NORTH CAROLINA REPORTS

Vol. 261

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1963
SPRING TERM, 1964

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT

1964

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2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1963
SPRING TERM, 1964

CHIEF JUSTICE:

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SUSIE SHARP.

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ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

[1]Died 15 April 1964.

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OF THE
SUPERIOR COURTS OF NORTH CAROLINA

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Name	*District*	*Address*
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JOSEPH W. PARKER	Sixth	Windsor.
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SECOND DIVISION

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WILLIAM Y. BICKETT	Tenth	Raleigh.
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RAYMOND B. MALLARD	Twelfth	Tabor City.
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EUGENE G. SHAW	Eighteenth-A	Greensboro.
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ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

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ZEB V. NETTLES	Asheville.	HUBERT E. OLIVE	Lexington.
F. DONALD PHILLIPS			Rockingham.

[1]Died 12 April 1964. Succeeded by William A. Johnson, Lillington.

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JOHN B. REGAN	Ninth-A	St. Pauls.
DAN K. EDWARDS	Tenth	Durham.
THOMAS D. COOPER, JR.	Tenth-A	Burlington.

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KENNETH R. DOWNS	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
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J. ALLIE HAYES	Seventeenth	North Wilkesboro.
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ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Waynesville.
CHARLES M. NEAVES	Twenty-first	Elkin.

SUPERIOR COURTS, FALL TERM, 1964.

FIRST DIVISION

First District—Judge Fountain.

Camden—Sept. 28; Dec. 14†.
Chowan—Sept. 14; Nov. 30.
Currituck—Sept. 7; Dec. 7†.
Dare—Oct. 26.
Gates—Oct. 19.
Pasquotank—Sept. 21†; Oct. 12†; Nov. 9†; Nov. 16*.
Perquimans—Nov. 2.

Second District—Judge Cowper.

Beaufort—Sept. 7†; Sept. 21*; Oct. 19†; Nov. 9*; Dec. 7†.
Hyde—Oct. 12; Nov. 2†
Martin—Aug. 10†; Sept. 28*; Nov. 23†; Dec. 14.
Tyrell—Aug. 31†; Oct. 5.
Washington—Sept. 14*; Nov. 16†.

Third District—Judge Morris.

Carteret—Aug. 31†(a)(2); Oct. 19†; Nov. 9.
Craven—Sept. 7(2); Oct. 5†(2); Nov. 2†(a); Nov. 16; Nov. 30†(2).
Pamlico—Sept. 21(a); Oct. 26.
Pitt—Aug. 24(2); Sept. 21†(2); Oct. 12(a); Oct. 26†(a); Nov. 2; Nov. 23; Dec. 14.

Fourth District—Judge Peel.

Duplin—Aug. 31; Oct. 5†(a); Oct. 12; Nov. 9*; Dec. 7†(2).
Jones—Sept. 28(a); Nov. 2†; Nov. 30.
Onslow—July 20(a); Sept. 28(2); Oct. 19†(a)(2); Nov. 16†(2); Dec. 7(a).
Sampson—Aug. 10(2); Sept. 7†(2); Oct. 19*; Oct. 26†; Nov. 30(a).

Fifth District—Judge Bundy.

New Hanover—Aug. 10*(2); Aug. 24†(2); Sept. 14†(2); Oct. 5*; Oct. 19†(2); Nov. 2*(2); Nov. 23†(3); Dec. 14*.
Pender—Sept. 7†; Sept. 28; Oct. 12†(a); Nov. 16.

Sixth District—Judge Hubbard.

Bertie—Sept. 7; Nov. 23(2).
Halifax—Aug. 17(2); Oct. 5†(2); Oct. 26*; Dec. 14.
Hertford—July 27(a); Oct. 19.
Northampton—Aug. 10; Nov. 2(2).

Seventh District—Judge Mintz.

Edgecombe—Aug. 17*; Sept. 7†(a); Oct. 5*(a); Nov. 2†(2); Nov. 16*.
Nash—Aug. 24*; Sept. 14†(2); Oct. 12*; Oct. 19†(2); Nov. 23*(a)(2); Dec. 14†.
Wilson—July 20*; Aug. 31*(2); Sept. 28†(2); Oct. 19*(a)(2); Nov. 23†(2); Dec. 7*.

Eighth District—Judge Parker.

Greene—Oct. 12†; Oct. 19*(a); Dec. 7.
Lenoir—Aug. 10†(a)(2); Aug. 24*; Sept. 14†(2); Oct. 19†; Oct. 26*(2); Nov. 16†(a); Nov. 30†; Dec. 14.
Wayne—Aug. 10*(2); Aug. 31†(2); Sept. 28†(2); Nov. 9*(2); Dec. 7†(a)(2).

SECOND DIVISION

Ninth District—Judge Carr.

Franklin—Sept. 21†(2); Oct. 19*; Nov. 30†.
Granville—July 20; Oct. 12†; Nov. 16(2).
Person—Sept. 14; Oct. 5†(a)(2); Nov. 2; Dec. 7†.
Vance—Oct. 5*; Nov. 9†; Dec. 14†.
Warren—Sept. 7*; Oct. 26†.

Tenth District—Judge McKinnon.

Wake—July 13*(a)(2); July 27†#(a); Aug. 3*(a); Aug. 10†; Aug. 17*(2); Aug. 24†#(a); Aug. 31*(a); Aug. 31†; Sept. 7†(a)(2); Sept. 7*(2); Sept. 21†#(a); Sept. 21†(2); Sept. 28*(a); Oct. 5†(a)(2); Oct. 5*(2); Oct. 19†#(a); Oct. 26*(a); Oct. 26†(2); Nov. 2*(a)(2); Nov. 9†(2); Nov. 16†#(a); Nov. 23†(a)(2); Nov. 23*(2); Dec. 7†(a)(2); Dec. 7*(2).

Eleventh District—Judge Hobgood.

