonably prudent person would use in similar circumstances. That care must be used in designing the article, *Swaney v. Steel Co., ante,* 531; in selecting proper materials with which to make the article, *Schubert v. J. R. Clark Co.,* 15 L.R.A. 818, *Heise v. J. R. Clark Company,* 71 N.W. 2d 818 (where a manufacturer of stepladders was held liable for using ponderosa pine in violation of the American Standard Safety Code); and finally he owes the duty of reasonable inspection to protect the user against hidden defects. *Gwyn v. Motors, Inc.,* 252 N.C. 123, 113 S.E. 2d 302; *Whiting v. Cheesebro-Whitman Co.,* 36 N.Y.S. 2d 4 (a stepladder case).

The subject of "products liability" is treated at length in the annotations following the cases of *Katz v. Arundel-Brooks Concrete Corp.,* 78 A.L.R. 2d 692, *Comstock v. General-Motors Corp.,* 78 A.L.R. 2d 449, and *Prashker v. Aircraft Corporation,* 76 A.L.R. 2d 78.

The evidence, viewed in the light most favorable to plaintiff, is sufficient for a jury to find these facts: The ladder was manufactured by defendant; it was purchased by plaintiff on 13 July. He was injured on 27 July. The ladder had not been subjected to any misuse or abuse during the two weeks intervening between the purchase and plaintiff's injury. The American Standard Safety Code for portable wood ladders provides: "This code is intended to prescribe rules and establish minimum requirements for the construction, care, and use of the common types of portable wood ladders, in order to insure safety under normal conditions of usage." Its declared purpose is "to provide reasonable safety for life, limb, and property." Defendant has adopted that code as a standard to govern it in the construction of ladders which it sells to the public. The code declares: "Mandatory rules of this code are characterized by the word 'shall.' If a rule is of an advisory nature, it is indicated by the word 'should' or is stated as a recommendation." Under the requirements for wood parts the code provides: "All wood parts shall be of the species specified in Table 1;

seasoned to a moisture content of not more than 15 percent; smoothly machined and dressed on all sides; free from sharp edges and splinters; sound and visibly free from sharp edges and splinters; sound and visibly free from shake, wane, compression failures, compression wood, decay, or other irregularities except as hereinafter provided. Low-density wood shall not be used." "All minimum dimensions and specifications set forth hereinafter for side rails and flat steps are based on the species of wood listed in Group 3 (Table 1) except where otherwise provided. The species of all other groups may be substituted for those of Group 3 when used in sizes that provide at least equivalent strength." Table 1 there referred to lists southern yellow pine in group 2. White pine and ponderosa pine are listed in group 4. The code divides stepladders into three types dependent upon the length and use intended. Plaintiff's ladder fits in a description of type 3. Under the heading "General Requirements" the code in sec. 4.2.1.4 provides: "Steps shall be closely fitted into grooves in the side rail $\frac{1}{8}$ inch in depth with a tolerance of $+\frac{1}{32}$ inch and -0 inch." The requirements for type 3 ladders are: "The minimum dimensions of the parts of the Type III step ladder shall be as follows when made of Group 2 or Group 3 woods.

	"Length 3 to 6 Feet Thickness (Inch)	**Depth (Inches)**
"Side Rails	$\frac{3}{4}$	$3\frac{1}{2}$
Back Legs	$\frac{3}{4}$	$1\frac{5}{16}$
Steps	$\frac{3}{4}$	3
Top	$\frac{3}{4}$	5"

The side rail which broke was made of wood listed in group 4, a wood not suitable under the code for that purpose. The code limits the depth of the groove in which steps are to be inserted to $\frac{5}{32}$ of an inch, but "the depth of the mortise cut at the rail break is $\frac{7}{32}$ of an inch on one side, $\frac{6}{32}$ of an inch on the other side." This excessive cutting reduced "the flexural rigidity by 28 percent. It would reduce the flexural strength, or, one other way to put it, is increase the flexural stress by 21 percent." These computations were made by plaintiff's witness Hardee, a structural engineer, found by the court to be an expert. Hardee further testified: "My opinion is that the fracture or failure occurred as a result of overstressed condition."

The jury might find, therefore, these infractions of the safety code: (1) The rail that broke was made of wood specifically declared unfit for that purpose. (2) The groove or mortise was cut deeper than permitted by the code. These grooves are cut by automatic machinery

which can be so regulated that the cut cannot exceed the desired depth. These failures to comply with the code requirements could have been discovered upon a reasonable inspection.

The voluntary adoption of a safety code as the guide to be followed for protection of the public is at least some evidence that a reasonably prudent person would adhere to the requirements of the code. *Stone v. Proctor, ante,* 633.

Here witnesses for plaintiff and for Michigan testified to the general recognition accorded the American Standard Safety Code for Portable Wood Ladders. The basic disagreement between the parties is not what is a proper rule of conduct but whether Michigan conformed to what it recognizes as such a rule. That of course required a weighing of the evidence, a jury function.

No error.

HIGGINS, J., dissents.

CORA FLINTALL v.
CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 14 June 1963.)

1. Appeal and Error § 42—

An assignment of error to the charge will not be sustained when the charge, construed contextually, could not have prejudiced appellant.

2. Insurance § 17—

A representation on an application for life insurance that the applicant has not used drugs or alcoholic stimulants to the point of intoxication for the prior five years refers to habitual use and not an occasional use or even an occasional excessive use.

3. Insurance § 9—

When insured himself procures a policy, he has a right to designate any person as his beneficiary.

4. Insurance §§ 11.1; 26—

Where a policy limits insurer's liability if insured's death should result within the first twelve months from causes specified or "from undetermined causes," the burden is upon insurer, after the beneficiary's proof of death of insured, to prove that the death resulted from a cause within the limitation.

5. Insurance § 26—

Where the death certificate introduced by plaintiff discloses the immediate cause of insured's death as unknown and the antecedent causes as natural causes, the stipulation of the antecedent causes as "natural causes" cannot be inferred to mean more than that the coroner, a layman without medical training, found no evidence of foul play, and it necessarily follows from plaintiff's evidence that the cause of death is undetermined, entitling insurer to a peremptory instruction under the provisions of the policy limiting liability if death resulted from undetermined causes.

6. Trial § 31—

While ordinarily a verdict may not be directed in favor of the party upon whom rests the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury.

APPEAL by defendant from *McKinnon, J.*, January Civil Term 1963 of ALAMANCE.

This is a civil action to recover as beneficiary the sum of $1,000.00, the face amount of a policy of insurance issued by the defendant on 25 July 1960 on the life of Wade Hinton.

The defendant denied recovery on the alleged ground that in the application for the insurance the insured made false statements material to the risk. It is alleged that in answer to question No. 17 in the application, which reads as follows: "Do you now or have you in the past five years used drugs or alcoholic stimulants to the point of intoxication?" the insured answered "No."

The defendant further alleged that its liability, if any, was only $500.00 because of a provision in the policy which reads: "If the death of the insured occurs during the first twelve months from the date of this policy resulting from suicide or homicide, whether intentional or unintentional, or from childbirth, tuberculosis, cancer, apoplexy, cerebral hemorrhage, paralysis, heart trouble, disase of the kidneys, or from undetermined causes, the company's liability hereunder shall be one half of the amount that would be payable for death from natural causes."

The insured lived in the home of plaintiff beneficiary from the time he was 14 or 15 years of age until his death some 20 years later, and the plaintiff made the arrangements for the insured's funeral, although he had several brothers and sisters living around Burlington. The plaintiff was not related to the insured.

The plaintiff and the defendant stipulated that the policy in question was issued; that the premiums were duly paid; and that the insured died on or about 6 November 1960.

The insured was found dead in a patch of woods on Richmond Hill, near the pathway, on 6 November 1960. No details or other information as to how he came to his death are disclosed by the record except in the death certificate and report signed by the coroner of Alamance County and in the proof of death filed with the defendant. The location of Richmond Hill or the nearness thereof to the home where the insured lived is not disclosed by the record.

The death certificate stated, "DEATH CAUSED BY: Immediate Cause (a) Unknown. Antecedent Causes * * * Due To (b) Natural Causes." The coroner's report attached to the proof of death contained the same information as that disclosed by the death certificate.

The evidence is to the effect that the insured "never saw a doctor" in 1960 and that his body was not examined by a doctor after his death. The coroner was a layman with no medical training.

The defendant's evidence tended to show that the insured had been seen occasionally prior to July 1960 under the influence of an intoxicant; that his employer had sent him home several times because of his drinking. The insured prior to his death was employed to do hard manual labor.

The defendant introduced in evidence a certified copy of the death certificate issued by the coroner relative to the death of Wade Hinton and the proof of death signed by the plaintiff.

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

"1. Did Wade Hinton use drugs or alcoholic stimulants to the point of intoxication within five years prior to July 14, 1960? Answer: No.

"2. Did Cora Flintall pay the premiums on the policy covering the life of Wade Hinton? Answer: No.

"3. Did Wade Hinton die from undetermined causes within twelve months from the date of the policy? Answer: No.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000.00."

Judgment was entered on the verdict and the defendant appeals, assigning error.

J. J. Shields for defendant appellant.
Dalton & Long for plaintiff appellee.

DENNY, C.J. The appellant assigns as error several excerpts from the charge of the court below applicable to the first and second issues.

We have carefully considered these assignments of error and in our opinion when the charge is considered contextually with respect to these issues, the jury could not have been misled to the prejudice of the defendant. *Kennedy v. James,* 252 N.C. 434, 113 S.E. 2d 889; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356; *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650.

In 45 C.J.S., Insurance, section 601, page 417, it is said "Whether statements as to temperate habits or denials of excessive use of stimulants or narcotics are regarded as warranties or as material representations, they are to be construed as referring to continuous or periodical excessive indulgence which has become habitual, and not to occasional use or even an exceptional case of excess. So it has been held that a statement that insured does not drink or does not use malt or spirituous liquors or beverages, or does not use narcotics, should receive a reasonable construction, and refers not to a single incidental use but to a customary or habitual use."

Likewise, in 29 Am. Jur., Insurance, section 774, page 1030, we find the following statement: "It is generally held that questions whether an applicant for insurance has used or uses intoxicating liquor, and if so, the extent and average quantity, do not refer to an occasional or exceptional use of such drinks, but to the habitual or customary use. For instance, in an application for life insurance, a negative answer to the question, 'Do you use spirituous, malt, or vinous liquors?' is not false when the answerer partakes of intoxicating liquors only occasionally and temperately. It is likewise generally held that a warranty or representation that the insured is sober and temperate does not mean that he is a total abstainer from the use of intoxicants, but implies that his use is a moderate and not an excessive one. An occasional use of intoxicating liquors does not render the insured a man of intemperate habits, and an occasional case of excess will not justify the application of this character to him."

Furthermore, we think the evidence supports the conclusion that the insured procured the policy of insurance in question on his life. If so, he had the right to designate any person he might choose as beneficiary. *Hardy v. Insurance Co.,* 152 N.C. 286, 67 S.E. 767; *Hardy v. Insurance Co.,* 154 N.C. 430, 70 S.E. 828.

It appears the insured had previously taken out a policy on his life with the defendant but had let it lapse due to his unemployment. When he procured a new job in July 1960 he requested the defendant to reinstate his old policy, but at the suggestion of the defendant's agent he took out a new policy instead.

These assignments of error are overruled.

The defendant contends that its liability, if any, upon the policy of insurance involved herein, is limited by the provisions of the policy to $500.00, and assigns as error the following instruction to the jury: "Upon this third issue, members of the jury, I instruct you that if you are satisfied from the evidence and by its greater weight, the burden being upon the defendant to so satisfy you that Wade Hinton did die from some undetermined cause it being admitted that he died within twelve months of the date of the policy, that is you find he died from cause not decided upon after a reasonable investigation as to what the cause was, it would be your duty to answer the issue 'Yes.' If you fail to so find, it would be your duty to answer 'No.' "

In 29A Am. Jur., Insurance, section 1854, page 918, it is said: "If a risk is excepted by the terms of a policy which insures against other perils or hazards, loss from such a risk constitutes a defense which the insurer may urge, since it has not assumed that risk, and from this it follows, at least as a general rule, that an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss, or a part thereof, comes within the purview of the exception or limitation set up. In other words, the principle generally applied by the courts is that if proof is made of a loss apparently within a contract of insurance, the burden is upon the insurer to prove that the loss arose from a cause of loss which is excepted or for which it is not liable, or from a cause which limits its liability."

This assignment of error seems to present a question not heretofore considered by this Court. Moreover, the briefs contain no citation of authority bearing on the interpretation to be given the words "undetermined causes." Neither have we found any. Even so, we see no reason why the word "undetermined" should not be given its ordinary meaning. Webster's New International Dictionary, Third Edition, defines "undetermined" as: "Not yet definitely or authoritatively decided, settled, or fixed; not yet positively identified or ascertained."

The insured died under unusual or mysterious circumstances. The evidence discloses no illness immediately prior to his death except in the proof of death, defendant's Exhibit 1, in answer to question No. 5, which reads as follows: "When did deceased first complain of, or give other indications of his last illness?" this question was answered by the plaintiff, viz: "November 3, 1960, sore throat." This was on Thursday before the insured was found dead on Sunday, 6 November 1960. The proof of death also reveals that the deceased last attended to his usual work on 4 November 1960.

In view of the facts and circumstances disclosed on this record, we have come to the conclusion that the statement in the certificate of death, that the immediate cause of death was "unknown," and giving the antecedent causes as "natural causes," that the antecedent causes should not be interpreted to mean anything more than that the coroner found no evidence of foul play. Moreover, if the cause of death is unknown, it necessarily follows that the cause of death is undetermined. Therefore, when the defendant introduced in evidence the proof of death filed by the plaintiff, and the coroner's certificate of death, they were sufficient to show that the cause of death was undetermined. Consequently, we think the defendant was entitled to an instruction that, if the jury answered the first and second issues "No," and found from the evidence and by its greater weight that the insured died from "undetermined causes," the jury would answer the third issue "Yes." We do not think the burden was on the defendant to establish by the greater weight of the evidence that the defendant died from "cause not decided upon after a reasonable investigation as to what the cause was * * *."

"While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury." *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *Church Conference v. Locklear,* 246 N.C. 349, 98 S.E. 2d 453; *Finance Co. v. O'Daniel,* 237 N.C. 286, 74 S.E. 2d 717; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 592; *LaVecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489; McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1516.

Therefore, since the burden of proof was on the defendant to establish an affirmative answer to the third issue, thereby reducing the amount that plaintiff was entitled to recover under the provisions of the policy from $1,000.00 to $500.00, the defendant, in light of all the evidence adduced in the trial below, was entitled to a peremptory instruction on the third issue.

The defendant is entitled to a new trial and it is so ordered.

New trial.

MRS. STELLA P. DAVIS, WIDOW; AND MRS. STELLA P. DAVIS, NEXT FRIEND OF TONDAH LEE DAVIS, DAUGHTER OF WILLIAM GRAY DAVIS, DECEASED, EMPLOYEE, v. N. C. GRANITE CORPORATION, EMPLOYER; SELF-INSURER.

(Filed 14 June 1963.)

1. Master and Servant § 69a—

Under G.S. 97-61.6 the dependents of a deceased employee are entitled to compensation if the employee dies as a result of silicosis within two years from the date of the last exposure or if the employee dies within 350 weeks from the date of last exposure to silicosis and while he is receiving or is entitled to receive compensation for disability due to silicosis, either partial or total, notwithstanding that the death does not result from silicosis.

2. Statutes § 5—

Where a statute contains two independent clauses connected by a disjunctive, prescribing conditions of its applicability, the statute is applicable to cases falling within either clause and it is not required that the conditions of both clauses be met.

3. Same—

When the language of a statute is clear and free from ambiguity, the courts must give it its plain and definite meaning.

4. Master and Servant § 69a—

The clear intent of G.S. 97-61.6 to provide compensation for death from silicosis occurring within 350 weeks from the date of last exposure if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding G.S. 97-2(6), (10) and G.S. 97-52, since the specific provisions relating to silicosis which were enacted because of the peculiar course of the disease must be construed as an exception to the general tenor of the Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment.

5. Statutes § 5—

A special or particular provision of a statute which, standing alone, would seem to be in conflict with a general provision of the same act, will ordinarily be construed to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict.

APPEAL by defendant from *Crissman, J.*, November 1962 Term of SURRY.

Hiatt & Hiatt and Weisner Farmer for plaintiffs.
Folger & Folger for defendant.

MOORE, J. This is a proceeding by plaintiffs under the Workmen's Compensation Act for compensation on account of the death of William Gray Davis, formerly an employee of defendant N. C. Granite Corporation.

Davis was a stonecutter and was employed as such by defendant from 1945 until he was laid off on 31 December 1957. He had contracted silicosis and on 25 March 1959 the medical advisory committee of the Industrial Commission determined that he had silicosis, grade I, and was 30% disabled. A year later he was found to have silicosis, grade II, and was 50% disabled. The following year he was examined again and on 30 March 1961 was rated 100% disabled. The defendant admitted liability for the occupational disease and agreed to pay compensation. There were two agreements, one dated 13 April 1959 under which Davis was to be paid $35 per week beginning 16 March 1959 and continuing 104 weeks, and another under which he was to be paid $35 per week for an unspecified number of weeks. Davis died 13 July 1961; the last compensation payment to him was made 7 July 1961.

Plaintiffs, deceased's dependents, applied for compensation on account of his death. At the hearing before the Deputy Hearing Commissioner there was testimony from Dr. T. C. Britt, who had treated Davis, that the immediate cause of death was acute myocardial infarction due to arteriosclerotic heart disease and that in his opinion silicosis was not the cause of death and was not related to terminal disease. The Deputy Hearing Commissioner found as a fact that decedent's death was not caused by or related to the occupational disease, silicosis, and, based on this finding, concluded that plaintiffs are not entitled to compensation. On appeal, the Full Commission affirmed. Plaintiffs appealed to Superior Court. Judge Crissman overruled the Commission's conclusion and award, adjudged that plaintiffs are entitled to compensation under the provisions of G.S. 97-61.6, and remanded the cause to the Industrial Commission for the entry of an award of compensation. Defendant appeals.

Silicosis is the characteristic fibrotic condition of the lungs caused by inhalation of dust of silica or cilicates. G.S. 97-62. "The slow development, incurable nature, and usual permanence of the disability resulting from . . . silicosis were pointed out in *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426, as reasons prompting the Legislature to draw distinctions between the tests for compensation to be paid an

injured employee and a diseased employee suffering from silicosis." *Pitman v. Carpenter*, 247 N.C. 63, 67, 100 S.E. 2d 231.

After the Industrial Commission has been advised initially by the State Board of Health that an employee has silicosis, the employee is required to undergo annual examinations by the advisory medical committee of the Commission. G.S. 97-61.1; G.S. 97-61.3; G.S. 97-61.4. If the employee refuses to be examined, he forfeits his right to compensation. G.S. 97-60. After the first such examination, the Commission may remove the employee from the industry, and the employee, by agreement of his employer or as a result of a hearing by the Commission to determine his right to compensation, may be awarded compensation for a period of 104 weeks. G.S. 97-61.5. In the instant case the various steps outlined by the sections referred to in this paragraph were taken.

G.S. 97-61.6 provides in pertinent part:

> "After receipt by the employer and employee of the advisory medical committee's third report, the Industrial Commission, unless it has approved an agreement between the employee and employer, shall set a final hearing in the cause, at which it shall receive all competent evidence bearing on the cause, and shall make a final disposition of the case, determining what compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received.
>
> "Where the incapacity for work resulting from . . . silicosis is found to be total, the employer shall pay, or cause to be paid, to the injured employee during such total disability a weekly compensation equal to sixty per centum (60%) of his average weekly wages, but not more than thirty-five dollars ($35.00), nor less than ten dollars ($10.00), a week; and in no case shall the period covered by such compensation be greater than 400 weeks, nor shall the total amount of all compensation exceed ten thousand dollars ($10,000.00).
>
> . . . . .
>
> "Provided, however, should death result from . . . silicosis within two years from the date of last exposure, *or* should death result within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to . . . silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid, by one of the methods set forth in G.S. 97-38 a total compensation which when added to the payments already made for partial or total disability to time of

death, shall not exceed ten thousand dollars ($10,000.00) including burial expenses."

Davis died pending an award for permanent disability. Defendant contends that decedent's dependents are not entitled to compensation on account of his death because it "was not caused by or related to silicosis."

Decision must rest upon the meaning of the last paragraph of G.S. 97-61.6. It provides two conditions under which dependents of a deceased employee, who had silicosis, are entitled to compensation on account of his death: (1) If death results *from silicosis* within two years from the date of last exposure, or (2) if death results within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to silicosis, either partial or total. These conditions are stated in independent clauses of a compound sentence and neither clause is dependent upon the other.

The first condition does not apply here, for Davis did not die *of silicosis* within two years of the date of his last exposure. The second condition does apply. He died within 350 weeks from the date of his last exposure; at the time of his death he was entitled to and was drawing compensation for disablement due to silicosis; and under the second condition there is no requirement that death result from silicosis.

"Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." 4 Strong: N. C. Index, Statutes, § 5, p. 180; *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572. The language of that portion of G.S 97-61.6 under consideration here is clear, positive and understandable. When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly. *Long v. Smitherman,* 251 N.C. 682, 684, 111 S.E. 2d 834.

Silicosis is incurable, but it rarely, if ever, causes disability until secondary infection develops. It has frequently been said that silicosis is not in itself a disabling disease, and usually some other disease causes death. 2 Gray: Attorney's Textbook of Medicine (3rd. ed. 1962), s. 147.08, p. 1589. It must be presumed that the General Assembly legislated with respect to this subject with a full understanding of the nature and effects of silicosis, and used language which expresses its intention.

Defendant contends that an award of compensation in this case will violate the general purposes and provisions of the Workmen's Compensation Act. Within the purview of the Act a compensable death is a death resulting from injury arising out of and in the course of employment. G.S. 97-2(6),(10). And "disablement or death of an employee resulting from an occupational disease . . . (silicosis) shall be treated as the happening of an injury by accident. . . ." G.S. 97-52. We concede *arguendo* that compensation in the instant case is contrary to these definitive terms. Nevertheless, "where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict." 4 Strong: N. C. Index, Statutes, s. 5, pp. 182-3.

Defendant insists that the crucial question on this appeal was settled in principle by the decision in *Gilmore v. Board of Education,* 222 N.C. 358, 23 S.E. 2d 292, in which, construing G.S. 97-38, it was said that "compensation is only allowed for death which 'results proximately from the accident.' " *Gilmore* and the case at bar are not analagous either factually or legally. The conditions prescribing applicability of G.S. 97-38 are both based on death resulting proximately from injury by accident arising out of and in the course of employment. The *Gilmore* case did not involve G.S. 97-37.

In appropriate circumstances the right to compensation survives the death of the employee and accrues to his dependents. G.S. 97-37; G.S. 97-61.6; *Inman v. Meares,* 247 N.C. 661, 101 S.E. 2d 692.

The judgment below is affirmed. The case is remanded to the Superior Court that its judgment heretofore entered may be implemented.

Affirmed.

JOHN GASTER v. LEAMON GOODWIN, LAYTON DENSON, INDIVIDUALLY AND TRADING AS APEX TAXI COMPANY, AND HUBERT E. GASTER.

(Filed 14 June 1963.)

1. Appeal and Error § 49—

When the evidence does not appear of record it will ordinarily be presumed that the court's findings of fact are supported by competent evidence, but this presumption may not be indulged when a party has

requested permission to amend his affidavit to allege crucial facts and the court has refused to allow such amendment.

2. Judgments § 22—

While ordinarily the neglect of a reputable attorney authorized to practice law in this State will not be imputed to a defendant who is not himself in default, after counsel has filed answer defendant is required to give the case that attention which a man of ordinary prudence usually gives to his important business, and contact his attorney at reasonable intervals, and if he knows or is chargeable with notice that his attorney has become unable to conduct his case on account of departure from the State, serious illness or mental incapacity, or death, the neglect of the attorney to defend the action when called for trial is not excusable.

3. Same—

The record disclosed that defendant employed counsel who aptly filed answer, that the case remained on the civil issue docket for more than ten years when the judge peremptorily ordered it set for trial, that the attorney was notified, and that neither defendant nor his attorney appeared and judgment on the jury's verdict was rendered without defendant's knowledge. There were no findings as to whether defendant was in contact with his attorney at reasonable intervals after answer was filed, or whether the attorney was incapacitated to defendant's actual or constructive knowledge. *Held:* The cause must be remanded for the finding of the crucial facts.

4. Appeal and Error § 55—

Where a judgment is entered without a finding of the essential facts the cause must be remanded.

APPEAL by plaintiff from *McConnell, S.J.* (now J.) October 22, 1962, Term of WAKE.

Defendant Layton Denson moved in this cause, pursuant to G.S. 1-220, to set aside a judgment entered in his absence and without his knowledge. Upon an order granting the motion plaintiff prosecutes this appeal.

Manning, Fulton, Skinner & Hunter, by John V. Hunter, III, for plaintiff.

Dupree, Weaver, Horton & Cockman, and Jerry S. Alvis for defendant Layton Denson.

MOORE, J. On 8 December 1947 plaintiff instituted an action in the Superior Court of Wake County against defendants Goodwin, Denson (appellee) and Hubert E. Gaster to recover damages for personal injuries suffered by him in a collision of automobiles. At the time of the collision plaintiff was a passenger in a car driven by

Hubert E. Gaster. This car collided with a car operated by Goodwin and owned by Denson, Goodwin's employer.

Summons was personally served on Denson on 11 December 1947. Denson employed Robert W. Johnson, Jr., an attorney of Apex, North Carolina, who prepared and on 5 February 1948 filed a verified answer on behalf of Denson and Goodwin. The answer set up as defenses the sole negligence of Hubert E. Gaster, contributory negligence of plaintiff, and joint venture of the Gasters. The case remained on the civil issues docket for more than ten years. On 18 June 1958 Mallard, J., made an order peremptorily setting the case for trial at the October 1958 term. The order directed the clerk to send copies thereof to the attorneys of record.

The case came on for trial, at the term designated in the order, before *Clark, J.*, and a jury. Neither Goodwin, Denson nor attorney Johnson was present. At the conclusion of plaintiff's evidence Hubert E. Gaster's motion for nonsuit was allowed. The jury answered the negligence and contributory negligence issues in favor of plaintiff and awarded plaintiff $10,000 damages. Judgment was entered accordingly. The judgment recites "that Robert W. Johnson, attorney for Leamon Goodwin and Layton Denson, was duly notified by the Clerk of the Superior Court of Wake County, and in addition thereto was called personally by counsel for plaintiff and advised that the case was ready for trial and that it would be tried on Thursday, October 9, 1958."

On 4 August 1962 (about 4 years after the judgment was entered) execution was served on Denson. Six days later Denson filed a motion in the cause to set aside the judgment on the ground of surprise and excusable neglect, alleging *inter alia* that he had no notice of the trial, he was given no opportunity to present his defense, and he has a good and meritorious defense. After hearing, the court allowed the motion, vacated and set aside the judgment, and reinstated the case on the docket for trial on the merits.

There are seven assignments of error, but we need only to consider on this appeal whether the court heard or permitted to be introduced sufficient competent evidence to warrant a finding of excusable neglect on the part of Denson.

The court below found as a fact that Denson "did in apt time employ duly licensed and qualified attorney to represent his interest; that he communicated to his attorney all of those matters and things relevant to his defense in this action; that he . . . relied explicitly upon his attorney's representation that he could attend to his defense and notify him whenever necessary of all proceedings." There were also

findings that the attorney filed answer in apt time, Denson had no notice of the trial from his attorney or any other source, and he had no knowledge that the judgment had been entered until execution was served on him. The court concluded that Denson was without fault or neglect in his attention to his defense.

Litigation must ordinarily be conducted through counsel and, if there is neglect of counsel, the litigant will be held excusable for relying on the diligence of his counsel, provided he is not in default himself. *Manning v. R.R.*, 122 N.C. 824, 28 S.E. 963. As a matter of necessity a client must rely on his lawyer. *Sutherland v. McLean*, 199 N.C. 345, 154 S.E. 662. This Court has held in many cases that when a client has employed a reputable attorney of good standing, licensed to practice in this State, has put him in possession of the facts constituting the defense, and the lawyer has prepared and filed an answer, if a judgment is obtained for the negligent failure of the attorney to appear and defend the cause when called for trial, the client may have the judgment set aside for surprise and excusable neglect. *Brown v. Hale, ante,* 480; *Meece v. Commercial Credit Co.*, 201 N.C. 139, 159 S.E. 17; *Sutherland v. McLean, supra.* The learned judge below undoubtedly had in mind the long line of cases, of which those next above cited are representative.

This Court has heard appeals in well over a hundred cases involving G.S. 1-220. Some opinions are conflicting; many are apparently in conflict. Be that as it may, in most instances the individual case has been determined upon its own peculiar circumstances. In the instant case the affidavits clearly support the findings of fact set out above, except the finding that Denson "relied explicitly upon his attorney's representation that he could attend to his defense and notify him whenever necessary of all proceedings." The circumstances seem to negative the proposition that appellee was warranted in relying upon such representation of his counsel over the period of ten years from 1948 to 1958. The burden is on movant, and he must show facts not barely sufficient in law to excuse neglect, but so clearly sufficient as to call for the exercise of the discretion of the judge. *Kerchner v. Baker*, 82 N.C. 169.

Where a party knows or is chargeable with notice that his attorney will be unable to conduct his case on account of the attorney's departure from the State, extended serious illness, mental incompetency, or death, the party's inaction will amount to inexcusable neglect. *Land Co. v. Wooten*, 177 N.C. 248, 98 S.E. 706; *Holland v. Benevolent Association*, 176 N.C. 86, 97 S.E. 150; *Cahoon v. Brinkley*, 176 N.C. 5, 96 S.E. 650; *Queen v. Lumber Co.*, 170 N.C. 501, 87 S.E. 325; *Simpson*

v. Brown, 117 N.C. 482, 23 S.E. 441; *Kivett v. Wynne,* 89 N.C. 39. The holdings are otherwise where the attorney's illness is sudden and temporary. *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Gunter v. Dowdy,* 224 N.C. 522, 31 S.E. 2d 524.

At the hearing on the motion Denson introduced affidavits which tend to establish the following facts (on this record undisputed): The attorney, Robert W. Johnson, Jr., was in early childhood afflicted with polio and as a result he was thereafter a semi-invalid. His physical handicap limited his activities, he often tripped and fell, and when prone could not get up without assistance. He did not keep regular office hours. From about 1955 until the time of his death he was restricted to office practice and did not engage in trial practice at all. He was neither physically nor mentally capable of practicing law during the last few years of his life. He died in 1961.

Plaintiff requested the court to find as a fact that after the answer was filed in early 1948 Denson did not make any inquiry of or address any communication to his attorney. The court denied the request. The record does not show whether Denson was in contact with his attorney at any time after 1948. Judge McConnell's order states that he considered the "verified motion, affidavits and evidence." The record does not set out the testimony of any witnesses or any evidence, other than the original pleadings, the motion and the answer thereto, and affidavits. Ordinarily when testimony is not brought forward in the record, it will be presumed that the court's findings of fact are supported by competent evidence. *Carter v. Carter,* 232 N.C. 614, 61 S.E. 2d 711. But we cannot apply this rule in the present case. When plaintiff requested the finding mentioned above, Denson requested permission to amend his affidavit and motion to show "That after employment of his attorney in early 1948, he was on numerous occasions in contact and communication with his . . . attorney, both socially and professionally. . . ." The court declined to permit the amendment. This request having been denied, we cannot consistently indulge the presumption that the court later heard testimony to that effect.

It appears to us that the crucial point in this case has not been considered. If Denson over the ten year period was in contact with his attorney at reasonable intervals, observed and learned nothing which would put him on notice that the attorney was incapacitated to present his defense, and was assured that his case would be attended to and he would be notified when needed, the court may find that Denson was not in default. On the other hand, if Denson knew that his attorney was not capable of handling his business, or by inaction and inattention neglected to discover the incapacity of his attorney which

had existed over a long period of time, he may not claim the benefit of the statute unless there are other considerations, not appearing on the present record, which might excuse him. There is also the question whether, if Johnson was incapacitated, this fact was known to plaintiff or his attorneys and they failed to so inform the court.

A litigant does not relieve himself of all imputations of negligence under all circumstances when he employs counsel, imparts to him all the facts concerning the defenses, files answer, and then lapses into inaction, relying solely on his attorney. The standard of care a litigant must observe with respect to his case has been repeatedly stated by us. The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business. *Jones v. Fuel Co.*, 259 N.C. 206, 130 S.E. 2d 324; *Sluder v. Rollins*, 76 N.C. 271.

We will not now consider the merits of this controversy, for injustice may be done if we decide the matter without having the essential facts before us. *Gaylord v. Berry*, 169 N.C. 733, 86 S.E. 623. The motion is remanded for rehearing. The parties may, if so advised, request the court below for permission to amend the motion and the answer thereto. All phases of the matter should be fully heard and considered. The conditions precedent to setting aside a judgment for surprise and excusable neglect are stated in *Fellos v. Allen*, 202 N.C. 375, 162 S.E. 905.

Error and remanded.

NEW HOME BUILDING SUPPLY COMPANY, INC. v.
BERTHA LAPISH NATIONS.

(Filed 14 June 1963.)

1. Deeds § 26—

An instrument conveying standing timber must meet the requirements for a valid conveyance of realty.

2. Deeds § 1—

A deed is an instrument in writing containing operative words of conveyance sufficient to indicate the grantor's intent to convey, which instrument must be signed, sealed and delivered by the grantor, and must contain a description sufficiently certain within itself or by reference to something extrinsic to which it refers to identify the thing granted.

3. Same; Deeds § 26—

The grantee in a timber deed in regular form endorsed on its reverse side the date and a statement that he did "hereby transfer this deed in its entirety to" a designated person, and signed same under seal. *Held:* The endorsement being under seal and containing operative words of conveyance and identifying the thing conveyed by reference, is sufficient in law to convey the timber interest.

4. Registration § 2—

A timber deed in regular form having a valid assignment of the timber rights by the grantee in the deed endorsed on its back was duly registered, and the endorsement was transcribed on the records with the deed. *Held:* Even though the endorsement be sufficient as a conveyance of the timber rights, the endorsement was not acknowledged, and therefore there was no registration of the endorsement so as to defeat the rights of the creditors of the grantee in the deed. G.S. 47-1, G.S. 47-12, G.S. 47-13, G.S. 47-18, G.S. 47-20.

5. Registration § 5—

The original grantor may not defeat the title of his grantee's transferee for value on the ground that the grantee procured the execution of the instrument by fraud and that the conveyance by the grantee was not registered, there being no contention that the transferee participated in any fraud or that the original grantor had reduced her claim against her grantee to judgment or filed *lis pendens.*

APPEAL by plaintiff from *Armstrong, J.*, October 8, 1962 Term of GUILFORD.

This action was instituted on May 14, 1962 under the Uniform Declaratory Judgment Act. The complaint alleges the following facts:

On March 26, 1962 defendant conveyed to A. E. Lundy all the merchantable timber on the 13.74 acre tract of land described in the deed and granted him the right to cut and remove it at any time within six months. Simultaneously with the delivery of the deed, Lundy gave defendant a check in the amount of $1,000.00 for the purchase price of the timber. On the following day, March 27, 1962, Lundy exhibited defendant's deed to the officers of the plaintiff who paid him $1,000.00 for the timber rights it conveyed. Lundy attempted to transfer these rights to the plaintiff by executing the following endorsement on the reverse side of the deed:

"March 27, 1962

"I, A. E. Lundy do hereby transfer this deed in its entirety to New Home Bldg. Supply Co., Inc., with the exception of pulp wood.

SEAL A. E. Lundy
WITNESS Alma W. Crumley"

Thereafter, on March 30, 1962, plaintiff caused the deed from defendant to Lundy to be recorded in the office of the Register of Deeds of Guilford County. Lundy's assignment to plaintiff was transcribed on the records with it.

Upon presentation for payment the check which Lundy gave to the defendant was dishonored, and it has not been paid. When plaintiff attempted to cut the timber defendant forbade its agents to go on the land and threatened criminal prosecution for trespass if they did. In consequence they desisted, and on May 14, 1962 plaintiff instituted this action to determine its rights under the purported transfer. Defendant demurred to the complaint on the grounds that (1) the assignment from Lundy to the plaintiff was insufficient to pass title to the timber in question and (2) the conveyance to Lundy was procured by fraud. On October 9, 1962 Judge Armstrong sustained the demurrer, and plaintiff appealed.

Block, Meyland & Lloyd by Henry H. Isaacson for plaintiff appellant.

Hubert E. Seymour, Jr., and W. Marcus Short for defendant appellee.

SHARP, J. Standing timber is a part of the realty and can be conveyed only by an instrument which is sufficient to convey any other realty. *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528, 3 A.L.R. 2d 571. A conveyance of land can only be by deed. *Ward v. Gay,* 137 N.C. 397, 49 S.E. 884. The determinative question here is whether the endorsement on the back of the deed from defendant to Lundy meets the requirements for a valid conveyance.

Today in North Carolina, the word *deed* ordinarily denotes an instrument in writing signed, sealed, and delivered by the grantor whereby an interest in realty is transferred from the grantor to the grantee. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Strain v. Fitzgerald,* 128 N.C. 396, 38 S.E. 929; *Fisher v. Pender,* 52 N.C. 483; 16 Am. Jur., Deeds, § 5. A grantor, a grantee, and a thing granted are necessary requisites. *Powell v. Powell,* 168 N.C. 561, 84 S.E. 860. The description of the thing granted must identify the land or furnish the means of identifying it with certainty by reference to something extrinsic. *Peel v. Calais,* 223 N.C. 368, 26 S.E. 2d 916. However, it is the seal which distinguishes a deed from a simple contract. *Strain v. Fitzgerald, supra.* For the origin of sealing and the uses which have been made of it at different periods, see *Ingram v. Hall,* 2 N.C. 193.

An effective deed must, of course, contain operative words of conveyance which indicate the grantor's intention to convey his property.

16 Am. Jur., Deeds, § 49. The absence of such words cannot be supplied, *Pope v. Burgess,* 230 N.C. 323, 53 S.E. 2d 159, but the failure to use *technically* operative words will not usually defeat an intention which is plainly though not technically expressed. Ordinary words in common parlance may be effectively used, *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687, and informality alone will not defeat an instrument which is intended to be a deed. *Armfield v. Walker,* 27 N.C. 580.

In *Cobb v. Hines,* 44 N.C. 343, in giving effect to the intention of the grantor in a most informal document, the Court said:

> "The deed under which the defendant claims, and by virtue of which he seeks to defeat the recovery of the plaintiff's lessor, is, as must be admitted, very informal. It is untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography, and yet it may be valid, if 'there be sufficient words to declare clearly and legally the party's meaning.' 2 Black. Com. 298"

In *Linker v. Long,* 64 N.C. 296, Taylor conveyed land to Linker on November 6, 1852. Thereafter, on May 11, 1853, Linker redelivered the deed to Taylor with the following endorsement which he signed, but did not seal: "I transfer the within deed to W. F. Taylor again." In holding that the redelivery of the deed with the assignment on it did not amount to a conveyance, Pearson, C. J., said: "(T)he writing on the back of the deed was not sealed or delivered as a deed; and a defeasance by which to defeat a deed must be *by deed.* . .The only effect that can be allowed to this writing is, that it furnishes evidence of an agreement to reconvey, which a court of equity would enforce by a decree for specific performance, provided it be supported by a valuable consideration."

In *Tunstall v. Cobb,* 109 N.C. 316, 14 S.E. 28, Peter Hays conveyed land to Tunstall on March 6, 1886. "After the deed had been registered, the following endorsement purported to have been made: 'I relinquish all my right and title to the within deed. 10 March, 1874.' (Signed by Robert A. Tunstall and witnessed by James McHays.)" The deed was found in the papers of Peter Hays after his death. Speaking through Avery, J., the Court held (citing *Linker v. Long, supra*) that the writing endorsed upon the deed, being without a seal, could not operate as a reconveyance of the land by Tunstall no matter what was the real intention of the parties. It held further, however, that if the endorsement were made for a valuable consideration, it would support a decree for specific performance. Pertinent to the instant case are the following words of Justice Avery:

> "There can be no doubt that the land referred to in the writing was that admitted to have been fully described in the deed, and its identity is as clearly ascertained as if the description in the deed had been copied in the endorsement. The quantity of interest that he intended to relinquish was all of his right and title in a piece of land that Peter Hays had conveyed to him in fee simple. *The physical connection between the deed and the memorandum is sufficient to make it valid, as the description of the subject-matter and of the quantity of interest, by the reference to the deed.*" (Italics ours)

It is implicit in both of the preceding opinions that if the endorsement in question had been under seal it would have been sufficient as a deed.

The signature of the grantor on the endorsement under consideration in this case is preceded by a seal. It is, therefore, a sealed instrument. By reference to the deed on which it is written, the thing conveyed is made certain. It names a grantor and a grantee. Although it recites no consideration, and none is necessary between Lundy and the plaintiff, *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530, the demurrer admits that plaintiff paid Lundy $1,000.00 for the timber rights. The remaining question is, does the endorsement contain operative words of conveyance? The authorities answer YES.