Harnett—Aug. 17†; Aug. 24†(a); Aug. 31*; Sept. 14†(a)(2); Oct. 12†(2); Nov. 2†(a); Nov. 16*(a)(2); Dec. 14†(a).
Johnston—Aug. 24; Aug. 31†(a); Sept. 28†(2); Oct. 19†(a); Oct. 26; Nov. 9†(2); Dec. 7(2).
Lee—Aug. 3*; Aug. 10†; Sept. 14; Sept. 21†; Oct. 12†(a); Nov. 2*; Nov. 30†.

Twelfth District—Judge Bickett.

Cumberland—Aug. 10†; Aug. 17*; Aug. 31*(2); Sept. 14†(2); Sept. 28†(a)(2); Sept. 28*(2); Oct. 12†(2); Oct. 19*(a)(2); Oct. 26†(2); Nov. 9†(a)(2); Nov. 9*(2); Nov. 30*(a); Nov. 30†(2); Dec. 14*.
Hoke—Aug. 24; Nov. 23.

Thirteenth District—Judge Johnson.

Bladen—Aug. 24; Oct. 19*; Nov. 16†.
Brunswick—Aug. 31†; Sept. 21; Oct. 26†; Dec. 7†(2).
Columbus—Sept. 7*(2); Sept. 28†(2); Oct. 12*; Nov. 2†(2); Nov. 23*(2).

Fourteenth District—Judge Braswell.

Durham—July 13*(2); July 20†(a); July 27†(2); Aug. 3*(a); Aug. 31†(a)(2); Aug. 31*(2); Sept. 14*(a)(2); Sept. 14†(2); Oct. 5†(a); Oct. 5*(2); Oct. 26†(2); Nov. 2*(a); Nov. 9*; Nov. 16†(2); Nov. 23*(a); Nov. 30*(2); Dec. 7†((a)(2); Dec. 14*.

Fifteenth District—Judge Mallard.

Alamance—July 20†(a); Aug. 3†; Aug. 17*(2); Sept. 14†(2); Oct. 19*(2); Nov. 16†(2); Dec. 7*.
Chatham—Aug. 31†; Sept. 7; Nov. 2†(2); Nov. 30.
Orange—Aug. 10*; Sept. 28†(2); Nov. 16†(a)(2); Dec. 14.

Sixteenth District—Judge Hall.

Robeson—July 13†(a); Aug. 17*; Aug. 31†; Sept. 7*(2); Sept. 21†(2); Oct. 12†(2); Oct. 26*(2); Nov. 16†(2); Nov. 30*.
Scotland—July 27†; Aug. 24; Nov. 9†; Dec. 7(2).

THIRD DIVISION

Seventeenth District—Judge McLaughlin.

Caswell—Sept. 28(a); Dec. 7†.
Rockingham—Aug. 24*(2); Sept. 21†(2); Oct. 19†(a); Oct. 26(2); Nov. 23†(2); Dec. 14*.
Stokes—Oct. 5; Oct. 12(a).
Surry—Aug. 10*(2); Sept. 7†(2); Oct. 12†(2); Nov. 9*(2); Dec. 7(a).

Eighteenth District—Guilford.

Schedule A—Judge Gambill.

Gr.—July 13*; July 27*; Aug. 31*; Sept. 7†; Sept. 14†(2); Oct. 5*; Oct. 12†(2); Oct. 26*; Nov. 9*; Nov. 16†(2); Nov. 30*(2); Dec. 14†#.
H.P.—Sept. 28*; Nov. 2*.

Schedule B—Judge Gwyn.

Gr.—July 13*; Aug. 31*(2); Sept. 28†(2); Oct. 12*(2); Oct. 26†(2); Nov. 23†(2); Dec. 7*.
H.P.—July 20*; Aug. 24†; Sept. 14†(2); Nov. 9†(2); Dec. 14*.

Schedule C—Judge to be Assigned.

Gr.—Aug. 17*; Aug. 31†#; Sept. 14*(2); Sept. 28†#; Nov. 9*(2); Nov. 30*; Dec. 14*.
H.P.—Oct. 26†; Dec. 7†.

Nineteenth District—Judge Shaw.

Cabarrus—Aug. 24*; Aug. 31†; Oct. 12(2); Nov. 9†(a)(2); Dec. 14†.
Montgomery—July 13; Oct. 5; Nov. 23.
Randolph—July 20†(a)(3); Sept. 7*; Sept. 21†(a)(2); Oct. 26†(2); Nov. 9†(2); Nov. 30*; Dec. 7†(a)(2).
Rowan—Sept. 14(2); Sept. 28†; Oct. 26†(a)(2); Nov. 30†(a); Dec. 7*.

Twentieth District—Judge Crissman.

Anson—Sept. 21*; Sept. 28†; Nov. 23†.
Moore—Aug. 17*(a); Sept. 7†(2); Nov. 16.
Richmond—July 20†; July 27*; Aug. 31†(a); Oct. 5†; Oct. 12*; Nov. 9†(a); Dec. 7†(2).
Stanly—July 13; Oct. 19†; Nov. 30.
Union—Aug. 24†(a); Aug. 31; Nov. 2(2).

Twenty-First District—Judge Armstrong.

Forsyth—July 13†(2); July 27†(a)(2); July 27(2); Aug. 10(a)(2); Aug. 31†#(a); Sept. 7†(a)(3); Sept. 7(3); Sept. 28†(2); Oct. 12†(a)(2); Oct. 12(2); Oct. 26†(3); Nov. 2(a)(3); Nov. 16†#; Nov. 23†(2); Dec. 7†(a)(2); Dec. 7(2).

Twenty-Second District—Judge McConnell.

Alexander—Sept. 28.
Davidson—July 20†(a); Aug. 24; Sept. 14†(2); Sept. 28(a); Oct. 12†; Oct. 19†(a); Nov. 16(2); Dec. 7†(a); Dec. 14†.
Davie—Aug. 3; Oct. 5†; Nov. 23(a).
Iredell—Aug. 31; Sept. 7†; Oct. 19†; Oct. 26(2); Nov. 30†(2).

Twenty-Third District—Judge Johnston.

Alleghany—Aug. 31; Oct. 5.
Ashe—July 20*; Sept. 14†; Oct. 26*.
Wilkes—July 27; Aug. 24; Sept. 21†(2); Oct. 12; Nov. 2†; Nov. 9; Dec. 7.
Yadkin—Sept. 7*; Nov. 16†(2); Nov. 30.