In *Harlowe v. Hudgins,* 84 Tex. 107, 31 Am. St. Rep. 21, James Stephens executed a deed to John M. Graham, dated October 1841 and recorded August 7, 1844. On the same page of the record, following immediately after the deed, without any space or line intervening, the following was recorded: "Assignment. — I assine the within to Elizabeth Graham, for value received of her, the sum of fourteen hundred and sixty-three dollars and thirty-three cents, this April 11th, 1843. (Signed) J. M. Graham. (Test) Jacob Barnes, N. D. Graham." (Texas law required no seal.) Both deed and assignment were acknowledged before the same officer and on the same day; both were recorded in the same handwriting with the same pen and ink. There was but a single file mark on the record of the instruments. The trial judge refused to admit this assignment in evidence. The Supreme Court reversed, saying:

> "The common law, which was also in force in this state at the date of this instrument, did not require the use of technical words in making a conveyance. The employment of words sufficient to show a purpose and intent to convey is all that was required, either by the statute or common law. No precise technical words

> are required to be used in creating a conveyance; the use of any words which amount to a present contract of bargain and sale is all-sufficient. Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the title can be discovered the courts will give effect to it and construe the words accordingly. The word 'assign' is defined, 'to make or set over to another; *to transfer*; as to assign property or some interest therein': 2 Bla. Com. 326; Black's Law Dict. 97. The word 'assignment' means, 'the act by which one person transfers to another or causes to vest in another his property, or an interest therein; the transfer or making over the estate, right, or title which one has in lands and tenements': Black's Law Dict. 97, 98; Burrill on Assignments, sec. 1 . . . If it be true that this instrument refers to the deed executed by James Stephens to Graham, or was written and indorsed on the deed (which are facts to be passed on by the jury), then the words, *'I assign the within,' are effectual not only to pass the title to the paper upon which the deed from Stephens to Graham was written, but also to pass the title to the land described in the deed.*" (Italics ours)

The report of this case in 31 Am. St. Rep. is immediately followed by an annotation at page 26 which collects cases from other jurisdictions and declares the law to be as set out in the cases herein cited.

The word *transfer* has several times been held to be an operative word of conveyance:

> "*Transfer* is a word commonly used to denote a passing of title in property usually realty or an interest therein from one to another." *Ex parte Okahara,* 191 Cal. 353, 216 P. 614.
>
> "(T)he words 'assign and transfer' are sufficient to convey title." *Reagan v. Dugan,* 112 Ind. App. 479, 41 N.E. 2d 841.
>
> "The word, then 'convey,' or 'transfer,' in a deed, is of equivalent signification and effect as *grant.*" *Lambert v. Smith,* 9 Or. 185.
>
> "The words 'transfer' and 'assign' are not the usual operative words of a conveyance of real estate, but are sufficient to transfer title." (Quoting from the Syllabus by the Court) *Sanders v. Ransom,* 37 Fla. 457, 20 So. 530.

Although we do not approve this informal mode of attempting a conveyance of land — obviously the work of a layman — the authorities cited in this opinion constrain us to hold that as between Lundy and

the plaintiff it is a valid conveyance. We agree with Professor Mordecai, when he said in his lectures, Vol. II, p. 797, that it would be "a very pernicious thing for a lawyer to experiment with legal writings by endeavoring to see how informal he can make them and how far he can with safety depart from known and customary forms." He advised that in drawing all instruments the safe and intelligent lawyer would heed the warning language of Ruffin, C.J., in *Henry v. Henry,* 31 N.C. 278, 386, and of Blackstone in his Commentaries, 2 Black, 298.

The deed from defendant to Lundy has been duly recorded. However, according to the record before us, the informal conveyance from Lundy to plaintiff has not been. It has not been acknowledged under either G.S. 47-1, G.S. 47-12, or G.S. 47-13. Apparently it was transcribed on the records of Guilford County when the deed from defendant to Lundy was recorded. The registration of an improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. *King v. McRackan,* 168 N.C. 621, 84 S.E. 1027; *McClure v. Crow,* 196 N.C. 657, 146 S.E. 713. While the unregistered deed is good as between Lundy and plaintiff, *Patterson v. Bryant,* 216 N.C. 550, 5 S.E. 2d 849, it would pass no title to plaintiff as against creditors of Lundy whose liens are recorded prior to its registration. No notice will supply the want of registration of a deed. G.S. 47-18; G.S. 47-20; *Realty Co. v. Carter,* 170 N.C. 5, 86 S.E. 714.

There is no basis for defendant's second ground for demurrer. The allegation in the complaint is that plaintiff is a purchaser for value from Lundy. There is no allegation that its agents perpetrated any fraud on defendant or had any notice that Lundy had done so. *Cheek v. Squires,* 200 N.C. 661, 158 S.E. 198. The complaint reveals that defendant is a creditor of Lundy's to the extent of $1,000.00 The inference is strong that he secured the deed from her by fraud. However, there is no allegation that she has either reduced her claim against him to judgment or filed a *lis pendens* in an action against Lundy to set the deed aside for his fraud.

The judgment of the Superior Court sustaining the demurrer is

Reversed.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. FORBES TRANSFER COMPANY, INC.

(Filed 14 June 1963.)

Carriers § 3— Carrier purchasing certificate of another carrier may combine the purchased authority with its original authority.

Where an irregular carrier acquires the certificate of another irregular carrier with the authority of the Utilities Commission, G.S. 62-121.27, the purchasing carrier has the legal right to combine or "tack" the irregular route authority purchased by it and its original irregular route authority, there being no conditions or restrictions imposed by statute or any rule or regulation of the Commission in effect at the time of the purchase, [Rule 24(b) being adopted subsequent to the purchase], and *held* further, an authority to transport goods from a named municipality to points and places on or east of a designated highway and from points and places on or east of the designated highway to the named municipality does not require that all shipments originate or terminate in the designated municipality, and the purchase of the certificate obviates the question of authority as to interchange of traffic between the irregular carriers.

APPEAL by Forbes Transfer Company, Inc., from *Copeland, Special Judge,* January Assigned Civil Session 1963 of WAKE.

On March 22, 1962, Forbes Transfer Company, Inc. (Forbes), filed with the North Carolina Utilities Commission (Commission) a tariff schedule, to become effective April 23, 1962, showing truckload rates and refrigeration charges on meats or packing house products between Wilson, on the one hand, and Charlotte, Gastonia, and Asheville, on the other hand. This tariff schedule specifically provided the rates applied to shipments *via Goldsboro.* See G.S. 62-121. 29(b). On April 17, 1962, the Commission (1) ordered an investigation into Forbes' authority in respect of shipments to which said rate schedule would apply, (2) suspended use of the tariff schedule and deferred application thereof until August 21, 1962, and (3) designated Forbes as respondent in the proceedings and set a time and place for hearing. See G.S. 62-121.28(f).

Forbes is an irregular route common carrier by motor vehicle. Its home office is at Wilson, N. C.

In 1947, under the grandfather clause of the North Carolina Truck Act, G.S. 62-121.11, Forbes was granted authority to transport general commodities to and from points and places in the area on and east of U. S. Highway 52. Under this authority, Forbes could and can transport general commodities from any originating point to any destination point within the described area, including shipments between Wilson and Goldsboro.

Prior to March 31, 1960, F. L. Express, an irregular route common carrier, acquired under Certificate C-248 authority to transport general commodities "(a) (f)rom Goldsboro to points and places on and east of U. S. Highway 25 extending in a general north and south direction through Asheville," and "(b) (f)rom points and places on and east of said U. S. Highway 25 to Goldsboro, North Carolina." As expressly authorized by the Commission's order of March 31, 1960, F. L. Express sold and transferred to Forbes Certificate C-248 and the authority conferred thereby. G.S. 62-121.26. The Commission's order provided that Forbes "filed with the Commission proper schedules of tariffs covering the authority hereby authorized to be transferred."

At the hearing before the Commission, the only testimony was that of Vance T. Forbes, Vice-President of Forbes, and of George S. Warren, Jr., Secretary-Treasurer of Forbes, which tends to show the facts narrated below.

When Forbes acquired Certificate C-248, Forbes filed "certain petitions and applications with the Interstate Commerce Commission." Pending action thereon, the (Utilities) Commission, at the request of Forbes, suspended Forbes' said authority "until the I.C.C. either approved or denied transfer of interstate rights." G.S. 62-121.27. In a final order dated September 22, 1961, "the I.C.C. . . . denied the interstate authority." (Note: Except as indicated, the record does not disclose the nature of Forbes' petition and proceeding before the Interstate Commerce Commission.)

On October 10, 1960, Forbes, through its tariff publishing agent, North Carolina Motor Carriers, published a tariff covering hauls "from Wilson to Charlotte, Gastonia and Asheville." When a member of the Commission's staff questioned Forbes' authority "to transport shipments of this nature between Wilson and Asheville, Charlotte, or Gastonia," Forbes stated (by letter signed by Mr. Warren) in reply that it had requested its agent "to change this tariff publication to conform with your regulations, since we are not authorized to transport shipments to Asheville, Charlotte, and Gastonia."

During the period (March 31, 1960-September 22, 1961) its authority to do so was suspended, Forbes did not operate under the rights it had acquired from F. L. Express or under the tariff published October 10, 1960. During this period, Forbes leased equipment to Goldston (later A & G Truck Lines) and shipments (approximately ten to fifteen) to points west of U. S. Highway 52 were made under agreement between Forbes and the lessee of its equipment and in the exercise of rights held by such lessee.

On October 12, 1961, Forbes advised the Commission it was beginning to exercise the rights it had acquired from F. L. Express.

Early in 1962 Forbes began operations under its own authority and under the tariff schedule published October 10, 1960. When its authority to do so was questioned by the Commission, the tariff schedule of March 22, 1962, was filed, specifically providing that the rates appearing thereon applied only to shipments *via Goldsboro.*

The Commission, under date of July 3, 1962, ordered that Forbes file an appropriate supplement cancelling said tariff schedule and that Forbes "cease and desist from the transportation of meats or packing house products from and to" the points named in said tariff schedule. Forbes excepted to said order and appealed to the superior court.

In the superior court, Judge Copeland, after reviewing the record, "ORDERED, ADJUDGED AND DECREED that the exceptions of Forbes Transfer Company, Inc., and each and every one of them, be, and the same are hereby overruled, and the Order of the North Carolina Utilities Commission dated July 3, 1962 be, and the same is hereby affirmed." Forbes excepted to the overruling of each of its exceptions to the Commission's order and excepted to said judgment of Judge Copeland and appealed to the Supreme Court.

Attorney General Bruton and Assistant Attorney General Charles W. Barbee, Jr., for plaintiff appellee.

Vaughan S. Winborne for defendant appellant.

BOBBITT, J. The question for decision is whether Forbes has the legal right, by combining or "tacking" the irregular route authority it purchased from F. L. Express and its original irregular route authority, to transport commodities between Wilson, on the one hand, and Charlotte, Gastonia, and Asheville, on the other hand, *provided* such shipments are routed and pass through Goldsboro. Charlotte, Gastonia, and Asheville are west of U. S. Highway 52.

The tariff schedule filed by Forbes on March 22, 1962, applies only to shipments between Wilson, on the one hand, and Charlotte, Gastonia, and Asheville, on the other hand. However, in respect of Forbes' legal rights, we perceive no difference between such shipments and shipments between *any* community on or east of U. S. Highway 52, on the one hand, and *any* community west of U. S. Highway 52 and on or east of U. S. Highway 25, on the other hand, *provided* such shipments are routed and pass through Goldsboro.

The Commission's order of March 31, 1960, authorizing the sale and transfer to Forbes by F. L. Express of Certificate C-248 and the authority conferred thereby imposes no condition or restriction in respect

of the exercise by Forbes of the rights conferred by Certificate C-248. Moreover, no such condition or restriction was imposed by any statutory provision or by any Commission rule or regulation *then in effect.* Thereafter, Rule 24(b) of the Commission's Rules and Regulations for the Administration and Enforcement of the Truck Act, General Order No. T-100, effective December 1, 1961, was adopted. Rule 24(b) provides: "No carrier *acquiring operating authority by purchase,* lease or otherwise, *on and after the effective date of this rule,* shall tack or join such authority to an authority already held by said carrier without the written consent of the Commission." (Our italics) Suffice to say, Forbes acquired by purchase the rights conferred by Certificate C-248 prior to the effective date of Rule 24(b).

In support of the Commission's order, it is contended that Forbes' proposed shipments between Wilson, on the one hand, and Asheville, Charlotte, and Gastonia, on the other hand, *via Goldsboro,* are not authorized by Forbes' present certificates; and that Forbes must apply for a new certificate and prove to the satisfaction of the Commission that "a public demand and need exists for the proposed service in addition to existing authorized transportation service." G.S. 62-121.15(f)(1). Certificate C-248 does not provide expressly or by necessary implication that the authority it grants relates solely to instances where Goldsboro is either the original point of shipment or the point of ultimate destination of the commodities involved. Rather, in our view, the more reasonable construction is that *the authority of F. L. Express to transport* under Certificate C-248 began at Goldsboro or terminated at Goldsboro.

It is contended that G.S. 62-121.28 and G.S. 62-121.29 make no provision for the interchange of traffic and the establishment of joint rates between irregular route common carriers. Conceding, without deciding, that Forbes and F. L. Express could not have established an interchange of traffic and joint rates, when Forbes purchased from F. L. Express the rights conferred by Certificate C-248 questions as to interchange of traffic and establishment of joint rates between irregular route common carriers were eliminated.

It appears to be conceded that authority to transport general commodities includes authority to transport meats and packing house products.

No condition or restriction having been imposed by the Commission's order of March 31, 1960, or by statute, or by a Commission rule or regulation in effect when Forbes acquired by purchase the rights conferred by Certificate C-248, it is our opinion, and we so hold, that decision must be based on Forbes' original authority considered

in relation to and in combination with the authority Forbes acquired by purchase from F. L. Express. When so considered, we reach this conclusion: Under its original authority Forbes is authorized to transport commodities from Wilson to Goldsboro and under the authority it purchased from F. L. Express, Forbes is authorized to transport such commodities from Goldsboro to Charlotte, Gastonia, or Asheville. Conversely, under the authority it purchased from F. L. Express, Forbes is authorized to transport commodities from Asheville, Gastonia, or Charlotte to Goldsboro, and under its original authority it is authorized to transport such commodities from Goldsboro to Wilson. Hence, the judgment of the court below is reversed.

Reversed.

M. P. CARROLL, EDWARD M. MOODY, AND EDWARD RADFORD, CO-PARTNERS, TRADING AS CENTRE WAREHOUSE NO. 2 v. THE WARRENTON TOBACCO BOARD OF TRADE, INCORPORATED.

(Filed 14 June 1963.)

1. Injunctions § 13—

Upon the hearing of an order to show cause the merits are not before the court, and an agreement that the court might enter an order out of term and out of the district refers to an order granting or denying motion for the temporary restraining order and does not empower the court to determine the issues of fact raised by the pleadings, and therefore the court's action in dismissing the action prior to trial on the merits is erroneous.

2. Injunctions § 1—

A mandatory injunction is comparable to a writ of *mandamus* and may not ordinarily be issued as a preliminary injunction.

3. Injunctions § 13—

A temporary restraining order is an ancillary remedy to preserve the *status quo* pending the hearing on the merits and is properly denied when plaintiff seeks a mandatory injunction to establish a right not theretofore enjoyed or previously exercised.

4. Appeal and Error § 47—

The denial of a motion to strike allegations from an adversary party's pleading will not be disturbed when appellant is not prejudiced thereby.

MOORE, J., concurs in result.

APPEAL by plaintiffs from a judgment of *Williams, J.*, filed November 15, 1962. From WARREN.

This action was instituted August 23, 1962, to enjoin defendant permanently from putting into effect against plaintiff the new bylaws and new formula for allocation of selling time purportedly adopted by defendant on July 9, 1962, and from taking from plaintiffs the selling time properly allocable to Centre Warehouse No. 2 under defendant's bylaws in effect on March 15, 1962, and on April 26, 1962, and for a mandatory injunction in plaintiffs' favor requiring defendant to allot to plaintiffs the selling time to which, under defendant's bylaws in effect on March 15, 1962, and April 26, 1962, they were entitled as the seventh warehouse on the Warrenton tobacco market.

An order to show cause was issued August 24, 1962, by his Honor Clawson L. Williams, Judge holding the courts of the Ninth Judicial District for the Fall Term 1962, in which defendant was ordered to appear before Judge Williams in Warrenton on September 6, 1962, and show cause, if any it had, why it should not be restrained and enjoined in accordance with plaintiffs' motion pending the final determination of the action.

For present purposes, a brief summary of the respective contentions will suffice: Plaintiffs contend they are entitled to an allocation of selling time for the 1962 and subsequent seasons in accordance with amendments to defendant's bylaws adopted July 18, 1952, along with the six other warehouses with membership in defendant on July 9, 1962, when the bylaws were again amended. Defendant contends plaintiffs' Centre Warehouse No. 2 is a new warehouse to which the 1962 amendments apply and under which plaintiffs' selling time or number of baskets allotted to them for the 1962 season and subsequent seasons would be substantially less than under the 1952 amendments.

Plaintiffs, as owners and operators of Centre Warehouse No. 1, were members of defendant prior to and on July 18, 1952, and continuously thereafter.

Plaintiffs alleged, *inter alia,* that they, as prospective owners and operators of Centre Warehouse No. 2, were admitted to membership in defendant on March 15, 1962; that selling time for the 1962 season was allotted to Centre Warehouse No. 2 by resolution adopted April 26, 1962, and this allocation was based on the bylaws in effect since 1952; that, in reliance upon the actions taken by defendant on March 15, 1962, and on April 26, 1962, plaintiffs purchased land for $9,000.00 and constructed a warehouse thereon at a cost of $61,000.00; and that on July 9, 1962, plaintiffs had almost completed construction of Centre Warehouse No. 2 and had incurred expenses of at least $60,000.00 in connection therewith.

Defendant, by answer, denied allegations on which plaintiffs base their cause of action, including the allegations summarized in the preceding paragraph.

At the hearing before Judge Williams on September 6, 1962, plaintiffs offered in evidence the verified complaint and two affidavits and defendant offered in evidence its verified answer. No order was signed at the conclusion of said hearing. It was agreed that Judge Williams might take the matter under advisement and sign his order "either in or out of term and either in or out of the District."

Pending Judge Williams' ruling on plaintiffs' said motion, plaintiffs filed on September 26, 1962, a motion in which, in fifteen separate paragraphs, they moved to strike all or portions of designated paragraphs of the answer and "(a)ll of defendant's purported Further Answer and Defense." This motion was heard by Judge Williams at Oxford, N. C., on October 8, 1962, and by Judge Williams' order dated October 11, 1962, was "denied in its entirety." Plaintiffs excepted.

There were no hearings except those referred to above, namely, the hearing September 6, 1962, on return of said order to show cause, and the hearing October 8, 1962, on said motion to strike.

On November 15, 1962, Judge Williams filed with the Clerk of Superior Court of Warren County a judgment, entitled an "Order," which recites that the matter was being heard "upon the motion or order to show cause why a restraining order should not be issued as prayed for in the complaint." In said judgment, the court stated findings of fact and conclusions of law. Conclusion of Law (e) is in these words: "That all matters in controversy having been resolved and all material facts at issue between the parties having been determined by the Court, and there being no further issue for litigation, that defendant's motion to dismiss this action should be allowed." Thereupon, the court entered judgment as follows:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"1. That plaintiffs' action be, and the same is hereby dismissed.

"2. That the injunctive relief hereby sought by the plaintiffs is denied.

"3. And that plaintiffs pay the costs of this action to be taxed by the Clerk."

Plaintiffs excepted (a) to designated findings of fact, (b) to each and all of the conclusions of law, and (c) to the judgment, and appealed.

Zollicoffer & Zollicoffer and Maupin, Broughton, Taylor & Ellis for plaintiff appellants.

John H. Kerr, Jr., and Blackburn & Blackburn for defendant appellee.

BOBBITT, J. The only question for decision by Judge Williams at the hearing on September 6, 1962, was whether defendant should be restrained and enjoined pending the final determination of the action. Findings of fact made by the court at such hearing are not binding on the parties or even proper matters for consideration by the court or jury at the trial on the merits. *Huskins v. Hospital,* 238 N.C. 357, 362, 78 S.E. 2d 116.

There was no waiver of jury trial. There was no demurrer to the complaint. There was no motion to dismiss other than the formal prayer in defendant's answer. Obviously, the agreement that the order might be signed "either in or out of term and either in or out of the District" referred to an order granting or denying plaintiffs' motion for an order restraining and enjoining defendant pending the final determination of the action.

It appears from Conclusion of Law (e), quoted in our preliminary statement, that Judge Williams based his judgment, in which the action was dismissed and plaintiffs were taxed with the costs, on findings of fact made by him.

No term of court was held in Warren County between the one week Criminal Term beginning September 3, 1962, and November 15, 1962, the date the judgment was filed with the clerk. The judgment was not signed and entered in term. In *Mosteller v. R.R.,* 220 N.C. 275, 281, 17 S.E. 2d 133, this statement appears: "It was proper to dismiss or dissolve the restraining order, but the dismissal of the action upon the hearing of the order to show cause is not approved by decisions relating to the present practice. *Cox v. Kinston,* 217 N.C. 391, 399, 8 S.E. 2d 252, 258; *Bynum v. Powe,* 97 N.C. 374, 2 S.E. 170. Motions of that kind should be heard at term." See *Moore v. Monument Co.,* 166 N.C. 211, 81 S.E. 170; *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792. *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359, cited by defendant, is distinguishable on the ground, among others, that the judgment was entered in term.

Under the circumstances, the judgment, being erroneous and irregular, is vacated; and the cause is remanded for trial.

Even so, without reference to the findings of fact made by Judge Williams, we are of opinion, and so hold, that plaintiffs were not entitled, pending the final determination of the action, to the restraining

order they seek. Whatever the merits of plaintiffs' cause, Centre Warehouse No. 2 was a new warehouse; and, prior to the 1962 season, no sales had been conducted therein and no selling time had been allocated thereto. Thus, plaintiffs are not seeking to preserve the status quo. They are asserting rights they have not previously exercised. Although plaintiffs' prayer for relief, in part, is phrased in terms of restraining defendant, the relief plaintiffs seek pending the final determination of the action as well as upon its ultimate determination is a mandatory injunction requiring defendant to allocate selling time to Centre Warehouse No. 2 in accordance with plaintiffs' contention.

A mandatory injunction is comparable in its nature and function to a writ of mandamus. *Hospital v. Wilmington,* 235 N.C. 597, 601, 70 S.E. 2d 833.

A temporary restraining order is an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action. *R.R. v. R.R.,* 237 N.C. 88, 94, 74 S.E. 2d 430, and cases cited. "As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established, or the party has done a particular act in order to evade an injunction which he knew had been or would be issued." McIntosh, North Carolina Practice and Procedure, § 851; *Board of Trade v. Tobacco Co.,* 235 N.C. 737, 740, 71 S.E. 2d 21; *Ingle v. Stubbins,* 240 N.C. 382, 390, 82 S.E. 2d 388, and cases cited.

If and when plaintiffs' legal rights are established in accordance with their contention by final judgment a mandatory injunction would be an appropriate remedy in the nature of execution to compel compliance with such judgment. McIntosh, *op. cit.,* § 851.

In the light of these legal principles, plaintiffs are not entitled, pending the final determination of their legal rights, to a writ requiring defendant to allocate to Centre Warehouse No. 2 the selling time for which plaintiffs contend. In this connection, it is noted that the 1962 season had passed before November 15, 1962, the date said judgment was filed. The time is at hand for trial on the merits.

We have not overlooked plaintiffs' general exception to the order in which plaintiffs' motion to strike was denied in its entirety. In this connection, it is noted that plaintiffs' exception is broadside and ineffectual. Too, the discussion in plaintiffs' brief is general and is not directed specifically to any of the numerous portions of the answer referred to in plaintiffs' motion. Independent of these considerations,

we do not perceive plaintiffs have been prejudiced by said order. Hence, Judge Williams order of October 11, 1962, denying plaintiffs' said motion to strike, will not be disturbed.

As stated above, the judgment filed November 15, 1962, is vacated and the cause is remanded for trial.

Error and remanded.

MOORE, J. concurs in result.

CLARENCE L. MORTON, JR., CHARLES A. DIGGS, AND CARROLL D. OGLESBY, AS JOINT ASSIGNEES V. EUGENE P. THORNTON AND ELIZABETH P. THORNTON, PARTNERS, TRADING AS THORNTON SALES SERVICE.

(Filed 14 June 1963.)

1. Appeal and Error § 60—

The decision on appeal becomes the law of the case upon subsequent hearing and upon subsequent appeal.

2. Assignment § 1—

An assignment must designate the assignor, the assignee, and the chose assigned, and plaintiffs' allegations that the assignment constituted them joint owners is a mere conclusion of law as to the legal effect of the instrument.

3. Same—

An assignment to M, D, and O, individually and collectively, is the same as an assignment to M or D or O or to all three as joint owners, and is ineffective for failure to identify the assignee.

4. Same; Parties § 2—

The appointment of an agent by the owner of property does not divest the owner of his property rights, and the agent is not the real party in interest and cannot maintain an action on the chose.

APPEAL by defendants from *Riddle, J.*, November 5, 1962 Non-Jury 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 action was begun by plaintiffs "jointly and as assignees" to recover unpaid commissions owing to each of fifteen of

defendants' salesmen. The asserted unpaid balance owing the several salesmen varies from $24.55 claimed to be due C. Fraiser Whatley to $3,077.91 claimed to be due plaintiff Morton. The aggregate of the claims is $10,107.43.

We were called upon at the Spring Term 1962 by defendants' demurrer to determine whether there was a misjoinder of parties and causes. *Morton v. Thornton,* 257 N.C. 259, 125 S.E. 2d 464. We then held each salesman had a right of action which he could enforce for his individual claim, but he and other employees could not maintain a joint action to enforce their several claims. That holding is the law of this case. It is a mere restatement of the law as announced by this Court in its prior decisions. *Roberts v. Mfg. Co.,* 181 N.C. 204, 106 S.E. 664; *Shore v. Holt,* 185 N.C. 312, 117 S.E. 165; *Weaver v. Kirby,* 186 N.C. 387, 119 S.E. 564; *Warden v. Andrews,* 200 N.C. 330, 156 S.E. 508; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Branch v. Board of Education,* 233 N.C. 623, 65 S.E. 2d 124; *Chambers v. Dalton,* 238 N.C. 142, 76 S.E. 2d 162; *Morton v. Telegraph Co.,* 130 N.C. 299; *Eller v. R.R.,* 140 N.C. 140; *Thigpen v. Cotton Mills,* 151 N.C. 97, 65 S.E. 750; *Cooper v. Express Co.,* 165 N.C. 538, 81 S.E. 743; *Fleming v. Power Co.,* 229 N.C. 397, 50 S.E. 2d 45; *Ellington v. Bradford,* 242 N.C. 159; 86 S.E. 2d 925; 1 Am. Jur. 2d 644.

We also held that claims for unpaid wages were choses in action which could be assigned, and a single assignee or several assignees holding jointly could maintain one action to recover the several sums assigned to them. In such an action, Rule 20 (2) of this Court would apply and each claim should be set out as a separate and distinct cause of action.

We did not then decide the question of misjoinder because we thought plaintiffs should have an opportunity to restate and reconcile seemingly conflicting factual allegations with respect to the alleged assignments. Accordingly we remanded with permission to apply to the Superior Court to amend. Permission was granted and an amended complaint was filed.

The amended complaint changes the phrase following plaintiffs' names in the caption from "jointly and as assignees" to "joint assignees." The other amendment, so far as pertinent to the question under consideration was in sec. XVI of the complaint. That section then read and now reads: "The defendants owed December 1, 1958 by reason of the matters and things hereinabove alleged the following sums to the following salesmen:" (Then follows a tabulation showing the amount due each salesman.) Originally it said: "Plaintiffs. . .are the owners and assignees of all the above listed claims. The assign-

ments are in writing, and the *plaintiffs individually* and jointly are entitled to recover of the defendants. . ." It now reads: "Plaintiffs. . . *are the joint owners* as assignees of all of the above listed claims, including those in their own names to wit: Clarence L. Morton, Jr., Charles A. Diggs, Carroll D. Oglesby. The assignments are each in writing and each are executed by each of the fifteen salesmen as assignors listed above and are as follows:" (Emphasis added.) Then follows a copy of the assignment which each salesman executed.

The allegation that plaintiffs are joint owners as assignees is not an allegation of fact; it merely alleges plaintiffs' interpretation of the effect of the fifteen assignments. The assignments recite a consideration of one dollar and other valuable considerations for which the assignor transfers, sells, conveys, and assigns "unto Clarence L. Morton, Charles A. Diggs, and Carroll D. Oglesby, *individually and collectively*" all sums due assignor by defendants arising or growing out of his contract as a salesman for defendants. The assignment further reads: "I am advised, believe, assert and have have asserted that E. P. Thornton and Elizabeth P. Thornton, partners, failed to pay the full amount of the commissions due me for the year ending November 30, 1958, and, particularly, the full amount of commissions upon a proper and legal accounting for the sales classified as MADE-RITE transactions. It is with particular reference to these commissions, although not limited thereto, that this assignment shall be effective. *The said assignees have the full right and power to act individually or together in their individual names as assignees or in the event, for any reason, this assignment is held void, they shall be deemed to act in their own name or names and individual capacity or capacities for me as my agent coupled with an interest.*" (Emphasis added.)

Every action must be brought by the real party in interest. G.S. 1-57. An assignee of a contractual right is a real party in interest and may maintain the action. Brown, J., defined the term "assignment" in *Ormond v. Ins. Co.,* 145 N.C. 140. He said: "An assignment is substantially a *transfer,* actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred." 6 C.J.S. 1045; 6 Am. Jur. 2d 185.

Since an assignment is a conveyance, it requires an assignor, an assignee, and a thing assigned. As said by Adams, J., in *Boyd v. Campbell,* 192 N.C. 398, 135 S.E. 121: "In every conveyance of land there must be a grantor, a grantee, and a thing granted. The grantor cannot make himself the grantee." Pearson, J., later C.J., said in *Dupree v. Dupree,* 45 N.C. 164: "Property must at all times have an

owner. One person cannot part with the ownership unless there be another person to take it from him. There must be a 'grantor and a grantee and a thing granted.' "

Barnhill, J., later C.J., said in *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45: "A deed, to be operative as a conveyance, must in some manner designate as grantee an existing person who is capable of taking title to the land. 16 A.J., 482. While the correct name of the grantee affords a ready means of identification of the person intended, its use is not a prerequisite to the validity of the instrument. 16 A.J., 483. If a living or legal person is intended as the grantee and is identifiable by the description used, the deed is valid, however he may be named in the deed. 16 A.J., 483." Case law and textbooks are in accord with these statements. *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466; *Neal v. Nelson,* 117 N.C. 393; *Deslauriers v. Senesac,* 163 N.E. 327, 62 A.L.R. 511; *Rixford v. Zeigler,* 88 P. 1092, 119 Am. St. Rep. 229; 16 Am. Jur., Deeds, sec. 71; 26 C.J.S., Deeds, sec. 13. It is said in Washburn On Real Property, 281: "(I)f a grant be made AB *or* CD, it would be void as to both." See also 4 Bacon's Abridgment 511.

Here there is no difficulty in identifying the grantor or assignor, or the thing conveyed; but when we seek to ascertain the party acquiring title we are confronted with an entirely different situation. The conveyance is to Clarence L. Morton, Charles A. Diggs, and Carroll D. Oglesby, *individually and collectively.* Paraphrased and giving effect to the language used, the conveyance is "to Clarence L. Morton or Charles A. Diggs or Carroll D. Oglesby or to all three as joint owners." Unless it has this meaning the word "individually" has no meaning. Assignors manifestly intended for each of the three named to exercise the right of control. They said: "The said assignees have the full right and power to act *individually or together* in their individual names as assignees." But, fearful for some unexplained reason that the assignment might be declared void, each assignor expressly agreed that Morton, Diggs, or Oglesby, "shall be deemed to act in their *own name or names and individual capacity or capacities* for me as my agent coupled with an interest." (Emphasis added.)

So by express language the instrument, insufficient because of the failure to identify the assignee, appoints the three as agents with authority to each to act as agent. The appointment of an agent does not divest the owner of his property rights. The agent is not the real party in interest and cannot maintain an action. *Rental Co. v. Justice,* 211 N.C. 54, 188 S.E. 609.

We reach the conclusion that the paper writing made a part of the complaint is not such an assignment as is contemplated by G.S.

1-57, thereby authorizing plaintiffs to maintain an action to recover the several claims which the individual salesmen assert against defendants.

Reversed.

ROBERT CRUTHIS AND WIFE, LUCY CRUTHIS, HILLERY CRUTHIS AND WIFE, LOIS CRUTHIS, RAYMOND CRUTHIS AND WIFE, BESSIE CRUTHIS, LAURA BREEDLOVE AND HUSBAND, JOHN WILLIAM BREEDLOVE, EDITH F. CREWS AND HUSBAND, HOMER L. CREWS, PETITIONERS, v. LOUISA STEELE AND HUSBAND, JOHN STEELE, WILLIAM MODLIN AND WIFE, NONA MODLIN, LULU HUTCHINSON AND HUSBAND, OSCAR HUTCHINSON, CHARLIE MODLIN AND WIFE, LOIS MODLIN ROSELLA RUSSELL AND HUSBAND, JAMES RUSSELL, CALLIE M. JONES AND HUSBAND, O. M. JONES, RESPONDENTS.

(Filed 14 June 1963.)

1. Husband and Wife § 4—

A married woman may contract and deal with her own property in the same manner and with the same effect as if she were unmarried, subject to well established exceptions, one of which is that she may not convey her real estate without the written assent of her husband. G.S. 52-2, G.S. 52-7.

2. Estoppel § 1—

A deed having no validity cannot be made the basis of an estoppel.

3. Same; Husband and Wife § 4—

The conveyance by a married woman of her separate realty without the assent of her husband will estop her and those claiming under her from attacking the title of her grantee or those in privity with him, provided the deed is supported by a valuable consideration, but if her deed is not supported by a valuable consideration it cannot form the basis of an estoppel, since the rationale of the estoppel is that equity will treat the deed as a contract to convey, and a contract to convey which is not supported by a valuable consideration is void.

4. Same; Seals—

The fact that a married woman's deed made without the assent of her husband bears her seal does not make the instrument effective in equity after the husband's death when the deed is to her children by a prior marriage and the sole consideration is love and affection, since equity disregards the form and will go to the substance to ascertain the consideration notwithstanding the presence of a seal, and love and affection of a parent, while sufficient to support an executed deed, will not support a contract to convey.

APPEAL by respondents from *Copeland, S.J.*, November 1962 Civil Term of GUILFORD (Greensboro Division).

W. H. Steed for respondent appellants.
Frazier & Frazier for petitioner appellees.

MOORE, J. This is a special proceeding for the sale of land for partition.

Sallie B. Modlin Cruthis died intestate survived by the children of two marriages and the heirs at law of a child who predeceased her. She and her first husband, W. G. Modlin, owned as tenants by the entireties a tract of land containing 38.5 acres. W. G. Modlin died, and on 20 August 1902 she married James William Cruthis. On 12 February 1916, during her coverture with Cruthis, she, without the assent and joinder of her said husband, executed and delivered a certain paper writing purporting to be a deed to John Modlin and Callie Modlin, her children by her first husband. The instrument was under seal and purported to convey for "($1.00) Love and Affection" to John and Callie Modlin the 38.5 acre tract of land in fee, subject to grantor's life estate and other limitations not of importance here. The instrument is recorded in deed book 280, at page 225, of the Registry of Guilford County. Five children were born of the second marriage. James William Cruthis died on 13 March 1949, and thereafter Sallie B. Modlin Cruthis died intestate.

Petitioners are the five children (and their spouses) of the second marriage. Respondents are Callie Modlin (Jones) and the heirs at law of John Modlin (and their spouses). The petition alleges that the petitioners and respondents are tenants in common and seized in fee simple of the lands described in the petition, including the 38.5 acre tract, that the paper writing executed by Sallie B. Cruthis in 1916 is void for lack of assent of James William Cruthis thereto. Respondents allege sole ownership of the 38.5 acres in themselves and deny that petitioners have any right, title or interest in or to this tract.

The case was transferred to the civil issues docket for determination of the title issue. The facts, summarized above, are stipulated. The court entered judgment declaring void the purported deed from Sallie B. Cruthis to John and Callie Modlin, and remanding the cause to the clerk for further proceedings.

Respondents (appellants) contend that the deed in question, though executed and delivered without the written assent of the husband, was effective and binding on the parties hereto after the death of the husband on 13 March 1949, for the reason that the grantor did nothing at

any time to disaffirm it and her children by the second husband are in privity and are bound by the deed by estoppel or otherwise.

Subject to well established exceptions, a married woman may contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she was unmarried. One of the exceptions is that she may not convey her real estate except with the written assent of her husband. G.S. 52-2; G.S. 52-7; *Harrell v. Powell,* 251 N.C. 636, 112 S.E. 2d 81.

We have held in a number of cases that where a married woman conveys her real estate without the written assent of her husband, if she survives her husband she may not, after his death, recover the land or defeat the title of her grantee, or those in privity with him, on the ground that the deed was void for lack of assent of her husband at the time of its execution. *Harrell v. Powell, supra; Mills v. Tabor,* 182 N.C. 722, 109 S.E. 850; *Sills v. Bethea,* 178 N.C. 315, 100 S.E. 593.

A deed having no validity cannot be made the basis of an estoppel. *Buford v. Mochy,* 224 N.C. 235, 29 S.E. 2d 729; *Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493; *Wallin v. Rice,* 170 N.C. 417, 87 S.E. 239; 19 Am. Jur., Estoppel, s. 8, p. 605; 31 C.J.S., Estoppel, s. 43(a), p. 223. But a deed which is invalid in the sense that it is inoperative may nevertheless under some circumstances be held operative as a contract. 19 Am. Jur., Estoppel, s. 8, p. 606; 16 Am. Jur., Deeds, s. 359, p. 645. The rationale of the holdings that the separate deed of the wife, unassented to by the husband, may be binding on her after the death of the husband, the wife surviving, is: The purported deed is a contract to convey, and while the husband is alive the obligation of the contract can be enforced only by an action for damages — the reason being that the court cannot require specific performance because it cannot compel the husband to give his written assent. After the death of the husband the obstacle to specific performance is removed, and equity will declare the contract effective as a deed under the maxim "equity regards as done that which ought to be done." *Sills v. Bethea, supra*; 19 Am. Jur., Equity, s. 456, p. 315.

In all the cases in which the separate conveyances of the wife, unassented to by the husband, have been held to be binding upon the wife after the death of the husband, the contracts (purported conveyances) were supported by valuable consideration. The deed in the instant case recites as consideration "($1.00) Love and Affection." "It is a well-settled rule in equity that a contract will not be enforced if it be not founded on a valuable consideration" *Lamb v. Pigford,* 54 N.C. 196; *Woodall v. Prevatt,* 45 N.C. 199. While "love

and affection" is generally held to be a sufficient consideration to support a conveyance, at least as between the parties, it may not be a sufficient consideration to support a promise. *Exum v. Lynch,* 188 N.C. 392, 125 S.E. 15; *Edwards v. Batts,* 245 N.C. 693, 97 S.E. 2d 101; 12 Am. Jur., Contracts, s. 78, p. 569. "(A) promise founded on what is properly termed a good consideration, as one resting on natural love and affection, is, according to the great weight authority, a gratuitous one and unenforceable." 17 C.J.S., Contracts, s. 91, p. 778. The relationship of parent and child, although a good and sufficient consideration to support an executed deed, does not entitle the child (or those in privity) to compel or direct a conveyance of the parent's lands. *Edwards v. Batts, supra.* "The real consideration to which equity will look, regardless of form, in order to determine whether it will exercise its discretion to decree specific performance is the price promised for the land," *Samonds v. Cloninger,* 189 N.C. 610, 127 S.E. 706.

The writing here bears a seal. At common law a contract executed under seal imports a consideration. *Honey Properties, Inc. v. Gastonia,* 252 N.C. 567, 114 S.E. 2d 344; *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 2d 763. But "in equity it has always been permissible to inquire into the consideration of a sealed instrument." 17 C.J.S., Contracts, s. 72, p. 424. "A Court of Equity addresses itself to the conscience of the parties, and of course pays no respect to forms, and disregards even the solemn act of sealing and delivering, and looks behind all forms to see if there be a consideration binding the conscience of the parties." *Woodall v. Prevatt, supra.* Where equitable relief is sought, the court goes back of the seal and refuses to act unless the seal is supported by consideration. 13 N.C.L. Rev. 1, 77; *Samonds v. Cloninger, supra; Buxley v. Buxton,* 92 N.C. 479; *Scott v. Jones,* 75 N.C. 112.

At the most the paper writing in question here is a contract to convey, unsupported by valuable consideration and therefore unenforceable and of no effect.

The judgment below is

Affirmed.

ELIZABETH SLATER HOSKINS v. RICHARD THORNTON HOSKINS.

(Filed 14 June 1963.)

1. Costs § 3—

In an action between husband and wife seeking specific performance of an agreement between them to "pool" their property and assets, to

declare a resulting trust, and for an accounting, the court has discretionary authority to apportion the costs, the action being equitable in nature, but the attorneys' fees of the respective parties in such instance do not come within the statutory or equitable exceptions to the general rule and may not be taxed as a part of the costs. G.S. 6-21, G.S. 6-21(2).

2. Appeal and Error § 14—

Where the judgment of the court below is modified and affirmed, the Supreme Court may apportion the costs on appeal between the parties in the exercise of its discretion. G.S. 6-33.

APPEAL by plaintiff from *Hobgood, J.*, November 12, 1962, Term of ALAMANCE.

Action to determine the ownership and use of certain properties and for an accounting.

Omitting details unnecessary to an understanding of the nature of the action, the complaint alleges in substance: Plaintiff and defendant are wife and husband and have separated. They formerly lived in New York, and while there agreed to pool their property and assets, each to own one-half, and except for joint checking accounts no property or money was to be removed from their joint control without the consent of both. They decided to move to Burlington, North Carolina. They sold a rooming house in New York and from the proceeds $7500 was placed in joint accounts in Savings and Loan Associations in North Carolina, and $10,000 was put in a safety deposit box listed in their joint names. 200 shares of McAndrews & Forbes stock and a note and mortgage in the amount of $2000 were also placed in the safety deposit box. They set up a joint checking account in a North Carolina bank. Defendant purchased three rental houses on Sidney Avenue in Burlington with plaintiff's money and took title in his own name, but later the title was made to plaintiff and defendant by the entireties. They own another house and lot on Elwood Street by the entireties. In violation of the agreement defendant has removed the deposits from the Savings and Loan accounts, the money from the joint checking account, the stock certificate, note and mortgage, and money from the safety deposit box, and he has all of these assets under his separate control. Defendant has collected rents, interest, dividends and other income and has failed to account therefor. Plaintiff is the sole owner of the three houses on Sidney Avenue; defendant holds one-half of all other property in trust for plaintiff; and plaintiff is entitled to an accounting. Plaintiff asks that a receiver be appointed.

Defendant, answering, avers: Plaintiff and defendant had a dispute over the construction of a home. Plaintiff is extravagant, and defend-

ant took control of the property and assets to preserve them. He collects rents, interest, dividends and other income and therefrom maintains the rental houses, pays all expenses and supports plaintiff. All property was acquired from defendant's earnings, and he has at all times furnished his wife adequate support.

There was an order of reference on 26 April 1961. There was a full hearing before the referee and the parties introduced evidence, including depositions taken in New York, tending to support their pleadings. The referee filed his report in July 1962, and defendant excepted thereto and tendered issues. On 12 November 1962 defendant withdrew his demand for a jury trial and agreed "that the Court . . . hear and pass upon all exceptions to the Referee's Report. . . ."

Judgment was entered on 12 November 1962 conforming in most particulars to the conclusions and recommendations of the referee. It was adjudged (numbering ours): (1) The real estate located on Sidney Avenue and Elwood Street is owned by the parties as tenants by the entireties; (2) the note and mortgage in the amount of $2000 is owned by the parties in equal right (provision is made for division thereof); (3) the certificate for the 200 shares of McAndrews & Forbes stock is to be surrendered and a certificate for 100 shares issued to each party; (4) defendant is not required to account for rents, interest, dividends and other income collected by him prior to the entry of this judgment, and he may continue to collect and use the rents from the real estate owned by the entireties; and (5) "the sum of $17,500.00 held by defendant . . . be applied and divided as follows:

> "(a) The balance owing upon Court costs accrued through this date in this action including Referee's fee shall be paid to the Clerk of this Court;
>
> "(b) To plaintiff or to the Clerk of this Court for use of plaintiff the sum of $2,058.38 as reimbursement for expenses incurred in this litigation;
>
> "(c) To the Clerk of this Court for the use of E. S. W. Dameron, Jr., and B. F. Wood, as attorneys for plaintiff, the sum of $1,000 for balance due said attorneys for services in this cause through this date;
>
> "(d) That $2,441.08 be retained by and awarded to defendant as reimbursement for expenses incurred in this litigation;
>
> "(e) To the Clerk of this Court for the use of Long, Ridge, Harris & Walker, as attorneys for defendant, the sum of $1,600.00

for balance due said attorneys for services in this cause through this date;

"(f) That the balance of said $17,500 fund remaining after satisfying items (a) through (e) above be divided equally between plaintiff and defendant, and the one-half portion of said balance belonging to plaintiff shall be paid to the clerk of this Court for the use of plaintiff, with the defendant retaining his one-half portion of said balance."

The $2,058.38 expenses incurred and paid by plaintiff in connection with this litigation, for which reimbusement is ordered, consists of $1250 attorneys' fees, $306.38 for attorneys' fees and expenses in connection with depositions, $20 bond premiums, and $482 advanced for reference expenses.

The $2441.08 expenses incurred and paid by defendant in connection with this litigation, for which reimbursement is ordered, consists of $1335 attorneys' fees, $590.54 attorneys' fees and expenses in connection with depositions, $33.50 for exemplified copies of New York laws, and $482 advanced for reference expenses.

Plaintiff excepts to the order requiring payment of court costs, attorneys' fees and expenses from the $17,500 fund in the hands of defendant, and appeals.

Blair L. Daily for plaintiff.
Long, Ridge, Harris & Walker for defendant.

MOORE, J. The inquiry on this appeal is whether the court below erred in taxing costs. The judgment directs the payment of all costs and attorneys' fees from the fund of $17,500 belonging to plaintiff and defendant in common, before division of the fund between them. Thus, the costs are apportioned between the parties, and attorneys' fees are made a part of the court costs.

The apportionment of the compensation for a referee and the court reporter employed by him is within the discretionary power given the court by G.S. 6-21(6). *Tyser v. Sears,* 252 N.C. 65, 112 S.E. 2d 750.

If an action is equitable in nature the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other, or require the parties to share the costs. *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528; *Kluttz v. Allison,* 214 N.C. 379, 199 S.E. 395; *Hare v. Hare,* 183 N.C. 419, 111 S.E. 620; *Yates v. Yates,* 170 N.C. 533, 87 S.E. 317. See G.S. 6-20. The exercise of this discretionary authority is not reviewable. *Parton v. Boyd,* 104

N.C. 422, 10 S.E. 490. Nothing to the contrary appearing, it will be taken that the court gave judgment as to costs in the exercise of this discretion. *Wooten v. Walters,* 110 N.C. 251, 259, 14 S.E. 734.

The case at bar is equitable in nature. The remedies sought are specific performance of an agreement between husband and wife to "pool" their property and assets, declaration of a resulting trust as to real estate, and an accounting. The jurisdiction of the chancery court is held to extend to disputes between husband and wife, such as a suit by a wife to secure her separate property. 19 Am. Jur., Equity, s. 175, p. 158. All of the items referred to in the judgment in the instant case as costs and expenses, except attorneys' fees, are allowable as costs, and it was within the discretion of the court to apportion them between the parties.

It was said in *Trust Co. v. Schneider,* 235 N.C. 446, 454, 70 S.E. 2d 578, that "Except as otherwise provided by statute, G.S. 6-21, attorneys' fees are not now regarded as a part of the court costs in this jurisdiction." There are one or more exceptions to this rule. *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21; 31 N.C.L. Rev. 115. There is no statute authorizing the allowance of attorneys' fees as a part of the court costs in cases such as the one at bar, and this case does not come within the exceptions referred to.

In the types of cases enumerated in G.S. 6-21 attorneys' fees may be included as a part of the costs in such amounts as the court in its discretion determines and allows. Defendant contends that G.S. 6-21 (2) is apposite. It includes "any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder." The present case does not involve a trust agreement, and if there is a trust it arises out of the conduct of the defendant. None of the attorneys' fees incurred by plaintiff and defendant, for representation, taking of depositions or otherwise, are allowable as a part of the costs in this action.

The cause is remanded that the judgment be modified in accordance with this opinion.

The costs in the Supreme Court will be paid one-half by plaintiff and one-half by defendant. G.S. 6-33.

Modified and affirmed.

GENERAL METALS, INCORPORATED v.
TRUITT MANUFACTURING COMPANY.

(Filed 14 June 1963.)

1. Appeal and Error § 49; Trial § 56—

In a trial by the court under agreement of the parties it will be presumed that the court disregarded incompetent evidence in making its findings, and the fact that some incompetent evidence may have been admitted will not be held prejudicial in the absence of a showing to the contrary, there being ample competent evidence to support the findings.

2. Appeal and Error § 41—

The fact that certain evidence, competent generally, is admitted only for the purpose of illustrating the testimony of a witness will not be held prejudicial when appellant has had full benefit of the facts sought to be established by the general admission of other evidence upon the same point.

3. Appeal and Error § 19—

An assignment of error should clearly present the error relied on without the necessity of going beyond the assignment itself.

4. Contracts § 29—

If one party without legal right directs the other to suspend work prior to completion of the contract, such other party is entitled to an award on the basis of *quantum meruit* for part performance.

5. Trial § 56—

In a trial by the court under agreement of the parties, inconsistencies or contradictions in the evidence are for the court to resolve as the trier of the facts.

6. Contracts § 29; Interest § 2—

Interest may be allowed on damages for breach of contract from the date of the breach when the amount of damages is ascertained from the contract itself or from relevant evidence, or from both.

APPEAL by plaintiff from *Sink, E. J.*, October 1, 1962, Special Term, GUILFORD Superior Court, Greensboro Division.

The plaintiff, "a steel fabricating company," instituted this civil action against the defendant, "a steel manufacturing company," to recover damages for alleged breach of contract. Both parties are North Carolina corporations with places of business in Greensboro.

The plaintiff alleged that on August 9, 1957, the parties entered into a written contract by which the defendant agreed to construct for the plaintiff "a diffuser section, and a contraction section," the two being component parts of a large installation being built for the United

States Navy as a tunnel to test underwater pressures. The plaintiff agreed to furnish materials, plans and specifications, and to pay the defendant $17,500.00 for fabricating the contraction section, and $2,744.00 for fabricating the diffuser section. These units for the Navy were to be installed by another contractor at its Carderock, Maryland, testing plant.

The plaintiff alleged its compliance with the contract (a copy of which was attached to the complaint), the defendant's breach, and plaintiff's damages in the sum of $48,750.00.

The defendant, by answer, admitted the execution of the contract, but alleged the document was only a part of the agreement; that the parties on the same day executed another contract in more detail, and that the two when construed together and in the light of certain detailed proposals, acceptances, plans and specifications, constituted the entire contract between the parties. The defendant alleged the plaintiff did not supply materials in accordance with the terms of the agreement and that any failure of the two fabricated units to meet specifications was due to the fault of the plaintiff in furnishing improper materials; that after the work had been 95 per cent completed by the defendant, the plaintiff stopped further work, not because of any material defects in the two units, but because the plaintiff had failed to meet its commitments for other construction, of which the two units were small parts. The defendant set up a counterclaim for its damages in the amount of $21,244.00.

After preliminary motions for inspection of records and for an order of reference were disposed of, the parties consented to the following order:

> "*ORDER* (FOR TRIAL WITHOUT JURY)
>
> "This matter coming on to be heard before his Honor, H. Hoyle Sink, Judge Presiding, at the January 22, 1962, Term of the Superior Court of Guilford County, Greensboro Division;
>
> "AND IT APPEARING TO THE COURT from the argument of counsel and from the pleadings that this cause involves complicated matters of law and fact and when tried will involve voluminous amounts of highly technical testimony and that the trial of this cause before a jury would take from one to three weeks' time;
>
> "And it further appearing to the Court that the parties to this action, through their respective counsel, have agreed to waive and do hereby waive their rights to a jury trial and agree to have all issues of law and fact in this cause determined by a Judge duly appointed to hold a special term of the Greensboro Division

of the Superior Court of Guilford County, such term not to be held earlier than April 1, 1963;

"And it further appearing to the Court that the ends of justice will best be served and the business of the Court can be more orderly conducted by the Court agreeing and consenting as by law provided to the trial of this cause without a jury.

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the trial of this cause be continued from the present term of Court to be tried by a duly appointed Judge of the Greensboro Division of the Superior Court of Guilford County, without a jury as agreed by the parties and approved and consented to by this Court as by law provided.

"This 26 day of January, 1962. /s/ H. Hoyle Sink, Judge Presiding."

At the conclusion of the hearing in which much of the evidence was technical, the court rendered this verdict:

"1. Was the paper writing alleged in the Complaint the contract between the parties?

"ANSWER: No.

"2. Was the contract entered into between the parties that as alleged in the Answer and Counterclaim?

"ANSWER: Yes.

"3. Did the defendant breach the contract?

"ANSWER: No.

"4. Did the plaintiff breach the contract?

"ANSWER: Yes.

"5. What damage, if any, is the plaintiff entitled to recover from the defendant?

"ANSWER: — 0 —

"6. What damage, if any, is the defendant entitled to recover from the plaintiff?

"ANSWER: $12,500.00."

From the judgment entered by the court in accordance with the verdict as returned, that the defendant recover of the plaintiff the sum of $12,500.00 with interest from March 15, 1958, the plaintiff excepted and appealed.

Booth, Osteen, Upchurch & Fish by Roy M. Booth, for plaintiff appellant.

Douglas, Ravenel, Josey & Hardy by C. Kitchin Josey; McLendon, Brim, Holderness & Brooks by L. P. McLendon, Jr., for defendant appellee.

HIGGINS, J. The parties waived a jury trial and consented that the presiding judge should hear the evidence, answer the issues raised by the pleadings, and render judgment. The consent order required the trial court to sit as both judge and jury.

In passing on the appeal from the judgment, we may assume, since nothing appears to the contrary, that the careful and experienced presiding judge disregarded any incompetent evidence which may have crept into the record and based his findings exclusively on competent evidence. *Chappell v. Winslow,* 258 N.C. 617, 129 S.E. 2d 101; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668. That Judge Sink was fully aware of his responsibility in this respect is shown by his own comment during the hearing: ". . .this Court after 35 years, can skim the cream off and let the whey and clabber go to the pigs."

Seventeen of the 20 assignments of error relate to the admissibility of evidence. Because of the plaintiff's failure to follow the rules of appellate procedure in the assignments of error, we have found it difficult to determine what is actually involved. *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; *Armstrong v. Howard,* 244 N.C. 598, 94 S.E. 2d 594. However, after a careful search we have discovered that all assignments except Nos. 1, 11, 14 and 18 involve bits of evidence admitted over objection. Analysis of this evidence fails to show anything in the record prejudicial to the plaintiff's cause. However, if it should appear that material evidence has been offered and excluded, the exclusion would be considered prejudicial error, for the reason that the court made decision without having given it consideration.

In one instance only do we find excluded evidence open to question. The plaintiff offered generally, as its Exhibit No. 7, a chart showing the measurements of the contraction section. This chart was received by the plaintiff as an enclosure in a letter from the defendant's president. The court admitted it only for the purpose of illustrating the testimony of the witness. After combing through the record, however, it appears that the measurements in the chart are identical with the references to them in the letter which was admitted generally. Consequently, the admission of the chart for the limited purpose is not prejudicial for the reason that the plaintiff had the full benefit of what it contained as the result of the general admission of the letter.

The other assignments of error based on the exclusion of testimony are likewise defective. *Jenks v. Morrison,* 258 N.C. 96, 127 S.E. 2d 895; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294; Strong's Index, Vol. 1, Appeal and Error, §19, and the First Supplement to the same section, p. 30. However, overlooking the defective assignments, we have made voyages through the record without discovering that any evidence was offered and excluded which would strengthen the plaintiff's cause.

By Assignment No. 19, the plaintiff challenges the judgment upon two grounds: (1) The evidence was insufficient to support the court's answers to the issues. (2) Interest was improperly allowed from March 15, 1958.

The parties agreed upon the issues and that the court should answer them. The condition of the record casts some doubt whether the plaintiff, by proper exception and assignment, actually challenges the sufficiency of the evidence to support the issues. Nevertheless, we have reviewed the record in detail. It discloses ample evidence to support the issues, except as to the amount of damages. The amount of the award is within the range of the pleadings and the evidence, and presumably correct. *Madison County v. Catholic Society,* 213 N.C. 204, 195 S.E. 354. There was evidence the plaintiff actually directed the defendant to suspend work before the fabrication was completed. In any event this evidence would justify an award upon the basis of *quantum meruit* for part performance. *Haymen v. Davis,* 182 N.C. 563, 109 S.E. 554. All inconsistencies and contradictions in the evidence were resolved by the trier of the facts. Having been so resolved, the result is binding on this Court.

The time when interest begins to run upon a debt, the amount of which is in dispute and finally determined by judgment, has been before this Court many times. The later cases following the enactment of G.S. 24-5 seem to have established this rule: When the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach. *Construction Co. v. Crain & Denbo,* 256 N.C. 110, 123 S.E. 2d 590; *Thomas v. Realty Co.,* 195 N.C. 591, 143 S.E. 2d 144; *Perry v. Norton,* 182 N.C. 585, 109 S.E. 641; *Bond v. Cotton Mills,* 166 N.C. 20, 81 S.E. 936. The court's action in allowing interest from March 15, 1958, finds support in the record and the cases cited.

The judgment entered in the Superior Court of Guilford County is Affirmed.

HERMAN ALLEN CARTRETTE, PLAINTIFF v. MRS. ELSIE JEAN CANADY AND JOHNNIE A. CANADY, DEFENDANTS AND MATTHEW JOHNSON, ADDITIONAL DEFENDANT.

(Filed 14 June 1963.)

1. Automobiles § 41c—

Conflicting evidence as to whether defendant's car was over the center-line of the highway when it collided with plaintiff's car, which was approaching from the opposite direction, takes the issue of negligence to the jury.

2. Torts § 4; Trial § 21—

Where the original defendant has an additional defendant joined on his cross action for contribution, the plaintiff alleging no cause of action against such additional defendant, the burden is upon the original defendant to establish by the greater weight of the evidence that the additional defendant was negligent and that such negligence concurred as a proximate cause of plaintiff's injury, and plaintiff's evidence against the original defendant which is contradictory to that of the original defendant cannot be used by the original defendant to supply deficiencies in his proof against the additional defendant.

3. Automobiles § 43— Evidence held to show that negligence of additional defendant had spent itself prior to accident.

Evidence tending to show that the original defendant was forced to drive her car off on the shoulder of the road to the right by the negligent operation of the additional defendant's car, which approached from the opposite direction, followed by plaintiff's car, but that before the collision with plaintiff's car the original defendant had gotten back on the road and had regained her position on the right side of the highway, *is held* insufficient to be submitted to the jury on the issue of the additional defendant's negligence, since the evidence discloses that at the time of the accident the additional defendant's negligence had spent itself and had become a mere circumstance of the accident and not a proximate cause thereof.

APPEAL by original defendants, Mrs. Elsie Jean Canady and Johnnie A. Canady, from *Hall, J.*, January Civil Term 1963 of COLUMBUS.

This is a civil action in which the plaintiff alleges that he sustained personal injuries and property damages in a motor vehicle collision on 22 January 1961 as the result of the negligence of original defendant Mrs. Elsie Jean Canady.

The evidence tends to show that original defendant Mrs. Elsie Jean Canady was operating an automobile, registered in the name of her husband, Johnnie A. Canady, southwardly on the White Marsh-Red Hill Road. Mrs. Canady had been driving at a speed of 45 to 50 miles per hour before she reached a sharp curve in the road which bore to her left. She testified that she had reduced her speed to 25 to 30 miles an

hour immediately prior to entering the curve. At the time she saw the car of the additional defendant approaching from the south, she testified, the Johnson car was in the center of the road. "I jerked my car over to the right on the shoulders of the road to keep from hitting him, and there was no collision between my car and his. * * * I went off the shoulder of the road and stayed on the shoulder * * *. The Johnson car was traveling about 65 or 70 miles an hour. After the Johnson car passed me * * * I jerked my car back on the road trying to get back upon the road. I did get back upon the road. When I got back upon the road, then I jerked back in, getting back completely over on my side of the road, so I could straighten up and continued.

"A collision occurred between my car and Herman Cartrette's car. I know what the position of my automobile was on the road at the time of the impact, and I was on my side of the road. The Cartrette car collided with my fender, my left fender — of the door."

This witness gave as her reason for jerking her car back on the road was to avoid running into a sycamore tree which she testified was only four or five feet from the pavement. Two of the original defendants' witnesses, however, testified the sycamore tree was approximately ten feet from the pavement; that there is room to drive a car between the tree and the paved portion of the road. The evidence tends to show that Mrs. Canady traveled about 65 feet after the Johnson car passed her before the impact with the Cartrette car.

On cross-examination Mrs. Canady testified: "I did not ever see the Cartrett car until the collision. * * * I did not know I was meeting the Cartrette car. At the impact, I saw it * * *. I saw it and heard it just about the same time. * * * I was able to pass Johnson's car without contact by pulling fast over to the side; as I did I lost control of the car getting back. After I dropped off on the shoulder, if I turned the wheel, the car would turn with it. If I turned the wheel the other way, the car would go in that direction. To that extent at least, I did have control of it. It went where I aimed it. * * * At no time after I dropped off on the shoulder of the road was it impossible for me to control the movement of the automobile."

The plaintiff's evidence tends to show that at the time of impact the Cartrette car was in its right lane of traffic and that the Canady car skidded across the center line into plaintiff's lane of traffic. Plaintiff's evidence further tends to show that the Canady car was being operated at approximately 65 miles per hour at the time of the collision.

At the close of the evidence of the original defendants the additional defendant moved for judgment as of nonsuit and the motion was allowed. The original defendants excepted.

The original defendants moved for judgment as of nonsuit at the close of plaintiff's evidence and renewed their motion at the close of all the evidence. The motion was denied.

It was stipulated that in the event the defendant Mrs. Elsie Jean Canady was negligent that such negligence would be imputed to the defendant Johnnie A. Canady under the family purpose doctrine, and that it was not necessary to submit an agency issue to the jury.

The jury answered the issues of negligence and damages against the original defendants, and judgment was entered on the verdict.

The original defendants appeal, assigning error.

Edward L. Williamson for original defendants.
Poisson, Marshall, Barnhill & Williams for additional defendant.
Powell, Lee & Lee for plaintiff.

DENNY, C. J. The appellants assign as error the failure of the court below to sustain their motion for judgment as of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence.

A careful review of all the evidence disclosed by the record leads us to the conclusion that it was sufficient to carry the case to the jury against the appellants. This assignment of error is overruled.

The appellants also assign as error the ruling of the court below in allowing the additional defendant's motion for judgment as of nonsuit at the close of the original defendants' evidence.

The appellants argue and contend that the evidence of the plaintiff is to be considered in the light most favorable to the original defendants and that such evidence indicated that the automobile operated by Mrs. Canady, one of the original defendants, was in a skid when it was first observed by the plaintiff. It is further contended that this evidence, when considered together with Mrs. Canady's evidence, corroborates her evidence as why her automobile skidded down the road at the time of the impact and thus created an inference of concurrent negligence as between her and additional defendant sufficiently to entitle the original defendants to have their action for contribution against the additional defendant submitted to the jury.

In the first place, the plaintiff alleged no cause of action against the defendant Johnson and sought no recovery against him. Therefore, the burden was upon the original defendants, on their cross action, to establish by the greater weight of the evidence that the additional defendant was negligent and that such negligence concurred with their own negligence, if any, which joint and concurrent negligence was a

proximate cause of the injuries and damages sustained by the plaintiff. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780. This is the reason why an additional defendant should not move for a judgment as of nonsuit in such an action as this until the original defendant or defendants, who had him made an additional party defendant, have presented their evidence against the additional defendant on the cross action for contribution. *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773.

The original defendants seek to rely upon testimony which was not offered by them and which was directly contradictory to Mrs. Canady's own testimony. The original defendants did allege in their answer, that "Mrs. Elsie Jean Canady pulled her automobile off the road on the right shoulder in order to avert a head-on collision, and the shoulder of said road being rough and uneven caused the automobile of defendants to go into a skid and the said automobile came back on the road resulting in a collision between plaintiff's and defendant's automobiles." In her testimony, however, she categorically and unequivocally denied that her car ever skidded or that she ever completely lost control of her car.

We think the evidence of the additional defendant failed to show a causal connection between the negligence of Johnson and the negligence of the defendant Mrs. Canady which was the proximate cause of plaintiff's injuries. When the driver of the Canady car, who testified that she had it under control, pulled back on the highway and across the center line of the highway and never looked to ascertain the approach of the Cartrette car, the negligence of Johnson had spent itself, and the court below did not commit error in sustaining the additional defendant's motion for judgment as of nonsuit.

When Mrs. Canady became aware of the existence of the potential danger created by the negligence of Johnson, and thereafter by an independent act of negligence brought about an accident, the first tort feasor (Johnson) was relieved of liability because the condition created by him was merely a circumstance of the accident and not its proximate cause. *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312. See also *Potter v. Frosty Morn Meats, Inc., supra; Smith v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; and *Beatty v. Dunn,* 103 Vt. 340, 154 A. 770.

The facts in the instant case are not controlled by our decisions in *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; *Cotton Co. v. Ford,* 239 N.C. 292, 79 S.E. 2d 389, and similar cases

The judgment of the court below is

Affirmed.

PAULINE THELMA CZARNECKI v. AMERICAN INDEMNITY COMPANY.

(Filed 14 June 1963.)

1. Insurance § 3—

The parties to an insurance contract may make whatever agreement they deem advantageous unless restricted by statute enacted in the exercise of the police power.

2. Insurance § 47—

The limitation contained in a medical payments provision of a policy of automobile insurance that insurer should be liable for only such expenses as are incurred within one year from the date of the accident is valid, and insurer may not be held liable for medical expenses incurred after the one year period even though the treatment of insured is continuous from the date of the accident, but insurer is liable for such payments within the limitation even though some of the expenses may have been incurred subsequent to the expiration date of the policy.

APPEAL by defendant from *Phillips, J.*, November 5, 1962 Civil Term of GUILFORD (High Point Division).

This action was begun in the municipal court of High Point to recover medical expenses incurred more than one year after plaintiff was accidentally injured by an automobile. Liability is asserted under a policy of insurance issued by defendant to plaintiff and her husband, obligating it to pay medical expenses because of accidental injuries. Plaintiff was injured 15 May 1960. She was under continuous medical treatment from the date of the injury to a date subsequent to 15 May 1961.

Defendant paid $1,054.05 and admitted liability for the additional sum of $90.15. The sums paid and tendered cover expenses incurred within one year of the accident. Defendant contends its liability is, by the policy, limited to expenses incurred within one year. Plaintiff contends defendant is liable for all expenses incurred, irrespective of the date incurred, up to but not exceeding the amount stipulated in the policy. The municipal court adopted defendant's construction of the policy. The Superior Court on appeal adopted plaintiff's interpretation and rendered judgment for the sum claimed.

Louis J. Fisher and Schoch & Schoch by Arch K. Schoch for plaintiff appellee.

Roberson, Haworth & Reese by Arthur M. Utley, Jr., for defendant appellant.

RODMAN, J. Defendant, on 7 November 1959, issued to plaintiff and her husband its "Family Combination Automobile Policy" in-

suring plaintiff and her husband with respect to ownership of two automobiles for (A) bodily injury liability, (B) property damage liability, (C) medical payments. The policy states the premium paid for each of the two cars for each of the coverages. It fixes the limit of liability for bodily injury for each person at $10,000 and for each occurrence at $20,000. It fixes the liability for property damage at $10,000 for each occurrence. It fixes the limit of liability for medical payments at $2,000 for each person. The policy is divided into parts. Part 1 is entitled "Liability." This part fixes defendant's obligation under coverages A and B, that is, bodily injury liability and property damage liability.

Part 2 is headed "EXPENSES FOR MEDICAL SERVICES." It provides: "Coverage C—Medical Payments: To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services. . .: to or for the named insured and each relative who sustains bodily injury. . . caused by accident, while occupying or through being struck by an automobile."

The total of the liability which plaintiff would impose on defendant is within the $2,000 limitation fixed by the policy. Defendant further limits its liability by the language of the policy: "to pay all reasonable expenses incurred within one year from the date of the accident." Judge Phillips, in imposing liability on defendant for all the expenses incurred, held: "That although a part of said medical treatment went beyond the twelve-month period, the limitation set out in said insurance policy was not a valid limitation, because all medical expenses incurred related back to the time of the accident."

The quoted provision is not void. An insurance policy is a contract between insurer and insured. The parties are at liberty to make such contract as they deem advantageous unless restricted by statute in the exercise of the police power. *Utilities Comm. v. Greyhound Corp.* 252 N.C. 18, 113 S.E. 2d 57; *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 80 L. ed. 772.

Our attention has not been called to any statute or regulation requiring insurance companies affording protection against medical expenses incurred on account of injuries accidentally sustained to obligate themselves to pay for an indefinite period. No sound reason exists why the parties may not fix a time limitation as well as a limitation on the amount of liability.

Since the provision is valid, the only question left for consideration is: What is the extent of defendant's obligation? The answer is to be found in the language which the parties have chosen to express their

contract. *Parker v. Ins. Co.*, 259 N.C. 115, *Strickland v. Jackson*, 259 N.C. 81; *Muncie v. Ins. Co.*, 253 N.C. 74, 116 S.E. 2d 474.

The language of the policy obligates defendant to pay "expenses incurred within one year from the date of accident." Plaintiff would rewrite the provision to read "pay all expenses incurred because of accidental injuries"; but she stipulated defendant "has paid a total amount of $1,054.05, which amount is *for all of the medical expenses of the Appellant (plaintiff) incurred within one (1) year from the date of the accident* except for the sum of $90.15." (Emphasis added.)

The very language which the parties selected to state the facts is the language chosen to measure defendant's obligation. "Incur" is defined by Webster as: "1: to meet or fall in with (as an inconvenience); become liable or subject to: bring down upon oneself (*incurred* large debts to educate his children)." Courts have accepted Webster's definition as the correct meaning of the word. *Weinberg Co. v. Heller*, 239 P. 358; *Flanagan v. Baltimore & O. Ry. Co.*, 50 N.W. 60; *Pilot Life Ins. Co. v. Stephens*, 103 S.E. 2d 651; *Bartlett v. Vanover*, 86 S.W. 2d 1020; *Gordon v. Fidelity & Casualty Co. of N.Y.*, 120 S.E. 2d 509; *Drearr v. Conn. Gen. Life Ins. Co.*, 119 So. 2d 149.

It is suggested that *Maryland Casualty Co. v. Thomas*, 289 S.W. 2d 652, points to a different conclusion. A careful reading of the case and understanding of the facts there involved distinguish that case from the case under consideration. There the policy provision was identical with the provision in this case except the limitation as to the amount of insurance. There the total amount for which defendant obligated itself was $1,000. Here it is $2,000. There a nine-year-old boy was injured on 25 July 1953 in an automobile accident. The insurance ran to the father. The Court refers to it as a liability policy. Extensive dental work was necessary but because of the age of the child and the necessity of a bridge, the work could not be done until he had permanent teeth to which a bridge could be anchored. The father obtained estimates as to the cost of the work from several dentists. On 22 July 1954 he contracted with Dr. Wood, fixing the amount of his charges for the services to be rendered, and paid him for the services to be thereafter performed. The Court held under those facts the expenses had been incurred, that is, the obligation created within the one-year period.

The policy sued on insured plaintiff for a term of one year, that is, from 7 November 1959 to 7 November 1960, but the expiration date of the policy did not terminate defendant's liability for medical expenses incurred for accidental injuries sustained prior to 7 November 1960 until the expiration of one year from the date of the accident.

Defendant is liable for $90.15, the unpaid balance of expenses incurred prior to 16 May 1961. It has admitted its liability for this sum. It is not, however, liable for any expenses incurred after 15 May 1961.

Reversed.

CARL DAVID CASEY v. J. CLAIBORNE BYRD, T/A/D/B/A ASSOCIATED SCAFFOLDING AND EQUIPMENT COMPANY.

(Filed 14 June 1963.)

1. **Master and Servant § 18; Sales § 16—**

The person furnishing a scaffold for the use of painters in the painting of a ceiling twenty-five to thirty feet above the floor owes to the painters using the scaffold, independent of any contractual relationship, the duty to use proper care in the construction of the scaffold and to supply a reasonably safe structure, the instrumentality being inherently dangerous if not properly constructed.

2. **Same—**

Evidence tending to show that a tubular-type steel scaffold furnished by defendant fell because one of the crossarms bracing a section of the scaffold was not equipped with a safety lock takes the issue of defendant's negligence to the jury, and is sufficient to overrule motion for nonsuit.

3. **Same—**

Evidence that plaintiff workman was an apprentice painter and had had little or no experience with tubular-type scaffolding, that his foreman inspected the scaffolding, and that plaintiff had no control over it, does not disclose contributory negligence or assumption of risk as a matter of law on the part of plaintiff in using the scaffold which was not equipped with a safety lock on a crossarm brace, whether the defect was an obvious condition or was a concealed danger being a question for the jury.

APPEAL by plaintiff from *McKinnon, J.*, November 1962 Civil Term of DURHAM.

This appeal involves only the question of nonsuit. Plaintiff, an apprentice painter employed by J. D. Starkey Paint Company, was injured on June 18, 1956 when a scaffold furnished by defendant to Starkey collapsed, throwing plaintiff to the floor of the Hill Music Hall in Chapel Hill. Plaintiff instituted this action on June 17, 1959 alleging, *inter alia*, that the scaffold was unsafe and defective in that it was insecurely connected and braced. Defendant denied any negligence and alleged that the scaffold fell because of misuse by Starkey's

employees; that the condition of the scaffold was obvious and, if dangerous, both plaintiff and Starkey were guilty of contributory negligence and assumption of risk in using it.

Plaintiff's evidence, if accepted by the jury, was sufficient to establish the following facts:

Hill Hall is an auditorium with semicircular rows of opera-type seats and a floor which slopes from the back toward the stage. The height of the ceiling varies from thirty to thirty-five feet with the level of the floor. Defendant, according to his contract with Starkey, set up two scaffolds in the auditorium. The one upon which plaintiff was working was approximately twenty-five feet high. It was made of tubular steel rods, in five sections, either four feet or five feet high. The sections were placed in sockets, one on top of the other, to raise the scaffold to the desired height making a simple, web-type arrangement. The sections of scaffold were connected by crossarms. Each end of the crossarm fitted into a hole on the side of the scaffold and a locking mechanism, consisting of a hook and a piece of metal which flipped into it, kept the crossarm from coming out. The four legs of the bottom section were mounted on wheels which could be raised or lowered by a locking, screw-type arrangement so that the scaffold could be kept level as well as moved from place to place.

The scaffold had been moved by the Starkey painters several times since defendant had set it up prior to June 18, 1956. On the day of the accident, it had been used continuously from 8:00 a.m. and had been moved at least once. In moving the scaffold it was necessary to unfasten the braces and then put them back after it was moved. Each time it was moved the foreman on the job adjusted the wheels and inspected it. He thought it was perfectly safe when plaintiff mounted it, and plaintiff himself had no reason to think otherwise.

When the scaffold collapsed, about 4:00 p.m. plaintiff had been on it for about thirty-five minutes painting the ceiling. It partially folded into a point, like an accordian, and fell towards the wall throwing the plaintiff to the floor between the wall and the rows of seats on the south side of the building. He received multiple fractures of his feet in the fall.

The foreman then inspected the scaffold and observed that the crossarms had come out in two places on the bottom section. This rod did not have a safety hook on it as did all of the others which remained in place. In describing the crossarm which came out, the foreman said: "Well, these here is special rods on the bottom which is a homemade affair. It wasn't a patented scaffold, and it didn't have a hook on them like the rest of the stage had . . . I mean a little clamp to keep it from

coming out. In other words, a safety measure. That is what it is for. . . If crossarms remain in their sockets, a scaffold will not fold."

At the close of plaintiff's evidence defendant's motion for nonsuit was allowed and plaintiff appealed.

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

Bryant, Lipton, Bryant & Battle for defendant appellee.

SHARP, J. A scaffold, designed to be used by workmen painting a ceiling twenty-five to thirty feet above the floor, is an inherently dangerous instrument if not properly constructed. One who contracts to furnish a scaffold for such a purpose owes to those for whose use it is provided the duty to use proper care in its construction and to supply a reasonably safe structure. *Odum v. Oil Co.*, 213 N.C. 478, 196 S.E. 823; *Cathey v. Construction Co.*, 218 N.C. 525, 11 S.E. 2d 571; *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496.

The rule applicable to this case is stated in Annotation: Contractor's Servants — Contractee's Liability, 44 A.L.R. 932, 1049:

> "Where the defendant furnishes appliances to be used for a particular purpose with knowledge of such use, he is liable for a defect therein created by his own negligence, or negligently permitted to exist, where such negligence renders the appliance dangerous to life and limb of those who may use the same. Such liability exists independent of any privity of contract between the parties."

In *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387, a case in which a scaffold fell killing a workman, Rapallo, J., said: "It is evident from the nature and position of the structure that death or great bodily harm to those persons (for whose use it had been provided) would be the natural and almost inevitable consequence of negligently constructing it of defective material or insufficient strength. It was clearly the duty of the defendant and its agents to avoid that danger by the exercise of proper care. (Citations omitted). This duty was independent of the obligation created by the contract." See *Petty v. Print Works*, 243 N.C. 292, 90 S.E. 2d 717, where *Coughtry* is discussed.

Plaintiff's evidence, which we must accept as true in ruling upon the motion for nonsuit, is sufficient to establish that the scaffold fell because one of the crossarms bracing it was not equipped with a safety lock. Its credibility and the question of defendant's negligence were for

the jury. If the jury should answer the issue of negligence in plaintiff's favor, whether the defective brace was an obvious condition for which the plaintiff assumed the risk or was a concealed danger he could not have discovered in the exercise of reasonable care, will also be a question for the jury. Plaintiff testified that he was an apprentice painter and had had little or no experience with tubular-type steel scaffolding. His foreman testified that he himself inspected the scaffold and that plaintiff had no control over it. Plaintiff was not, as a matter of law, bound to look for hidden defects. *Gray v. Boston R. B. & L. R. Co.*, 261 Mass. 479, 159 N.E. 441; *Devlin v. Smith*, 89 N.Y. 470, 42 Am. Rep. 311; *Campbell v. Fong Wan*, 60 C.A. 2d 553, 141 P. 2d 43.

The judgment of nonsuit is

Reversed.

WILLIAM M. COLE, EXECUTOR OF THE ESTATE OF ELIZABETH M. COLE, WILLIAM M. COLE, INDIVIDUALLY, AND CLARENCE E. COLE, MAE COLE LONG, JACK B. COLE, AND EDNA COLE BRASHER, NEXT OF KIN OF ELIZABETH M. COLE, DECEASED v. GUILFORD COUNTY AND HARTFORD ACCIDENT & INDEMNITY COMPANY.

(Filed 14 June 1963.)

1. Master and Servant § 53—

The death of an employee is compensable under the Workmen's Compensation Act only if it results from an injury from an accident arising out of and in the course of the employment. G.S. 97-2(6).

2. Master and Servant § 54—

Whether an accident arises out of the employment is a mixed question of law and fact, and the finding of the Industrial Commission in regard thereto is conclusive if supported by any competent evidence.

3. Same—

The words "out of" refer to the origin or cause of the accident and the words "in the course of" to the time, place, and circumstances under which the accident occurred, and in order for an accident to arise out of the employment there must be some causal connection between the injury and the employment so that it can be traced to the employment as a contributing proximate cause, while if the injury arises from a hazard to which the employee would have been equally exposed apart from the employment, it does not arise out of the employment, and the fact that the accident occurs on the employer's premises is immaterial.

4. Same—

The evidence disclosed that deceased, a seventy-four year old woman, fell on the cement porch while she was leaving the building and that the fall occurred solely because her leg gave way because of physical infirmity. *Held:* The fall was caused by an idiopathic condition unconnected with the employment and is not compensable. Whether a juror is an "employee" of the county, quaere?

APPEAL by defendants from *Armstrong, J.,* November 19, 1962 Civil Term of GUILFORD (Greensboro Division).

Proceeding under the Workmen's Compensation Act to determine the liability of defendants for compensation to the next of kin of Elizabeth M. Cole, deceased.

At the September 5, 1960 Civil Term of the Superior Court of Guilford County at Greensboro, Mrs. Elizabeth M. Cole, the decedent, was serving as a regular juror. On September 7, 1960 she was a member of the jury which was trying a case. Mrs. Cole was seventy-four years old. At 12:30 p.m. the court took its luncheon recess and the jurors were dismissed until 2:00 p.m. when the trial was scheduled to resume. During the recess the jurors were "at will to go where they wanted to go." Mrs. Cole left the courtroom on the second floor with two other ladies. They walked down the stairs to the first floor preparatory to leaving the building by the north entrance fronting on Market Street. She descended the three steps which led from the vestibule on the first floor to the three sets of entrance doors. Between these steps and the doors is a level floor about six feet wide. Each entrance is composed of two doors with a level space four feet wide between them. The doors open on a landing approximately five feet wide from which stone steps lead down to the front walk which connects with the street.

Mrs. Cole fell on the porch. Her account of the fall is as follows:

> "The first set of doors are light and the second set is heavy. After the second set of doors there is a large cement porch before the steps start. I went out the first set of doors after the judge dismissed us and I went out of the second set of doors. Someone behind me was holding the second heavy door open. When I went through the door and was on the described porch I fell down. There was no foreign matter on the porch nor did the door hit me. My leg just gave way and I fell. I was not pushed but I simply fell and I broke my hip in the fall. I did not see any defects on the porch nor were there any defects near the door. I had my leg to give way. That was the first time that my leg had given away."

In the fall Mrs. Cole suffered an intertrocanteric fracture of the hip. She was taken to the hospital where, under a general anesthetic, an operation was performed and a steel pin put in the bones. Her recovery was satisfactory until September 18, 1960 when she died suddenly from a pulmonary embolism which, in the opinion of the medical experts, resulted from the fracture.

Mrs. Cole was survived by five adult children, none of whom were dependent upon her. They filed a claim against Guilford County and its workmen's compensation insurance carrier for compensation for her death. On October 18, 1961, upon the above facts which are not in dispute, the hearing commissioner found that Mrs. Cole was injured by an accident arising out of and in the course of her employment by Guilford County from which her death resulted. He awarded compensation based on evidence that the average civil juror sits four days a week at six dollars a day. Defendants appealed to the full commission assigning as error the findings and conclusions (1) that Mrs. Cole was employed by Guilford County and (2) that she suffered an injury by accident arising out of and in the course of her employment. On appeal, both the full commission and the Superior Court affirmed the award. Defendants now appeal to this Court assigning the same errors.

Falk, Carruthers & Roth for plaintiff appellees.
Adams, Kleemeier, Hagan & Hannah for defendant appellants.

SHARP, J. Under the Workmen's Compensation Act a compensable death is one which results to an employee from an injury by accident arising out of and in the course of his employment. G.S. 97-2(6); *Slade v. Hosiery Mills,* 209 N.C. 823, 184 S.E. 844; *Plemmons v. White's Service,* 213 N.C. 148, 195 S.E. 370.

In our view of this case, it is not necessary to decide the interesting question whether a juror serving during a term of the Superior Court is an employee of the county. Assuming *arguendo* that Mrs. Cole was such an employee, we are confronted by the query, did the fall which caused her death arise out of her service as a juror?

Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not. *Slade v. Hosiery Mills, supra; Lockey v. Cohen, Goldman & Co.,* 213 N.C. 356, 196 S.E. 342. The words "out of," refer to the origin or cause of the accident and the words "in the course of," to the time, place and circumstances under which it occurred. *Plemmons v. White's Service, supra.* For an accident to arise out of the employment there must be

some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410. In such a situation the fact that the injury occurred on the employer's premises is immaterial. *Poteete v. Pyrophyllite,* 240 N.C. 561, 82 S.E. 2d 693.

A fall itself is usually regarded as an accident. In *Robbins v. Hosiery Mills,* 220 N.C. 246, 17 S.E. 2d 20, the claimant, a topper in a hosiery mill, reached up toward a rack to get work to put on her machine. For some undisclosed reason she lost her balance and fell. In sustaining the award of compensation for the injury suffered in the fall, Barnhill, J., (later C.J.) said:

> "The decisions in somewhat similar cases may be divided into two distinct groups. . .
>
> "The logic of these decisions is this: where the employee, while about his work, suffers an injury in the ordinary course of the employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment — the result of a hazard to which others are equally exposed — compensation will not be allowed. Herein lies the distinction which is bottomed upon the rule of liberal construction."

In *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77, the cause of claimant's fall at the base of a flag pole was unexplained and recovery was allowed even though it was known that he was subject to mild epileptic seizures. However, in the instant case, the cause of Mrs. Cole's unfortunate fall is known — her leg simply gave way because of a physical infirmity, the nature of which we do not know. The fact that she was serving on the jury at the time had nothing to do with either the fall or its consequences. She did not fall out of an elevated jury box or tip over in a juror's chair. Jury service did not increase the danger of injury from the fall she sustained. There is nothing to suggest that she would not have fallen had she been leaving the court-

house after having listed her taxes or having attended to any other business there.

Mrs. Cole's fall was idiopathic — that is, one due to the mental or physical condition of the particular employee. 99 C.J.S., Workmen's Compensation, § 257(1). The liability of an employer for such injuries was considered by this Court in *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173. In that case an employee subject to epileptic seizures, while driving his employer's truck, felt one approaching. He stopped the truck, opened the door, and laid down in the seat with his feet hanging out. During the seizure he fell and was injured. In reversing the Commission's award of compensation, this Court held that the seizure was the sole cause of the injury which was unrelated to the employment. The Court said:

> "(T)he better considered decisions adhere to the rule that where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. *But not so where the idiopathic condition is the sole cause of the injury.*" (Italics ours)

The opinion in *Vause* referred to 5 Schneider's Workmen's Compensation Text (Permanent Ed.), § 1376, where the author states: "(T)he question that usually determines whether the injury is compensable is, did the employee's working conditions contribute to the fall and consequent injury or was the accident solely due to the employee's idiopathic condition which might have caused him to fall in his home with the same injurious results? If it is the latter the employer is not liable, if the former he is liable." Quite clearly Mrs. Cole's fall was in the latter category. The claimant's fall in *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97, and in *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476, were in the former. See 40 N.C. Law Rev. 488.

The judgment of the lower court is

Reversed.

RITCH *v.* HAIRSTON AND YORK *v.* HAIRSTON.

J. G. RITCH, PLAINTIFF v. CLYDE JUNIOR HAIRSTON AND DOAK HUDSON, DEFENDANTS, AND FRANK P. HOLTON, JR., ADMINISTRATOR OF THE ESTATE OF DOAK HUDSON ADDITIONAL DEFENDANT.

AND

MRS. BERTIE D. YORK, PLAINTIFF v. CLYDE JUNIOR HAIRSTON AND FRANK P. HOLTON, JR., ADMINISTRATOR OF THE ESTATE OF DOAK HUDSON, DEFENDANTS.

(Filed 14 June 1963.)

Automobiles §§ 41a, 41f, 43; Negligence § 8— In order for second defendant to be held liable in three-car collision it must be shown that the second impact caused or contributed to the injuries or damages.

Evidence that the first defendant hit the vehicle in which plaintiffs were riding on its left after it had been pulled to its right into the ditch on its right side of the highway, and that immediately thereafter the car of the second defendant, which had been following the car of the first defendant, crashed into the car of the first defendant and knocked it against plaintiffs' car and caused the first defendant to be thrown through the window of his car against plaintiffs' car, breaking the glass, which cut one of plaintiffs, with further evidence that the second defendant was following the first defendant at excessive speed on a dusty winding road, *is held* sufficient to be submitted to the jury in the action by the plaintiff cut by glass to recover for personal injuries, but there being no evidence that the second impact contributed to the personal injuries of the other plaintiff or to the damages to his car, nonsuit in the action by the other plaintiff is proper.

APPEAL by plaintiffs from *Riddle, S.J.*, October 15, 1962 Civil Term of GUILFORD (High Point Division).

These two actions for damages growing out of two collisions involving three automobiles were consolidated for trial. Plaintiff Ritch and his passenger, the plaintiff York, each sued the drivers of the other two cars alleging joint and concurring negligence. The defendant Hairston filed no answer and judgments by default and inquiry were taken against him. After summonses were served upon defendant Doak Hudson, he died from causes unrelated to the accident and his administrator was made a party. At the close of plaintiffs' evidence the court allowed the motion of the defendant administrator for judgment of involuntary nonsuit. The jury assessed damages against Hairston in both cases. On appeal, each plaintiff questions only the correctness of the judgment nonsuiting his case against the estate of Hudson.

The following is a resume of plaintiffs' evidence:

On July 28, 1959 about 12:30 p.m. plaintiff Ritch was operating his 1957 Cadillac in a westerly direction on the right side of an unpaved road, twenty-two feet wide from ditch to ditch, in Randolph County.

On the front seat with him were the plaintiff York and her son. The sun was shining; the road was dry and very dusty. The defendant Hairston was operating his 1950 Oldsmobile in an easterly direction. He was followed by the defendant Hudson in his 1951 Oldsmobile. The two defendants had been together all the morning drinking white whiskey and, at the time of the collision, were enroute from a store where they had eaten to Hudson's home. Ritch testified that when he was from one hundred to one hundred and fifty feet east of the crest of the hill he first saw the Hairston car when it came over in a cloud of dust. Hairston was in the middle of the road, traveling at fifty to sixty miles an hour. Ritch pulled over as far as he could into the ditch with the right side of his car against the bank. His version of the impact was: "(A)nd when their car hit, their car hit my left fender — left fender on my side, and it was just a little past the right fender of his car where it hit. Well, when it hit that, of course, that throwed this other car around and immediately when it hit that and hit my headlight. . . I heard another bang. . . The first car collided with my left front. The first car swung around in the road so that it was headed back almost in the same direction I was going." The first impact threw plaintiffs against the front of the car and neither saw the Hudson car until after the collision.

The Hairston car had no damage on the rear end — only on the side. However, Ritch thought there was damage on the left side as well as on the right. He described the first impact as "a pretty terrific crash." A few seconds elapsed between it and the second impact. The Hudson car never hit the Ritch car but when Hudson collided with Hairston's automobile it was knocked against the Ritch car again. The Ritch car was damaged on the left front and the left rear fender. After the second collision a man came through the window of the Hairston car and hit the glass on the left of the Ritch car. Ritch testified, "(T)hat's where I got cut across that side. I was this way and that way. There were two impacts."

Plaintiff York testified that in the first collision she was thrown against the heater and that was where she got the injuries to her legs. The windshield cut her arm and face. The medical testimony was, by stipulation, omitted from the record.

A passenger in the Hairston automobile testified that the collision between the Hairston and Ritch cars was almost head-on; that immediately prior to the impact Hairston was going up the hill and Ritch had just topped it and was coming down, meeting Hairston on the west side. He said that after the collision the Hairston car was "angled" and, a few seconds later, the Hudson vehicle struck the Hairston car — the right side of it, he thought.

The highway patrolman who investigated the accident testified that he found the Cadillac on the north side of the road headed west with the right front in the right ditch; the Hairston car was about in the middle of the road headed back almost the way it had come. Twenty-nine feet of tire marks led from about the center of the road to the Cadillac. Tire marks fifty-seven feet long led to the Hairston automobile. West of the Hudson car were one hundred and sixteen feet of tire marks "more or less on the right side of the road." According to the patrolman the point of impact was seventeen feet west of the knoll and visibility from that point west was unobstructed for two hundred feet.

The road west of the point of impact was unpaved, narrow, hilly, and curvy. Plaintiffs alleged, *inter alia,* that Hudson was following the Hairston automobile too closely; that he was operating his vehicle while under the influence of alcoholic beverages; that he failed to keep a proper lookout and that he was traveling at an excessive speed under the circumstances.

Morgan, Byerly, Post, Van Anda & Keziah for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter for Frank P. Holton, Jr., Admr. of the Estate of Doak Hudson, Deceased, Defendant Appellee.

SHARP, J. In order to make out a case against Hudson's estate, plaintiffs must offer evidence tending to show (1) that the second collision was proximately caused by the negligence of Hudson; and (2) that the second collision proximately caused or contributed to the injuries upon which plaintiffs' action is based. *Riddle v. Artis,* 246 N.C. 629, 99 S.E. 2d 857.

The ruling on the motion for nonsuit does not depend upon the plaintiffs' testimony even though it be in conflict with other plaintiffs' witnesses. *Russell v. Hamlett,* 259 N.C. 273, 130 S.E. 2d 395; *Wiggins v. Ponder,* 259 N.C. 277, 130 S.E. 2d 402. Both the investigating officer and a passenger in the Hairston car fixed the collision on the west side of the knoll at a point where visibility from the west, the direction from which the Hudson automobile came, was unobstructed for two hundred feet. Hudson was traveling behind Hairston in "a lot of dust" on a treacherous road. After making one hundred and sixteen feet of tire or skid marks he collided with the Hairston car with such force that it was knocked into the Ritch automobile causing Hairston to be thrown from the window of his vehicle against the Ritch car. Hairston's impact with it broke the window. From this evidence the jury could find that Hudson was operating his vehicle

at an excessive rate of speed considering the dust and other highway conditions, following the Hairston car too closely, and that he was not keeping a proper lookout.

Thus, there was ample evidence that Hudson was guilty of negligence on the occasion in question. Was there also evidence that his negligence proximately contributed to plaintiffs' injuries? In the absence of any evidence, the jury may not be permitted to speculate whether any part of a plaintiff's injury resulted from the second tort-feasor's negligence.

As to the plaintiff York, we think the evidence is insufficient to show that the second collision caused or contributed to her injuries. As to the plaintiff Ritch, however, there is evidence that the second collision contributed to his personal injuries and from which it may be reasonably inferred, to his property damage.

As to plaintiff York —

Affirmed.

As to plaintiff Ritch —

Reversed.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ROGER M. SPIVEY AND BONNIE M. SPIVEY.

(Filed 14 June 1963.)

Insurance § 53—

A settlement between the tort feasor and insured for personal injuries to insured and for that part of the property damage to insured's car not covered by the insurance, with knowledge of the tort feasor that insurer had paid insured for the property damage less $100 deductible under the policy, and that the settlement did not include insurer's subrogated claim, *held* not to bar insurer's subsequent action against the tort feasor to recover on the subrogated claim, and the fact that the tort feasor's settlement with insured was by consent judgment does not alter this result.

APPEAL by plaintiff from *Hobgood, J.*, January 1963 Civil Term of ROBESON.

Defendant demurred to the complaint for that it failed to state a cause of action. The demurrer was sustained and the action dismissed. Plaintiff appealed.

John W. Campbell for plaintiff appellant.

Henry & Henry for defendant appellees.

RODMAN, J. The facts alleged, summarily stated, are: Plaintiff insured the Chevrolet automobile of James C. Hardee against damage by collision; the policy obligated plaintiff to pay any loss in excess of $100; the Chevrolet was, on 27 February 1961, in a collision with an automobile operated by defendant Roger Spivey as the agent of defendant Bonnie M. Spivey; Hardee sustained personal injuries in the collision and the insured automobile was damaged to the extent of $534; the collision was caused by the negligence of defendant Roger Spivey; plaintiff, on 7 April 1961, complying with its policy provision, paid its insured $434 on account of the damage to the automobile and took from him a release and assignment of his claim to the extent of the amount paid; defendants were notified of the payment and assignment so made; in December 1961 Hardee instituted an action against defendant Spivey to recover for personal injuries sustained by him and for the $100 uncompensated loss to the automobile, therein specifically alleging the payment which plaintiff had made to him as required by its policy of insurance and waiving any right to recover the sum which he had received from plaintiff; a consent judgment was entered in said action, settling the claims there asserted by Hardee against defendants.

Unless defendants have succeeded in escaping liability by settling with Hardee, the facts alleged and admitted by the demurrer impose liability on defendants to pay full compensation for the loss resulting from their tortious conduct.

The rights of insured and insurer, paying the loss in whole or in part, and how those rights may be enforced are stated in *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231. What is there said is, we think, universally recognized as a correct statement of the law. Defendants rely on the fourth proposition there stated as the basis for the demurrer and the judgment sustaining it. Ervin, J., said: "4. Where the insurance paid by the insurance company covers only a portion of the loss, the insured is a necessary party plaintiff in any action against the tort-feasor for the loss. The insured *may recover* judgment against the tort-feasor in such case for the full amount of the loss without the joinder of the insurance company. He holds the proceeds of the judgment, however, as a trustee for the benefit of the insurance company to the extent of the insurance paid by it. The reasons supporting the rule stated in this paragraph are that the legal title to the right of action against the tort-feasor remains in the insured for the entire loss, that the insured sustains the relation of trustee to the insurance company for its proportionate part of the recovery, and that *the tort-feasor cannot be compelled against his will to defend two actions for the same wrong.*" (Emphasis supplied.)

The language used is an accurate statement of the law. It does not, however, as defendant contends, require an affirmance of the judgment sustaining the demurrer. It should be noted, as we have done by italicizing, that Judge Ervin says the insured *may* recover, not that he *must* recover, the full loss. True the tort-feasor cannot be compelled against his will to defend two actions for the same wrong. His remedy, if sued by the injured party for the uncompensated portion of the loss and he wishes to settle the entire controversy in one action, is to require a determination of the entire damage to the motor vehicle. To accomplish that purpose he would be entitled to have the insurance carrier made a party.

The law as stated by Judge Ervin in *Burgess v. Trevathan, supra,* had been similarily stated some thirty-six years prior thereto by Allen, J., in *Powell v. Water Co.*, 171 N.C. 290, 88 S.E. 426, cited with approval in *Burgess v. Trevathan, supra. Powell v. Water Co., supra,* dealt with a factual situation for all practical purposes identical with the facts here alleged. There Judge Allen quotes from 19 Cyc. 895: " 'After the loss has been paid by the company, the wrong-doer, having knowledge of the fact, cannot make settlement with the insured for the loss, his liability being to the company to the extent of the insurance paid.' ", and supplements this statement of the law by quotations from *Hart v. R.R.*, 54 Mass. 100; *Swarthout v. R.R.*, 49 Wis. 628, and *Insurance Co. v. Hutchinson,* 21 N.J. Eq. 117.

It is said in 46 C.J.S. 179, cited with approval in *Burgess v. Trevathan, supra*: "After the loss has been paid by the insurer, or the insurance is in the process of adjustment, a third person, having knowledge of the fact, cannot make settlement with insured for the loss, his liability being to insurer to the extent of the insurance paid; and if a third person makes such settlement it is no defense to a suit by insurer against him."

The right of a tort-feasor to defeat the claims of an insurer who has been subrogated to the rights of its insured was again considered in *Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580. We there reaffirmed the conclusion reached in *Powell v. Water Co., supra,* that the tort-feasor who has knowledge of insurer's rights cannot, by settling with claimant for the rights remaining in him, defeat the insurer's rights. 29A Am. Jur. 810-811.

The fact that the right remaining in the insured for which he sought compensation was disposed of by a consent judgment can make no difference. Such a judgment is a contract and must be interpreted as other contracts. *Owens v. Voncannon,* 251 N.C. 351, 111 S.E. 2d 700; *Ijames v. Swaim,* 248 N.C. 443, 103 S.E. 2d 507; *Rand v. Wilson County,* 243 N.C. 43, 89 S.E. 2d 779.

To hold that an insured seeking only his uncompensated loss defeats the rights of his insurer by settling that claim with a tort-feasor who has knowledge of insurer's claim would make an innocent insured an instrumentality in the perpetration of a fraud on his insurer. *Fire Ass'n. of Philadelphia v. Wells*, 94 A 619, Ann. Cas. 1917A 1296. If the tort-feasor acts in good faith and without knowledge of any injustice which would result from a settlement, he is of course protected; but he is not protected when both he and the injured party understand that he is only paying for the portion of the damage for which the injured party has not received compensation.

Reversed.

HOWARD CLINTON MOORE v. ADAMS ELECTRIC COMPANY, INC., EMPLOYER, NON-INSURER AND/OR INSURED BY ZURICH INSURANCE COMPANY, CARRIER, GREAT AMERICAN INSURANCE COMPANY, CARRIER.

(Filed 14 June 1963.)

1. Master and Servant § 93—

On appeal from award of the Industrial Commission the Superior Court is limited to questions of law or legal inference and is bound by findings of fact supported by competent evidence, but the Superior Court is not bound by conclusions of law, even though such conclusions be denominated findings of fact.

2. Same; Master and Servant § 80—

Where the Industrial Commission does not find the facts upon which it holds that one insurer had cancelled its coverage and does not find the facts as to whether the other insurer had issued a policy requiring notice or a mere binder not requiring notice of termination and makes no findings as to notice, *held* there are not sufficient findings upon which to predicate the conclusion that the first insurer had cancelled its coverage and that the other insurer had terminated the coverage, and the cause must be remanded to the Industrial Commission for the finding of the predicate facts.

APPEALS by Zurich Insurance Company and Great American Insurance Company from *Crissman, J.*, October 1962 Civil Term of ROCKINGHAM.

Howard Clinton Moore (claimant) an employee of Adams Electric Co., Inc. (employer) sustained an injury arising out of and in the course of his employment on 7 February 1960. All parties agree claimant is entitled to compensation as provided by the North Carolina Workmen's Compensation Act.

Great American Insurance Company (American) in March 1959 issued its compensation policy to M. E. Adams trading as Adams Electric Co. When called upon to pay compensation to claimant, American denied liability.

Zurich Insurance Company (Zurich) on 15 December issued a certificate showing workmen's compensation insurance coverage for employer effective 24 December 1959. When called upon to pay compensation to claimant, it denied liability.

Employer requested the Industrial Commission to determine who was liable to claimant. A hearing was had. The hearing commissioner made findings. On his findings he concluded: Neither American nor Zurich was liable to claimant; employer, as a self-insurer, was liable. On employer's appeal the full Commission affirmed the findings and conclusions of the hearing commissioner.

On employer's appeal to the Superior Court, Judge Crissman found as a fact that the policy issued by American and the certificate issued by Zurich were in force when claimant was injured. He concluded there was no evidence in the record to support the Commission's findings relating to the cancellation of American's policy and Zurich's certificate. He adjudged American and Zurich liable to claimant for compensation and medical care as provided in our compensation act. American and Zurich appealed.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., for defendant Appellant Zurich Insurance Company.

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for defendant appellant Great American Insurance Company.

Bethea and Robinson by Norwood E. Robinson for defendant appellee Adams Electric Company.

PER CURIAM. The authority to find facts necessary for an award pursuant to the provisions of our compensation act is vested exclusively in the Industrial Commission. G.S. 97-86. On appeal from the Commission to the Superior Court the review is limited to questions of law. Whether the record contains any competent evidence to support the facts as found and whether the facts found are sufficient to support the conclusions of the Commission are questions of law. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

While the judgment recites the judge made findings of fact as well as conclusions of law, we think it apparent the court treated as legal conclusions statements purporting to be findings of fact made by the Commission.

Under the heading "FINDINGS OF FACT" the hearing commissioner said: "8. That Great American Insurance Company had cancelled its coverage for defendant Adams Electric Company, Inc. on December 27, 1959; that on February 7, 1960, Great American Insurance Company was not bound on the workmen's compensation risk.

"9. That Zurich Insurance Company terminated its coverage for defendant Adams Electric Company, Inc., on January 21, 1960; that on February 7, 1960, Zurich Insurance Company was not bound on the workmen's compensation risk."

"11. That on February 7, 1960, defendant Adams Electric Company, Inc. had failed to comply with the provisions of the Workmen's Compensation Act and did not have insurance coverage on its employees."

If statements 8 and 9 quoted above are true findings of fact, statement 11 follows as a logical conclusion.

The appeals necessarily present this question: Are designated findings 8 and 9 really factual decisions reached after weighing the evidence or are they conclusions based, in part at least, on the finder's interpretation of the law?

American stipulated it issued a policy of workmen's compensation insurance to M. E. Adams trading as Adams Electric Co. on 22 March 1959. The expiration date of the policy, as disclosed by an exhibit, was 22 March 1960.

The evidence is sufficient to establish that: M. E. Adams and two others created a North Carolina corporation in July 1959 under the corporate name "Adams Electric Company" (the record here uses the name "Adams Electric Company, Inc."); the corporation after organization took over and operated the business theretofore conducted by M. E. Adams under the trade name of Adams Electric Company; M. E. Adams was the sole stockholder in the corporation which had an authorized capital stock of $100,000 but was authorized to begin business when $100 had been paid in.

Is the clause in finding 8 that American "was not bound on the workmen's compensation risk" based on the argument that American only insured Adams as an individual and not the corporate entity employing claimant when injured? If so, the so-called finding is an interpretation of the law.

G.S. 97-99 prohibits an insurer from writing workmen's compensation insurance unless the policy "shall provide a thirty-day prior notice of an intention to cancel same by the carrier to the insured by registered mail or certified mail."

The evidence, undisputed as we read the record, is to the effect that American not only wrote workmen's compensation insurance for

Adams Electric Company but also insured it against liability in connection with the use of its automobiles.

American asserted, when charged with liability to claimant, that it had cancelled all the insurance which employer carried with it, having given insured at least thirty days' notice of its intent to cancel.

Employer conceded it had notice of the cancellation of the automobile insurance but denied that any notice had been given it of an intent to cancel the workmen's compensation policy.

The evidence is sufficient to show American sent notice of its intent to cancel the workmen's compensation insurance to the Industrial Commission, to the Compensation and Rating Bureau, and to American's agent who wrote the insurance. There is also evidence from which the Commission could find employer had notice of this cancellation.

The Commission has not found the facts. Did employer have notice of cancellation, and if so when and how was it given? Until these facts have been found, the Commission could not properly conclude American "had cancelled its coverage."

Zurich stipulated it issued on 15 December 1959 a "Certificate of Insurance" to employer. This certificate put in evidence "certifies that the following insurance policies have been issued on behalf of the Name of Insured M. E. Adams, t/a/ Adams Electric Co., Inc. Address of Insured Reidsville, North Carolina

"TYPE OF INSURANCE	POLICY NUMBER	EFFECTIVE DATE
Workmen's Compensation and Employers' Liability	Binder	12/24/59
Manufacturers' and Contractors' (Bodily Injury)	Binder	12/12/59

* * * * * * * * * * * *

"In the event of cancelation of the said policies the Company will mail notice thereof to Robert & Co., Associates for (Dundee Mills Inc., Mill #5, Griffin, Ga.) at 96 (illegible) St., (illegible), Atlanta, Ga. at whose request this certificate is issued."

This certificate was procured for employer by the agent who had written the policy for American. He acted upon notice given him by American of its intent to cancel employer's workmen's compensation insurance. The employer testified he had no knowledge of this certificate and insurance by Zurich until after claimant was injured. Notwithstanding employer's lack of knowledge of the issuance of a policy by Zurich, employer could, as a third party beneficiary, claim the benefit thereof. *Lammonds v. Manufacturing Co.*, 243 N.C. 749, 92 S.E. 2d 143.

Zurich contends that it never insured, i.e., issued a formal policy but only obligated itself to protect and indemnify employer until it (Zurich) could investigate and determine whether it wished to write the insurance; it did investigate and notified employer that it (Zurich) was "unwilling to continue this protection and they will cease to afford such coverage effective January 30, 1960"; the statute requiring thirty days' notice applies to policies, not binders.

What did Zurich agree to? The broker who procured the insurance, testifying as a witness for Zurich, was questioned with respect to the agreement. He was asked: "Q. Well, what were the terms and conditions of that binder? A. It was temporary coverage. Q. What kind of coverage? A. Workmen's compensation coverage. Q. Under what conditions? A. Under what conditions? Statutory conditions. Q. Statutory conditions? A. That's right." Employer relies on this evidence to show that the agreement between Zurich and its witness acting on behalf of employer expressly provided for the statutory notice. Did the parties so agree or was the witness merely giving his interpretation of what they agreed to? The Commission has made no finding. The certificate states that cancellation cannot be made without giving notice to Robert & Co., Associates. Was notice so given? The Commission makes no finding.

Employer, relying on *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377, insists that the term "binder" necessarily incorporates the statutory requirement of thirty days' notice. It is not contended, as we understand it, that Zurich gave employer thirty days' notice.

Because, in our opinion, the Industrial Commission has failed to find the facts necessary for a determination of the rights of the parties, the judgment of the Superior Court must be reversed in order that it may remand to the Industrial Commission with directions to make necessary findings of fact on which the rights of the parties can be determined.

Reversed.

FLORA DALE R. AMMONS AND CARLTON E. AMMONS, ADMINISTRATORS OF GWENDOLYN FAYE AMMONS, DECEASED v. MARY WADDELL BRITT.

(Filed 14 June 1963.)

Appeal and Error § 41—

Where a witness testifies without challenge or impeachment as to what the witness heard another witness testify on a former trial, the exclusion of the transcript of the testimony on the former trial to the same tenor cannot be prejudicial, since the transcript could add nothing under the circumstances except by way of corroboration.

APPEAL by plaintiffs from *Bickett, J.*, August, 1962 Term, ROBESON Superior Court.

Plaintiffs instituted this civil action to recover damages for the alleged wrongful death of their daughter, age six years. The evidence offered at the trial was substantially as outlined by this Court on the former appeal which is reported in 256 N.C. 248, with this one exception: Mrs. Britt, the defendant, did not testify in the case now before us.

At the conclusion of the evidence the court overruled motions to nonsuit and submitted issues of negligence and damages. The jury answered the issue of negligence in favor of the defendant. From the judgment dismissing the action, the plaintiffs appealed.

Varser, McIntyre & Hedgpeth by Ingram P. Hedgpeth.
Hackett & Weinstein by Robert Weinstein for plaintiffs, appellants.
Johnson, Biggs & Britt by I. M. Biggs for defendant appellee.

PER CURIAM. The single assignment of error on the basis of which the plaintiffs request a new trial involves the court's refusal to admit in evidence what "purported" to be the transcript of Mrs. Britt's testimony at the former trial. The record as offered consists of nine pages of questions and answers. The authentication as a court record leaves much to be desired. With the exception of a few lines hereafter quoted, all the remainder might well have been excluded as immaterial. The pertinent part of the record is here quoted:

> "A. I was going down Carolina Avenue south and it happened so quick. I didn't see the child in front of me until I was right at her, I tried to turn but was too late. I didn't see her until she was right in front of the car, and that's the reason I pulled off to the other side. . . .

"Q. Will you state whether or not the child was running, walking or standing still when you first saw her?

"A. It happened so quick, I can't say. It happened so quick I didn't see the child until she was right in front of the car. . . .

"Q. How fast were you driving?

"A. I think about thirty-five."

Prior to the time the plaintiff offered and the court excluded the transcript, Mrs. Ammons, one of the plaintiffs, had testified: "I heard Mrs. Britt say at the last term of court in regard to seeing my child on the day she was injured that it happened so fast she don't know how it happened; that she was right in front of her, don't know how it happened; that when she saw her she was right in front of her. . . . I heard Mrs. Britt make a statement as to the speed she was driving at the time. She said about 35 miles an hour."

The plaintiffs, through the testimony of Mrs. Ammons, had the full benefit of Mrs. Britt's admissions against interest made at the former trial. No attempt by cross-examination, or otherwise, was made to challenge or impeach the testimony of Mrs. Ammons. Hence the transcript added nothing except corroboration to the testimony of Mrs. Ammons. The transcript, if admitted, would merely have added an accumulation of admissions already in. The exclusion, therefore, was nonprejudicial.

No doubt the plaintiff lost the case because of the testimony of the disinterested eye-witness Walters. His evidence in the present record was substantially as recited in the former decision. The record fails to disclose any valid reason in law why the verdict and judgment should be disturbed, or that another trial might produce a different result.

No error.

APPENDIX.

REGULATIONS RELATING TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby respectfully submit Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases and hereby certify that the same have been duly adopted by the Council of The North Carolina State Bar at its regular quarterly meeting held on July 12, 1963 in accordance with the provisions of G.S. 84 and Chapter 1080 of the Session Laws of 1963.

Given over my hand and the seal of The North Carolina State Bar, this the 15th day of July, 1963.

/s/ Edward L. Cannon

Edward L. Cannon, Secretary
The North Carolina State Bar

REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

ARTICLE I.

AUTHORITY

Section 1.1 These rules and regulations are issued pursuant to the authority contained in Section 3, Chapter 1080 of the Session Laws of 1963.

ARTICLE II.

DETERMINATION OF INDIGENCY

Section 2.1 Prior to the appointment of counsel in any criminal case on grounds of indigency of the defendant, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form substantially as set out in Form Number 1 attached hereto.

Section 2.2 Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3 The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4 Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III.

WAIVER OF COUNSEL

Section 3.1 Any defendant desiring to waive the right to counsel as provided in G.S. 15-4.1 shall complete and sign under oath a WAIVER OF COUNSEL in a form substantially as set out in Form Number 2 attached hereto. If such defendant waives the right to counsel but refuses to exe-

cute such waiver, the Court shall so certify in a form substantially as set out in Form Number 2A attached hereto.

Section 3.2 Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3 The judge, upon being so satisfied, shall accept the WAIVER OF COUNSEL, executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV.

APPOINTMENT OF COUNSEL

Section 4.1 Any district bar as provided in G.S. 84-18 may adopt a plan for the naming and designation of the attorney's to serve as assigned counsel. Such plan may be applicable to the entire district, or, at the election of the district Bar, separate plans may be adopted by the district Bar for use in each separate county within the district.

Section 4.2 Such plan or plans as adopted by a district bar, shall be certified to the Clerk of Superior Court of each county to which such plan is applicable and shall constitute the method by which counsel shall be selected in said district for appointment as counsel to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge in the exercise of his sound discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of the Superior Court, and if so, he is authorized to appoint as counsel to represent an indigent defendant or defendants some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

Section 4.3 No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in

which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4 No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5 The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the district bar in which such county is located.

Section 4.6 The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the district Bar and a permanent record of the appointments made under said plan.

Section 4.7 Orders for the appointment of counsel shall be entered by the court in a form substantially as set out in Form Number 3.

ARTICLE V.

WITHDRAWAL BY COUNSEL

Section 5.1 At any time during or pending the trial or re-trial of a case, the trial judge, the appointing judge, or the resident judge of the district, upon application of the attorney and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2 At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Supreme Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3 Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

ARTICLE VI.

PROCEDURE FOR PAYMENT OF COMPENSATION

Section 6.1 Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the

trial judge shall, upon application, enter an order allowing such compensation as is provided in G.S. 15-5.

Section 6.2 Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3 Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge substantially in the form set out in the ORDER ALLOWING COUNSEL FEES. (Form Number 4 attached hereto)

Section 6.4 Two certified copies of the order for the payment of fees (Form Number 4) shall be forwarded by the clerk of the Superior Court of the County to the office of the State Treasurer, Raleigh, North Carolina, for payment.

Section 6.5 Upon the entry of the order for the payment of counsel fees, the court shall likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be substantially in the form set out in Form Number 5 attached hereto.

FORM NUMBER 1

NORTH CAROLINA IN THE SUPERIOR COURT

_____ COUNTY

Docket No. _____)
)
STATE OF NORTH CAROLINA)
)
vs.) AFFIDAVIT OF INDIGENCY
)
)
_____)
Defendant)

1. By whom are you employed? _____

2. What is your present income? $_____ ☐ Weekly ☐ Monthly ☐ Other

3. Are you married? _____

4. How many children under age 18 do you have? _____

5. What kind of car do you own? _____

6. Is it paid for? _____ If not, what are the payments? _____

7. State specifically all property which you own and give location and its value. _____

8. State specifically all property which you and your Spouse own jointly and give location and its value. _____

9. How much do you owe? _____

I hereby declare under the penalties of perjury that the foregoing answers are true, correct and complete and that I am financially unable to employ counsel to represent me in this action. I hereby request the Court to appoint counsel to represent me in this action.

This _____ day of _____, 19_____.

_____
Defendant

Sworn to and subscribed before
me this _____ day of _____, 19 _____.

_____

FORM NUMBER 2

NORTH CAROLINA IN THE SUPERIOR COURT

_____ COUNTY

Docket No. _____)
)
STATE OF NORTH CAROLINA)
)
vs.) WAIVER OF RIGHT TO HAVE
) APPOINTED COUNSEL
)
_____)
Defendant)

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, the statutory punishment therefor and the right to appointment of counsel upon his representation to the Court that he is unable to employ counsel and the reasons threfor, all of which he fully understands. The undersigned now states to the Court that he does not desire the appointment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

_____
Defendant

Sworn to and subscribed before me this ___ day of_____ 19___.

_____
Clerk of Superior Court

CERTIFICATE OF JUDGE

I hereby certify that the above named defendant has been fully informed in open Court of the charges against him and of his right to have counsel appointed by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the appointment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This _____ day of _____, 19_____.

_____
Signature of Judge

- -

FORM NUMBER 2A

CERTIFICATE OF JUDGE

I hereby certify that the above named defendant has been fully informed in open Court of the Charges against him and of his right to have counsel appointed by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the appointment of counsel; and that he has refused to sign a waiver.

This _____ day of _____, 19 _____.

_____
Signature of Judge

FORM NUMBER 3

NORTH CAROLINA IN THE SUPERIOR COURT

_____ COUNTY

Docket No. _____

STATE OF NORTH CAROLINA

vs. ORDER OF APPOINTMENT OF LEGAL COUNSEL FOR INDIGENT DEFENDANT

_____
Defendant

The defendant, _____ having been called to plead to the true bill(s) of indictment(s) found or warrants issued against him, wherein he is charged with _____

and it appearing to the undersigned Judge Presiding, from the affirmations made by the defendant and after due inquiry made, as appears in the record, that the defendant is unable by reason of his indigency to employ the services of counsel to represent him in this cause; it is,

ORDERED AND ADJUDGED that the defendant is an indigent and in need of the services of an attorney, as contemplated by law; and that _____ Attorney at Law, is hereby appointed as counsel for the indigent defendant as is provided in G.S. 15-4.1 and G.S. 15-5.

This the _____ day of _____, 19_____.

_____
Judge Presiding

FORM NUMBER 4

NORTH CAROLINA IN THE SUPERIOR COURT

_____ COUNTY

Docket No. _____)
)
STATE OF NORTH CAROLINA)
)
vs.) ORDER ALLOWING COUNSEL FEES
)
)
_____)
Defendant)

This cause coming on to be heard before the undersigned Judge of the Superior Court and it appearing that the defendant has heretofore been found to be an indigent within the meaning of G.S. 15-4.1 and upon such finding _____ was appointed by the Court as counsel to represent him in this case;

And it further appearing to the Court that the said defendant was charged in this case with the offense of _____

_____;

And it further appearing to the Court that pursuant to such appointment said attorney did represent said defendant in this case and has performed valuable legal services for said indigent defendant;

And the Court being fully informed as to the time consumed by said attorney in the performance of his services, the nature and character of this case, the amount of fees usually charged for cases of this kind in this locality, and of other pertinent matters, the Court is of the opinion that said legal services so rendered to the defendant in this case are reasonably worth at least _____ Dollars ($ _____) and it is now therefore

ORDERED by the Court that the sum of _____ Dollars ($ _____) be and it is hereby allowed to the assigned attorney as reasonable counsel fees for services rendered the defendant in this case; it is further

ORDERED AND ADJUDGED that the Treasurer of the State of North Carolina pay to said assigned attorney the said sum of _____ Dollars ($ _____) hereby and herein allowed to him for his services rendered to said indigent defendant.

This the _____ day of _____, 19____.

_____
JUDGE OF THE SUPERIOR
COURT OF NORTH CAROLINA

FORM NUMBER 5

NORTH CAROLINA IN THE SUPERIOR COURT

_____ COUNTY

Docket No. _____)
)
STATE OF NORTH CAROLINA)
)
vs.) JUDGMENT
)
)
_____)
Defendant)

This cause coming on to be heard before the Honorable _____ _____, Judge of the Superior Court and the Court finding the following facts:

(1) By order dated _____, the Court appointed counsel for _____, an indigent defendant within the meaning of G.S. 15-4.1 and G.S. 15-5;

(2) By order dated _____, the Court directed the State of North Carolina to pay to said counsel the sum of _____ Dollars ($ _____) for services rendered the indigent defendant, all according to the terms and provisions of G.S. 15-5;

(3) G.S. 15-5 provides that the fee so allowed shall be entered as a judgment against the defendant;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the State of North Carolina have and recover of the defendant, _____, _____, the sum of _____ Dollars ($ _____) and that this judgment be docketed in the judgment docket in the Office of the Clerk of the Superior Court of _____County and the same shall constitute a lien as provided by the general law of the State pertaining to judgments.

This _____ day of _____, 19 _____.

_____
JUDGE OF THE SUPERIOR
COURT OF NORTH CAROLINA

After examining the foregoing Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, it is my opinion that the same complies with a permissible interpretation of Chapter 1080 of the Session Laws of 1963 and Chapter 84 of the General Statutes incorporating The North Carolina State Bar.

19 July 1963.

/s/ R. Hunt Parker
Associate Justice
For the Court

Upon the foregoing certificate, it is ordered that the foregoing Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 19th day of July, 1963.

/s/ Sharp, J.
For the Court

AMENDMENTS TO RULES OF PRACTICE IN THE SUPREME COURT

AMENDMENT TO RULE 25

Effective 1 July 1963, amend Rule 25 as appearing in Volume 254, p. 807, by striking "$1.40" and substituting in lieu thereof "$1.15."

AMENDMENT TO RULE 19(1)

Effective January 1, 1964, every pleading, motion, affidavit, or other document included in the transcript on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. Every order and judgment shall show the date on which it was signed and filed. If this information is not furnished the transcript may be considered insufficient and dealt with as provided in subsection (10).

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ANALYTICAL INDEX

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari and Review.

Certiorari lies only to review the judicial or quasi-judicial action of an inferior tribunal, commission or officer. *In re Markham*, 566.

Certiorari will not lie to review refusal of city council to amend zoning ordinance, since courts will not attempt to control exercise of legislative power. *Ibid.*

Appeals from administrative agencies are purely statutory, but if statute does not provide for appeal, the courts may revue decision by *certiorari*. *In re Assessment of Sales Tax*, 589.

Commissioner of Revenue may appeal from decision of Tax Review Board. *Ibid.*

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction.

Where a subsequent trial is necessary, the Supreme Court will refrain from discussing the evidence further than is necessary to explain the conclusions reached. *Weaver v. Bennett*, 16; *Pettus v. Sanders*, 211.

The Supreme Court will not decide a constitutional question which was not raised and considered in the court below. *Johnson v. Highway Com.*, 371.

The Supreme Court will not pass upon a question which has become moot. *Rice v. Rigsley*, 506.

§ 2. Supervisory Judisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will take notice *ex mero motu* of the failure of the complaint to state a cause of action. *May v. R. R.*, 43; *Davis v. Singleton*, 148.

The Supreme Court will protect the rights of an incompetent in the subject matter of the litigation *ex mero motu*. *Perry v. Jolly*, 306.

The Court will not deem the statute of limitations pleaded in behalf of minors when their duly appointed guardian *ad litem* has not entered such plea. *Overton v. Overton*, 31.

Where the lower court holds the statute attacked by defendant to be unconstitutional, the Supreme Court, in the exercise of its supervisory jurisdiction over the inferior courts, may consider the constitutional questions notwithsanding that defendant failed properly to present them in the lower court, but even so the Supreme Court will ordinarily consider only the specific constitutional questions discussed in the brief. *Rice v. Rigsley*, 506.

§ 3. Judgments Appealable.

An order overruling a demurrer is not immediately reviewable except by *certiorari*, and a purported appeal therefrom will be dismissed as premature. *Jenkins & Co. v. Lewis*, 85.

Where plaintiff's motion to strike is addressed to an entire defense set up in the answer, it amounts to a demurrer to such defense, and an appeal will lie from the order allowing the motion to strike. *Ibid; Jewell v. Price*, 345.

APPEAL AND ERROR—*Continued.*

An order continuing the hearing of a motion until the determination on appeal on a judgment entered on another motion in the cause, is not appealable. *Fryar v. Gauldin*, 391.

There is no inherent or inalienable right of appeal from an inferior court to the Superior Court or from the Superior Court to the Supreme Court, and appeals from administrative agencies of the State or special statutory tribunals whose proceedings are not according to the course of the common law are purely statutory. *In re Assessment of Sales Tax*, 589.

§ 4. Parties Who May Appeal—"Party Aggrieved."

The executor is not the party aggrieved by judgment directing the distribution of the estate among the beneficiaries, and on his purported appeal the costs and attorneys' fees may not be charged against the estate. *Bank v. Melvin*, 255.

A commissioner who is entitled to have his fees or compensation fixed as provided by law, and taxed as a part of the cost, is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. *Welch v. Kearns*, 367.

The term "party aggrieved" within the meaning of various statutes authorizing appeals has no technical meaning and must be construed in light of the attendant circumstances, and the term includes one who is affected in only a representative capacity in discharging duties owed the public. *In re Assessment of Sales Tax*, 589.

§ 14. Costs in Supreme Court.