FOURTH DIVISION

Twenty-Fourth District—Judge Pless.

Avery—July 13(a)(2); Oct. 19(2).
Madison—Aug. 31†(2); Oct. 5*; Nov. 2†; Dec. 7*.
Mitchell—Aug. 3†(a); Sept. 14(2).
Watauga—Sept. 28*; Nov. 16†.
Yancey—Aug. 10; Aug. 17†(2); Nov. 23.

Twenty-Fifth District—Judge Patton.

Burke—Aug. 17; Oct. 5(2); Nov. 23(2).
Caldwell—Aug. 24(2); Sept. 21†(2); Oct. 26†(2); Dec. 7(2).
Catawba—Aug. 3(2); Sept. 7†(2); Nov. 9(2).

Twenty-Sixth District—Mecklenburg.

Schedule A—Judge Huskins.

Aug. 3*(2); Aug. 17†; Aug. 24†(a); Aug. 31†; Sept. 7†(2); Sept. 21†(2); Oct. 5*(2); Oct. 19†(a); Oct. 26†(2); Nov. 9†(2); Nov. 23†(2); Dec. 7*(2).

Schedule B—Judge Farthing.

Aug. 17†(3); Sept. 7*(2); Sept. 21†(2); Oct. 5†(3); Oct. 26†; Nov. 2*(3); Nov. 23†(2); Dec. 7†(2).

Schedule C—Judge to be Assigned.

July 13*(2); Aug. 17†(2); Aug. 31†(2); Sept. 14†(2); Oct. 5†(2); Oct. 19†(2); Nov. 2†(2); Nov. 16†(3); Dec. 7†(2).

Schedule D—Judge to be Assigned.

Aug. 17†(2); Aug. 31†(2); Sept. 14†(2); Oct. 5†(2); Oct. 19†(2); Nov. 2†(2); Nov. 16†(3); Dec. 7†(2).

Twenty-Seventh District—Judge Campbell.

Cleveland—July 13(a)(2); Sept. 28†(2); Nov. 2*; Nov. 30†(a)(2).
Gaston—July 13†(a); July 13*; July 20†(2); Aug. 3†(a); Aug. 3*; Aug. 31*(a)(2); Sept. 7†; Sept. 14†(a)(2); Sept. 28†(2); Oct. 12†(a); Oct. 12*; Oct. 19†(2); Nov. 9†(a); Nov. 9*; Nov. 16†(2); Nov. 30*(2); Dec. 14†.
Lincoln—Sept.14(2).

Twenty-Eighth District—Judge Clarkson.

Buncombe—July 13*(a)(2); July 27†(a)(2); Aug. 10†(2); Aug. 24*(2); Aug. 31†#(a); Sept. 7†(2); Sept. 21†(a)(2); Sept. 21*(2); Oct. 5†(3); Oct. 26†(a)(2); Oct. 26*(2); Nov. 9†(2); Nov. 23†#(a); Nov. 23*; Nov. 30†; Dec. 7†(2); Dec. 14*(a).

Twenty-Ninth District—Judge Froneberger.

Henderson—Aug. 17†(2); Oct. 19.
McDowell—Sept. 7(2); Oct. 5†(2).
Polk—Aug. 31.
Rutherford—Aug. 17*†(a); Sept. 21†*(2); Nov. 9*†(2).
Transylvania—July 13; Oct. 26(2).

Thirtieth District—Judge McLean.

Cherokee—Aug. 3; Nov. 9(2).
Clay—Oct. 5.
Graham—Sept. 14.
Haywood—July 13(2); Sept. 21†(2); Nov. 23(2).
Jackson—Oct. 12(2).
Macon—Aug. 10; Dec. 7(2).
Swain—July 27; Oct. 26.

Numerals following dates indicate number of weeks term may hold.
* For criminal cases.
† For civil cases.
(a) Indicates judge to be assigned.
# Indicates non-jury term.

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Judges

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

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

WILLIAM A. KOPP, JR., RALEIGH, N. C. (Chief Deputy)
MRS. MAUDE S. STEWART, RALEIGH, N. C.
MRS. ELSIE LEE HARRIS, RALEIGH, N. C.
MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
MISS CORDELLIA R. SCRUGGS, RALEIGH, N. C.
MRS. NANCY H. COOLIDGE, FAYETTEVILLE, N. C.
MRS. ELEANOR G. HOWARD, NEW BERN, 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.
EUGENE A. GORDON, 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.

Deputy Clerks

JAMES M. NEWMAN, GREENSBORO, N. C.
MRS. JOAN E. BELK, GREENSBORO, N. C.
MRS. SUE L. BUMGARNER, WILKESBORO, N. C.
MRS. RUTH R. MITCHELL, GREENSBORO, N. C.
MRS. BOBBIE D. WYANT, GREENSBORO, N. C.
WAYNE N. EVERHART, GREENSBORO, N. C.
MRS. DEANE J. SMITH, GREENSBORO, N. C.

WESTERN DISTRICT

Judges

J. B. CRAVEN, JR., *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.

Deputy Clerks

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1963

IN THE MATTER OF: THE TRUSTEESHIP OF SARAH GRAHAM KENAN.
IN RE: PETITION TO THE RESIDENT JUDGE OF THE FIFTH JUDICIAL DISTRICT (PURSUANT TO CHAP. 111, P. L. 1963).
AND
IN THE MATTER OF: THE TRUSTEESHIP OF SARAH GRAHAM KENAN.
IN RE: PETITION TO THE RESIDENT JUDGE OF THE FIFTH JUDICIAL DISTRICT (PURSUANT TO CH. 112, P.L. 1963).
AND
IN THE MATTER OF: THE TRUSTEESHIP OF SARAH GRAHAM KENAN.
IN RE: PETITION TO THE RESIDENT JUDGE OF THE FIFTH JUDICIAL DISTRICT (PURSUANT TO CHAP. 113, P.L. 1963).

(Filed 17 January 1964.)

1. Constitutional Law §§ 2, 6—

Within its compass the Constitution is supreme and any governmental act which violates its mandates or which thwarts the power granted to the United States is void.