Where the judgment of the court below is modified and affirmed, the Supreme Court may apportion the costs on appeal between the parties in the exercise of its discretion. *Hoskins v. Hoskins*, 704.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error not supported by exception duly noted in the record will not be considered. *Gene's v. Charlotte*, 118; *Rice v. Rice*, 171; *Wilson v. Hardware, Inc.*, 660.

An assignment of error should clearly present the error relied on without the necessity of going beyond the assignment itself. *General Metals v. Mfg. Co.*, 709.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

A sole exception to the entry of judgment presents whether the facts found support the judgment and whether error of law appears on the face of the record. *Spitzer v. Lewark*, 49; *Coburn v. Timber Corp.*, 100.

§ 22. Execptions and Assignments of Error to Findings of Fact.

Where motions to nonsuit are properly preserved, the cause should be dismissed when the evidence is insufficient to make out a case, regardless of failure to preserve exceptions to the findings of the court. *Parker v. Ins. Co.*, 115.

APPEAL AND ERROR—*Continued.*

§ 33. Necessary Parts of Record Proper.

The pleadings form a necessary part of the record proper, and when the pleadings are not present in the record the appeal must be dismissed, Rule of Practice in the Supreme Court No. 19(1); nor will memoranda of the pleadings suffice. *Williams v. Contracting Co.*, 232.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of evidence tending to show the authority of a commissioner to execute a deed constituting a link in plaintiffs' chain of title cannot be prejudicial when plaintiffs do not claim to have shown good paper title, and as to color of title, have failed to show that the land in controversy was embraced within the descriptions in their deeds or that plaintiffs had been in adverse possession thereof. *Coburn v. Timber Corp.*, 100.

The benefit of an exception to the admission of testimony is ordinarily lost when other witnesses testify to the same import without objection. *Dunes Club v. Ins. Co.*, 294.

Admission of testimony over objection will not be held for prejudicial error when it is apparent that the testimony could not have affected the result. *Ibid.*

The admission of testimony of a witness in regard to his readings of his wind gauge *held* not prejudicial when the testimony was admitted solely to establish that there was a hurricane in the area at the time in question and the fact of the hurricane is abundantly established by other evidence. *Ibid.*

The admission of testimony of a witness not qualified to speak on the particular subject is not prejudicial error when such testimony merely corroborates other evidence admittedly competent. *Wilson v. Hardware*, 660.

Where the record does not show what the answer of the witness would have been, the Supreme Court cannot hold that the exclusion of the testimony from the jury was prejudicial. *Service Co. v. Sales Co.*, 400.

The fact that certain evidence, competent generally, is admitted only for the purpose of illustrating the testimony of a witness will not be held prejudicial when appellant has had full benefit of the facts sought to be established by the general admission of other evidence upon the same point. *General Metals v. Mfg. Co.*, 709.

Where a witness testifies without challenge or impeachment as to what the witness heard another witness testify on a former trial, the exclusion of the transcript of the testimony on the former trial to the same tenor cannot be prejudicial, since the transcript could add nothing under the circumstances except by way of corroboration. *Ammons v. Britt*, 740.

§ 43. Harmless and Prejudicial Error in Instructions.

An assignment of error to the charge will not be sustained when the charge, construed contextually, could not have prejudiced appellant. *Flintall v. Ins. Co.*, 666.

§ 44. Invited Error.

Where instructions requested by defendant, embodying the correct intensity of proof required by plaintiff, are erroneously understood by the court to

APPEAL AND ERROR—*Continued.*

relate to a subordinate issue, without fault on the part of defendant, whereupon the court gives incorrect instructions as to the burden of proof on the crucial issue, the doctrine of invited error does not apply. *Vinson v. Smith*, 95.

§ 45. Error Cured by Verdict.

Error in the instructions in placing an excessive burden upon one of the parties in respect to an issue is cured by a verdict on the issue in favor of such party. *Conference v. Miles*, 1.

§ 47. Review of Motions Relating to Pleadings.

The denial of a motion to strike allegations from an adversary party's pleading will not be disturbed when appellant is not prejudiced thereby. *Carroll v. Board of Trade*, 692.

§ 49. Review of Findings or Judgments on Findings of Fact.

A holding by the court that the policy of insurance in question was not in force at the time of the loss in suit is a conclusion of law and not a finding of fact, and when such conclusion is not supported by the actual findings, the cause must be remanded. *Baysdon v. Ins. Co.*, 181.

Where there is no request for findings of fact, it will be presumed that the court found facts sufficient to support its order, notwithstanding that no findings appear of record. *Motley v. Thompson*, 612.

When the evidence does not appear of record it will ordinarily be presumed that the court's findings of fact are supported by competent evidence, but this presumption may not be indulged when a party has requested permission to amend his affidavit to allege crucial facts and the court has refused to allow such amendment. *Gaster v. Goodwin*, 676.

In a trial by the court under agreement of the parties it will be presumed that the court disregarded incompetent evidence in making its findings, and the fact that some incompetent evidence may have been admitted will not be held prejudicial in the absence of a showing to the contrary, there being ample competent evidence to support the findings. *General Metals v. Mfg. Co.*, 709.

§ 55. Remand.

Where it is apparent that the order appealed from was entered by the court under a misapprehension of the applicable law, the cause will be remanded to the end that the facts may be found in the light of the true legal principles. *Blatt Co. v. Southwell*, 468.

Where a judgment is entered without a finding of the essential facts the cause must be remanded. *Gaster v. Goodwin*, 676.

§ 60. Law of the Case.

The decision on appeal becomes the law of the case upon subsequent hearing and upon subsequent appeal. *Morton v. Thornton*, 697.

ARMY AND NAVY.

50 U.S.C.A. 531(1) does not apply to a chattel mortgage executed by a serviceman after he has been inducted into the service. *Jenkins & Co. v. Lewis*, 85.

ARREST AND BAIL

§ 6. Resisting Arrest.

Words "Resist Arrest" written on printed form of warrant for offenses against motor vehicle laws held insufficient. *S. v. Wells*, 173.

§ 14. Proceedings Against Bail Bonds in Civil Actions.

Judgment may not be entered against the sureties on a bail bond in a civil action without ten days notice, G.S. 1-436, and the adjudication by a jury of the essential facts upon which arrest of defendant was predicated, G.S. 1-420, notwithstanding that default judgment had been entered against defendant and notwithstanding that the bond acknowledges the sureties to be bound to pay plaintiff such damages and costs as may be assessed in the trial of the cause against defendant. *Fryar v. Gauldin*, 391.

ASSIGNMENT

§ 1. Requisites and Validity of Assignment.

An assignment must designate the assignor, the assignee, and the chose assigned, and plaintiffs' allegations that the assignment constituted them joint owners is a mere conclusion of law as to the legal effect of the instrument. *Morton v. Thornton*, 697.

An assignment to M, D, and O, individually and collectively, is the same as an assignment to M or D or O or to all three as joint owners, and is ineffective for failure to identify the assignee. *Ibid.*

AUTOMOBILIES

§ 2. Grounds and Procedure for Suspension or Revocation of Driver's License.

The Department of Motor Vehicles is given exclusive authority to issue, suspend, or revoke licenses to operators of motor vehicles upon the public highways of the State, but a license is a privilege in the nature of a right of which the licensee may not be deprived except upon the conditions and in the manner prescribed by staute. *Gibson v. Scheidt*, 339.

The suspension or revocation of an operator's or chauffeur's license for driving during the period of revocation or suspension of license must be based upon a conviction of that offense, and neither a conviction of driving 75 miles per hour in a 60 miles per hour zone, nor a conviction of having no driver's license, warrants a suspension or revocation of license under G.S. 20-28(a), nor do such convictions warrant the mandatory suspension or revocation of license, G.S. 20-17, G.S. 20-16.1, G.S. 20-16(a) (1), nor the suspension of license under G.S. 20-16. *Ibid.*

§ 3. Driving Without License or During Period of Suspension.

A warrant charging that defendant operated a motor vehicle on the public highway "after" his driver's license had been revoked or suspended fails to charge the offense defined in G.S. 20-28(a), it being necessary to charge that defendant operated a motor vehicle during the period his license was suspended or revoked. *S. v. Sossamon*, 374.

AUTOMOBILES—*Continued.*

§ 6. Safety Statutes and Ordinances in General.

It is negligence *per se* to operate a motor vehicle on a public highway while under the influence of intoxicating liquor or in violation of the reckless driving statute. *Russell v. Hamlett*, 273.

The violation of a statute enacted to promote the safe operation of motor vehicles on the public highways is negligence, and is actionable if such negligence proximately causes injury, and the question of proximate cause is ordinarily for the jury. *Stephens v. Oil Co.*, 456.

§ 7. Attention to Road, Look-out, and Due Care in General.

A motorist driving through fog must exercise care commensurate with the danger, and may be required to come to a complete stop if the fog is so thick as to render visibility practically nonexistent, and therefore what constitutes due care under varying atmospheric conditions is ordinarily a question for the jury, with regard both to the issue of negligence and the issue of contributory negligence. *Williams v. Tucker*, 214.

A motorist is not under duty to anticipate negligence on the part of others. *Ibid.*

§ 8. Turning and Turning Signals.

It is not required that conditions on the highway be such as to make a left turn absolutely free from danger before a motorist may undertake such movement, but a motorist is required only to exercise reasonable care under the circumstances to ascertain, before attempting the movement, that the movement can be made in safety to himself and others. *Williams v. Tucker*, 214.

Before making a left turn at an intersection, a motorist must first ascertain that he can make such movement in safety and must give a plainly visible signal of his intention to turn, G.S. 20-155(b), and the failure to observe either of these two statutory requirements makes out a *prima facie* case of actionable negligence. *Wiggins v. Ponder*, 277.

When two motorists approach an intersection from opposite directions, and one of them attempts to turn left at the intersecion G.S. 20-155(b) governs the right to make the left turn, and G.S. 20-155(a) has no application. *Ibid.*

§ 10. Negligence and Contributory Negligence in Hitting Stopped or Parked Vehicle.

If a motorist is traveling within the legal speed limit, his inability to stop within the range of his headlights is not negligence *per se* but is only evidence of negligence to be considered with the other evidence in the case. *May v. R.R.*, 43.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Fact that motorist drove to left and struck approaching vehicle because his brakes failed does not necessarily relieve him of liability. *Stephens v. Oil Co.*, 456.

§ 17. Intersections.

The driver of a vehicle along a dominant highway does not have the absolute right of way in the sense that he is relieved of the duty to exercise due care,

AUTOMOBILES—*Continued.*

but he is not under duty to anticipate that the operator of a vehicle approaching along the servient highway will fail to stop as required by law, and in the absence of notice or anything which should give notice to the contrary, is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the other vehicle will stop before entering the intersection. *Scott v. Darden*, 167.

§ 19. Sudden Emergencies.

The fact that a motorist, in an emergency caused by the blowout of a tire, suddenly applies his brakes will not be held for negligence since a person acting in a sudden emergency is not required to select the wisest choice of conduct but only such choice as an ordinarily prudent person, similarly situated, would have made. *Crowe v. Crowe*, 55.

Act of driver in driving off the road to the right when confronted with the sudden emergency of a car, which had just passed him, skidding in front of him into a spin, *held* not negligent. *Jones v. Atkins Co.*, 655.

§ 21. Brakes and Defects in Vehicles.

G.S. 20-124 must be given a reasonable interpretation and will not be construed to constitute the operator of a motor vehicle an insurer of the adequacy of the brakes of the vehicle, but the statute requires that the operator act with care and diligence to see that his brakes meet the standards prescribed by statute, without making him liable for a latent defect of which he has no knowledge and which is not discoverable by reasonable inspection. *Stephens v. Oil Co.*, 456.

§ 24. Loading and Protruding Objects.

Evidence held insufficient to show that pedestrian was struck by any object protruding from side of truck. *Kinlaw v. Willetts*, 597.

§ 25. Speed in General.

Speed in excess of that allowed by law in the zone may be the proximate cause of injury in preventing the driver from being able to avoid collision in a sudden emergency. *Stephens v. Oil Co.*, 456.

§ 33. Pedestrians.

Evidence held insufficient to show that plaintiff had sufficient time after discovery of pedestrian's position of peril to have avoided injury and therefore doctrine of last clear chance does not arise. *McMullan v. Horne*, 159.

§ 34. Children and School Buses.

When a motorist sees, or in the exercise of reasonable care should see, a child ahead of him on or near the highway, the motorist is under duty to maintain a vigilant lookout, to give timely warning of his approach, and to drive at such speed and in such manner that he can control his vehicle if the child, in obedience to childish impulses, attempts to cross the street in front of his vehicle. *Wainwright v. Miller*, 379.

§ 38. Opinion Evidence as to Speed.

The fact that defendant changes his testimony so as to aver that he first saw intestate's vehicle when it was 85 feet away instead of 150 feet away does not render defendant's testimony as to the speed of the vehicle incom-

petent for want of opportunity by defendant to judge its speed when defendant further testifies that he saw the car again when 50 feet away, and as it passed through and beyond the intersection, and that it continued on through the intersection at about the same speed. *Loomis v. Torrence*, 381.

§41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence that while defendant was attempting to negotiate a left curve at some 40 to 50 miles per hour his right front tire suddenly blew out, causing him to lose control and resulting in injury to his passenger, without evidence that there were special speed restrictions at the *locus*, *held* insufficient to overrule nonsuit, since the blowout was not reasonably foreseeable under the circumstances, and therefore the injuries resulted from an unavoidable accident. *Crowe v. Crowe*, 55.

Evidence that defendant was driving his vehicle some 50 miles per hour in heavy fog and crashed into plaintiff's vehicle which was making a left turn across his lane of travel, *held* to take the issue of defendant's negligence to the jury. *Williams v. Tucker*, 214.

When a defendant drives in a very reckless manner so that injury to other motorists is reasonably foreseeable, he may be held liable for injury to a following motorist who runs into the wreck of defendant's car with a third car. *Russell v. Hamlett*, 273.

No presumption of negligence arises from the mere fact that there has been an accident and an injury, but in order to be entitled to go to the jury plaintiff must show that defendant was negligent in some respect and that such negligence was the proximate cause of injury. *Jones v. Atkins Co.*, 655.

Negligence which does not result in injury or damages is not actionable. *Ritch v. Hairston*, 729.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Road.

Conflicting evidence as to whether defendant's car was over the centerline of the highway when it collided with plaintiff's car, which was approaching from the opposite direction, takes the issue of negligence to the jury. *Cartrette v. Canady*, 714.

§ 41d. Sufficiency of Evidence of Negligence in Passing Cars Traveling in Same Direction.

Evidence tending to show that plaintiff before attempting to turn left into a side road gave the statutory signal and observed in his rear view mirror the line of traffic behind him and that the driver of the car immediately behind him was slowing down and giving the appropriate signal, and that defendant, hidden from plaintiff's view by other cars, passed four vehicles and collided with plaintiff's vehicle, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. G.S. 20-140, and not to disclose contributory negligence as a matter of law on the part of plaintiff. *Faulk v. Chemical Co.*, 395.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely or in Hitting Car Standing or Traveling in Front.

The rule that a collision with the preceding vehicle furnishes some evidence that the following motorist was negligent as to speed, or was following too

closely or failed to keep a proper lookout, is not an absolute rule but the relative duty of motorists in such instances must be governed by the circumstances of each particular case, and when the evidence shows no negligence on the part of the following vehicle, the mere fact of collision with the preceding vehicle cannot supply evidence of negligence on this aspect. *Jones v. Atkins Co.*, 655.

Evidence held insufficient to show negligence on part of defendant driver in striking passing vehicle which skidded into spin, or in driving off the road to the right when confronted with the emergency of the skidding car. *Ibid.*

Following car crashing into rear of two car wreck and causing one of those cars to be knocked into the second cannot be held liable except for such injuries or damages as are shown to have resulted from the second impact. *Ritch v. Hairston*, 729.

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

Evidence tending to show that bailee's driver, in entering an intersection to make a left turn, was struck by a bus approaching along the intersecting street from his left and making a left turn, *held* sufficient to be submitted to the jury on the issue of the individual driver's negligence in failing to keep an adequate lookout and in driving into the intersection so nearly in front of the approaching bus that a collision could not be avoided, and *held* further, not to rebut the *prima facie* showing of negligence on the part of the bailee in failing to return the car in good condition, even though the evidence showed that the bus, in turning left, encroached some three or four feet on its left side of the street. *Dellinger v. Bridges*, 90.

Evidence is this case *held* sufficient to be submitted to the jury on the issue of defendant's negligence in entering an intersection with a dominant highway without bringing his vehicle to a stop and colliding with plaintiff's truck which was traveling along the dominant highway at a lawful speed. *Scott v. Darden*, 167.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Evidence of negligence in turning into the path of the car in which plaintiff was riding without first ascertaining that the movement could be made in safety and without giving the statutory signal, *held* to take the issue to the jury. *Wiggins v. Ponder*, 277.

§ 41i. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence of negligence in striking pedestrian *held* sufficient to take the issue to the jury. *Pettus v. Sanders*, 211.

The evidence tended to show that plaintiff was engaged with other workmen in erecting a highway sign at the beginning of a median between the highway and an access road connecting another highway at an overpass, that defendant drove his truck, which had tool boxes flush with the fenders, past the locus and that as the truck passed, plaintiff sustained a wound about the size of a fifty-cent coin between the elbow and wrist, penetrating to the bones and breaking them. *Held:* In the absence of evidence that any object protruded beyond the fenders of the truck, or of any actual contact between plaintiff and any part of the truck, or what actually inflicted the wound, nonsuit was proper. *Kinlaw v. Willetts*, 597.

AUTOMOBILES—*Continued.*

§ 41m. Sufficiency of Evidence of Negligence in Striking Child.

Evidence permitting the inference that a motorist failed to see a child ahead of him walking on the sidewalk near the curb when, in the maintenance of a proper lookout, he should have seen the child, or that the motorist saw the child but ignored the possibility that the child might run into the street in front of his car, and did not blow his horn or use proper care with respect to speed and control of the vehicle, and that omission of duty in one or the other of these respects was the proximate cause of fatal accident to the child, is sufficient to overrule nonsuit. *Wainwright v. Miller*, 379.

§ 41p. Sufficiency of Evidence of Identity of Driver of Vehicle.

Competent evidence of a six and one-half year old witness that defendant was driving at the time of the accident in suit, which evidence is corroborated by statements made by the witness to others prior to the trial, *held* sufficient to be submitted to the jury on the issue of the identity of the defendant as the driver, and nonsuit is properly denied. *McCurdy v. Ashley*, 619.

§ 41r. Sufficiency of Evidence of Negligence in Operating Defective Vehicle.

Evidence that defendant driver was traveling north 60 miles per hour in a 45 mile per hour zone, that upon approaching a wreck in his lane of travel he depressed his brake pedal and discovered that his brakes were not working, and that he then pulled to the left and collided with the left rear fender of plaintiff's vehicle, which was traveling south, *held* sufficient to take the issue of negligence to the jury. *Stephens v. Oil Co.*, 456.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence *held* not to show contributory negligence as a matter of law in running into wreck of two cars on highway blocking both lanes of travel. *Russell v. Hamlett*, 273.

§ 42g. Nonsuit for Contributory Negligence in Entering Intersection.

Evidence tending to show that the driver of the vehicle along the dominant highway saw defendant's vehicle approaching the intersection along the servient highway from his left, that the driver along the dominant highway slowed his vehicle and saw the driver along the servient highway also reduce his speed, and that he acted on the assumption that the driver along the servient highway would stop before entering the intersection, until too late to avoid collision, *is held* insufficient to establish contributory negligence as a matter of law on the part of the driver along the dominant highway. *Scott v. Darden*, 167.

§ 42h. Nonsuit for Contributory Negligence in Turning or Hitting Vehicle Making Turn.

Evidence that plaintiff, driving in heavy fog, reduced speed to five miles per hour, gave a proper left turn signal, and, after careful lookout, failed to see any vehicle or the lights of any vehicle approaching, and thereupon increased speed and attempted to turn left into a driveway, *held* not to show contributory negligence as a matter of law in an action to recover for injuries in a collision with a vehicle approaching from the opposite direction. *Williams v. Tucker*, 214.

AUTOMOBILES—*Continued.*

Evidence *held* not to show contributory negligence as a matter of law in turning left across path of car attempting to pass from rear, there being four cars between the vehicles, hiding defendant's vehicle, when plaintiff began to turn. *Faulk v. Chemical Co.*, 395.

§ 42k. Nonsuit for Contributory Negligence of Pedestrian.

Evidence *held* not to show contributory negligence as a matter of law on part of pedestrian. *Pettus v. Sanders*, 211.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence in this action by guest in car to recover for negligence of defendant in turning left across the path of the car in which the guest was riding held not to disclose intervening negligence on the part of the driver of the car in which the guest was riding. *Wiggins v. Ponder*, 277.

Evidence tending to show that the original defendant was forced to drive her car off on the shoulder of the road to the right by the negligent operation of the additional defendant's car, which approached from the opposite direction, followed by plaintiff's car, but that before the collision with plaintiff's car the original defendant had gotten back on the road and had regained her position on the right side of the highway, *is held* insufficient to be submitted to the jury on the issue of the additional defendant's negligence, since the evidence discloses that at the time of the accident the additional defendant's negligence had spent itself and had become a mere circumstance of the accident and not a proximate cause thereof. *Cartrette v. Canady*, 714.

In order for second defendant to be held liable in three-car collision it must be shown that the second impact caused or contributed to the injuries or damages. *Ritch v. Hairston*, 729.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance to Jury.

Evidence that plaintiff was attempting to cross a municipal street in heavy traffic, that the three southern lanes were for east-bound traffic and the one northern lane for west-bound traffic, and that plaintiff crossed the two southernmost lanes and stepped into the side of defendant's car which was traveling east in the third lane, *held* insufficient to support the submission of the issue of last clear chance to the jury, since the evidence fails to disclose that defendant had time after she could or should have discovered plaintiff's position of peril to have avoided the injury. *McMillan v. Horne*, 159.

Evidence held not to disclose that there was sufficient time, after the situation of peril was or should have been discovered, in which to have avoided the injury, and therefore the doctrine of last clear chance cannot bar recovery. *Scott v. Darden*, 167.

§ 46. Instructions in Automobile Accident Cases.

An instruction which omits foreseeability as an essential element of proximate cause is prejudicial. *Pettus v. Sanders*, 211.

Instruction held for error in failing to charge jury as to circumstances which would relieve defendant of liability for operating car with defective brakes. *Stephens v. Oil Co.*, 456.

AUTOMOBILES—*Continued.*

§ 52. Liability of Owner for Driver's Negligence in General.

Mere ownership of an automobile involved in a collision does not impose liability upon the owner, but the owner's liability must rest upon his personal negligence, or the negligence of his agent or employee, or upon the family purpose doctrine, and a complaint which fails to allege any one of these bases of liability fails to state a cause of action against the owner. *Cohee v. Sligh*, 248.

§ 59. Assault and Homicide—Culpable Negligence.

Culpable negligence in the law of crimes is more than a mere want of due care, and is such recklessness or carelessness resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and each case must be determined upon its own particular facts. *S. v. Fuller*, 111.

Evidence held insufficient to be submitted to the jury on the issue of culpable negligence. *Ibid.*

Testimony and physical evidence tending to establish that defendant was driving his car at an excessively high speed, resulting in the accident causing the death of the driver of the car with which he collided, held sufficient to be submitted to the jury in this prosecution for manslaughter. *S. v. Toomes*, 386.

§ 64. Reckless Driving.

It is reckless driving constituting negligence *per se* for the operator of a motor vehicle to drive abreast of a preceding car and fall back twice, running abreast of the proceding car on one of the occasions for a distance of some fourth of a mile, and then to pass the preceding car at a good speed, all for the purpose of "teasing" the driver of the preceding car. *Russell v. Hamlett*, 273.

§ 65. Prosecutions for Reckless Driving.

Check marks on printed warrant form opposite listed violations of speeding and reckess driving *held* fatally defective. *S. v. Wells*, 173.

BAILMENT

§ 1. Nature and Requisites of the Relationship.

Delivery of possession of an automobile by an owner to a garage for repairs creates a bailment for mutual benefit. *Dellinger v. Bridges*, 90.

§ 3. Liabilities of Bailee to Bailor.

A bailee for hire is not an insurer but is liable for his failure to return the property in good condition only when such failure is due to ordinary negligence. *Dellinger v. Bridges*, 90.

Proof of delivery of property to a bailee for hire and failure of the bailee to return it in good condition makes out a *prima facie* case of actionable negligence against the bailee, but does not shift the burden of proof on the issue of negligence, which remains on the bailor throughout the trial. *Ibid.*

Evidence of negligence of bailee in driving automobile held to take issue to jury in action by bailor to recover damages. *Ibid.*

BOUNDARIES

§ 7. Nature and Essentials of Processioning Proceeding.

Where there is a *bona fide* dispute as to the boundary between the lands of plaintiffs and the lands of defendants, nonsuit is inapposite. *Rice v. Rice*, 171.

§ 9. Sufficiency of Description and Admissibility of Evidence Aliunde.

Description in deed in this case held void for indefiniteness. *Boone v. Pritchett*, 226.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. Cancellation for Fraud or Mistake Induced by Fraud.

Ordinarily a party is under duty to read an instrument before signing it and may not avoid the instrument on the ground of mistake as to its contents, but this rule does not apply when the failure to read the instrument is due to fraud or oppression, and the party defrauded has acted with reasonable diligence in the matter. *Mills v. Lynch*, 359.

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence that defendant and the attorney acting for all the parties induced plaintiffs to sign a deed to the defendant by falsely representing that the instrument was a deed of trust, that plaintiffs were prevented from reading the paper or having it read to them by positive assertion that this was unnecessary because plaintiffs knew it was a deed of trust and that the attorney was in a hurry, *held* sufficient to overrule nonsuit in an action to set aside the deed for fraud. *Mills v. Lynch*, 359.

CARRIERS

§ 2. State License and Franchise.

Evidence that having a truck terminal near to port warehouses would be conducive to the development and expansion of business by enabling shipments to be dispatched promptly is properly considered by the Utilities Commission upon the question of public need for a new carrier with nearby terminals when all other carriers authorized to transport such goods in the same territory have terminals some distance from the warehouses. *Utilities Com. v. Tank Line*, 363.

Evidence *held* sufficient to support the conclusions of the Utilities Commission that there was a public need for the limited carrier service proposed, and the ability of the applicant to perform that service. *Ibid.*

§ 3. Sale of Franchise.

The approval of the Utilities Commission of the transfer of a carrier's certificate of authority implies the duty on the part of the transferee to render the service called for in the certificate, which it must perform in a substantial manner. *Utilities Com. v. Colter*, 268.

A finding of the Utilities Commission to the effect that the purchaser of operating rights to transport household goods under common carrier certificate did not exercise such rights for more than two years after the approval of the transfer of the certificate by the Commission, *held* to support the Commission's conclusion that, since rights under the certificate had become

CARRIERS—*Continued.*

lost or dormant, the transferee had no right thereunder which it could sell, regardless of the question of public convenience and necessity. *Ibid.*

Carrier purchasing certificate of another carrier may combine the purchased authority with its original authority. *Utilities Com. v. Transfer Co.*, 688.

§ 5. Rates and Tariffs.

The findings of fact of the Utilities Commission in this proceeding *held* supported by competent, material, and substantial evidence, and the findings support an order of the Commission allowing in part petitioning carriers' request for an increase in certain intrastate rates in order to permit a fair return on the railroads' property used in intrastate transportation and to prevent disparity between intrastate and interstate rates. *Utilities Com. v. Champion Papers*, 449.

CONSPIRACY

§ 1. Elements of Civil Conspiracy.

If two or more individuals agree to do an unlawful act or to do a lawful act in an unlawful manner, and an overt act which causes damage is committed by any one or more of them in furtherance of the common design, the party injured may maintain an action against the conspirators jointly or severally. *Burton v. Dixon*, 473.

§ 2. Actions for Civil Conspiracy.

Counterclaim held to state cause of action against husband and wife for civil conspiracy to obtain control of estate of wife's father and convert it to their own use. *Burton v. Dixon*, 473.

CONSTITUTIONAL LAW

§ 6. Legislative Powers in General.

A statute which is repugnant to a provision of the Constitution is void. *Horton v. Redevelopment Com.*, 605.

§ 8. Delegation of Power to Municipal Corporations.

The Urban Redevelopment Law is a constitutional delegation of power by the State to municipal corporations. *Horton v. Redevelopment Com.*, 605.

§ 11. The Police Power in General.

G.S. 1-538.1 imposing liability on the parent in an amount not exceeding $500, for malicious or wilful destruction of property by the child is a constitutional exercise of the police power for the purpose of curbing juvenile delinquency. *Ins. Co. v. Faulkner*, 317.

§ 15. Public Convenience and Prosperity.

Statutory change in qualifications for unemployment compensation upon stoppage of work because of strike is constitutional exercise of police power, the difference in the qualifications being one of degree and not of principle and the amendment being uniform in its application to the class specified. *In re Abernethy*, 190.

CONSTITUTIONAL LAW—*Continued.*

§ 24. What Constitutes Due Process.

G.S. 1-538.1 imposing liability on the parent in an amount not exceeding $500 for malicious or wilful destruction of property by the child affords the parent notice and opportunity to be heard and is a constitutional exercise of the police power for the purpose of curbing juvenile delinquency. *Ins. Co. v. Faulkner*, 317.

A fair jury in jury cases and an impartial judge in all cases are basic to due process of law. *Rice v. Rigsby*, 506.

The words "the law of the land" as used in § 17, Art. I, of the State Constitution are equivalent to the words "due process of law" as used in § 1 of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

Act providing jury commissioner for Madison County held constitutional. *Ibid.*

§ 31. Right of Confrontation.

The act of the court in recapitulating the testimony of a witness which the jury could not hear, *held* prejudicial on authority of *S. v. Payton*, 255 N.C. 420. *S. v. Hubert*, 140.

CONTRACTS

§ 2. Offer and Acceptance and Mutuality.

In order to constitute a contract the parties must assert to the same thing in the same sense. *Johnson v. Johnson*, 430.

§ 23.1 Negligence in Performance of Contract.

In an action by the owners to recover of the contractor damages from a fire resulting from the alleged negligence of the contractor in the installation of the furnace in the house, the contractor is entitled to allege that he built or caused the house to be built in accordance with plans and specifications established by plaintiffs and that plaintiffs had accepted the completed job prior to the fire, and therefore plaintiff's motion to strike such defense in its entirety should have been denied. Whether particular allegations should have been stricken is not presented in the absence of motions under G.S. 1-153 directed to the particular allegations. *Jewell v. Price*, 345.

§ 25. Pleadings.

In order to constitute a contract, the parties must assent to the same thing in the same sense, and therefore when the allegations of a pleading fail to disclose a definite agreement on the part of one of the parties to purchase the rights of the other, and a definite agreement on the part of the other to sell upon the terms and conditions stipulated, the pleading fails to set up an enforceable contract. *Johnson v. Johnson*, 430.

§ 29. Measure of Damages for Breach of Contract.

A party injured as a result of breach of contract is entitled to compensation which will place him, insofar as can be done by money, in the same position he would have occupied had the contract not been breached, which compensation includes gains prevented as well as losses sustained, provided they were within the contemplation of the parties at the time the contract was executed. *Service Co. v. Sales Co.*, 400.

CONTRACTS—*Continued.*

If one party without legal right directs the other to suspend work prior to completion of the contract, such other party is entitled to an award on the basis of *quantum meruit* for part performance. *General Metals v. Mfg. Co.*, 709.

Interest may be allowed on damages for breach of contract from the date of the breach when the amount of damages is ascertained from the contract itself or from relevant evidence, or from both. *Ibid.*

CORPORATIONS

§ 26. Liability of Corporation for Torts of Officers and Agents.

A corporation is liable for the torts of its agents or employees committed by them while acting within the scope of their authority or in the course of their employment. *Raper v. McCrory-McLellan Corp.*, 199.

COSTS

§ 3. Taxing of Costs in Discretion of Court.

The taxing and apportionment of costs and the fixing of reasonable attorney fees in apposite instances rests in the sound discretion of the trial court, G.S. 6-21(2), and in such instance it is error for the court to rule as a matter of law that the request for allowance of attorney fees should be denied. *Godwin v. Trust Co.*, 520.

In an action between husband and wife seeking specific performance of an agreement between them to "pool" their property and assets, to declare a resulting trust, and for an accounting, the court has discretionary authority to apportion the costs, the action being equitable in nature, but the attorneys' fees of the respective parties in such instance do not come within the statutory or equitable exceptions to the general rule and may not be taxed as a part of the costs. *Hoskins v. Hoskins*, 704.

COURTS

§ 1. Nature and Function of Courts in General.

Courts will not attempt to control the exercise of legislative power, and therefore *certiorari* is improperly granted to review the refusal of a city council to amend a zoning ordinance. *In re Markham*, 566.

§ 9. Jurisdiction of Superior Court after Orders or Judgments of Another Superior Court Judge.

Where one Superior Court judge sustains a demurrer another Superior Court judge is without authority to overrule the demurrer even after the complaint has been amended when the amendment, though adding evidentiary details, adds nothing to the basic statement of plaintiff's cause of action. *Davis v. Singleton*, 148.

Order awarding custody of children does not preclude another judge from decreeing a different disposition upon change of condition. *Thomas v. Thomas*, 461.

COURTS—*Continued.*

§ 10. Terms of Superior Court.

Where a term of Superior Court is held on the date prescribed by statute, the fact that the clerk incorrectly designates it as the fourth rather than third Monday after the first Monday of the month is immaterial. *Staton v. Blanton*, 383.

§ 20. What Law Controls—Laws of This and Other States.

A will probated in accordance with laws of the state in which testator died is effective as to personalty in this State when an exemplified copy is probated here, but does not transfer realty in this State unless the probate in the state of the testator's domicile meets the solemnity required of probate in this State. *In re Will of Marks*, 326.

Where two separate wills of the same deceased have been probated respectively in two states, the courts of each state have jurisdiction to determine the question of where the deceased was domiciled at the time of her death, and neither is bound by the adjudication of the other of the question of domicile, which is determinative to the jurisdiction of the court to probate the will. *Ibid.*

Plaintiff instituted this action to recover for injuries sustained when an gyroglider manufactured by defendant fell while it was being operated by plaintiff in another state. *Held:* While the cause of action in tort is governed by the laws of the state in which the accident occurred, in the absence of allegation that the contract of sale was made in the state of plaintiff's residence, or indeed that plaintiff himself had purchased the gyroglider from defendant, the laws of this State will be applied in determining whether plaintiff has alleged a cause of action *ex contractu*. *Murray v. Aircraft Corp.*, 638.

CRIMINAL LAW

§ 18. Jurisdiction of Superior Court on Appeals from Inferior Courts.

On an appeal from conviction in a county court of specific misdemeanors, the Superior Court acquires jurisdiction only of the specific misdemeanors charged in the warrant and upon which defendant had been convicted. *S. v. Carver*, 229.

§ 71. Confessions.

The competency of a confession is a preliminary question for the trial court and the court's determination of the question of the voluntariness of the confession is conclusive on conflicting evidence, but what facts amount to threats or promises rendering a confession involuntary and incompetent is a question of law which is reviewable on appeal. *S. v. Woodruff*, 333.

The use of promises or threats invalidates a subsequent confession unless it is made to appear that their influence had been entirely done away with before the confession was made. *Ibid.*

§ 94. Expression of Opinion on Evidence by Court During Trial.

Interrogations by the court of various witnesses during the course of the trial *held* prejudicial, the probable effect upon the jury and not the motive of the court being determinative of whether the court exceeded the bounds of

CRIMINAL LAW—*Continued.*

questioning for a proper understanding and clarification of the testimony of the witnesses. *S. v. Lea*, 398.

§ 101. Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which raises no more than a suspicion or conjecture of the fact of guilt is insufficient to carry the case to the jury. *S. v. Carver*, 229.

§ 106. Instructions on Presumptions and Burden of Proof.

It is prejudicial error for the court to place the burden upon defendant to prove an alibi. *S. v. Walston*, 385.

§ 107. Instructions—Statement of Evidence and Application of Law Thereto.

Where there is plenary evidence that defendant transported nontaxpaid whiskey in the trunk of his car, and it is apparent from the warrant and evidence that the court submitted to the jury the sole question of defendant's guilt of the one offense of unlawful transportation of nontaxpaid whiskey, with correct instructions thereon that the transportation of any quantity of nontaxpaid whiskey is unlawful, further reference in the charge to possession and transportation of taxpaid whiskey, *held* not prejudicial. *S. v. Wells*, 173.

§ 121. Arrest of Judgment.

Judgment on a count in a warrant must be arrested when the record discloses that the court in its instructions to the jury did not refer to the count or to the evidence or contentions pertinent thereto, and thus did not submit the count for the determination of the jury. *S. v. Wells*, 173.

The arrest of judgment for fatal defects in the warrant does not bar subsequent prosecution on a valid warrant. *Ibid; S. v. Sossamon*, 374.

Where the warrant is fatally defective it cannot be cured by the charge of the court on the verdict, and the judgment must be arrested. *S. v. Sossamon*, 374.

§ 125. New Trial for Newly Discovered Evidence.

A motion to vacate a judgment on the ground that thirteen jurors served on the jury is not a motion to vacate the judgment for newly discovered evidence, but is in the nature of a review of the constitutionality of the trial. *S. v. Broadway*, 243.

A motion for a new trial for newly discovered evidence is inapposite to evidence that the sample of defendant's blood, the subject of expert testimony at the trial, had been destroyed prior to the trial, defendant having made no inquiry in regard to the blood sample before or at the trial, since defendant's ignorance at the time of the trial that his blood sample would not have been available if he had demanded it, does not constitute newly discovered evidence. *S. v. Dixon*, 249.

The discretionary refusal of a motion for a new trial for newly discovered evidence is not reviewable in the absence of a showing of abuse of discretion. *Ibid.*

§ 136. Revocation of Suspension of Judgment or Sentence.

Judgment activating a suspended sentence for condition broken may not be based upon a conviction on a fatally defective warrant. *S. v. Sossamon*, 378.

CRIMINAL LAW—*Continued.*

§ 142. Right of State to Appeal.

The State cannot appeal in either civil or criminal cases except on statutory authority. *In re Assessment of Sales Tax*, 589.

§ 151. Conclusiveness of Record.

The Supreme Court is bound by the record as certified. *S. v. Walston*, 385.

§ 161. Harmless and Prejudicial Error in Instructions.

The charge of the court will be construed contextually as a whole. *S. v. Davis*, 138.

§ 165. Error Cured by Verdict.

A fatally defective warrant may not be cured by the charge of the court or the verdict of the jury. *S. v. Sossamon*, 374.

§ 173. Past Conviction Hearing Act.

A motion to vacate a judgment of conviction on the ground that thirteen jurors served on the jury at the trial is not a motion to vacate the judgment for newly discovered evidence, but is in the nature of a review of the constitutionality of the trial, G.S. 15-217, and the motion is properly denied upon findings, supported by evidence, that only twelve jurors served at the trial. *S. v. Broadway*, 243.

DAMAGES

§ 14. Burden of Proof and Sufficiency of Evidence of Damages.

Plaintiff is not required to prove his damages with absolute certainty but is required to introduce evidence showing his damages with sufficient completeness and certainty to permit the jury to arrive at a reasonable conclusion. *Service Co. v. Sales Co.*, 400.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

Neither the widow nor the dependants of a deceased employee may maintain proceedings under the Declaratory Judgment Act to determine their right to retain a settlement from the third person tort feasor, since the disbursement of such settlement is under the exclusive original jurisdiction of the Industrial Commission. *Cox v. Transportation Co.*, 38.

DEEDS

§ 1. Nature and Requisites in General.

A deed is an instrument in writing containing operative words of conveyance sufficient to indicate the grantor's intent to convey, which instrument must be signed, sealed and delivered by the grantor, and must contain a description sufficiently certain within itself or by reference to something extrinsic to which it refers to identify the thing granted. *Supply Co. v. Nations*, 681.

The grantee in a timber deed in regular form endorsed on its reverse side the date and a statement that he did "hereby transfer this deed in its en-

DEEDS—*Continued.*

tirety to" a designated person, and signed same under seal. *Held:* The endorsement being under seal and containing operative words of conveyance and identifying the thing conveyed by reference, is sufficient in law to convey the timber interest. *Ibid.*

§ 7. Delivery, Acceptance and Registration.

The intentional delivery of a deed to the grantee is essential to its effectiveness. *Vinson v. Smith*, 95.

§ 11. Construction and Operation in General.

When the language of a deed is clear and unambiguous, the courts are limited to the words chosen by the parties in ascertaining their intent. *Strickland v. Jackson*, 81.

§ 13. Estates Created by Construction of Instrument.

Where a deed, in its granting clause, habendum, and a paragraph imposing a lien states in effect that the land was conveyed to the named husband and wife with remainder to their children born of the marriage which should survive them, *held* the deed conveys only a life estate with contingent remainder over to those children living at the time of death of the surviving life tenant. *Strickland v. Jackson*, 81.

The distinction between a vested and a contingent remainder is whether those who are to take upon termination of the preceding estate can be ascertained at the time of the effective date of the instrument, or whether they can be ascertained only upon the happening of a future event. *Ibid.*

Where a contingent remainderman dies prior to the death of the life tenant, the event specified, the issue of such contingent remainderman can take nothing under the instrument. *Ibid.*

Where a deed conveys only a life estate to the grantee with remainder to the children of the life tenant, the life tenant does not take an estate of inheritance and therefore the contention that the deed conveyed an estate tail, converted into a fee simple by the statute is inapposite. *Ibid.*

§ 26. Timber Deeds.

An instrument conveying standing timber must meet the requirements for a valid conveyance of realty. *Supply Co. v. Nations*, 681.

DIVORCE AND ALIMONY

§ 1. Jurisdiction and Pleadings in General.

The rule that plaintiff may take a voluntary nonsuit at any time if defendant has not filed a counterclaim or cross-action applies to actions for divorce, and when plaintiff takes such nonsuit the action is no longer pending and defendant may not file a cross action for alimony without divorce. *Scott v. Scott*, 642.

§ 16. Alimony Without Divorce.

Plaintiff in an action for absolute divorce is entitled as a matter of right to take a voluntary nonsuit upon paying costs and alimony *pendente lite* to the date of motion, notwithstanding he has notice of defendant's intention

DIVORCE AND ALIMONY—*Continued.*

to file a cross action for alimony without divorce, and, the nonsuit having been taken, no action is pending in which defendant may amend her answer to assert such cross action. *Scott v. Scott*, 642.

§ 18. Alimony and Subsistance Pendente Lite.

The court, either in granting or refusing to allow alimony *pendente lite*, is not required to make specific findings of fact except in regard to adultery when adultery of the wife is pleaded in bar, and where defendant charges that plaintiff abandoned him, it will be assumed on appeal from the denial of alimony *pendente lite* that the court found the facts in favor of the husband. Whether the wife is entitled to an order for alimony when the husband has not ceased to provide her with necessary subsistence, *quaere?* G.S. 50-16. *Deal v. Deal*, 489.

Even though the court denies the wife's motion for alimony *pendente lite*, the court may properly allow counsel fees to the wife's attorney in order that she may have adequate means to meet her husband at the trial upon substantially even terms. *Ibid.*

§ 24. Awarding Custody of Children of Marriage.

Where plaintiff alleges in her complaint the date she and defendant separated and admits in her reply that she is the mother of a six month's old child, which must have been conceived some fifteen months after the separation, and plaintiff's father testifies that plaintiff told him that the father of her child born after the separation was a person other than her husband, the record supports the court's conclusion that plaintiff is an unfit person to have custody of the children of the marriage. *Thomas v. Thomas*, 461.

In a hearing to determine the right to custody of the children of the marriage, the court's findings of fact are conclusive if supported by competent evidence. *Ibid.*

An order awarding the custody of minor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered in the wife's action for alimony without divorce, awarding the custody of the children to her does not preclude another judge of the Superior Court from awarding custody of children to the husband in the wife's later action for absolute divorce under G.S. 50-6 when there is evidence that subsequent to the prior decree the wife had given birth to an illegitimate child. *Ibid.*

The fact that the father had been convicted of abandonment of his children and ordered to provide for their support does not preclude the court from finding upon a hearing of a subsequent motion for the custody of the children in a divorce action that the father is a fit and suitable person to have custody of the children when there is uncontradicted evidence upon the hearing that the father has a good reputation in the community in which he lives. *Ibid.*

DOMICILE

§ 1. Definitions and Distinctions.

Domicile remains until another is acquired and is not lost by mere change of residence, but in order to acquire a new domicile it is necessary that there

DOMICILE—*Continued.*

be a change of residence to a new *locus* coupled with the intention of making it a permanent home. *In re Estate of Cullinan*, 626.

§ 2. Domicile of Wife.

The domicile of the wife becomes that of her husband upon marriage, and upon his death does not revert automatically to her domicile prior to the marriage. *In re Estate of Cullinan*, 626.

DOWER

§ 4. Will of Husband as Excluding Dower.

The statutory time within which a widow must dissent from the will of her husband in order to be entitled to dower is a statute of limitations and the bar of the statute must be pleaded. *Overton v. Overton*, 31.

EASEMENTS

§ 8. Nature and Extent of Easement.

A railroad company having a right-of-way over plaintiff's land for its wooden trestle has a right, after the burning of the trestle, to enter upon the right-of-way and replace the trestle, and if the replacement of the trestle with an earth and concrete trestle places a heavier burden upon plaintiff's land by precluding access between plaintiff's lands on either side of the trestle, plaintiff's remedy is by a proceeding under G.S. 40-12, and the railroad company's act in replacing the trestle cannot constitute a trespass nor may the alleged acts of its employees in failing to negotiate in good faith and its failure and refusal to pay damages demanded give rise to a cause of action for conspiracy. *Bane v. R. R.*, 285.

EJECTMENTS

§ 8. Defendant's Bond.

The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants file a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond is properly set aside when plaintiffs file a reply to the counterclaim and raise no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they move for default judgment before the clerk. *Motley v. Thompson*, 612.

G.S. 1-111 and G.S. 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when motion to strike a cross-action on ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

Eminent domain is the power of the sovereign, or some agency authorized by it, to take private property for public use, and the exercise of the power

EMINENT DOMAIN—*Continued.*

must be based upon the failure of condemnor and the owner to agree upon a price after *bona fide* negotiations, G.S. 40-11, and perforce the condemnor cannot seek to condemn any right which it already owns. *Power Co. v. King*, 219.

§ 7a. Proceedings to Take Land and Assess Compensation in General.

In proceedings by the owners of land to recover compensation for its taking by the State Highway Commission, allegations of defendant are deemed denied when the answer is not served on plaintiffs, and therefore when the answer alleges that the land in dispute was within the area of a prior right of way granted to the Commission for the highway prior to its relocation, the burden is upon the Commission to prove the defense and the court may not enter judgment until the correct location of the previously granted right of way has been properly ascertained. *Johnson v. Highway Com.*, 371.

§ 14. *Distribution of Compensation Paid.*

Where condemnor asserts ownership of an easement over a part of the lands sought to be condemned, but evidence of its easement is excluded over its objection, and an award is entered without appeal therefrom, condemnor may not seek to have the value of its asserted easement paid to it out of the award which it, itself, had paid into court. *Power Co. v. King*, 219.

ESTOPPEL

§ 1. Estoppel by Deed.

A deed having no validity cannot be made the basis of an estoppel. *Cruthis v. Steele*, 701.

Therefore a married woman's deed to her children, void because not assented to in writing by her husband, cannot be upheld in equity as a contract to convey. *Cruthis v. Steele*, 701.

§ 4. Equitable Estoppel.

A party may be estopped by a misrepresentation only if the other party has been led to change his position to his detriment on the strength of such misrepresentation. *Strickland v. Jackson*, 81.

EVIDENCE

§ 1. Judicial Notice of Legislative, Executive and Judicial Acts.

The Supreme Court will take judicial notice of the assignment of judges. *Staton v. Blanton*, 383.

§ 4. Presumptions.

Presumption of possibility of issue held rebutted by evidence that 73 year old woman had had operation removing her overies. *Hicks v. Hicks*, 387.

§ 11. Transactions or Communications with Decedent or Lunatic.

If a witness is a party to or is pecuniarily interested in the event of an action against the personal representative of a deceased or against a person deriving title or interest through such deceased, he is incompetent to testify in his own behalf as to a personal transaction or communication with the deceased. *Godwin v. Trust Co.*, 520.

EVIDENCE—*Continued.*

In an action by a trustee against the personal representative of one of the settlors to recover possession of the *res* of the trust, testimony of the trustee in regard to instructions given him by the settlor for the preparation of the instruments in suit is incompetent. *Ibid.*

Testimony of a surviving occupant in a car to the effect that he was not driving but that one of the other occupants killed in the accident was driving at the time of the accident comes within the provisions of G.S. 8-51 in actions against the surviving occupant for wrongful death. *McCurdy v. Ashley*, 619.

Adverse examinations of defendant in regard to transactions with a decedent, which examinations were taken in prior actions nonsuited and are not offered in whole or in part in either of the actions in suit, nor even referred to in the presence of the jury in the instant trials, do not operate as a waiver of G.S. 8-51 so as to render competent defendant's testimony in the instant trials in regard to such transactions. *Ibid.*

Where an action to recover for injuries to one passenger is consolidated with two actions for wrongful deaths of two other passengers against the same defendant, the admission of testimony of plaintiff passenger in regard to a transaction between defendant and one of the deceased passengers does not constitute a waiver of G.S. 8-51 in regard to the two actions for wrongful death. *Ibid.*

§ 15. Relevancy and Competency of Evidence in General.

It is competent for a witness to testify from his personal observation that debris was blown in a whirl, around and around, by the wind at the time in question and that he had seen like phenomenan in previous cyclones. *Dunes Club v. Ins. Co.*, 295.

Safety Code for Building Construction does not have force of law and is incompetent. *Swaney v. Steel Co.*, 531; But safety code voluntarily adopted by defendant is competent when evidence tends to show that manufacturer failed to follow its standards. *Wilson v. Hardware, Inc.*, 660.

In an action against a psychiatrist to recover for injuries resulting from the repetition of electroshock treatments without an examination, the "Standards for Electroshock Treatment" prepared by the American Psychiatric Association, of which defendant was a member, is competent. *Stone v. Proctor*, 633.

§ 16. Experimental Evidence.

In order for experimental evidence to be competent, the circumstances attendant the experiment must be substantially similar to those which attended the actual occurrence; thus, where the crucial question is whether the design or tensile strength of the metals in a mechanical device were sufficient to enable it to perform a particular function when properly installed in certain types of automobiles, evidence of the failure of the device when installed in a particular type of automobile is incompetent in the absence of evidence of proper installation in a type of automobile contemplated by the parties, etc. *Service Co. v. Sales Co.*, 400.

§ 20. Competency of Pleadings in Evidence.

An admission in the answer of one defendant is not competent against an antagonistic co-defendant, *Mfg. Co. v. Construction Co.*, 649.

EVIDENCE—*Continued.*

§ 24. Proof of Public Records and Documents.

It is error to permit a witness to read from a purported official publication of the U. S. Department of Commerce when the publication is identified only by a statement of counsel upon handing the publication to the witness, G.S. 8-35, and when such evidence has a material bearing on the crucial question of whether plaintiff's property was damaged by wind prior to high water incident to the hurricane in question, its admission must be held prejudicial. *Dunes Club v. Ins. Co.*, 294.

§ 36. Opinion Evidence—"Shorthand" Statement of Fact.

Admission of testimony of a witness that the winds during the hurricane in question were much stronger than the winds of a prior hurricane in the area will not be held for error when it is apparent that the testimony of the witness was predicated upon his personal experiences in the two hurricanes and amounted to a shorthand statement of fact based upon numerous factors which could not be adequately and clearly reproduced and described to the jury. *Dunes Club v. Ins. Co.*, 294.

§ 42. Expert Testimony in General.

Expert testimony must be based on sufficient data. *Service Co. v. Sales Co.*, 400.

§ 48. Expert Testimony in Regard to Physics.

Testimony of a witness as to readings made by him on his wind guage during the storm in question *held* incompetent in the absence of evidence tending to show that the witness' wind guage was properly made and accurately measured the wind velocity according to scientific principles approved and generally accepted. *Dunes Club v. Ins. Co.*, 294.

Testimony of an expert that the tensile strength of metals in a device were insufficient for the device to perform the function for which manufactured *held* incompetent when the evidence does not make it appear whether the devices tested were manufactured before or after the modification of the design. *Service Co. v. Sales Co.*, 400.

A witness with more than thirty years experience in working with woods, especially pine woods, and who is found by the court to be an expert craftsman in the use of wood for manufacturing purposes, is competent to testify that yellow pine is stronger than white pine. *Wilson v. Hardware*, 660.

§ 51. Examination of Experts.

A hypothetical question should ask the expert witness whether a particular condition could or might have produced the result in question and not whether it did produce the result. *Service Co. v. Sales Co.*, 400.

§ 55. Evidence Competent for Purpose of Corroboration.

Where the testimony of a six and one-half year old child has been properly admitted in evidence, testimony of the child's grandfather and aunt as to statements made by the child to them separately to the same effect as his testimony upon the trial, is competent for the purpose of corroboration. *McCurdy v. Ashley*, 619.

§ 58. Cross-Examination.

Where plaintiff, in cross-examination of defendant's witness, uses a written statement and has the witness identify his signature to the statement and read

EVIDENCE—*Continued.*

parts of the statement inconsistent with the testimony of the witness at the trial. It is prejudicial error for the court to refuse the request of defendant's counsel to see the statement and to use it if he deems it desirable to do so, notwithstanding the statement was not introduced in evidence. Defendant's objection *held* directed to the refusal of the court to permit him to see the statement and not to the failure of plaintiff's counsel to put the statement in evidence. *Warren v. Trucking Co.*, 441.

EXECUTORS AND ADMINISTRATORS

§ 5. Attack of Appointment and Revocation of Letters.

Upon the revocation of the probate in this State of the will of a nonresident, it is proper for the clerk to revoke his order appointing as administrators c. t. a. the persons named executors in the purported will, since the clerk may not appoint persons to administer an estate as directed by a writing until that writing has been here established as a will. *In re Estate of Marks*, 332.

§ 10. Operation of the Business of the Decedent.

Where a codicil revokes a trust set up in the will but reaffirms the item of the will enumerating the powers of the executor and trustee and states that the grant of power should be without distinguishing the powers granted it as executor and as trustee, the codicil, through eliminating the trust created by the will, does not delete any of the powers conferred by the will on the personal representative. *Bank v. Melvin*, 255.

§ 23. Widow's Years Support.

The limitation of six months within which a widow must dissent from her husband's will in order to be entitled to her year's support is a statute of limitation and must be pleaded. *Overton v. Overton*, 31.

Under G.S. 30-15 as rewritten by Chapter 749 Session Laws 1961 a dissenting widow is entitled to her year's allowance in addition to her statutory share of the estate. *Bank v. Melvin*, 255.

§ 24a. Actions to Recover for Personal Services Rendered Decedent.

In a daughter's action against her father's estate to recover for personal services rendered her father, the defendant executor may set up a counterclaim against her for civil conspiracy between her and her husband pursuant to which the husband obtained a power of attorney and sold merchantable timber belonging to her father and converted the proceeds to their own use, since the counterclaim is connected with the subject of the plaintiff's action and is so related thereto that adjustment of both is necessary in a full and final determination of the controversy. *Burton v. Dixon*, 473.

§ 34. Costs, Commissions and Attorney Fees.

A personal representative may not be sued in his individual capacity to recover alleged excessive fees and compensation, the sole remedy in such instance being by motion to vacate the order of the clerk fixing the fee and for an order fixing a reasonable allowance. *Strickland v. Jackson*, 81.

§ 36. Actions Against Personal Representative.

A suit alleging that testator left his personal property one-half to plaintiff and one-half to defendant, that defendant was named executrix, that defen-

EXECUTORS AND ADMINISTRATORS—*Continued.*

dant's final account omitted funds from a certain bank account, and that defendant had converted the funds in the account to her own use, without paying plaintiff her one-half share of such funds, *is held* to state a cause of action to surcharge and falsify the account of the executrix, and demurrer was properly sustained in an action against the executrix in her individual capacity. *Davis v. Singleton*, 148.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime.

Under the decisions of this State, in order to constitute false pretense there must be a misrepresentation of some subsisting fact, and while there need not be any token, promises of future action, even though unfulfilled, cannot be made the basis of a prosecution. *S. v. Hargett*, 496.

§ 2. Indictment and Warrant.

An indictment charging that defendant, who owned a casket, a box in which it was to be placed, and a cemetery used for burial purposes, promised to bury the son of the prosecuting witness in the casket shown and give the body a decent burial, and that defendant did not bury the child in the casket shown and in a separate grave, *held* fatally defective, since the averments other than those in regard to existing facts relate to promises for future fulfillment, which are insufficient basis for a prosecution for false pretense. *S. v. Hargett*, 496.

FRAUD

§ 1. Fraud in General.

Inducing a person to execute the very instrument intended by the use of false and fraudulent representations constitutes fraud in the treaty; inducing a party to execute an instrument different from the one intended by the use of trick, artifice or fraud is fraud in the *factum*. However, the distinction is immaterial when the action is between the original parties to the instrument. *Mills v. Lynch*, 359.

§ 5. Reliance on Misrepresentation and Deception.

Ordinarily a party is under duty to read an instrument before signing it and may not avoid the instrument on the ground of mistake as to its contents, but this rule does not apply when the failure to read the instrument is due to fraud or oppression, and the party defrauded has acted with reasonable diligence in the matter. *Mills v. Lynch*, 359.

FRADULENT CONVEYANCES

§ 2. Parties Entitled to Invoke the Remedy.

Creditors having unconnected claims against a common debtor may join in suing the common debtor and his transferee to have the debtor's conveyance of property set aside as fraudulent and to recover judgment against the debtor on their claims, and the fact that some of plaintiffs have reduced their claims to judgment is immaterial. *Refining Co. v. Bottling Co.*, 103.

GAMBLING

§ 5. Operating Gambling House.

A warrant charging that defendant did operate a house in which various types of gambling "is continuously carried on" and did permit named persons to engage in a game of cards in which money was bet, *held* sufficient to charge defendant with operating a gambling house. *S. v. Anderson*, 499.

GUARANTY

Where a third party, with the consent of the seller, assumes all liability of the original purchaser, and the original purchaser guarantees in writing to the seller the payment by such third party of the indebtedness, the original purchaser becomes a mere guarantor of payment. *Service Co. v. Sales Co.*, 400.

A guarantor of payment by the purchaser may not set up a counterclaim against the seller for breach of warranty and can realize no affirmative recovery thereon but, at most, may set up damages for breach of warranty as a setoff to be subtracted from the indebtedness of the principal for which the guarantor is liable. *Ibid.*

HABEAS CORPUS

§ 3. To Determine Right to Custody of Infants.

Mental illness alone is insufficient ground to deprive a mother of the custody of her child if she remains capable of its proper supervision. *Spitzer v. Lewark*, 49.

The findings of fact by the trial court in a hearing to determine the right to custody of a minor child as between its parents and the paternal grandmother and stepgrandfather of the child, are conclusive if supported by any competent evidence. *Ibid.*

HIGHWAYS

§ 12. Nature and Grounds of Remedy to Establish Cartway.

The statutory right to have a cartway laid off is in derogation of the rights of the owner of property and the statute must be strictly construed; but "cultivation" is used in G.S. 136-69 in its broad sense and includes the use of land for orchards and the raising of cattle, as well as the growing of timber. *Candler v. Sluder*, 62.

The right to have a cartway laid off across the lands of respondents in order to afford petitioner necessary access to a public highway may not be defeated by a contention that necessary access could be afforded petitioner by laying off a shorter cartway across the lands of others to a neighborhood public road when the evidence discloses that the junction with the neighborhood public road would be some two thousand feet from the highway and that at times it was hazardous or impassable, and that the construction of a cartway thereon would be more difficult and expensive because of the topography and existence of woods. *Wetherington v. Smith*, 493.

§ 13. Proceeding to Establish Cartways.

Evidence held for jury in this proceeding to establish right to cartway. *Candler v. Sluder*, 62.

HIGHWAYS—*Continued.*

In a proceeding to establish a cartway under G.S. 136-69, the issue before the clerk and before the Superior Court on appeal from the clerk is solely petitioners' right to the establishment of the cartway and not its location across the lands of the several respondents, the mechanics of actually locating the cartway being for the jury of view with right of appeal from the findings of the jury of view by any respondent adversely affected, even though he may not have appealed from the determination of petitioners' right to the establishment of the cartway. *Ibid.*

HOMICIDE

§ 18. Evidence Competent on Question of Self-Defense.

Defendant is not entitled to introduce evidence that deceased at different times assaulted specifically named persons in order to establish the dangerous and violent character of deceased as relating to the issue of self-defense. *S. v. Davis*, 138.

HUSBAND AND WIFE

§ 2. Martial Rights, Duties and Disabilities in General.

The husband is under legal duty to support his wife. *Perry v. Jolly*, 306.

Under both Virginia and North Carolina law husband and wife may conspire together, and an action for civil conspiracy may be maintained against the husband or wife alone. *Burton v. Dixon*, 473.

§ 4. Wife's Separate Estate, Contracts and Conveyances.

A married woman may contract and deal with her own property in the same manner and with the same effect as if she were unmarried, subject to well established exceptions, one of which is that she may not convey her real estate without the written assent of her husband. *Cruthis v. Steele*, 701.

The conveyance by a married woman of her separate realty without the assent of her husband will estop her and those claiming under her from attacking the title of her grantee or those in privity with him, provided the deed is supported by a valuable consideration, but if her deed is not supported by a valuable consideration it cannot form the basis of an estoppel, since the rationale of the estoppel is that equity will treat the deed as a contract to convey, and a contract to convey which is not supported by a valuable consideration is void. *Ibid.*

The fact that a married woman's deed made without the assent of her husband bears her seal does not make the instrument effective in equity after the husband's death when the deed is to her children by a prior marriage and the sole consideration is love and affection, since equity disregards the form and will go to the substance to ascertain the consideration notwithstanding the presence of a seal, and love and affection of a parent, while sufficient to support an executed deed, will not support a contract to convey. *Ibid.*

§ 17. Estates by Entireties—Termination and Survivorship.

While a tenancy by the entireties may be terminated by a voluntary sale on the part of both husband and wife, when one of them has been adjudged incompetent a sale cannot be the voluntary act of both and therefore when the

court orders a sale in such instances the right of survivorship is transferred to the proceeds of the sale. *Perry v. Jolly*, 306.

Where the wife has been adjudged incompetent and the court orders a sale of lands held by the entireties, the husband is entitled to hold the proceed of the sale and is entitled to the income therefrom subject to his duty to support his wife, but he holds the *corpus* as trustee for the survivor and may not invade the *corpus* except to the extent his income from all sources is insufficient for his wife's and his own needs, and the court is without discretionary authority to dissolve the rights of survivorship in the funds. *Ibid.*

INDICTMENT AND WARRANT

§ 9. Charge of Crime.

A statutory offense may be charged substantially in the language of the statute if its language charges the offense with sufficient definiteness to apprise the accused of the specific offense charged, enable him to prepare his defense, and to appeal his conviction or acquittal as a bar to a subsequent prosecution, otherwise the language of the statute must be implemented so as to supply the requisite definiteness. *S. v. Wells*, 173; *S. v. Sossoman*, 374.

A warrant or indictment is sufficient if it expresses the charge against defendant in a plain, intelligible, and explicit manner and contains sufficient matter to enable the court to proceed to judgment and bar a subsequent prosecution for the same offense, and it is not required that it be couched in the language of the statute or refer to the statute upon which it is based, and reference to an inapposite statute will not vitiate it. *S. v. Anderson*, 499.

§ 14. Time of Making Motions to Quash and Waiver of Defects.

Duplicity in an indictment or warrant is waived by failure to move to quash. *S. v. Wells*, 173.

A warrant which is fatally defective because of its failure to charge a criminal offense may not be cured by the court's instructions or by the verdict of the jury, and motion in arrest of judgment must be allowed. *S. v. Sossamon*, 374.

INFANTS

§ 1. Protection and Supervision of Infants by Courts in General.

The court will not deem the statute of limitations pleaded in behalf of minors when their duly appointed guardian *ad litem* has not entered such plea. *Overton v. Overton*, 31.

§ 9. Right to Custody.

Right to custody and determination of such right in divorce actions see *Divorce and Alimony* § 24.

INJUNCTIONS

§ 1. Mandatory Injunctions.

A mandatory injunction is comparable to a writ of *mandamus* and may not ordinarily be issued as a preliminary injunction. *Carroll v. Board of Trade*, 692.

INJUNCTIONS—*Continued.*

§ 13. Continuance of Temporary Orders to the Hearing.

In a suit to restrain the threatened breach of a written contract, order continuing the temporary restraining order to the hearing upon the filing of bond by plaintiff will ordinarily be affirmed on appeal, even though defendant challenges the validity of the contract, since refusal to continue the temporary order would virtually determine the merits upon the preliminary hearing. *Finance Co. v. Jordan*, 127.

Where the court is not requested to find facts upon the hearing of an order to show cause, the continuance of the temporary restraining order without making specific findings will not be disturbed when the allegations of the verified complaint and affidavit are sufficient to warrant the relief. *Pleators, Inc. v. Kostakes*, 131.

Same—

In an action for permanent injunction to restrain a breach of a written contract upon controversy as to whether the proper construction of the contract precluded the action threatened by defendant, the cause is properly continued to the hearing upon a *prima facie* showing by plaintiff. *Ibid.*

Upon the hearing of an order to show cause the merits are not before the court, and an agreement that the court might enter an order out of term and out of the district refers to an order granting or denying motion for the temporary restraining order and does not empower the court to determine the issues of fact raised by the pleadings, and therefore the court's action in dismissing the action prior to trial on the merits is erroneous. *Carroll v. Board of Trade*, 692.

A temporary restraining order is an ancillary remedy to preserve the *Status quo* pending the hearing on the merits and is properly denied when plaintiff seeks a mandatory injunction to establish a right not theretofore enjoyed or previously exercised. *Ibid.*

§ 14. Hearing on the Merits.

Failure of defendant to appeal from the continuance of a temporary restraining order does not entitle plaintiff to judgment at the hearing on the merits, since the preliminary determination not only does not constitute *res judicata* but may not even be considered at the final hearing. *Gene's v. Charlotte*, 118.

§ 16. Liabilities on Bonds.

G.S. 1-496 and G.S. 1-497 are *in pari materia* and must be construed together, therefore in order to be entitled to recover against plaintiff and the surety on his bond for damages resulting from the issuance of a temporary restraining order the defendant has the burden of showing that the court has decided by final judgment that plaintiff was not entitled to the temporary restraining order or circumstances equivalent to such decision. *Blatt Co. v. Southwell*, 468.

It is error to allow defendant's motion for judgment against plaintiff and the surety on his bond for damages resulting from issuance of a temporary restraining order merely sequent to an order which dissolves the temporary restraining order without adjudicating that plaintiff was not entitled to the temporary restraining order or without finding the facts in regard to plain-

INJUNCTIONS—*Continued.*

tiff's affidavit that the temporary restraining order was dissolved by voluntary agreement of the parties upon representation by defendant that he would not perform the acts therein proscribed. *Ibid.*

INSANE PERSONS

§ 3. Effect of Adjudication of Lunacy.

A person who has been adjudged incompetent becomes a ward of the court and the Supreme Court will *ex mero motu* protect such incompetent's rights in the subject matter of the litigation. *Perry v. Jolly*, 306.

§ 4. Control and Management of Estate by Guardian.

G.S. 35-15 authorizes a court of equity to order that the property of an incompetent be sold, as well as mortgaged, for the support and maintenance of the incompetent. *Perry v. Jolly*, 306.

Where the wife has been adjudged incompetent and the court orders a sale of lands held by the entireties, the husband is entitled to hold the proceeds of the sale and is entitled to the income therefrom subject to his duty to support his wife, but he holds the *corpus* as trustee for the survivor and may not invade the *corpus* except to the extent his income from all sources is insufficient for his wife's and his own needs, and the court is without discretionary authority to dissolve the rights of survivorship in the funds. *Ibid.*

INSURANCE

§ 2. Brokers and Agents.

An insurance broker may not maintain that the insurer was negligent in failing to renew insurance binders on the property of one of their customers, in accordance with the custom and course of dealings between the broker and insurer, when the evidence discloses that the broker wrote insurer that if coverage should be needed after a specified date the broker would notify insurer and that the broker did not notify the insurer. *Equipment Co. v. Swimmer*, 69.

§ 3. Construction and Operation of Policies in General

Where the ultimate and controlling facts are not in dispute, the construction of a policy of insurance becomes a matter of law. *Parker v. Ins. Co.*, 115.

The parties to an insurance contract may make whatever agreement they deem advantageous unless restricted by statute enacted in the exercise of the police power. *Czarnecki v. Indemnity Co.*, 718.

§ 5. Modification and Waiver.

Insurer who has knowledge at the time of the issuance of the policy of the existence of conditions avoiding the policy under its terms will be held to have waived the policy provisions so far as they relate to the then existing defects. *Fire Fighters Club v. Casualty Co.*, 582.

But where the condition does not arise until after the issuance of the policy, the knowledge of the agent cannot constitute a waiver. *Ibid.*

§ 7. Reformation of Policies

Insurance contracts, like other written instruments, may be reformed by equity for mutual mistake, inadvertence, or the mistake of one party superin-

INSURANCE—*Continued.*

duced by the fraud or inequitable conduct of the other. *McCallum v. Ins. Co.*, 573.

Complaint held to allege cause of action to reform policy insuring loan to coincide with the term of the loan, and failure of old and feeble insured to read policy does not bar reformation. *Ibid.*

Allegations and evidence to the effect that at the time the policy was issued insured's agent advised insurer's agent to the effect that at some future time the property would be converted from a dwelling to a club house, does not make out a cause of action to reform the policy to describe the premises as a club house, there being neither allegation nor evidence of mutual mistake or mistake induced by fraud. *Fire Fighters Club v. Casualty Co.*, 582.

§ 9. Insurable Interest in Life Policy.

When insured himself procures a policy, he has a right to designate any person as his beneficiary. *Flintall v. Ins. Co.*, 666.

§ 10. Effective Date and Term of Policy.

The parties may agree upon the effective date of a policy of insurance, and if a policy is dated the contract ordinarily takes effect from such date unless a different date is specified therein, but the date is not conclusive and equity may reform the policy to specify a different date in proper instances to make the instrument conform to the intent of the parties or to prevent fraud. *McCallum v. Ins. Co.*, 573.

§ 11f. Provisions Excluding or Limiting Liability if Death Results from Specified Causes.

Where a policy limits insurer's liability if insured's death should result within the first twelve months from causes specified or "from undetermined causes," the burden is upon insurer, after the beneficiary's proof of death of insured, to prove that the death resulted from a cause within the limitation. *Flintall v. Ins. Co.*, 666.

§ 13. Avoidance of Life Policies for Nonpayment of Premiums.

The fact that a policy with premium payable monthly is issued on the 15th of the month does not make the 15th of each succeeding month its premium date when the unambiguous terms of the policy provide that the initial payment should pay the premium only until the first of the succeeding month and requires each succeeding premium to be paid on the first of the month. *Boger v. Ins. Co.*, 125.

Where employer fails to pay premium on certificate of group insurance, insurer may avoid liability even though employee's part of premium had been deducted from his wages. *Ibid.*

§ 17. Avoidance of Policy for Misrepresentations or Fraud.

A representation on an application for life insurance that the applicant has not used drugs or alcohoic stimulants to the point of intoxication for the prior five years refers to habitual use and not an occasional use or even an occasional excessive use. *Flintall v. Ins. Co.*, 666.

§ 21. Cancellation of Certificates Under Group Policies.

When the employer fails to pay the premium on a group policy within the grace period provided therein, insurer's liability upon a certificate issued under

INSURANCE—*Continued.*

the group policy terminates notwithstanding the employer may have deducted from the employee's wages his *pro rata* share of the premium. *Boger v. Ins. Co.*, 125.

§ 26. Actions on Life Policies.

Where the death certificate introduced by plaintiff discloses the immediate cause of insured's death as unknown and the antecedent causes as natural causes, the stipulation of the antecedent causes as "natural causes" cannot be inferred to mean more than that the coroner, a layman without medical training, found no evidence of foul play, and it necessarily follows from plaintiff's evidence that the cause of death is undetermined, entitling insurer to a preemptory instruction under the provisions of the policy limiting liability if death resulted from undetermined causes. *Flintall v. Ins. Co.*, 666.

§ 34. Death or Injury by Accident or Accidental Means.

In an action to recover on a policy of insurance providing indemnity for death resulting from accidental bodily injuries, nonsuit is properly entered upon evidence tending to show that prior to his death insured sustained two falls, but with further evidence that the falls inflicted only superficial injuries and that death resulted from hepatic failure due to acute alcoholism. *Bond v. Protective Asso.*, 287.

§ 36. Whether Accident Causes Injury and Limitations as to Time Between Injury and Incapacity.

Where a policy provides benefits if insured is hospitalized for an injury within 30 days of the accident causing such injury, insured may not recover if he is hospitalized for an injury 51 days after the accident notwithstanding that he should have been treated within the 30 day period, the time limitation being unambiguous. *Parker v. Ins. Co.*, 115.

The limitation contained in a medical payments provision of a policy of automobile insurance that insurer should be liable for only such expenses as are incurred within one year from the date of the accident is valid, and insurer may not be held liable for medical expenses incurred after the one year period even though the treatment of insured is continuous from the date of the accident, but insurer is liable for such payments within the limitation even though some of the expenses may have been incurred subsequent to the expiration date of the policy. *Czarnecki v. Indemnity Co.*, 718.

§ 53. Auto Insurance—Payment and Subrogation.

A settlement between the tort feasor and insured for personal injuries to insured and for that part of the property damage to insured's car not covered by the insurance, with knowledge of the tort feasor that insurer had paid insured for the property damage less $100 deductible under the policy, and that the settlement did not include insurer's subrogated claim, *held* not to bar insurer's subsequent action against the tort feasor to recover on the subrogated claim, and the fact that the tort feasor's settlement with insured was by consent judgment does not alter this result. *Ins. Co. v. Spivey*, 732.

§ 54. Vehicles Insured Under Liability Policy.

The provisions of a policy of liability insurance extending coverage to the use of other automobiles by insured without the payment of extra premium

INSURANCE—*Continued.*

usually excludes coverage of other cars owned by insured or by members of his household, and also cars furnished for regular use of the insured, the purpose of the extension being to provide coverage for the occasional and infrequent driving by insured of an automobile other than his own. *Whaley v. Ins. Co.*, 545.

Policies held not to cover non-owned vehicle furnished insured by his employer for business purposes. *Ibid.*

§ 65.1. Liability of Insurer to Party Secondarily Liable.

A party discharging the liability of insured's estate under an agreement that it should be subrogated to all claims of the estate against insurer stands in the same position as the personal representative of the estate in an action to recover against insurer. *Whaley v. Ins. Co.*, 545.

§ 67. Contracts to Procure Fire Insurance.

Where an insurance broker undertakes to provide continuous insurance coverage on property of a customer and fails to do so, the customer may elect to sue either for breach of the contract or for negligent failure to perform the duty imposed by the contract. *Equipment Co. v. Swimmer*, 69.

Instruction on liability of broker for negligent failure to provide insurance coverage held not prejudicial. *Ibid.*

§ 68. Fire Insurance—Insurable Interest.

Both a mortgagor and mortgagee have an insurable interest in encumbered property. *Ins. Co. v. Assurance Co.*, 485.

§ 72. Loss Payable Clause.

When mortgagee procures insurance pursuant to authority and at the expense of the mortgagor, proceeds of the policy must be applied to the mortgage debt. *Ins. Co. v. Assurance Co.*, 485.

A standard loss payable clause in a policy of fire insurance issued to the mortgagor constitutes a separate contract insuring the mortgage interest, and loss paid by insurer thereunder must be applied to the reduction of the mortgage debt. *Ibid.*

§ 74. Fire Insurance—Vacancy Clauses.

Provisions of a fire insurance policy relieving insurer of liability for loss occurring while the property is vacant are reasonable and enforceable. *Fire Fighters Club v. Casualty Co.*, 583.

Where the premises do not become vacant until after the issuance of the policy, the knowledge of insurer's agent of the vacancy cannot waive the provisions of the policy suspending the insurance if the premises should become vacant for a period in excess of sixty days, and the evidence in this case *is held* insufficient to show that the premises were vacant at the time the policy was issued. *Ibid.*

The premises in question were described in the policy as a dwelling, but insured contended that at the time the policy was issued insurer's agent was advised that the insured had purchased the property for use as a club house. The evidence disclosed that at the time of the fire the premises had not been occupied for any purpose for a period in excess of sixty days. *Held:* Nonsuit

INSURANCE—*Continued.*

was proper, since vacancy for a period in excess of sixty days suspended the insurance regardless of whether the premises were used as a dwelling or a club house. *Ibid.*

The term "occupied" as used in a policy of fire insurance imports a practical and substantial occupancy and does not include a mere trivial or transient use. *Ibid.*

§ 76. Avoidance of Fire Policy for Nonpayment of Premiums.

Under a policy of fire insurance issued for a five-year term with provision for payment of the balance of premiums in three yearly installments, with further provision that if insurer elects to cancel the policy for default in any payment it should give insured five days written notice of intention to cancel, *held* insurer may not cancel for delay in payment of the premium installments unless it gives notice to insured of its election to do so in accordance with the terms of the policy, there being no waiver by insured. *Baysdon v. Ins. Co.*, 181.

§ 81. Cancellation of Fire Policies.

Insured procured a fire insurance policy for a five-year term and thereafter procured two other policies with intention of canceling the first, but did not so advise the first insurer until after loss. *Held:* Insured's uncommunicated intention to cancel the policy is insufficient to effect a cancellation by insured, and further does not constitute a waiver by insured of notice by insurer of insurer's election to cancel the policy for default in the payment of premium installments, mutual consent or agreement being essential to the cancellation of a policy by substitution. *Baysdon v. Ins. Co.*, 181.

Where insured finances the balance of the premium on a five-year term policy through a bank under an agreement providing that failure of insured to pay an installment when due should constitute an election upon the part of insured to cancel the insurance, *held*, failure to pay installments when due does not work an automatic cancellation of the policy and there is no cancellation unless the bank, pursuant to authorization, requests insurer to cancel the policy, a communicated request by insured or insured's authorized agent being necessary to a valid cancellation at the request of insured. *Ibid.*

§ 84. Companies Liable and Adjustment of Loss Among Companies Liable.

Where insurance policies provide that each insurer should not be liable for a greater portion of the loss than the amount its policy bears to the whole insurance on the property, each insurer has the right to maintain that another policy on the property had not been cancelled because of the failure of the insurer therein to give insured notice of cancellation as required by the policy, since the general rule that only insured may complain of want of notice may not be invoked to deprive an interested party of a legal right. *Baysdon v. Ins. Co.*, 181.

The property destroyed by fire was insured by a policy issued to the mortgagee under authority of the mortgagor and the mortgagor was liable for the premiums thereon. The property was also insured under a policy issued to the mortgagor, which policy contained a standard loss payable clause. *Held:* The loss is properly prorated between the insurers. *Ins. Co. v. Assurance Co.*, 485.

INSURANCE—*Continued.*

§ 86. Payment and Subrogation.

An insurance company paying the loss sustained in a fire maliciously set out by a minor in a school is subrogated to the rights of the county board of education against the parent of the minor under G.S. 1-538.1, since the right of subrogation is not limited to claims arising in tort but extends to rights afforded by statute. *Ins. Co. v. Faulkner*, 317.

Allegations that an insurer had paid plaintiff the entire loss sued for constitute a complete defense to plaintiff's right to maintain the action, G.S. 1-57, and plaintiff's assertion that payments made by insurer covered only a portion of the loss raises an issue of fact but cannot entitle plaintiff to have defendant's defense stricken from the answer. *Jewell v. Price*, 345.

When a mortgagee purchases with his own funds insurance solely for the protection of the debt due him, the insurer, upon payment of loss, is subrogated to the rights of the mortgagee against the mortgagor; but when the insurance is procured by the mortgagee pursuant to authority and at the expense of the mortgagor, no right of subrogation exists, and the amount paid by insurer must be applied to the discharge or reduction of the debt. *Ins. Co. v. Assurance Co.*, 485.

§ 92. Actions on Lightning, Windstorm and Hail Insurance.

Plaintiff's evidence, together with defendant's evidence, favorable to plaintiff, *held* sufficient to be submitted to the jury on the issue of whether the damage to plaintiff's property was caused exclusively by wind storm independent of any water damage. *Dunes Club v. Ins. Co.*, 294.

INTEREST

§ 1. Items Drawing Interest.

Interest may be allowed on damages for breach of contract from the date of the breach when the amount of damages is ascertained from the contract itself or from relevant evidence, or from both. *General Metals v. Mfg. Co.*, 709.

INTOXICATING LIQUOR

§ 5. Possession and Possession for Sale.

Constructive possession of nontaxpaid whiskey will support conviction. *S. v. Carver*, 229.

§ 9. Indictment and Warrant.

The printed form of the warrant for motor vehicle violations in this case had typewritten words naming defendant and specifying the date and place, followed by the printed words, "did unlawfully and willfully operate a motor vehicle upon the public streets or highways," followed by words written in ink, "(T)ransporting and possession of a quantity of nontaxpaid whiskey for the purpose of sale. . ." *Held:* The warrant is sufficient to charge defendant with the unlawful transportation of nontaxpaid whiskey, and under the circumstances the reference to "possession" and "for the purpose of sale" were non-prejudicial surplusage, there being no motion to quash for duplicity. *S. v. Wells*, 173.

INTOXICATING LIQUOR—*Continued.*

§ 13c. Sufficiency of Evidence and Nonsuit.

Evidence of constructive possession of nontaxpaid whiskey held insufficient to raise jury question. *S. v. Carver*, 229.

JUDGES

§ 2. Assignment to Hold Courts.

The Supreme Court will take judicial notice of the Minute Book showing the assignment of judges by the Chief Justice, and will take notice that the Superior Court judge holding the particular term of court in question had been assigned to hold said term. *Staton v. Blanton*, 383.

JUDGMENTS

§ 1. Nature and Requisites of Judgments in General.

The court may not order a nonresident over whom it has no jurisdiction to be joined as a party, even though such nonresident be a proper or even a necessary party, since jurisdiction of an action *in personam* can be acquired only by personal service, acceptance of service, or general appearance. *Burton v. Dixon*, 473.

§ 2. Time and Place of Rendition.

The court may render judgment out of the district with the consent of the parties. *Perry v. Jolly*, 306.

Under G.S. 7-65 as amended, a resident judge has jurisdiction to hear and determine in chambers, motion for judgment of voluntary nonsuit. *Scott v. Scott*, 642.

§ 6. Modification and Correction of Judgment and Record in Trial Court.

A court of record has inherent power to amend its records and supply defects or omissions or correct mistakes to make its records speak the truth. *S. v. Broadway*, 243.

§ 8. Nature and Essentials of Judgments by Consent.

The power of the court to sign a consent judgment is based upon the unqualified consent of the parties, and the judgment is void if the parties do not consent thereto at the time the court promulgates it as a consent judgment. *Overton v. Overton*, 31.

§ 13. Judgments by Default in General.

A default judgment may not be predicated on a complaint which fails to state a cause of action, and such judgment must be vacated upon defendant's motion notwithstanding the allowance of plaintiff's motion to amend, since the amendment may not relate back so as to deprive defendant of his opportunity to answer. *Cohee v. Sligh*, 248.

§ 18. Direct and Collateral Attack in General.

A void judgment is subject to collateral attack. *Clay v. Clay*, 251.