2. Constitutional Law § 23—

The constitutional prohibitions against the taking of private property without due process of law limits the powers of the executive and judicial branches as well as the legislative branch, and protects incompetents equally with persons of sound mind. Constitution of North Carolina, Art. I, § 17; Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Same—

The constitutional prohibitions against the taking of private property except by due process of law preclude the Legislature from sanctioning the taking of a person's property except in satisfaction of a legal obligation or for a public purpose upon the payment of just compensation.

4. Same; Insane Persons § 4—

A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction (G.S. 35-29.1, .4, .5, .10, .11, .16), authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations.

5. Same— Court may sanction gift to charity by trustee of incompetent only upon finding that incompetent, if sane, would make such gift.

A court of equity may not authorize the fiduciary of an incompetent to make gifts to charity either from the income or the corpus of the incompetent's estate when such gifts are based upon the fiduciary's sense of moral fitness or judgment in the proper management of the estate in view of the rate of income tax paid by the estate or the difference between the rate of gift and inheritance taxes, since such order would amount to a taking of property in derogation of the incompetent's constitutional rights, but the court may authorize the fiduciary to make gifts to charity only on a finding based upon the preponderance of the evidence at a hearing duly had after notice that the incompetent, if then of sound mind, would make such gifts.

6. Same; Appeal and Error § 49—

Where upon the hearing by a court of equity of a fiduciary's application for authority to make charitable gifts from the estate of his incompetent, there is no evidence that the incompetent, if sane, would make such gifts, order authorizing the fiduciary to make such gifts must be reversed, since such order must be predicated upon a finding based on evidence that the incompetent, if sane, would have made such gifts.

HIGGINS, J., dissenting.

PARKER and SHARP, JJ., join in dissent.

APPEALS by W. C. Murchison and Louis A. Burney as guardians ad litem and by W. R. Kenan, Jr. and A. R. MacMannis as trustees from *Mintz, J.*, June 1963 Civil Session of NEW HANOVER.

Sarah Graham Kenan (hereafter Mrs. Kenan), a resident of New Hanover County was, in May 1962, found by a jury to be "physically and mentally incompetent from want of understanding to manage her affairs by reason of physical and mental weakness on account of old age, disease or other like infirmities." Based on this finding the clerk of the Superior Court adjudged her incompetent and, as authorized by G.S. 35-2, appointed her nephew, Frank H. Kenan, as trustee "to con-

trol and handle the person and entire estate of Sarah Graham Kenan wheresoever located."

In March 1963 the Legislature enacted three statutes, c. 111, 112, and 113, S. L. 1963, codified as G.S. 35-29.1 — 29.4, 29.5 — 29.10, and 29.11 — 29.16. These statutes authorize a guardian or trustee of an incompetent with the approval of the resident judge of the Superior Court to make gifts for religious, charitable, or educational purposes. C. 111 permits gifts to be made from income, c. 112, from principal, and c. 113 permits the trustee to surrender the right to revoke a trust created by the incompetent and make a gift of the reserved life estate.

In May 1963 Frank H. Kenan as trustee of Mrs. Kenan filed three petitions with the clerk of the Superior Court. In the first he sought authority to make gifts aggregating $731,600 from the income of his ward, in the second, a gift of $100,000 from the principal, and in the third, authority to surrender the right reserved by incompetent to revoke a trust created by her in 1956 and to donate to designated institutions the income reserved for her life.

Summarized, the petitions allege: Mrs. Kenan is and was in 1962 a resident of New Hanover County. She was there adjudged incompetent. Petitioner was appointed as trustee of her person and estate. It is improbable that she will hereafter have mental capacity to manage her affairs. She is a widow. She has no descendants and will never have any. Her estate, worth many millions, consists in part of a revocable inter vivos trust created by her in December 1956. Her annual income for the past five years has substantially exceeded $2,000,000. Her federal taxable income for 1963 is estimated to exceed $2,800,000. Her federal and state income taxes for 1963 are not expected to exceed $2,000,000. Expenditures for her maintenance in the five years preceding 1962 averaged $31,000. They were $35,500 for the year 1962, and are expected to amount to that sum in 1963. After the payment of all taxes and other expenses of the incompetent and the making of the gifts as proposed, the remaining income would be adequate to maintain Mrs. Kenan in the manner she is accustomed to and in excess of twice the sums expended annually for her maintenance for the preceding five years. The bulk of Mrs. Kenan's estate consists of stocks and bonds deposited for safekeeping in New York. She owns her home in Wilmington and other tangible property located in North Carolina. She has bank accounts in North Carolina and New York. On the same day in 1955 she executed two related testamentary writings. One, designated her North Carolina will, disposes of property located here; the other, designated her New York will, disposes of property located in that state. Each of the proposed donees meets the requirement of the particular statute under which petitioner seeks authority to act.

The gifts proposed to be made from income total $731,600, from principal, $100,000, and from the surrender of incompetent's right to receive the income from the 1956 trust created by her, approximately $300,000 per annum for her life.

The petition seeking authority to make gifts from income contains allegations in the language of G.S. 35-29.2(1); the petition seeking authority to make a gift from principal contains allegations in the language of G.S. 35-29.6(1). The proceeding to surrender the right to revoke the inter vivos trust and make a gift of Mrs. Kenan's right to receive the income for her life not only seeks to make a gift to tax-exempt beneficiaries but would impose a tax liability on Mrs. Kenan's estate. Petitioner, in that proceeding, alleged:

> "(A) That all gift taxes which will be incurred by reason of the making of said trust irrevocable and the making a gift of the lifetime interest to charity are properly payable out of the principal assets of the estate of the incompetent rather than from the principal assets held in said revocable inter vivos trust and no part of said gift taxes should be paid out of said revocable inter vivos trust assets; that the long term effect under the present Internal Revenue Code and Rulings would enable the estate of the incompetent to pay substantially less in gift taxes than would be incurred in estate and inheritance taxes by reason of the assignment of income and declaration of irrevocability because gift taxes are computed at a lower rate compared to the maximum rate of estate and inheritance taxes and are a credit against any estate and inheritance taxes which might be payable with respect to the trust estate and because the amount paid in gift taxes will not be subject to estate or inheritance taxes. In addition, it would save executors' fees and commissions on the amount of the gift taxes and administration costs in connection therewith and would constitute sound, wise, progressive, needed and essential estate planning in the best interests of the incompetent and of those who stand to take this estate upon her death and is within the discretionary authority of the Court and it is requested by your petitioner that he be permitted to raise sufficient funds for the purpose of paying said gift taxes by selling, or borrowing on the security of, such of the securities as your petitioner shall determine which are owned by the incompetent and are now held by Morgan Guaranty Trust Company of New York in custody in New York, New York. That in all probability, the incompetent, if competent, would take the necessary steps to accomplish these

purposes. To allow the matter to remain in status quo with reference to the trust would serve only to needlessly deplete the estate and would benefit nobody except the executors or administrators of the incompetent's estate and the taxing authorities.