§ 22. Setting Aside Judgment for Surprise and Excusable Neglect.

A defendant duly served with process is required to give his defense that attention which a man of ordinary prudence usually gives his important business, and his failure to do so is not excusable. *Jones v. Fuel Co.*, 206.

Where a husband is duly served with process in a civil action and turns the suit papers over to his wife, and thereafter makes no inquiry as to whether anything had been done with respect thereto, his wife's neglect to take any action to defend the suit will be imputed to him, and the court's denial of his motion under G.S. 1-220 to set aside the default judgment taken against him will not be disturbed. *Ibid.*

The discretionary refusal of a motion to set aside a default judgment on the ground of surprise and excusable neglect will be upheld on appeal in the absence of a showing of abuse of discretion. *Ibid.*

Where defendants, served with summons and complaint, deliver the suit papers together with information concerning matters relating to their defense to their insurer, and the insurer forwards the papers to attorneys selected by it who are reputable attorneys duly licensed to practice in the State, the neglect of the attorneys to file answer within the time limited because of the confusion incident to hospitalization in the family of the attorney to whom the suit had been assigned, will not be imputed to the defendants, and the allowance of defendant's motion under G.S. 1-220 to set aside default judgment upon appropriate findings, including the finding of a meritorious defense, will not be disturbed on appeal. *Brown v. Hale,* 480.

While ordinarily the neglect of a reputable attorney authorized to practice law in this State will not be imputed to a defendant who is not himself in default, after counsel has filed answer defendant is required to give the case that attention which a man of ordinary prudence usually gives to his important business, and contact his attorney at reasonable intervals, and if he knows or is chargeable with notice that his attorney has become unable to conduct his case on account of departure from the State, serious illness or mental incapacity, or death, the neglect of the attorney to defend the action when called for trial is not excusable. *Gaster v. Goodwin,* 676.

The record disclosed that defendant employed counsel who aptly filed answer, that the case remained on the civil issue docket for more than ten years when the judge peremptorily ordered it set for trial, that the attorney was notified, and that neither defendant nor his attorney appeared and judgment on the jury's verdict was rendered without defendant's knowledge. There were no findings as to whether defendant was in contact with his attorney at reasonable intervals after answer was filed, or whether the attorney was incapacitated to defendant's actual or constructive knowledge. *Held:* The cause must be remanded for the findings of the crucial facts. *Ibid.*

§ 25. Attack of Consent Judgments.

The proper procedure to attack a consent judgment on the ground that a party thereto did not give his consent to the judgment as entered is by motion in the cause, and the court's findings of fact in regard thereto are conclusive when the findings are supported by any competent evidence. *Overton v. Overton,* 31.

The agreements of the parties to a consent judgment are reciprocal, and therefore when the judgment is void as to one of the parties because of the want of his consent at the time the judgment was entered, it is error for the court to eliminate from the judgment only that part which affects that party alone, since what is left is not what agreed to by the other parties, and therefore the judgment must be set aside in its entirety. *Ibid.*

JUDGMENTS—*Continued.*

§ 35. Bar of Judgments of Retraxit and Dismissal.

Unless reversed on appeal, a judgment dismissing an action upon a demurrer for failure of the complaint to state a cause of action is a bar to a subsequent action on substantially identical allegations. *Williams v. Contracting Co.*, 232.

JUDICIAL SALES

§ 4. Confirmation.

The resident judge of the district is a proper officer to confirm a judicial sale, and he may do so out of the district with the consent of the parties. *Perry v. Jolly*, 306.

Where the petitioner obtains an offer for the private purchase of lands at a judicial sale and asks the court to authorize and approve such sale, he may not thereafter complain that the order of confirmation was entered without a finding by the court that the sale was fair and just. *Ibid.*

§ 5. Validity and Attack of Sale and Title of Purchaser.

Confirmation constitutes the last and highest bidder at a judicial sale the equitable owner of the land, and he must be given notice and an opportunity to be heard upon a motion to set aside the sale, and his equitable title may be defeated only for fraud, mistake, collusion, or vitiating defect appearing on the face of the record. *Perry v. Jolly*, 306.

§ 8. Costs and Commissions.

A commissioner appointed to sell land for partition is entitled to have the Superior Court determine *de novo* the reasonableness of his commission upon appeal by some of the tenants in common from order of the clerk fixing such commission. The power of the clerk to fix a fee in an amount as he may deem just, fair and reasonabe, G.S. 1-408, is not divested by the provisions of G.S. 28-170. *Welch v. Kearns*, 367.

JURY

§ 3. Selection and Qualification.

The statute providing for the appointment of a jury commissioner for Madison County to select the jury list held constitutional. *Rice v. Rigsby*, 506.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Liens of Subcontractors.

In order for a subcontractor to recover against the owner, the subcontractor must show its subcontract with the contractor, material furnished and labor performed in substantial fulfillment thereof, a balance due it, notice to the owner prior to payment of the contract price by the owner to the principal contractor, and a balance due the principal contractor by the owner. *Mfg. Co. v. Construction Co.*, 649.

While there is no privity of contract between the subcontractor and the owner, the rights of a subcontractor to a lien arises under statutory provisions substituting it to the rights of the contractor as against the owner, G.S. 44-6, and therefore in a subcontractor's suit to enforce its lien the owner may set up as

defenses the failure of the principal contractor to construct the building in accordance with the contract and the failure of the subcontractor to perform its contract with the principal contractor, and may contest the balance, if any, due the subcontractor on its contract with the principal contractor. *Ibid.*

LANDLORD AND TENANT

§ 7. Duty to Repair and Liability for Injuries from Disrepair.

Evidence held not to show failure of lessor to equip elevator with proper safety devices or that there was any defect in the elevator known to lessor and not to plaintiff, an employee of lessee, and therefore nonsuit was proper in plaintiff's action against the lessor to recover for injuries sustained by paintiff when the elevator fell, the doctrine of *res ipsa loquitur* not being applicable. *Tarrant v. Hull*, 238.

LIBEL AND SLANDER

§ 2. Words Actionable Per Se.

Accusation that plaintiff came into defendant's home and took specified items of personal property constitutes a libel, since if the words do not charge larceny, they tend to subject plaintiff to disgrace, ridicule, odium or contempt. *Clement v. Koch*, 122.

§ 7. Privilege in General.

Allegation that defendant filed a libelous matter with the clerk of the Superior Court does not render the complaint demurrable on the ground of privilege when it does not appear from the complaint that defendant was acting other than in an individual capacity or that the words were uttered in a judicial proceeding. *Clement v. Koch*, 122.

§ 12. Pleadings.

Allegations that defendant filed with the clerk of the Superior Court a certain writing and by written application caused said writing to be recorded, *held* sufficient to support the inference that defendant was the author of the writing and caused its publication or republication. *Clement v. Koch*, 122.
Allegation that defendant published libelous matter referring to "Robert F. Clemmons" and that the matter was written about and injured plaintiff, Robert F. Clement, *held* sufficient under the doctrine of *idem sonans*. *Ibid.*

LIMITATION OF ACTIONS

§ 16. Procedure to Set up Defense of the Statute.

Unless a statutory limitation is a condition precedent annexed to the cause of action itself, the bar of the statute must be affirmatively pleaded by answer. *Overton v. Overton*, 31.

Mere denial, in the answer, of plaintiff's allegations that she had instituted claim in apt time and in the proper manner is not a sufficient plea of the applicable statute of limitations, certainly when it does not affirmatively appear from plaintiff's pleadings that the claim was not instituted within the time allowed, but defendant is required to set up the affirmative defense of the

LIMITATION OF ACTIONS—*Continued.*

statute, not merely by pleading the legal conclusion that plaintiff's claim is barred, but by alleging facts disclosing the lapse of time in excess of the statutory limitation between the date the cause accrued and the date the claim or action was instituted. *Ibid.*

The courts will not deem the statute pleaded in behalf of minors represented by duly appointed guardian *ad litem*. *Ibid.*

MASTER AND SERVANT

§ 3. Distinction Between Employee and Independent Contractor.

A specialist employed to overhaul and repair machinery on the owner's premises in the owner's absence and free of any supervision by the owner is an independent contractor. *Henry v. White*, 282.

§ 7. Dual Employments.

When one employer lends or hires machinery with an operator to another, which of the two employers is the superior in the performance of the work by the employee must be determined upon the facts of each particular case, and factors to be considered are whether the general employer retains the right to hire and fire, whether the general employer is in the business of lending equipment with workmen to operate it, and whether the general employer retains control of the manner of performing the work as distinguished from merely pointing out the place where and the time when the work should be performed. *Weaver v. Bennett*, 16.

§ 17. Liability of Contractee to Independent Contractor.

The owner employing a specialist to repair machinery on the owner's premises, free from control of the owner in the performance of the work, owes such specialist the duty to warn him of hidden dangers known to the owner and not known to the specialist, but the owner is not under duty to exercise care to provide a reasonably safe place for the specialist to work, the specialist being more cognizant of the dangers incident to the machinery than the owner himself. *Henry v. White*, 282.

§ 19. Liability of Independent Contractor for Injuries to Third Persons.

Designer and manufacturer of steel framing may be held liable by contractor's workmen injured in fall when framing collapsed. *Swaney v. Steel Co.*, 531; Manufacturer of stepladder may be held liable for failure resulting when the ladder broke because of defective construction and material. *Wilson v. Hardware, Inc.*, 660.

Evidence that a construction worker "rode the load" in erecting a truss and was seriously injured when the apex of the truss collapsed, that "riding the load" was usual and customary in such work, and that the worker had no means of knowing that the truss had not been designed to withstand the stress of erection in such manner, *is held* not to disclose contributory negligence as a matter of law on the part of the worker in his action against the designer and fabricator of the truss. *Swaney v. Steel Co.*, 531.

The person furnishing a scaffold for the use of painters in the painting of a ceiling twenty-five to thirty feet above the floor owes to the painters using the scaffold, independent of any contractual relationship, the duty to use proper

MASTER AND SERVANT—*Continued.*

care in the construction of the scaffold and to supply a reasonably safe structure, the instrumentality being inherently dangerous if not properly constructed. *Casey v. Byrd*, 721.

Evidence tending to show that a tubular-type steel scaffold furnished by defendant fell because one of the crossarms bracing a section of the scaffold was not equipped with a safety lock takes the issue of defendant's negligence to the jury, and is sufficient to overrule motion for nonsuit. *Ibid.*

Evidence that plaintiff workman was an apprentice painter and had had little or no experience with tubular-type scaffolding, that his foreman inspected the scaffolding, and that plaintiff had no control over it, does not disclose contributory negligence or assumption of risk as a matter of law on the part of plaintiff in using the scaffold which was not equipped with a safety lock on a crossarm brace, whether the defect was an obvious condition or was a concealed danger being a question for the jury. *Ibid.*

§ 21. Liability of Contractor to Contractee in Performance of Work.

Even when the crucial question is whether defendant was employed to do the work as an independent contractor or whether plaintiff merely leased defendant's servant and equipment in order to do the job himself, evidence that defendant did not obtain liability insurance for the job cannot be admissible as tending to show that defendant did not regard himself as liable in the performance of the work, since the prejudicial effect of the evidence outweighs any probative force it may have on the question. *Electric Co. v. Dennis*, 354.

§ 29. Contributory Negligence of Employee.

An employee will not be held contributorily negligent as a matter of law in obeying an order of his superior unless the order is so obviously dangerous that a reasonably prudent man, under similar circumstances, would have disobeyed the order and quit the employment rather than incur the hazard. *Swaney v. Steel Co.*, 531.

The violation of a rule issued by the Department of Labor under G.S. 95-11 for the purpose of protecting construction employees from dangerous methods of work may not be asserted by a third person tort feasor as contributory negligence of the employee so as to relieve itself of liability for injury to the employee proximately caused by its negligence. *Ibid.*

§ 32. Liability of Employee for Injuries to Third Persons in General.

Where the jury finds that the railroad company's employees were not guilty of negligence in the particulars alleged with respect to warning plaintiff's intestate of the backing of a box car over the crossing, such finding exonerates the railroad company sought to be held liable under the doctrine of *respondent superior*, since any verdict against it must be predicated upon the negligence of its employees or agents. *May v. R. R.*, 43.

§ 45. Nature and Construction of Compensation Act in General.

The Compensation Act must be liberally construed to effectuate its purpose to provide compensation for workers injured in industrial accidents. *Keller v. Wiring Co.*, 222.

§ 53. Injuries Compensable in General.

The death of an employee is compensable under the Workmen's Compensation Act only if it results from an injury from an accident arising out of and in the course of the employment. *Cole v. Guilford County*, 724.

MASTER AND SERVANT—*Continued.*

§ 54. Causal Relation Between Employment and Injury.

The words "out of" refer to the origin or cause of the accident and the words "in the course of" to the time, place, and circumstances under which the accident occurred, and in order for an accident to arise out of the employment there must be some causal connection between the injury and the employment so that it can be traced to the employment as a contributing proximate cause, while if the injury arises from a hazard to which the employee would have been equally exposed apart from the employment, it does not arise out of the employment, and the fact that the accident occurs on the employer's premises is immaterial. *Cole v. Guilford County*, 724.

Fall of aged employee because her leg "gave way" due to physical infirmity *held* caused by idiopathic condition unconnected with employment and not compensable. *Ibid.*

§ 57. Negligence or Wilful Act of Fellow Employee.

Evidence held not to show that person whose negligence caused injury was fellow-employee, and nonsuit of common law action for such negligence was error. *Weaver v. Bennett*, 16.

§ 63. Hernia and Back Injuries.

Evidence that claimant received an injury while attempting, alone, to elevate and hold a 175 pound cabinet in place while another workman secured it to the wall, and that three men were usually assigned to the installation of such cabinets on the construction job, *is held* sufficient to sustain a finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment. *Davis v. Summitt*, 57.

Evidence that while digging a ditch 12 inches wide by 14 inches deep, claimant came upon a rock some 24 inches long and 12 inches wide, weighing 50 to 100 pounds, that claimant dug around the rock, bent down to pick it up, and, as he twisted to heave it out of the ditch felt a catch in his back, together with expert testimony that the rupture of claimant's spinal disc was caused by the lifting episode and that lifting from such a twisted and cramped position multiplied the intensity of the stress upon the vertebrae, *is held* sufficient to sustain the Commission's findings that the injury resulted from an accident arising out of and in the course of the employment. *Keller v. Wiring Co.*, 222.

§ 69a. Compensation for Occupational Diseases.

Under G.S. 97-61.6 the dependents of a deceased employee are entitled to compensation if the employee dies as a result of silicosis within two years from the date of the last exposure or if the employee dies within 350 weeks from the date of last exposure to silicosis and while he is receiving or is entitled to receive compensation for disability due to silicosis, either partial or total, notwithstanding that the death does not result from silicosis. *Davis v. Granite Corp.*, 672.

The clear intent of G.S. 97-16.6 to provide compensation for death from silicosis occurring within 350 weeks from the date of last exposure if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding G.S. 92-2(6), (10) and G.S. 97-52, since the specific provisions relating to silicosis which were enacted because of the peculiar course

MASTER AND SERVANT—*Continued.*

of the disease must be construed as an exception to the general tenor of the Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. *Ibid.*

§ 80. Cancellation of Compensation Insurance Policies.

Where the Industrial Commission does not find the facts upon which it holds that one insurer had cancelled its coverage and does not find the facts as to whether the other insurer had issued a policy requiring notice or a mere binder not requiring notice of termination and makes no findings as to notice, *held* there are not sufficient findings upon which to predicate the conclusion that the first insurer had cancelled its coverage and that the other insurer had terminated the coverage, and the cause must be remanded to the Industrial Commission for the finding of the predicate facts. *Moore v. Electric Co.*, 735.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission.

The Industrial Commission has exclusive original jurisdiction of the disbursement of funds received as a settlement from the third person tort feasor. *Cox v. Transportation Co.*, 38.

§ 84. Jurisdiction of Commission—Exclusion of Common Law Action Against Employer or Fellow-Employee.

In this action by workman against lessor and operator of machinery rented by plaintiff's employer, the evidence *held* not to show as a matter of law that plaintiff and operator of machinery were fellow employees, and nonsuit was erroneously entered. *Weaver v. Bennett*, 16.

Where the findings show that the employer-employee relationship existed with respect to plaintiff's injury and the evidence discloses that both plaintiff and defendant were co-employees and the injury arose out of and in the course of plaintiff's employment, action at common law instituted by plaintiff is properly dismissed for want of jurisdiction. *Neal v. Clarey*, 163.

§ 86. Common Law Action Against Third Person Tort Feasor.

The Industrial Commission has exclusive original jurisdiction of the disbursement of funds received in a settlement with the third person tort-feasor. *Cox v. Transportation Co.*, 38.

An agreement for the payment of compensation is binding on the parties when approved by the Industrial Commission, G.S. 97-84, and therefore where such agreement has been signed and approved by the Commission and an award entered thereon, and the Commission has entered an order setting aside the award alone without disturbing the Commission's approval or the agreement of the parties, such agreement precludes action at common law. *Neal v. Clary*, 163.

§ 93. Review of Award in Superior Court.

In passing upon exceptions to the findings of the Industrial Commission, the function of the Superior Court is to determine whether there is any evidence of substance which directly or by reasonable inference tends to support the findings, in which event the findings are conclusive, even though the evidence would also support findings to the contrary. *Keller v. Wiring Co.*, 222; *Cole v. Guilford County*, 724.

MASTER AND SERVANT—*Continued.*

On appeal from award of the Industrial Commission the Superior Court is limited to questions of law or legal inference and is bound by findings of fact, supported by competent evidence, but the Superior Court is not bound by conclusions of law, even though such conclusions be denominated findings of fact. *Moore v. Electric Co.*, 735.

§ 97. Construction and Operation of Employment Security Act in General.

The 1961 Amendment to the Employment Security Act, G.S. 96-14(4), which imposes a further disqualification on the right of employees to unemployment benefits upon the stoppage of work because of a strike, differs only in degree and not in principle to disqualifications theretofore provided, and the amendment is uniform in its application to the class specified and is therefore a constitutional exercise of the police power, the wisdom of the enactment being solely a legislative question. *In re Abernethy*, 190.

The Employment Security Act will be construed in the light of the legislative purposes of providing aid to those out of work through no fault of their own, and to provide for the accumulation of funds necessary to this end by a tax on employers, supplemented by Federal grant, and it was not contemplated that such funds should be depleted by, or used to encourage, work stoppages. *Ibid.*

§ 106. Right to Unemployment Compensation—Strikes.

Under the 1961 Amendment to the Employment Security Act, G.S. 96-14(4), where there is a strike of a group of employees which forces the employer to shut down his operations in this State, employees in this State, members of a separate union and different classification who are not on strike but who are out of work because of the strike, are not entitled to unemployment compensation benefits, notwithstanding that the striking employees are not based in this State when they perform, at terminals in this State, duties essential to the operation of the employer's business. *In re Abernethy*, 190.

§ 108. Appeal and Review of Decisions of Employment Security Commission.

The findings of fact of the Employment Security Commission are conclusive on appeal when the findings are supported by competent evidence. *In re Abernethy*, 190.

MORTGAGES AND DEEDS OF TRUST

§ 32. Deficiency and Personal Liability.

Where the purchaser of land executes a note and a deed of trust to secure the balance of the purchase price, he may recover against the seller for the seller's failure to insert a statement to this effect in the papers, only for loss sustained as a result of being required to pay a deficiency judgment, and he may not maintain an action therefor prior to the rendition of a deficiency judgment against him. *Childers v. Parker's, Inc.*, 237.

MUNICIPAL CORPORATIONS

§ 4. Legislative Control, and Powers of Municipal Corporations in General.

Municipal corporations have only those powers expressly conferred upon them by the General Assembly and those necessarily implied from those expressly conferred. *S. v. Byrd*, 141.

The Urban Redevelopment Law is a constitutional delegation of power by the State to municipal corporations, but the statute cannot authorize municipalities to levy a tax or issue bonds for a redevelopment project without a vote. *Horton v. Redevelopment Comm.*, 605.

§ 10. Liability for Torts in General.

A municipality may not be held liable for injuries inflicted by its police officer in assaulting a person arrested by him, notwithstanding allegations that the police officer was an agent of the municipality and that the municipality was negligent in failing to exercise ordinary care in the selection of its police officers, since a municipality may not be held liable in tort for acts committed by its agent in the performance of a governmental duty. *Croom v. Burgaw*, 60.

§ 12. Injuries from Defects and Obstructions in Streets or Sidewalks.

A municipality is under duty to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for travel by those using them in a proper manner and with due care, but it is not an insurer of the safety of its sidewalks. *Falatovitch v. Clinton*, 58.

Evidence that a broken place in the sidewalk some ten inches by seven inches had filled with dirt and trash level with the sidewalk, and that in walking along the sidewalk plaintiff's heel went into the hole and her ankle turned over causing her to fall, *is held* insufficient to overrule nonsuit, since a municipality's failure to correct such minor defect in the sidewalk cannot constitute a breach of its legal duty. *Ibid.*

§ 24.1. Construction of Municipal Ordinances in General.

A municipal ordinance must be construed to ascertain and effectuate the intention of the municipal legislative body to ascertain from the language of the ordinance. *Bryan v. Wilson*, 107.

The doctrine of *ejusdem generis* may be applied in proper instances in the construction of municipal ordinances, but the doctrine applies generally only to instances in which several classes of persons or things are enumerated, followed by a provision for "other" persons or things. *Ibid.*

§ 25. Zoning Ordinances and Building Permits.

A municipal board of adjustment has no authority to amend a zoning ordinance but must enforce it as written. *Bryan v. Wilson*, 107.

The zoning ordinance in question permitted "(S)chools, institutions of an educational or philantropic nature, public buildings." *Held:* The doctrine of *ejusdem generis* does not apply, and the ordinance permits the erection of a building by private owners to be used for a United States Post Office. *Ibid*

A municipal planning and zoning commission has no legislative, judicial or quasi-judicial power, and the city council acts in the exercise of its legislative function in determining whether the commission's recommendations in regard to the enactment of zoning ordinances should be followed. *In re Markham*, 566.

MUNICIPAL CORPORATION—*Continued.*

Certiorari is improperly granted to review the refusal of a city council to amend the municipal zoning ordinance with respect to petitioner's lands, since the courts will not attempt to control the exercise of legislative power. *Ibid.*

§ 28. Control, Regulation and Authority over Streets.

The owner of a drive-in restaurant abutting a street at an intersection is not entitled to restrain the municipality from constructing a median preventing the left turning of traffic into or from the street even though the median is not constructed across an intersection some miles distant at which a competitor maintains its business. *Gene's v. Charlotte*, 118.

Municipality held without authority to prohibit sale of ice cream products from mobile units on streets. *S. v. Byrd*, 141.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Where a statute fixes a standard of conduct and provides that its violation should be a criminal offense, its violation is negligence *per se* in a civil action instituted by a person who has sustained injury proximately resulting from such violation, but where no statute fixes a standard of conduct, whether the injured person's conduct amounts to contributory negligence must be determined by the rule of the reasonably prudent person under the circumstances. *Swaney v. Steel Co.*, 531.

A safety code voluntarily adopted by the manufacturer of a particular device as a guide to be followed for the protection of the public in the design and manufacture of such article is at least some evidence that a reasonably prudent person would have adhered to the requirements of such code. *Wilson v. Hardware*, 660.

§ 3. Sudden Peril and Emergencies.

A person confronted with a sudden emergency is not required to select the wisest choice of conduct but only such choice as a reasonably prudent man, similarly situated, would have made. *Crowe v. Crowe*, 55.

§ 7. Proximate Cause and Foreseeability of Injury.

Foreseeability of injury is an essential element of proximate cause. *Crowe v. Crowe*, 55; *Pettus v. Sanders*, 211.

Negligence must be the proximate cause of injury in order to be actionable. *Reason v. Sewing Machine Co.*, 264.

§ 8. Concurring and Intervening Negligence.

Where second impact does not contribute to the personal injuries or damages to property, author of second impact cannot be guilty of concurring negligence. *Ritch v. Hairston*, 729.

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance is applicable when both plaintiff and defendant have been negligent and the defendant has time, after the respective negligences have created the hazard, to avoid the injury. *McMillan v. Horne*, 159; *Scott v. Darden*, 167.

NEGLIGENCE—*Continued.*

The doctrine of last clear chance is essentially one of proximate cause and relates to defendant's negligence constituting a new proximate cause after defendant's negligence and plaintiff's negligence have created the hazard. *Scott v. Darden*, 167.

§ 12. Assumption of Risks.

Assumption of risk will not bar recovery when the factor causing the injury cannot be considered to have been included in the risk to which plaintiff exposed himself in taking the position of peril, since assumption of risk is founded on knowledge. *Swaney v. Steel Co.*, 531.

§ 22. Competency and Relevancy of Evidence.

Evidence that defendant did not obtain liability insurance for the job is incompetent even for the purpose of showing defendant did not regard himself as liable for the job, since the prejudicial effect of the evidence outweighs any probative force it may have on the issue of liability. *Electric Co. v. Dennis*, 355.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence *held* sufficient to be submitted to jury on issue of negligence of operator of a Unit Backhoe in backing over workman. *Weaver v. Bennett*, 16.

Evidence which establishes nothing more than an accident and an injury is insufficient to go to the jury, but plaintiff must introduce competent evidence tending to show defendant's failure to exercise that degree of care which a reasonably prudent person would have exercised under like circumstances and that such failure was the proximate cause or one of the proximate causes of the injury. *Kinlaw v. Willetts*, 579.

Negligence must be the proximate cause of injury in order to be actionable, and therefore nonsuit must be allowed when there is no evidence of a causal relation between the alleged neglignce and the injury complained of. *Reason v. Sewing Machine Co.*, 264.

Evidence held insufficient to show that oil sprayed into plaintiff's eyes while using sewing machine was the cause of conjunctiva. *Ibid.*

The inference of negligence may be drawn from facts in evidence but such inference may not be based on other inferences. *Ibid.*

§ 26. Nonsuit for Contributory Negligence.

Evidence *held* not to show contributory negligence as a matter of law on part of workman injured by backing Unit Backhoe. *Weaver v. Bennett*, 16.

Contributory negligence become a question of law only when plaintiff's evidence so clearly establishes it that no other reasonable inference may be drawn therefrom. *Swaney v. Steel Co.*, 531.

§ 28. Instructions in Negligence Actions.

Foreseeability is a requisite of proximate cause, even though plaintiff relies upon the violation of a safety statute constituting negligence *per se*, and an instruction which does not submit the element of foreseeability, even though in the other aspects the charge correctly defines proximate cause, must be held for error, and such omission cannot be held mere technical error when the evidence squarely presents the question whether defendant, under the circum-

NEGLIGENCE—*Continued.*

stances, could or should have foreseen injurious consequences. *Pettus v. Sanders*, 211.

A correct charge on aspects of negligence presented by the evidence and on proximate cause is rendered prejudicial by a further instruction permitting the jury to answer the issue of negligence in the affirmative if defendant was "negligent in any other way which the court may not have specifically mentioned," since such additional instruction does not confine the jury to aspects of negligence raised by the pleadings and supported by evidence. *Electric Co. v. Dennis*, 354.

§ 30. Verdict and Judgment.

Where the jury answers the issues of negligence, contributory negligence, and last clear chance in the affirmative, but it is determined on appeal that there is insufficient evidence to support the submission of the third issue to the jury, the third issue must be stricken and the cause remanded for judgment denying recovery. *McMillan v. Horne*, 159.

§ 31. Elements of Culpable Negligence.

Culpable negligence in the law of crimes is more than a mere want of due care, and is such recklessness or carelessness resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and each case must be determined upon its own particular facts. *S. v. Fuller*, 111.

§ 37b. Duties to Invitees in General.

A store proprietor is not an insurer of the safety of its customers but is only under duty to exercise reasonable and ordinary care to keep that part of its premises maintained for use of its customers in a reasonably safe condition for their use and to give warning of any hidden perils or unsafe conditions insofar as they may be ascertained by reasonable inspection and supervision, the rule of care being constant while the degree of care varies with the exigencies of the occasion. *Raper v. McCrory-McLellan Corp.*, 199.

Where a condition on the premises of a store constituting danger to patrons of the store is created by third parties or an independent agency, the store proprietor cannot be held liable for injury to a patron from such danger unless the condition exists for such a length of time that the proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the dangerous condition or given proper warning of its presence. *Ibid.*

The proprietor of a store will be charged with knowledge of a dangerous condition created by his own negligence or the negligence of his employees acting within the scope of their employment, or a dangerous condition of which the employees have notice. *Ibid.*

The proprietor of a store is not under duty to warn the customer of a condition which is obvious to any ordinarily intelligent person. *Coleman v. Colonial Stores*, 241.

The proprietor of a store owes the duty to his customers to exercise reasonable care to keep the aisles and passageways in a reasonably safe condition so as not to expose the customers unnecessarily to danger, and the duty to give warning of unsafe conditions of which the proprietor knows or in the

NEGLIGENCE—*Continued.*

exercise of reasonable supervision and inspection should know, but the proprietor is not an insurer of the safety of his customers. *Norris v. Department Store*, 350.

Where an unsafe condition is created by third parties or an independent agency, plaintiff must show that such condition had existed for such a length of time that defendant knew, or by the exercise of reasonable care should have known, of its existence in time to have removed the danger or to have given proper warning of its presence, and what length of time is sufficient to charge the proprietor with implied knowledge depends upon the facts and circumstances of each case. *Ibid.*

§ 37f, 37g. Sufficiency of Evidence of Negligence and Contributory Negligence in Action by Invitee.

In this action by customer to recover for fall in store, evidence held for jury on issue of negligence and held not to show contributory negligence as matter of law. *Raper v. McCrory-McLellan Corp.*, 199.

No inference of negligence arises from the mere fact of a customer's fall on the floor of a store during business hours, nor does the presence of debris, litter or other substances on the floor of the store establish negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable. *Ibid.*

Evidence tending to show that defendant, a self-service market, maintained a meshed metal screen, basically in the shape of a right triangle, at a right angle to the exit door when it was closed, that the metal screen could be plainly seen through the glass exit door by a person approaching the door, that plaintiff approached the door holding two sacks of groceries, which partially obstructed his vision, turned left in a hurry after passing through the exit door and fell over the metal screen, *held* insufficient to show negligence on the part of the proprietor and to show failure on the part of plaintiff to exercise ordinary care for his own safety. *Coleman v. Colonial Stores*, 241.

Evidence held insufficient to be submitted to jury on issue of negligence of store proprietor. *Norris v. Department Store*, 350.

PARENT AND CHILD

§ 5. Right to Custody of Child.

Parents are the natural guardians of their children and have the legal right to the custody, companionship, and control of their children, which right, while not absolute, may not be interfered with or denied except when the interest and welfare of the children clearly require it. *Spitzer v. Lewark*, 49.

Mental illness alone is insufficient ground to deprive mother of custody of child if she remains capable of proper supervision. *Ibid.*

§ 7. Liability of Parent for Torts of Child.

At common law the mere relationship of parent and child did not impose liability on the parent for the torts of the child, but liability on the part of the parent usually obtained only when there was an agency relationship or when the parent in some way joined in the commission of the tort. *Ins. Co. v. Faulkner*, 317.

PARENT AND CHILD—*Continued.*

G.S. 1-538.1 imposing liability on the parent not exceeding $500 for malicious or willful destruction of property is a constitutional exercise of the police power. *Ibid.*

PARTIES

§ 2. Parties Plaintiff.

Where insurer has paid the entire loss the action may be maintained only by insurer. *Jewell v. Price*, 345.

The appointment of an agent by the owner of property does not divest the owner of his property rights, and the agent is not the real party in interest and cannot maintain an action on the chose. *Morton v. Thornton*, 697.

§ 8. Joinder of Additional Parties.

The court may not order a nonresident over whom it has no jurisdiction to be joined as a party, even though such nonresident be a proper or even a necessary party, since jurisdiction of an action *in personam* can be acquired only by personal service, acceptance of service, or general appearance. *Burton v. Dixon*, 473.

PARTITION

§ 9. Commissions.

A commissioner appointed to sell land for partition is entitled to have the Superior Court determine *de novo* the reasonableness of his commission upon appeal by some of the tenants in common from order of the clerk fixing such commission. The power of the clerk to fix a fee in an amount as he may deem just, fair and reasonable, G.S. 1-408, is not divested by the provisions of G.S. 28-170. *Welch v. Kearns*, 367.

PHYSICANS AND SURGEONS

§ 11. Nature and Extent of Liability of Physicians or Surgeon for Malpractice.

A physician is required to possess that degree of professional knowledge and skill which others similarly situated ordinarily possess, to exercise reasonable care and diligence in the application of his knowledge and skill for the patient's care and to use his best judgment in the treatment and care of the patient, and may be held liable by the patient for injury resulting from failure in any one of these respects. *Stone v. Proctor*, 633.

§ 15. Competency and Relevancy of Evidence in Malpractice Suits.

In an action against a psychiatrist to recover for injuries resulting from the repetition of electroshock treatment after the first such treatment had caused pain of which paintiff had complained and given notice to defendant, plaintiff is entitled to introduce in evidence the "Standards for Electroshock Treatment" prepared by the American Psychiatric Association, of which defendant was a Fellow, setting forth a standard of practice, with which defendant was familiar, to make X-ray examination if a patient complained of pain after electroshock treatment. *Stone v. Proctor*, 633.

PHYSICIANS AND SURGEONS—*Continued.*

§ 17. Sufficiency of Evidence of Negligence.

Evidence tending to show that plaintiff, after receiving an electroshock treatment administered by defendant or under his control, complained of pain in his back, that further shock treatments were administered without X-ray examination of plaintiff to ascertain if he had suffered accidental injury as the result of the first, that such X-ray examination was standard practice in such instance, and that shortly thereafter X-ray examination by another physician disclosed that plaintiff had suffered a compressed fracture of recent date of the ninth thoracic vertebra, *is held* sufficient to overrule nonsuit in an action for malpractice. *Stone v. Proctor*, 633.

PLEADINGS

§ 2. Statement of Cause of Action in General.

Plaintiff's pleadings should contain a statement of the substantive and constituent facts upon which plaintiff's claim to relief is based, and a prayer for the relief to which plaintiff supposes himself entitled, G.S. 1-122(2), G.S. 1-122(3), and should not contain a narration of the evidence. *Johnson v. Johnson*, 430.

§ 4. Prayer for Relief.

The relief to which plaintiff is entitled is determined by the facts alleged and not the prayer for relief, and prayer for inapposite relief is not material. *Board of Education v. Board of Education*, 280.

§ 8. Counterclaims.

In a daughter's action against the estate of her father to recover for personal services rendered her father prior to his death, the personal representative's counterclaim alleging that the daughter and her husband conspired to obtain control of her father's property, and pursuant thereto the husband procured power of attorney under which he sold merchantable timber and converted the proceeds to their use, *held* to meet the requirements of G.S. 1-137 that a several judgment must be permissible on a counterclaim. *Burton v. Dixon*, 474.

In an action *ex contractu* defendant may set up a counterclaim in tort if it arises out of the same transaction or is connected with the subject of the action. *Ibid.*

A counterclaim is substantially a cause of action which must be alleged with the precision and certainty required of a complaint, and when the allegations in a counterclaim are so vague, general, and indefinite as to be insufficient to constitute a cause of action it is not a basis for a judgment against plaintiff for damages and may amount only to a defense to plaintiff's recovery. *Mfg. Co. v. Construction Co.*, 649.

§ 12. Office and Effect of Demurrer.

A demurrer admits the truth of the facts properly alleged in the complaint and the relevant inferences deducible therefrom, but such admission is solely for the purpose of the demurrer and does not obtain if the demurrer is overruled, nor does the demurrer admit inferences or conclusions of law. *Ins. Co. v. Faulkner*, 317; *Johnson v. Johnson*, 430; *McCallum v. Ins. Co.*, 573; *Horton v. Redevelopment Comm.*, 605.

PLEADINGS—*Continued.*

Where there is no appeal from an order sustaining a demurrer to a pleading and granting the pleader time to amend, the ruling becomes the law of the case and the pleading can be made effective only by an amendment supplying the deficiencies. *Johnson v. Johnson*, 430.

The requirement that a pleading be liberally construed upon demurrer with a view to substantial justice between the parties does not warrant the court in reading into a pleading facts which it does not contain. *Ibid.*

§ 13. Time of Filing Demurrer and Waiver of Right to Demur.

The filing of answer waives all grounds for demurrer except want of jurisdiction or failure of the complaint to state a cause of action. *Short v. Sales Corp.*, 133.

§ 15. Defects Appearing on Face of Pleading and Speaking Demurrers.

A demurrer *ore tenus* which fails to specify the grounds of objection may be disregarded. *Short v. Sales Corp.*, 133.

A demurrer must be determined upon the face of pleadings and the court may not hear evidence or find facts *dehors* the record. *Jewell v. Price*, 345.

§ 18. Demurrer for Defect of Parties.

A cause may not be dismissed upon demurrer for mere joinder of parties who are neither necessary nor proper parties. *Boone v. Pritchett*, 226.

Joinder of party necessary to complete determination of the controversy cannot constitute misjoinder. *Burton v. Dixon*, 473.

§ 19. Demurrer for Failure of Pleading to State Cause of Action or Defense.

The relief to which plaintiff is entitled is determined by the allegations of the complaint and not the prayer for relief, which is not a necessary part of the complaint, and the fact that plaintiff may have demanded a relief to which he is not entitled is not ground for demurrer. *Board of Education v. Board of Education*, 280.

Conflicting allegations in a pleading neutralize each other. *Motley v. Thompson*, 612.

Repugnant allegations of a pleading destroy and neutralize each other, therefore where it is alleged in one paragraph that a party defendant agreed to sell her interest in a business upon specified terms and conditions, and in another paragraph it is alleged that it was agreed that such party should retain her interest in the business subject to the pleader's right to call for a sale at a later date, and in another paragraph that such party was to take stock in corporation to be formed to operate the business, the allegations neutralize each other, and the pleading fails to state a contract to sell. *Johnson v. Johnson*, 43[illegible]

Plaintiff's pleadings in the instant case are held to contain such confusing and conflicting allegations of fact as to constitute the pleading a statement of a defective cause of action against the *feme* defendant, so that upon sustaining her demurrer, the action was properly dismissed as to her. *Ibid.*

Where a pleading is defective in omitting allegations essential to plaintiff's cause of action, demurrer thereto is properly sustained, but the action should

PLEADINGS—*Continued.*

not be dismissed without giving plaintiff an opportunity to amend. *Murray v. Aircraft Corp.*, 638.

§ 28. Variance Between Allegation and Proof.

Plaintiffs must prevail, if at all, upon the theory of the complaint. *Conference v. Miles*, 1.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

The issues arise upon the pleadings. *Conference v. Creech*, 1; *Vinson v. Smith*, 95.

When a fact alleged by one party is admitted in the pleading of the other, no issue arises thereon and both parties are bound thereby. *Vinson v. Smith*, 95.

Where the original answer denies the existence of a material fact but the amended answer admits such fact, the fact is no longer at issue. *Perry v. Jolly*, 306.

§ 30. Judgment on the Pleadings.

Judgment on the pleadings is correctly denied when the pleadings raise an issue of fact on any single material proposition. *Motley v. Thompson*, 612.

§ 34. Motions to Strike.

A motion to strike a pleading in its entirety and dismiss the action is in substance, if not in form, a demurrer to the pleading. *Johnson v. Johnson*, 430.

Allegations that an insurer had paid plaintiff the entire loss sued for constitute a complete defense to plaintiff's right to maintain the action, G.S. 1-57, and plaintiff's assertion that payments made by insurer covered only a portion of the loss raises an issue of fact but cannot entitle plaintiff to have defendant's defense stricken from the answer. *Jewell v. Price*, 345.

PRINCIPAL AND AGENT

§ 3. Revocation of Agency.

A power of attorney to sell specified realty which stipulates that the agent should be the principals' attorney in fact irrevocably and forever, is not an agency coupled with an interest and is terminated by the death of the principals. *Godwin v. Trust Co.*, 520.

QUIETING TITLE

§ 2. Actions to Remove Cloud from Title.

A complaint alleging that plaintiff's claim under a deed containing a description set forth is demurrable when the description is void for indefiniteness. *Boone v. Pritchett*, 226.

In an action to quiet title against parties claiming under a commissioner's deed, the commissioner is not a proper party when there is no allegation that he was ever in possession of the land or received any rents and profits from it. *Ibid.*

Plaintiffs, in an action to quiet title, may assert that defendants claim under a tax foreclosure deed and may attack the validity of the tax foreclosure

QUIETING TITLE—*Continued.*

deed as to them on the ground that they held a vested remainder in the lands and were not parties to the tax foreclosure, since a void judgment is subject to collateral attack. *Clay v. Clay*, 251.

RAILROADS

§ 5. Crossing Accidents—Injuries to Drivers.

The fact that a railroad company permits its crossing to become obstructed with vegetation or other objects does not constitute actionable negligence within itself, since such obstacles relate solely to whether the crossing was unusually dangerous so as to require the train crew to give warning of the approach of its train. *May v. R. R.*, 43.

If the jury finds that the defendant railroad's employees were not negligent, the railroad cannot be held liable under the doctrine of *respondeat superior*. *Ibid.*

Evidence tending to show that plaintiff was injured when defendant's train collided with plaintiff's truck on a clear day at a grade crossing where the track was straight for 700 feet in the direction from which the train approached, *is held* to show contributory negligence as a matter of law on the part of plaintiff, notwithstanding evidence that plaintiff's view of the track was obstructed by weeds, there being no evidence from which it might have been inferred that the obstruction along the track was sufficient to hide materially the view of an approaching train. *Clark v. Sherrill*, 254.

REFERENCE

§ 11. Trial by Jury Upon Exceptions.

Where plaintiff's evidence is insufficient to support recovery on the issue raised by the pleadings, the court, on appeal from the referee, properly refuses to submit an issue tendered by plaintiffs, and properly enters judgment dismissing the action. *Coburn v. Timber Corp.*, 100.

REFORMATION OF INSTRUMENTS

§ 2. For Mistake Induced by Fraud.

The failure of an 83 year old insured, in feeble health, to read her certificate of term insurance as to its effective date and expiration date, *held* not to bar as a matter of law an action to reform the certificate to make it conform with the intention of the parties as to the effective and expiration dates. *McCallum v. Ins. Co.*, 573.

REGISTRATION

§ 2. Requisites and Sufficiency of Registration.

A timber deed in regular form having a valid assignment if the timber rights by the grantee in the deed endorsed on its back was duly registered, and the endorsement was transcribed on the records with the deed. *Held:* Even though the endorsement be sufficient as a conveyance of the timber rights, the endorsement was not acknowledged, and therefore there was no registration of the

REGISTRATION—*Continued.*

endorsement so as to defeat the rights of the creditors of the grantee in the deed. *Supply Co. v. Nations*, 681.

§ 6. Rights Under Unregistered Instruments.

The original grantor may not defeat the title of his grantee's transferee for value on the ground that the grantee procured the execution of the instrument by fraud and that the conveyance by the grantee was not registered, there being no contention that the transferee participated in any fraud or that the original grantor had reduced her claim against her grantee to judgment or filed *lis pendens*. *Supply Co. v. Nations*, 681.

RELIGIOUS SOCIETIES

§ 2. Government, Management and Property.

The right to possession and use of church property belongs to those of the congregation who have remained faithful to the doctrines, policy, and fundamental customs and rules of the denomination as accepted by the congregation prior to dissension. *Conference v. Miles*, 1.

§ 3. Actions Involving Property or Rights.

Civil courts will not adjudicate ecclesiastical matters except when and to the extent necessary to determine civil and property rights, *Conference v. Miles*, 1.

When civil courts are required to determine ecclesiastical questions they will do so in accordance with the laws, customs, and usages of the church involved, and the decisions of an authorized church tribunal will be accepted by the courts as conclusive when the church tribunal has acted within the scope of its authority and has observed its own organic forms and rules unless its procedure is arbitrary or manifestly unfair. *Ibid.*

Subject to the limitation that an eccleciastical tribunal may not follow procedure which is patently arbitrary or unfair, its procedure in matters properly within its jurisdiction is to be determined by such tribunal, and a civil court may not require it to observe the usual incidents of trial. *Ibid.*

Where it is established by the answer to the first issue that an ecclesiastical tribunal has final ecclesiastical authority and jurisdiction to decide between factions of a church congregation in the event of a division within the congregation, it is error for the court in charging the jury on succeeding issues to fail to explain the law arising on the conflicting evidence as to whether the circumstances and activities within the congregation were such as to invoke the jurisdiction of the tribunal and whether the procedure of the tribunal was arbitrary and unfair. Further, it is error for the court to charge that the procedure of an ecclesiastical tribunal must follow the only procedure known to it in determining such dispute. *Ibid.*

SALES

§ 10. Right of Seller to Recover the Goods on the Sales Price.

If after partial delivery the purchaser wrongfully breaches its contract to buy a specified number of articles, the seller is entitled to recover as his damages the unpaid balance of the contract price for the units delivered, the loss

of profits with respect to the undelivered portion of the order, measured by the difference between the contract price and the cost of manufacture, including cost of materials, direct cost of labor, overhead, and fixed charges incurred at the time of notification by the purchaser that it would not accept further shipments, and the cost of materials, less salvage, and of labor, overhead, and fixed charges wasted by reason of the breach. *Service Co. v. Sales Co.*, 400.

§ 14c. Parties and Pleadings in Actions or Counterclaims for Breach of Warranty.

A stranger to a contract of sale may not recover against the seller for breach of warranty, and in the absence of allegation by plaintiff that he purchased the chattel from defendant, demurrer is properly sustained in his action for breach of warranty, notwithstanding allegations pertinent to a cause of action for negligence that the chattel failed to comply with Federal statutes designed to promote safety and that plaintiff was injured as the result of such failure. *Murray v. Aircraft Corp.*, 638.

A guarantor of payment by the purchaser may not set up a counterclaim against the seller for breach of warranty and can realize no affirmative recovery thereon, but, at most, may set up damages for breach of warranty as a setoff to be subtracted from the indebtedness of the principal for which the guarantor is liable. *Service Co. v. Sales Co.*, 400.

§ 16. Actions by Purchaser or User for Personal Injuries from Defects.

A company designing and fabricating a steel truss for use in the erection of an edifice may be held liable by an employee of the contractor injured as the result of the collapse of the truss through faulty design while it was being erected by methods which could have been reasonably anticipated, since the manufacturer of a chattel is liable to those whom he should expect to use the chattel, or to be in the vicinity of its probale use, for injury caused by defects in the chattel in its use in the manner for which the chattel was supplied. *Swaney v. Steel Co.*, 531.

The evidence in this case to the effect that plaintiff worker was injured while "riding the load" in erecting a steel truss fabricated by defendant when the truss collapsed at its apex because of defect in design, that the truss would have collapsed even though the workmen had not "ridden the load," and that the erection of the truss in the manner directed by plaintiff's employer was a customary manner that should have been anticipated by defendant, *held* to take the issue of defendant's negligence to the jury. *Ibid.*

A manufacturer is not an insurer of the safety of chattels designed and manufactured by it but is under obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonably prudent man would use in similar circumstances. *Wilson v. Hardware*, 660.

Evidence tending to show that plaintiff was injured when a stepladder manufactured by defendent broke while he was using it, that the side rail that broke was made of wood specifically declared unfit for that purpose by the code voluntarily adopted by defendant as a guide and that the groove or mortise was cut deeper than permitted by such code, and that these failures to comply with the code requirements could have been discovered upon reasonable inspection, is sufficient to overrule nonsuit on the issue of defendant's negligence. *Ibid.*

SALES—*Continued.*

The person furnishing a scaffold for the use of painters in the painting of a ceiling twenty-five to thirty feet above the floor owes to the painters using the scaffold, independent or any contractual relationship, the duty to use proper care in the construction of the scaffold and to supply a reasonably safe structure, the instrumentality being inherently dangerous if not properly constructed. *Casey v. Byrd*, 721.

SCHOOLS

§ 10. Assignment of Pupils.

Allegation of a city board of education that it had assigned the children in question, residents within the unit, to a certain school within the district, and that defendant county board of education had permitted the children to attend a school under its supervision, *held* to state a cause of action entitling plaintiff to relief. G.S. 115-176, and the action was improperly dismissed upon demurrer. Whether plaintiff was entitled to mandamus as prayed in the complaint or only to injunctive relief is not necessary to a decision. *Board of Education v. Board of Education*, 280.

SEALS

A seal will not import consideration for a contract to convey, since equity disregards the form and observes the substance. *Cruthis v. Steele*, 701.

SEARCHES AND SEIZURES

§ 1. Necessity for Search Warrant.

Consent eleminates the necessity for a search warrant. *S. v. Mock*, 501.

§ 2. Requisites and Validity of Search Warrant.

The deputy clerk of the Municipal Court of the City of High Point has authority to issue a search warrant for illegal liquor, G.S. 7-198. The effect of G.S. 15-27.1 was not to nullify G.S. 18-13 but merely to make the requirements of G.S. 15-26 and G.S. 15-27 applicable to search warrants obtained under G.S. 18-13. *S. v. Mock*, 501.

STATE

§ 4. Liability of State or Its Agencies in Tort.

A county board of education is subject to suit in tort only insofar as it has waived its governmental immunity, and may be liable for negligent injury to a pupil on a school bus only if it has procured liability insurance, G.S. 115-53, or to the extent it may be held liable under the State Tort Claims Act. *Huff v. Board of Education*, 75.

§ 5a. Nature and Construction of Tort Claims Act in General.

A county or city board of education may be held liable under the Tort Claims Act for negligence of the driver of a school bus employed by such unit, but may not be held liable for negligence of a school principal or of the county or city board of education. *Huff v. Board of Education*, 75.

STATE—*Continued.*

The State Board of Education has been relieved of all responsibility in connection with the operation and control of school buses, and therefore may not be held liable for any negligence in connection with the operation thereof. *Ibid.*

§ 5d. Negligence and Contributory Negligence in Actions Under Tort Claims Act.

Evidence held insufficient to establish negligence of school bus driver. *Huff v. Board of Education*, 75; Contributory negligence on part of pupil voluntarily entering fight on school bus precludes recovery for injury. *Ibid.*

STATUTES

§ 1. Enactment by Reference.

The Safety Code for Building Construction is not referred to in the North Carolina Building Code and does not have the force of law through enactment by reference, G.S. 143-138, and therefore the safety code is not admissible in evidence. *Swaney v. Steel Co.*, 531.

§ 2. Constitutional Prohibition Against Enactment of Local Statutes Relating to Certain Matters.

The statute providing a jury commissioner for Madison County is not a statute dealing with the establishment of a court and does not come within the constitutional prohibition. *Rice v. Rigsby*, 506.

§ 4. Procedure to Test Constitutionality.

Constitutional questions are of great importance, and therefore a person attacking the constitutionality of a statute must address his objections in clear and direct language to a specific article, section and clause of the State or Federal Constitution, and further it is not the practice of the courts to adjudicate merely that a statute contravenes the State or Federal Constitution, but the courts ordinarily will point out specifically the constitutional provisions violated. *Rice v. Rigsby*, 506.

§ 5. General Rules of Construction.

The purposes sought to be accomplished by the legislative branch in the enactment of a statute will be given due consideration by the courts in construing the statute. *In re Abernathy*, 190.

Where a statute contains two independent clauses connected by a disjunctive, prescribing conditions of its applicability, the statute is applicable to cases falling within either clause and it is not required that the conditions of both clauses be met. *Davis v. Granite Corp.*, 672.

When the language of a statute is clear and free from ambiguity, the courts must give it its plain and definite meaning. *Ibid.*

A special or particular provision of a statute which, standing alone, would seem to be in conflict with a general provision if the same act, will ordinarily be construed to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict. *Ibid.*

§ 7. Construction of Amendments.

Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same

STATUTES—*Continued.*

meaning and effect that they had before the amendment. G.S. 12-4. *Rice v. Rigsby*, 506.

§ 11. Repeal by Implication.

The repeal of a prior statute by implication is not favored, and the silence of a later statute in regard to a matter in which a prior statute has spoken in express terms will not effect a repeal in regard to such matter but both statutes will be construed together and effect be given the provisions of both. *In re Assessment of Sales Tax*, 589.

SUBROGATION

An insurer paying for damage to property owned by the insured is subrogated to the rights of the insured both under G.S. 58-176 and under equitable principles. *Ins. Co. v. Faulkner*, 317.

The right of subrogation is not limited to claims arising in tort but extends to rights afforded by statute. *Ibid.*

TAXATION

§ 6. Necessary Expenses and Necessity for Vote.

What is a necessary expense within the meaning of Article VII, § 7, of the State Constitution is a question of law for the courts. *Horton v. Redevelopment Comm.*, 605.

Necessary expenses of a municipality within the purview of Article VII, § 7, of the State Constitution are expenses incurred by a municipality in the maintenance of the public areas, the administration of justice, and the discharge of functions of a governmental nature in the exercise of a portion of the State's delegated sovereignty. *Ibid.*

An urban redevelopment plan is not a necessary expense of a municipality within the meaning of Article VII, § 7, of the State Constitution, and therefore a municipality may be enjoined from spending *ad valorem* taxes or levying taxes and issuing bonds for an urban redevelopment project until and unless such project is approved by a majority of the qualified voters of such municipality, and any provisions of G.S. 160-466 (b) and G.S. 160-470 authorizing a municipality to levy taxes and issue bonds for such purpose without a vote are unconstitutional. *Ibid.*

§ 28b. Income Tax on Foreign Corporations.

The mere fact that a foreign corporation engaged in business in this and other states owns a subsidiary corporation in another state, which subsidiary does no business in this State and owns no property here, does not in itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business, even though the subsidiary is engaged in a business similar to that of the parent corporation. *Bakeries Co. v. Johnson*, 419.

Same—

Plaintiff taxpayer was engaged in the wholesale bakery business, manufacturing and selling to customers not owned or controlled by it. Plaintiff tax-

TAXATION—*Continued.*

payer owned a subsidiary engaged in the manufacture and retail of bakery products, selling same to the general public, including restaurants and cafes, but the subsidiary purchased no products from plaintiff, and the subsidiary did no business in this State and owned no property here. *Held:* Plaintiff is not liable for income tax to this State on dividends received by it from the subsidiary. G.S. 105-134. *Ibid.*

§ 35. Collection and Enforcement.

The Tax Review Board is an administrative agency of the State within the purview of G.S. 143-306 and the Commissioner of Revenue is entitled to appeal under G.S. 143-307 from a decision of the Board reversing in part an assessment of taxes made by the Commissioner. G.S. 105-241.3 does not impliedly amend the prior statute so as to preclude the right of the Commissioner to appeal, but the two statutes must be construed together and effect given the provisions of both. *In re Assessment of Sales Tax*, 589.

The Commissioner of Revenue is a party aggrieved by a decision of the Tax Review Board reversing in part a tax assessed by the Commissioner, since the decision affects the duties and responsibilities of the Commissioner in assessing and collecting taxes due the State. *Ibid.*

TORTS

§ 4. Joinder of Parties for Contribution.

Where the original defendants have an additional defendant joined for contribution, the original defendants become plaintiffs in regard to their claim for contribution and have the burden of proof thereon. *Smith v. Whisenhunt*, 234.

When the jury returns judgment for plaintiff against the original defendants in a trial free from prejudicial error, but is unable to agree upon the issue of whether the additional defendant's negligence contributed to plaintiff's damages as alleged in the original defendants' cross action, the court properly enters judgment for plaintiff against the original defendants and orders the issue of contribution to be tried at a later date. *Ibid.*

Where the original defendant has an additional defendant joined on his cross action for contribution, the plaintiff alleging no cause of action against such additional defendant, the burden is upon the original defendant to establish by the greater weight of the evidence that the additional defendant was negligent and that such negligence concurred as a proximate cause of plaintiff's injury, and plaintiff's evidence against the original defendant which is contradictory to that of the original defendant cannot be used by the original defendant to supply deficiencies in his proof against the additional defendant. *Cartrette v. Canady*, 714.

TRESPASS

§ 1.1. Trespass to Personalty.

The basis of trespass to personalty is injury to possession and therefore the owner of a house may be liable for trespass if he unlawfully removes and damages chattels in the house in possession of another, and the denial of trespass in such instance raises an issue of fact for the jury. *Motley v. Thompson*, 612.

TRIAL

§ 20. Necessity for Motions to Nonsuit.

Where motion to nonsuit is not renewed after the introduction of evidence by defendant, defendant waives the matter. *Short v. Sales Corp.*, 133.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff must be given the benefit of every fact and every reasonable inference of fact arising upon the evidence, and all conflicts therein must be resolved in his favor. *Raper v. McCrory-McLellan Corp.*, 199; *Kinlaw v. Willetts*, 597.

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and evidence tending to contradict or impeach plaintiff's evidence must be disregarded, and all conflicts in the evidence resolved in plaintiff's favor. *Coleman v. Colonial Stores*, 241; *Mills v. Lynch*, 359.

Plaintiff's evidence against the original defendant which is contradictory to that of the original defendant cannot be used to supply deficiencies in the original defendant's cross-action against an additional defendant joined for contribution. *Cartrette v. Canady*, 714.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve and do not justify nonsuit. *Russell v. Hamlett*, 273; *Wiggins v. Ponder*, 277.

§ 25. Sufficiency of Evidence—Circumstantial Evidence.

An inference may be drawn from facts in evidence, but an inference may not be drawn from other inferences. *Kinlaw v. Willetts*, 598.

§ 29. Voluntary Nonsuit.

A resident judge has jurisdiction to hear and determine in chambers a motion for judgment of voluntary nonsuit. *Scott v. Scott*, 642.

Plaintiff may take a voluntary nonsuit as a matter of right, even in an action for divorce, if defendant has not set up a counterclaim, notwithstanding he has notice of defendant's intention to file a cross action for alimony without divorce, and, the nonsuit having been taken, there is no action pending in which a counterclaim or cross action may be asserted. *Ibid.*

§ 31. Directed Verdict and Peremptory Instructions.

While ordinarily a verdict may not be directed in favor of the party upon whom rests the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury. *Flintall v. Ins. Co.*, 666.

§ 33. Instructions—Statement of Evidence and Application of Law Thereto.

The court is required to apply the law to the conflicting factual situations presented by the evidence upon an issue and to bring into focus the controlling elements of controversy thereon. *Conference v. Miles*, 1.

It is error for the court to charge the jury as to matters materially affecting the issues but not raised by the pleadings or supported by the evidence in the case. *Electric Co. v. Dennis*, 354.

TRIAL—*Continued.*

§ 40. Form and Sufficiency of Issues.

The number, form, and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to enter judgment fully determining the cause. *Conference v. Creech*, 1.

The issues arise upon the pleadings. *Ibid.*

§ 56. Trial and Hearing by the Court.

In a trial by the court under agreement of the parties it will be presumed that the court disregarded incompetent evidence in making its findings, and the fact that some incompetent evidence may have been admitted will not be held prejudicial in the absence of a showing to the contrary, there being ample competent evidence to support the findings. *General Metals v. Mfg. Co.*, 709.

In a trial by the court under agreement of the parties, inconsistencies or contradictions in the evidence are for the court to resolve as the trier of the facts. *Ibid.*

TRUSTS

§ 5. Sale of Property by Trustee.

In an action against a trustee to enforce the trustee's agreement to sell an interest in a particular partnership, plaintiff must allege that the trustee had power to sell such interest. *Johnson v. Johnson*, 430.

§ 13. Creation of Resulting Trusts.

Where one party pays the purchase price for a conveyance made to another, for whom the first party has no obligation or duty to support, the transaction creates a resulting trust, provided the consideration for the conveyance is advanced at or before the time the deed is executed. *Vinson v. Smith*, 95.

§ 17. Presumptions and Burden of Proof.

In an action to establish a resulting trust upon conflicting evidence as to whether plaintiff or defendant furnished the consideration for the deed in question, the burden is upon the party seeking to establish the trust to prove his payment of the consideration by clear, strong, and convincing proof, and an instruction placing the burden upon such party to prove the issue by the greater weight of the evidence is prejudicial error. *Vinson v. Smith*, 95.

UTILITIES COMMISSION

§ 6. Hearings and Orders in Respect to Rates.

A proceeding in which a utility seeks an increase in rates for classes of customers providing its major source of revenue in order to provide funds assertedly necessary for continued operation is a general rate case and not a complaint proceeding, even though the increase is not requested for all classes of customers. *Utilities Comm. v. Gas Co.*, 558.

In a general rate case the function of the Utilities Commission is to determine whether a general increase or decrease in rates is warranted, and therefore in such proceeding the Commission has broad discretionary power to limit

and exclude evidence relating to alleged discrimination between classes of customers, since the question of such discrimination properly pertains to a complaint proceeding which may be thereafter instituted by the class of customers asserting discrimination. *Ibid.*

§ 9. Appeal and Review.

Findings of fact of the Utilities Commission are binding on appeal if supported by substantial evidence, and its orders are presumed to be valid. *Utilities Comm. v. Colter*, 269; *Utilities Comm. v. Champion Papers*, 449.

The Utilities Commission's resolutions of the questions of public need for a particular carrier service and the ability of the applicant to perform that service are conclusive if supported by competent, material, and substantial evidence. *Utilities Comm. v. Tank Line*, 363.

The question of public convenience and necessity is primarily for the determination of the Utilities Commission, and its order will not be disturbed on appeal except upon a showing of capricious, unreasonable, or arbitrary action, or disregard of law. *Ibid; Utilities Comm. v. Champion Papers*, 449.

Within the time limited for transmitting the record to the Superior Court the Utilities Commission, notwithstanding the filing of notice of appeal, has jurisdiction and authority to reopen the case, to hear further evidence, and to make such changes in the original record as the Commission concludes the facts and the law warrant in order that the record may speak the truth. *Utilities Comm. v. Champion Papers*, 449.

Where petitioner in a general rate case has introduced evidence showing its assets and liabilities, actual and adjusted income, average number of customers and quantity of gas used by each type of customer, the revenue provided by each type of user, etc., which evidence is plenary to support the crucial findings of fact, the denial of a protestant's request that the Commission reopen the case to require petitioner to furnish additional evidence relating to aspects which could not affect the result will not be held prejudicial, protestant having had the right to subpoena records and cross-examine during the hearing to develop such facts as it deemed necessary for the presentation of its case. *Utilities Comm. v. Gas Co.*, 558.

Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. *Ibid.*

VENDOR AND PURCHASER

§ 2. Tender.

The fact that the purchaser has the specified cash payment at the office of his attorney and requests the vendor to come there to close the deal does not constitute tender, since it is incumbent upon the purchaser to tender payment to the vendor, who is not required to go to a place designated by the purchaser. *Parks v. Jacobs*, 129.

WAIVER

§ 2. Nature and Elements of Waiver.

There can be no waiver unless so intended by one party and so understood by the other, or unless one party has acted so as to mislead the other. *Baysdon v. Ins. Co.*, 181.

WILLS

§ 6.1. Incorporation of Other Instruments by Reference.

Husband and wife executed a trust agreement and on the same day executed reciprocal wills devising and bequeathing the property of each respectively to the trustee to be disposed of as provided in the trust agreement. *Held:* The wills incorporate the trust agreement by reference so that the trust agreement takes effect as a part of each will respectively, even though the trust agreement itself be void because not executed in conformity with G.S. 52-12. *Godwin v. Trust Co.*, 520.

§ 7. Revocation of Wills.

A written will may be revoked by a subsequently written will executed in the manner provided by statute, G.S. 21-17, but in order to establish the revocation of a probated will by a subsequent writing it is necessary to prove the revocation in the manner required to establish the validity of the paper originally offered for probate. *In re Will of Marks*, 326.

Husband and wife executed a trust agreement and then executed their respective reciprocal wills incorporating the trust agreement and disposing of property held by the entireties and personalty owned respectively by each. After the wife's death, the husband executed another will making a different disposition of the property. *Held:* It being apparent that the respective wills were executed pursuant to an agreement entered into by the husband and wife, their mutual agreement is sufficient consideration to bind them, and equity will impress a trust on the estate of the husband in order to enforce the agreement and prevent him from defeating his obligation. *Godwin v. Trust Co.*, 520.

§ 8. Probate of Wills in Common in General.

An assistant clerk of the Superior Court has plenary authority to probate an instrument in common form. *In re Will of Marks*, 326.

§ 11.1. Domicile of Testator and Jurisdiction to Probate Will.

Where the will of a nonresident is probated in the state of her residence in accordance with its laws, an exemplified copy of the will and probate proceedings may be brought to this State and probated here in the county in which property of the estate is located, G.S. 28-1(3), in which event it is effective to pass title to the personalty in this State, but does not pass title to realty in this State unless the probate in the state of the deceased's domicile meets the solemnity required of probate in this State. *In re Will of Marks*, 326.

Where two separate wills of the same deceased have been probated respectively in two states, the courts of each state have jurisdiction to determine the question of where the deceased was domiciled at the time of her death, and neither is bound by the adjudication of the other of the question of domicile, which is determinative of the jurisdiction of the court to probate the will. *Ibid.*

WILLS—*Continued.*

The wife of a nonresident continued to live in the city of her husband's residence after his death. The evidence disclosed that thereafter she made visits to her mother who lived on the farm in this State where she was born and raised, that after her mother's death she made visits to this State on business and for family conferences, and during her last illness entered a hospital in a county adjacent her childhood home. *Held:* The evidence is insufficient to sustain an affirmative answer to the issue as to whether she had re-established her domicile in the county of her childhood home, notwithstanding testimony of expressions of her intent or desire to return to her childhood home at some future time and that she was permitted to vote by absentee ballot there. *In re Estate of Cullinan*, 626.

§ 12. Nature and Jurisdiction of Caveat Proceedings in General.

In this State the proper procedure to challenge the validity of the probate of an instrument in common form is by caveat. *In re Will of Marks*, 326.

After the will of a decedent has been probated in this State it is error to allow the probate of an exemplified copy of the probate in another state of another instrument written by the same decedent, the proper procedure being to attack the probate in this State by caveat, in which caveat proceeding the executors named in the instrument executed in the other state may offer to probate that instrument in solemn form, or controvert the fact of the deceased's domicile. *Ibid.*

§ 33. Fees, Life Estates and Remainders.

Evidence that the life tenant at the time of the hearing was some 73 years old and had had an operation removing her ovaries *held* sufficient to rebut the presumption of the possibility of further issue and to warrant the distribution of the remainder prior to her death. *Hicks v. Hicks*, 388.

§ 57. General and Specific Legacies and Order of Payment.

A bequest of a specified business to a named beneficiary is a specific legacy; a bequest of a designated sum of money out of the estate is a general legacy. *Bank v. Melvin*, 255.

The legatee is entitled to the income from a specified bequest from the date of testator's death. *Ibid.*

Income from personalty of the estate which is not the subject of a specific legacy should first be used to pay debts, costs of administration, etc., and then divided one-half to the residuary estate and one-half to the dissenting widow when she is entitled to one-half the net estate, and general legatees are not entitled to income except from the date of distribution. *Ibid.*

§ 60. Dissent of Widow and Effect Thereof.

G.S. 31-1, prescribing that a widow may dissent from the will of her husband at any time within six months after probate is a statute of limitations and not a condition precedent annexed to the remedy, both with regard to the widow's statutory right to a year's support, G.S. 30-15, and to the widow's right to dower as to testate property, G.S. 30-1, and therefore the six months' limitation must be pleaded in the same manner as is required for the pleading of any other statute of limitations. *Overton v. Overton*, 31.

Where testator leaves no lineal descendants or a parent, his dissenting widow is entitled to one-half his net estate without regard to any federal estate tax. *Bank v. Melvin*, 255.

WILLS—*Continued.*

When a widow dissents from her husband's will the share of the estate in excess of that devised or bequeathed her by will which must be set aside for her is not to be taken from the residuary estate but is to be taken *pro rata* from the shares of all the beneficiaries, G.S. 30-3(c), unless the will provides otherwise. *Ibid.*

Upon the dissent of the widow, her statutory share of the realty vests in her as of the date of testator's death and she is entitled to the income therefrom as from that date. G.S. 29-3 does not affect this rule. *Ibid.*

Upon her dissent, the widow is no longer a beneficiary under the will, and can take no benefit from it, and therefore she must pay the North Carolina inheritance tax on her share. G.S. 105-4; G.S. 105-18, notwithstanding the will directs that all inheritance taxes be paid out of the residuary estate. *Ibid.*

§ 63. Whether Beneficiary is Put to His Election.

Where it does not appear that testator, in disposing of his lands by will, intended to include in such disposition lands in which he owned a mere life estate, the remainderman cannot be put to his election. *Strickland v. Jackson*, 81.

§ 67. Suit for Distributive Share.

A suit alleging that testator left his personal property one-half to plaintiff and one-half to defendant, that defendant was named executrix, that defendant's final account omitted funds from a certain bank account, and that defendant had converted the funds in the account to her own use, without paying plaintiff her one-half share of such funds, *is held* to state a cause of action to surcharge and falsify the account of the executrix, and demurrer was properly sustained in an action against the executrix in her individual capacity. *Davis v. Singleton*, 148.

§ 71. Actions to Construe Wills.

The executor is not a party aggrieved by a judgment directing the distribution of the estate among the beneficiaries, and his attempted appeal therefrom will be dismissed without allowing the cost of its appeal, including attorneys' fees, to be charged against the estate. *Bank v. Melvin*, 255.

WITNESSES

§ 1. Competency of Witnesses—Age.

The competency of a boy who at the time of trial was some six years and five or six months old, and at the time of the accident in suit was some four years and four months old, is addressed to the sound discretion of the trial court, and where the record shows that upon the *voir dire* the court inquired into the child's intelligence and understanding of the obligation of an oath and admitted his testimony upon evidence supporting the conclusion of competency, the discretionary action of the court in admitting his testimony will not be disturbed. *McCurdy v. Ashley*, 619.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-57. If insurer pays entire loss, action must be maintained by insurer. *Jewell v. Price*, 345.

1-111; 1-112. Do not apply unless party against whom relief is demanded is in possession of property. *Motley v. Thompson*, 612.

1-127. Facts alleged and not prayer for relief determine right to relief. *Board of Education v. Board of Education*, 280.

1-128. Demurrer which fails to specify grounds of objection may be disregarded. *Short v. Sales Corp.*, 133.

1-137. Counterclaim held to meet requirement that several judgments might be rendered. *Burton v. Dixon*, 473.

1-151. Statute does not warrant court reading into a pleading fact which it does not contain, *Johnson v. Johnson*, 430.

1-180. Court must apply law to conflicting factual situations presented by evidence. *Conference v. Miles*, 1.

1-183. Failure to renew motion for nonsuit after introduction of evidence by defendant waives the matter. *Short v. Sales Corp.*, 133.

1-220. Neglect of attorney ordinarily will not be imputed to the client. *Brown v. Hale*, 480.
Wife's failure to defend action imputed to husband when he turns suit papers over to her and makes no further inquiry in regard thereto. *Jones v. Fuel Co.*, 206.

1-222(2); 1-222(3). Complaint should contain concise statement of constituent facts constituting cause of action. *Johnson v. Johnson*, 430.

1-408; 28-170. Clerk has the discretionary power to fix commissioner's fees. *Welch v. Kearns*, 367.

1-436. Judgment may not be entered against sureties in a civil action without 10 days notice. *Fryar v. Gauldin*, 391.

1-496; 1-497. Are to be construed in *pari materia* and defendant has burden of showing by final judgment that plaintiff was not entitled to temporary restraining order or circumstances equivalent to such decision. *Blatt Co. v. Southwell*, 468.

1-538.1. Statute imposing liability on parent for malicious damage to property by child is constitutional. *Insurance Co. v. Faulkner*, 317.

2-10. Assistant clerk of Superior Court has authority to probate will in common form. *In re Will of Marks*, 326.

6-21(2). Taxing of costs and fixing attorney's fees in apposite instances rests in discretion of court. *Godwin v. Trust Co.*, 520.

GENERAL STATUTES CONSTRUED—*Continued.*

6-21; 6-21(2). Attorney's fees may not be taxed as part of costs in action between husband and wife seeking specific performance of agreement to pool their property. *Hoskins v. Hoskins*, 704.

7-46; 7-71; 7-29.1(3). Supreme Court will take judicial notice of assignment of judges and terms of court. *Staton v. Blanton*, 383.

7-65. Resident judge has jurisdiction to hear motion for judgment of voluntary nonsuit in chambers. *Scott v. Scott*, 642.

7-198. Deputy clerk of High Point municipal court has authority to issue search warrant for illegal liquor. *S. v. Mock*, 501.

8-35. Weather report of Commerce Department must be properly identified before it is competent in evidence. *Dunes Club v. Insurance Co.*, 294.

8-51. In an action by trustee against personal representative of one of settlors, testimony of trustee in regard to instructions given him by settlor is incompetent. *Godwin v. Trust Co.*, 520.
Surviving occupant of car may not testify that another occupant, killed in the collision, was driving in action against surviving occupant for wrongful death. *McCurdy v. Ashley*, 619.

9-1. Statute providing for jury commissioner for Madison County is constitutional. *Rice v. Rigsby*, 506.

15-27.1. Effect of statute was not to nullify G.S. 18-13 but to make requirements of G.S. 15-26 and G.S. 15-27 applicable to search warrants obtained under G.S. 18-13. *S. v. Mock*, 501.

14-100. Representation as to burial of infant held to relate to promises of future action and cannot be basis for prosecution. *S. v. Hargett*, 496.

15-153. Indictment or warrant must charge offense in plain, intelligible, and explicit manner. *S. v. Sossamon*, 374.

15-217. Motion to vacate judgment on ground that thirteen jurors served is not motion to vacate judgment for newly discovered evidence but is in the nature of a review of constitutionality of trial. *S. v. Broadway*, 243.

20-28(a). Warrant charging operation of motor vehicle "after" driver's license had been revoked and not during period license was revoked held defective. *S. v. Sossamon*, 374.

20-28(a); 20-17; 20-16.1; 20-16(a), (1); 20-16. Neither conviction of driving 75 miles per hour in a 60 mile per hour zone nor of having no driver's license warrants a suspension or revocation of license. *Gibson v. Scheidt*, 339.

20-124. Must be given reasonable interpretation requiring motorist to act with care and diligence to see that his brakes meet statutory standards but not imposing liability for latent defects. *Stephens v. Oil Co.*, 456.

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20-140. Driving abreast of preceding car and falling back twice and running abreast of preceding car again constitutes reckless driving. *Russell v. Hamlet*, 273.

20-140; 20-154. Evidence held insufficient for jury on issue of negligence and not to disclose contributory negligence as a matter of law in action to recover for damages from collision when plaintiff turned left into side road. *Faulk v. Chemical Co.*, 395.

20-141(c). Motorist driving through fog must exercise care commensurate with increased danger. *Williams v. Tucker*, 214.

20-141(b). Inability to stop within range of headlights is not negligence *per se* if motorist is not exceeding speed limit. *May v. R. R.*, 43.

20-150(a). Inadvertent violation of statute is not culpable negligence. *S. v. Fuller*, 111.

20-154(a), 20-155(a), (b). Where two motorists approach intersection from opposite directions and one of them attempts left turn, G.S. 20-155(a) has no application. *Wiggins v. Ponder*, 277.

28-1(1), (3); 31-5.1(1); 31-12; 31027. Where two wills of same deceased are probated respectively in two states, the court of each state has jurisdiction to determine questions of domicile. *In re Will of Marks*, 326.

28-170. Personal representative may not sue in his individual capacity to recover excessive fees and compensation. *Strickland v. Jackson*, 81.

29-2(3); G.S. 30-3(a), (c). Where testator left no lineal descendants or parents his dissenting widow is entitled to one-half his estate without regard to any federal estate taxes and her share is to be taken pro rata from shares of beneficiaries and not from residuary estate. *Bank v. Melvin*, 255.

31-1; 30-1; 30-15. Provision that widow may dissent within six months is a statute of limitations and not a condition precedent with regard to both the widow's right to a year's support and to dower. *Overton v. Overton*, 31.

35-15. Authorizes court to sell or mortgage property of incompetent for his support. *Perry v. Jolly*, 306.

40-11. Condemnor cannot seek to condemn any right which it already owns. *Power Co. v. King*, 218.

40-12. Use of easement which places additional burden on land gives owner right to additional compensation. *Bane v. R. R.*, 285.

45-21.38. No action for failure to insert statement that mortgage was for purchase money unless mortgagor has been required to pay deficiency judgment. *Childers v. Parker's, Inc.*, 237.

40-23. Where condemnor's evidence of asserted easement is excluded, condemnor may not seek to have value of its asserted easement paid

GENERAL STATUTES CONSTRUED—*Continued.*

to it out of the award which it, itself, had paid into court. *Power Co. v. King*, 219.

44-6; 44-8; 44-9; 44-10. In subcontractor's suit to enforce lien, owner may set-up as defenses the failure of the principal contractor to construct the building in accordance with the contract, failure of the subcontractor to perform its contract with the principal contractor, and contest the balance due the subcontractor. *Manufacturing Co. v. Construction Co.*, 649.

47-1; 47-12; 47-13; 47-18; 47-20. Even though endorsement on timber deed was sufficient as a conveyance, the endorsement was not acknowledged so registration was ineffective. *Supply Co. v. Nations*, 681.

50-6. Order awarding custody of minor children determines present rights but does not preclude modification upon subsequent change of condition. *Thomas v. Thomas*, 461.

50-16. Whether wife is entitled to order for alimony when husband has not ceased to provide her with necessary subsistence, *quaere? Deal v. Deal*, 489.

52-2; 52-7. Conveyance of married woman of her separate realty to her children without assent of husband does not form basis of estoppel if it is supported only by love and affection. *Cruthis v. Steele*, 701.

52-12. Trust agreement void because not executed as required by statute may become part of valid will by reference. *Godwin v. Trust Co.*, 520.

55-36; 52-10; 52-15. Husband and wife may be liable for civil conspiracy. *Burton v. Dixon*, 473.

58-176. Insurer paying for damage to property is subrogated to rights of insured. *Insurance Co. v. Faulkner*, 317.
When insurance is procured by mortgagee pursuant to authority and at expense of mortgagor, insurer may not be subrogated to rights against mortgagor, but loss from fire should be prorated between insurers of mortgagor and of mortgagee. *Insurance Co. v. Assurance Co.*, 485.

62-26.4. Utilities Commission has authority after notice of appeal to reopen case within the time limited for transmitting record to Superior Court, *Utilities Comm. v. Champion Papers, Inc.*, 449.

62-26.10. Findings of fact by Commission supported by evidence are conclusive. *Utilities Comm. v. Gas Co.*, 558.

62-72. Proceeding held a general rate case not a complaint proceeding. *Utilities Comm. v. Gas Co.*, 558.

62-121.27. Carrier purchasing certificate of another carrier may combine purchased authority with its original authority. *Utilities Comm. v. Transfer Co.*, 688.

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95-11. Violation of rule issued by Department of Labor for protection of construction workers may not be asserted by third person tort feasor as contributory negligence of workman. *Swaney v. Steel Co.*, 531.

96-14(4). Under the 1961 Amendment there is no compensation unemployment due to strike even if claimants are nonmembers of striking union. *In re Abernathy*, 190.

96-15(i). Findings of fact of Employment Security Commission are conclusive when supported by evidence. *In re Abernathy*, 190.

97-2(6). Fall of aged employee because of physical infirmity held result of idiopathic condition and death resulting therefrom was not compensable. *Cole v. Guilford County*, 724.

97-2(6), (10); 97-72. Dependents of deceased employee are entitled to compensation if the employee dies within 350 weeks from date of last exposure to silicosis and while receiving disability, regardless of whether death results from silicosis. *Davis v. Granite Corp.*, 672.

97-9. Evidence held not to show affirmatively that tort feasor was fellow employee so as to preclude suit at common law. *Weaver v. Bennett*, 16.

97-10.2. Proceeds of settlement with third person tort feasor must be disbursed according to the provisions of the Act. *Cox v. Transportation Co.*, 38.

97-84. Agreement for payment of compensation is binding on parties when approved by Industrial Commission. *Neal v. Clary*, 163.

105-4; 105-18. Dissenting widow must pay North Carolina inheritance taxes on her share. *Bank v. Mclvin*, 255.

105-34. Nonresident corporation held not liable for income tax to this State for dividends from nonresident subsidiary corporation. *Bakeries Co. v. Johnson*, 419.

115-53. County Board of Education is subject to common law action in tort only insofar at it has waived governmental immunity by procuring liability insurance. *Huff v. Board of Education*, 75.

115-176. Complaint held to state cause of action by city board of education against county board interferring with assignment of children. *Board of Education v. Board of Education*, 280.

115-180. State Board of Education has been relieved of all responsibility in connection with school buses. *Huff v. Board of Education*, 75.

120-158(a). Evidence held sufficient to be submitted to jury on issue of negligence in violating statute. *Scott v. Darden*, 167.

136-68; 136-69. Owner of land used for orchards and raising cattle and cutting and removing timber is entitled to have cartway laid off. *Candler v. Sluder*, 62.

GENERAL STATUTES CONSTRUED—*Continued.*

136-108. Burden is upon Highway Commission to prove that area was within boundaries of previous right of way. *Johnson v. Highway Comm.*, 371.

143-138. Safety Code for building construction has not been enacted by reference and is not admissible in evidence. *Swaney v. Steel Co.*, 531.

143-291. Pupil voluntarily entering into fight with another on school bus may not recover for injuries under Tort Claims Act. *Huff v. Board of Education*, 75.

143-300.1. County Board of Education may be held liable under Tort Claims Act for negligence of school bus driver but not for negligence of school principal. *Huff v. Board of Education*, 75.

143-306; 143-307; 105-241.3. Commissioner of Revenue is entitled to appeal from decision of Tax Review Board. *In re Assessment of Sales Tax*, 589.

160-22 *et seq;* 160-177; 160-175. City council acts in legislative capacity in determining whether planning commission's recommendations should be enacted into ordinance, and courts will not interfere with such legislative authority by *certiorari* or otherwise. *In re Markham*, 566.

160-200(11), (13). Owner of drive-in restaurant abutting street at intersection may not restrain municipality from constructing median preventing left turns of traffic into or from intersecting street. *Gene's Inc. v. Charlotte*, 118.

160-200(6), (11), (13); 105-53(a), (c), (d). Municipality held without authority to prohibit sale of ice cream products from mobile units on streets. *S. v. Byrd*, 141.

160-466(d); 160-470; 160-463. City may not issue bonds for urban redevelopment without a vote. *Horton v. Redevelopment Comm.*, 605.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

Art.

I §§ 7, 17, 19. Statute providing for jury commissioner for Madison County is constitutional. *Rice v. Rigsby*, 506.

I, § 17. Statute imposing liability on parent for malicious damage to property by child is constitutional. *Insurance Co. v. Faulkner*, 317.

II. § 1. Urban Redevelopment Law is constitutional delegation of power. *Horton v. Redevelopment Comm.*, 605.

II, § 29. Statute providing for jury commissioner for Madison County does not deal with the establishment of court inferior to Superior Court. *Rice v. Rigsby*, 506.

IV, § 8. Although Superior Court may consider constitutional questions not properly presented, it will ordinarily consider only specific constitutional questions discussed in the brief. *Rice v. Rigsby*, 506.

IV, § 11. Supreme Court will take judicial notice of assignment of judges and terms of court. *Staton v. Blanton*, 383.

VII, § 7. Urban redevelopment is not necessary municipal expense. *Horton v. Redevelopment Comm.*, 605.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED

Fifth Amendment. Does not limit powers of the State. *Insurance Co. v. Faulkner*, 317.

Fourteenth Amendment. Statute providing for jury commissioner for Madison County is constitutional. *Rice v. Rigsby*, 506.