"(B) The petitioner respectfully petitions the Court to effectuate this sound estate planning, based on the tax and other economies involved and for the preservation of the estate of the incompetent which the incompetent would do for herself if competent, and eliminate what would otherwise be an unjust penalty and treatment of an incompetent and which would not befall a competent person making a sound estate plan."

Notice and summons were served on (1) those who would take as heirs or distributees if Mrs. Kenan had died when the petitions were filed, (2) those who would take as legatees or devisees under her wills, (3) the trustees of the inter vivos trust created in December 1956, and those beneficially interested in the trust. Guardians ad litem were appointed for Mrs. Kenan and minor or other incompetent beneficiaries.

Murchison, guardian ad litem for Mrs. Kenan, and Burney, guardian ad litem for minors and unborn parties, by answers challenge the right of the trustee to make the proposed gifts. They allege the statutes (c. 111, 112, and 113, S.L. 1963) violate provisions of the Constitutions of North Carolina and of the United States. Among other constitutional rights asserted to be violated if the gifts are authorized are Art. I, sec. 17 of the Constitution of North Carolina and the Fifth and Fourteenth Amendments of the Constitution of the United States.

W. R. Kenan, Jr. and A. R. MacMannis, two of the trustees of the trust created by Mrs. Kenan in 1956, aver they seek to faithfully perform the duties Mrs. Kenan imposed on them. Their answer to sec. 15 of the petition filed under the provisions of c. 113, S.L. 1963, reads:

"(A) Answering the allegations of paragraph 15(A) of the Petition, these respondents admit that no part of the gift taxes should be paid out of the revocable inter vivos trust assets. With regard to the other allegations of paragraph 15(A), these respondents deny any knowledge or information sufficient to form a belief as to the truth thereof, except as to such allegations which may be questions of law, which they are informed and believe that they are not required to answer.

"(B) These respondents deny any knowledge or information sufficient to form a belief as to the truth of allegations of paragraph 15(B) of the petition."

Sec. 2 of their further answer reads:

"That your respondents are informed and believe that the trust agreement dated December 26, 1956, is a validly executed and existing contract for which consideration has passed between the parties. That among other things the trust agreement provides in effect as follows:

"(a) Article 1-A. The net income shall be paid to or applied for the benefit of the donor so long as she shall live.

"(b) Article 2-A(1). That in the event any beneficiary shall be 'incompetent,' that the income payable to said beneficiary may be paid to the guardian or committee or other legal representative wherever appointed of the said incompetent.

"(c) Article 2-D. That no beneficiary shall have the right to dispose of or to assign or transfer any income from said trust until the same shall be paid or distributed to such beneficiary.

"(d) Article 5. The donor reserves the right to revoke or amend this agreement at any time and from time to time by a written instrument other than a will, duly executed and acknowledged by her and delivered during her life to the trustee at the time in office.

"That under these provisions of the said revocable trust agreement dated December 26, 1956, it was clearly the intention of the donor that she should receive the net income from said trust so long as she should live, and that in the event she became incompetent that the said income should be paid to her guardian or duly authorized legal representative; that no person entitled to receive income from said trust has the right to assign or dispose of the income prior to its receipt, and that she alone reserved the right to revoke or amend the said trust agreement during her lifetime. That the effect of the relief requested by the petitioner in this action would be to rewrite the provisions of the contract to completely change donor's intention with respect to the paragraphs and articles hereinabove referred to, and that these respondents are informed and believe that the court is without authority to rewrite said trust agreement in the respects requested."

Judge Mintz, resident judge of the Fifth District, of which New Hanover is a part, presided over the June 1963 Session. The parties stipulated that the proceedings might be consolidated for the purpose of taking testimony, and waived a jury trial on all factual questions raised by the pleadings, except as to the probability of Mrs. Kenan's

regaining mental capacity. To determine that question, the court submitted this issue to a jury: "Is it improbable that Sarah Graham Kenan, incompetent, will recover competency during her lifetime?" The jury answered in the affirmative.

Judge Mintz made findings of fact in each proceeding. Except as noted in the opinion, these findings are in accord with the allegations of the petition. Based on the factual findings, the court drew legal conclusions and entered orders authorizing petitioner to make the gifts as requested except the proposed gift of $125,000 to The North Carolina Episcopal Church School for Boys, Inc., which was not then authorized.

John T. Manning and Poisson, Marshall, Barnhill & Williams by Alan A. Marshall for petitioner appellee.

Hogue and Hill by C. D. Hogue, Jr. for A. R. MacMannis and William R. Kenan, Jr., trustees under a revocable trust agreement dated December 26, 1956, appellants.

Wallace C. Murchison and Louis A. Burney, guardians ad litem, appellants.

RODMAN, J. The appeals of Murchison and Burney as guardians ad litem are directed to the orders entered in each proceeding. The appeal of MacMannis and Kenan as trustees is directed to the validity of the order entered in the proceeding seeking permission to give away Mrs. Kenan's right to receive for her life the income from the trust created by her.

Defendant Murchison, appointed by the court to protect Mrs. Kenan's rights, challenges both the right of the trustee to make and the power of the Legislature or the court to authorize the proposed gifts.

The question for decision then is: Do the facts found, standing alone, suffice to sustain the order? The answer must, we think, be in the negative.

Ours is a constitutional form of government. "It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people. Its provisions must be observed by all." *In re Advisory Opinion House Bill* 65, 227 N.C. 708, 43 S.E. 2d 73.

Any governmental act which overrides the restrictions declared in our Constitution or which thwarts the powers granted to the United States is void. *S. v. Felton,* 239 N.C. 575, 80 S.E. 2d 625; *Freeman v. Comrs. of Madison,* 217 N.C. 209, 7 S.E. 2d 354; *Bayard v. Singleton,* 1 N.C. 5.

Sec. 17, Art. I, of our Constitution imposes this limitation on governmental authority: "No person ought to be . . . disseized of his freehold . . . or in any manner deprived of . . . his property, but by the law of the land." This limitation on governmental authority has been in force since the adoption of our first Constitution in 1776. See sec. 12 of that Constitution.

It is a matter of common knowledge that North Carolina delayed ratification of the Constitution of the United States until Congress had submitted to the States amendments guaranteeing fundamental rights. Among the amendments so submitted was the Fifth, declaring: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment to the Constitution of the United States says: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These constitutional limitations are not confined to the Legislature. They are applicable to courts and to the executive branch of the government. It is immaterial, therefore, whether a court of equity has the authority, without legislative sanction, to authorize the use of an incompetent's income or the principal of his estate for a purpose other than his own support and the discharge of his legal obligations. *Blake v. Respass,* 77 N.C. 193, or whether the right to so direct is dependent upon legislative authority. *Brooks v. Brooks,* 25 N.C. 389; *In the Matter of Latham,* 39 N.C. 231; *In re Hybart,* 119 N.C. 359; *Binney v. R. I. Hospital Trust Co.,* 110 A. 615.

It scarcely need be said that the constitutional limitation against taking of property of a citizen affords the same protection to a lunatic that it affords to a person of sound mind.

The Legislature cannot sanction the *taking* of one's property unless (a) in satisfaction of a legal obligation, or (b) for a public purpose, *Utilities Comm. v. Story,* 241 N.C. 103, 84 S.E. 2d 386; *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600; *Cozard v. Hardwood Co.,* 139 N.C. 283; and when taken for a public purpose, just compensation must be paid. *Davidson v. Stough,* 258 N.C. 23, 127 S.E. 2d 762; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144.

An interesting illustration of the scope of the constitutional limitation against taking of property of a citizen is to be found in *Allen v. Peeden,* 4 N.C. 442. There the Legislature enacted a statute emancipating slaves of a deceased owner. Although the deceased had expressed a wish that the slaves be emancipated, the statute was held void because title to the slaves had passed to others upon the death of the former owner.

The motives prompting the filing of the several petitions are in no way challenged. The gifts, which the trustee proposes making for his ward, are to deserving beneficiaries and would undoubtedly be of material assistance in promoting the laudable purposes for which each was created and is now functioning.

The amounts proposed to be given from the current income would largely be offset by a reduction in income taxes. The net cost would still leave Mrs. Kenan with ample income for her own needs. She has no financial (legal) obligation which would be adversely affected. The gift from the principal and the taxes to be paid from the principal for the privilege of surrendering the life income from the trust estate, while large when considered as individual items, are relatively small in relation to the total of Mrs. Kenan's estate. If the gifts are authorized, there will be a substantial saving in estate taxes.

While an incompetent's property may not, either with legislative sanction or court order, be *taken* for charitable purposes notwithstanding the part not taken is ample for incompetent's needs, *Monds v. Dugger*, 144 S.W. 2d 761, *Binney v. R. I. Hospital Trust Co., supra;* it is nonetheless true that courts of equity have authorized the *gift* of a part of incompetent's income or principal.

A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift. Appellees' argument that the gift may be authorized "if the court under all of the circumstances believes that such gift should be made," if accepted as a correct statement of the law, would permit the court to do that which the lunatic had not done and would not do if sane. Such an order, would amount to a taking of property in derogation of lunatic's constitutional rights.

Perhaps the most frequently cited case on the power of a court of equity to authorize the use of an incompetent's property for purposes other than his own support and the support of those to whom he owes a legal obligation is *Ex parte Whitbread*, 35 Eng. Rep. 879, decided in 1816. There a niece of the incompetent sought an allowance from his estate. Lord Chancellor Eldon said: "The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children —to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or as such, have any right to an allowance, *but because the*

Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done." (Emphasis supplied).

In the Matter of The Earl of Carysfort, 41 Eng. Rep. 418, the committee of the person of a lunatic proposed that an annuity be granted to a personal servant who had served the lunatic for many years. The allowance was made upon the statement that if the lunatic was sane he would approve.

In the Matter of Willoughby, decided in 1844, 11 Paige (N.Y.) 257, a stepdaughter of the incompetent sought an allowance. The chancellor said: "The court, in such cases, acts for the lunatic, and in reference to his estate, as it supposes the lunatic himself would have acted if he had been of sound mind."

In *In re Strickland,* 6 Ch. Ap., 225, a donation was requested by the officials of a church and school. The lunatic had an income after the payment of annuities and other charges of about 2,656 pounds. The sum of 900 pounds was set aside annually for his maintenance "and it appeared that his comfort could not be increased by any addition to it." The committee of the lunatic's estate and person requested authority to make a donation of 250 pounds to the building of a church and a like sum to the building of a school. The court authorized the donations, citing as authority therefor *Ex parte Whitbread, supra,* and *Oxendin v. Lord Crompton,* 2 Ves. 69.

In *In the Matter of Heeney,* 2 Barb. (N.Y.) 326, the chancellor said: "In the case under consideration, the lunatic, when in full possession of all his faculties, placed himself in the situation of a father to the two young ladies mentioned in the petition, and supported them as members of his family and sent them to a boarding school; where one of them completed her education and has again returned and become a member of his family, leaving the other still at school. I have no doubt, therefore, that if Mr. Heeney had retained the full possession of his faculties he would have continued to support them in the same way while they remained unmarried. I shall therefore but carry out his undoubted intentions, by directing the committee to let these two young ladies remain in the family and be supported as they have heretofore been, until their marriage, or the death of the lunatic, or the further order of the court."

In a later New York case, *In re Flagler,* 224 N.Y.S. 30, a second cousin of Mrs. Flagler (the incompetent) sought an allowance from the surplus income. The court said: "In granting applications of this character the court is not actuated by any supposed interest which the applicant may have in the property of the incompetent. Relief may be

had upon the principle that the court will act with reference to the lunatic and for his benefit as it is probable that he would have acted for himself, if he were of sound mind." The order there approved was reviewed by the New York Court of Appeals, *Re Flagler,* 162 N.E. 471. That court said: "If Mrs. Flagler today could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. In reaching decision it may give moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them. Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind.' *Re Lord,* 227 N.Y. 145, 124 N.E. 727. The appellate division correctly held that the allowance made at special term may be justified upon no other theory." See also *In re Hudleson's Estate,* 115 P. 2d 805; *In re Brice Guardianship,* 8 N.W. 2d 576; *Re Beilstein,* 62 N.E. 2d 205; *Potter v. Berry,* 53 N.J. Eq. 151; and the annotations in 34 L.R.A. 297, 59 A.L.R. 653, and 160 A.L.R. 1435.

A summary of the English and Irish cases dealing with the right of a court of equity to use an incompetent's estate other than for his own maintenance and the maintenance and support of his dependants may be found in an article entitled "The Surplus Income of a Lunatic," 8 Harv. L. Rev. 472 (1894-95).

The power and limitation on the power of a court of equity to authorize a fiduciary with respect to the use or other handling of the estate entrusted to him is illustrated in two recent decisions of this Court.

In *Ford v. Bank,* 249 N.C. 141, 105 S.E. 2d 421, adult children of an incompetent sought permission to use a part of his estate to purchase a home. We said: "No one can doubt that financial assistance would be of benefit to the children of the incompetent occupying the economic status in life depicted by the evidence and the findings of fact. If their father were mentally competent, would he not aid them? If so, the court has the authority to use his money for that purpose."

In *Cocke v. Duke University,* 260 N.C. 1, we denied authority to invest trust funds in securities not sanctioned by the trust agreement. As the basis for the denial, we quoted with approval the language of

Carter v. Kempton, 233 N.C. 1, 62 S.E. 2d 713: "It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator."

After oral argument appellees, with our permission, filed a supplemental brief which contained a copy of the opinion of the chancery court of the state of Delaware in the case of *In re Dupont*, 194 A. 2d 309. There the chancellor as the basis of his order authorizing large gifts from the incompetent's estate, said: "The guardians have offered substantial and convincing proof that the ward in fact intended to make such distributions prior to his incompetency."

Relating to the question of what Mrs. Kenan would do if competent, the court found in the proceedings relating to gifts from income and principal:

> "In the absence of tax deductible gifts, income retained by Sarah Graham Kenan would be depleted in excess of 85% by State and Federal income taxes and any balance thereof remaining in her estate at her death would be depleted in excess of 75% by death taxes; so that, even in the absence of current expenditure by the general trustee, less than 4% of the income received by Sarah Graham Kenan would remain to be transmitted to her legatees, heirs or next of kin upon her death . . . ."
>
> "Petitioner herein, trustee of the estate and person of Sarah Graham Kenan, has concluded that it is wise and provident, and consistent with the desires of Sarah Graham Kenan (if she were competent) to make the gifts herein authorized and directed."
>
> "It is proper in the exercise of sound judicial discretion, if not mandatory under the provisions of Chapter 111 of the 1963 Session Laws of North Carolina, to approve such declaration and gifts . . ."

Based on his findings of fact the court concluded as a matter of law:

> "Considering the situation of Sarah Graham Kenan and her estate, it is in no way detrimental to Sarah Graham Kenan, as a practical matter, but rather it is wise and provident for the petitioner to make the gifts herein authorized and directed.
>
> "It is reasonable to assume that if Sarah Graham Kenan were competent and heeding sound advice, she would make these or similar gifts.
>
> "It is proper in the exercise of sound judicial discretion, if not mandatory under the provisions of Chapter 111 of the 1963 Session Lews of North Carolina, to approve these gifts."

In the proceeding relating to the surrender of life income reserved in the trust, the court found:

> "The Petitioner herein, trustee of the estate and person of Sarah Graham Kenan, has concluded that, for the total net benefit of Sarah Graham Kenan and the natural objects of her bounty, it is wise and provident to declare the trust irrevocable and to make gifts of the life income to the donees named in paragraphs 30 and 31 above."

Based on its factual findings the court concluded as a matter of law:

> "Considering the situation of Sarah Graham Kenan and her estate, it is in no way detrimental to Sarah Graham Kenan, and from the standpoint of total net benefit to her and the natural objects of her bounty, it is wise and provident for the Petitioner to declare the 1956 trust agreement irrevocable and to make gifts of the life income to the donees specified in the Order herein. Indeed, it would be improvident not to do so.
>
> "It is reasonable to assume that if Sarah Graham Kenan were competent and heeding sound advice, she would declare the 1956 trust agreement irrevocable and make these or similar gifts, in view of the amount of the estate involved.
>
> "It is proper in the exercise of sound judicial discretion, if not mandatory under the provisions of Chapter 113 of the 1963 Session Laws of North Carolina, to approve such declaration and gifts . . ."

The language in which the court phrases its findings of facts and its legal conclusions is, we think, significant. They amount only to this: The cost to Mrs. Kenan of making the gifts is, when considered with the size of her income and the principal of her estate, insignificant; and the trustee, not Mrs. Kenan or the court, has concluded that it is wise *and consistent with the desires of Sarah Graham Kenan, if she were competent.* The legal conclusion that it is reasonable to assume that Mrs. Kenan, if competent, "and heeding sound advice," would make the gifts is not supported by the findings of fact. If it be said that although stated as a conclusion of law this is in reality a finding of fact, we find no evidence to support such a finding.

Mr. MacMannis, selected by Mrs. Kenan as one of the trustees of the trust created by her in December 1956, has acted as financial advisor and accountant for Mrs. Kenan, her brother, Mr. William R. Kenan, another trustee appointed by Mrs. Kenan, and her sister, Mrs. Wise, for many years. He testified:

"I did state that I met Mrs. Kenan at least once a year, to go over her income tax returns and have her sign them, and that she and I discussed these returns, and that she was fully aware of the impact of the taxes . . . . She was aware that her income was being taxed 87% or 89% for the last ten or fifteen years. That is the flat percentage applied to her entire taxable income . . . . I have discussed with Mrs. Kenan and she was aware of the fact that her income was being taxed at close to or perhaps slightly over 90% each year, and that if gifts were made to charity, which were deductible on the return, the out-of-pocket expense to Mrs. Kenan for making those gifts would be about 10% of the amount of the gift, within the applicable limits of deductibility."

John L. Gray, Jr., a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, a prominent law firm in New York City, for many years represented and advised Mrs. Kenan with respect to legal matters. Mr. Gray specialized "in the field of estate and trust work and taxation as it relates to those fields." He drafted Mrs. Kenan's wills. He drafted for her the trust created in 1956. He did this after consultation with Mrs. Kenan's brother, Mr. William R. Kenan, well informed with respect to financial problems and a generous benefactor of educational and charitable institutions in North Carolina.

There is nothing in the record to contradict the testimony of Mr. MacMannis that Mrs. Kenan was well aware of the impact of federal taxes on her income and her estate. Fully informed as she was, her gifts to charity were $8,160 in each of the years 1958, 1959, 1960, and 1961, and in 1962, the year in which she was adjudged incompetent, $8,360. These charitable gifts she had been accustomed to make for many years. After Mrs. Kenan was adjudged incompetent, the trustee filed his petition with and was authorized by the court by order dated 26 November 1962 to continue to make these charitable gifts. The largest single gift which Mr. MacMannis could recollect Mrs. Kenan making in the past twenty-five or thirty years was a gift of $25,000.

The orders, based as they are, either on a misapprehension of the power of the Legislature or upon findings not supported by any evidence, are erroneous and must be vacated.

In view of the conclusion we reach on the fundamental question raised by appellants, we deem it unnecessary to lengthen this opinion by discussing the other assignments of error.

Petitioner may, if he elects, obtain permission to amend his petitions to allege that the authority which he seeks is something which Mrs. Kenan would do, if competent. If permission to amend is allowed,

petitioner may then offer evidence to establish the truth of his allegations.

The order in each proceeding is

Reversed.

HIGGINS, J., dissenting: The record in this proceeding is voluminous. Time does not permit me to do more than record a few of the reasons why I can not concur in the opinion. The fundamental error, I think, is the assumption that these proceedings authorize a taking of property. If the beneficiaries of the gifts had brought this action to force the making of the gifts, the opinion would be sound. What the opinion says, however, is that the owner, acting through her trustee and with the approval of the court under legislative authority, cannot voluntarily make the gifts. The statutes discussed in the opinion (Chapters 111, 112 and 113, Session Laws of 1963) do not require or compel the trustee to do anything. They are permissive only. Before the trustee may exercise any of the powers conferred, the court must make critical findings of fact and then approve.

Until now this Court has not undertaken to say the North Carolina General Assembly may not pass laws regulating the disposition of property by deed, by will, by inheritance, by distribution, even by escheat. Neither has its power been doubted to provide for the appointment of guardians, administrators, receivers, and trustees, and prescribe their duties. *Ford v. Bank,* 249 N.C. 141, 105 S.E. 2d 421. This Court has no power to legislate. "It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law." *State v. Scoggins,* 236 N.C. 19, 72 S.E. 2d 54. "Whether a statute produces a just or an unjust result is a matter for the legislators and not for judges." *Deaton v. Deaton,* 237 N.C. 487, 75 S.E. 2d 398. "Nor are we the judges of the wisdom or impolicy of the law. It is enough that the General Assembly has spoken on the subject. *Wells v. Wells,* 156 N.C. 246, 72 S.E. 311. The defendant complains both at the law and at the insistence of the plaintiffs, but these are matters belonging not to the courts." *Cooper v. Cooper,* 221 N.C. 124, 19 S.E. 2d 237. "Outside the power granted to the Federal Government, the power of the Legislature of North Carolina to enact statutes is without limit, except as restrained by the Constitution of North Carolina." *Milk Commission v. Galloway,* 249 N.C. 658, 107 S.E. 2d 631.

In so far as I have been able to discover, not a single case cited in support of the Court's decision involved legislative authority comparable to Chapters 111, 112, 113, Session Laws of 1963. The enactments

are presumed to be valid until the contrary appears beyond a reasonable doubt. ". . . (T)he presumption is in favor of constitutionality and a statute will not be declared unconstitutional unless the conclusion is so clear that no reasonable doubt can arise." Strong's North Carolina Index, Constitutional Law, § 10, Vol. 1, and supplement thereto, citing 25 cases.

In the hearing before the trial judge, all conceivable interests adverse to the petitioner's request were represented. Near relatives who are *sui juris* joined with the petitioner in recommending the court's approval. After hearing, the trial court concluded with respect to the gifts from income:

> "21. Considering the situation of Sarah Graham Kenan and her estate, it is in no way detrimental to Sarah Graham Kenan, as a practical matter, but rather it is wise and provident for the petitioner to make the gifts herein authorized and directed."

With respect to the gifts from the corpus of the estate, the court concluded:

> "16. Considering the situation of Sarah Graham Kenan and her estate, it is in no way detrimental to Sarah Graham Kenan, as a practical matter, but rather it is wise and provident for the petitioner to make the gift herein authorized and directed."

With respect to the trust, the court concluded:

> "9. This reduction in taxes will be greatly in excess of the amount of trust income remaining to be transmitted to her legatees, heirs, or next of kin in the absence of such declaration and gifts. It is, therefore, to the general, over-all financial advantage of the legatees, heirs and next of kin of Sarah Graham Kenan that the declaration and gifts be made, and in no way detrimental to the incompetent, as a practical matter."
>
> * * *
>
> "31. That the relief sought by the Petitioner herein is consistent with sound estate planning and is in keeping with the action which might be reasonably expected of a competent person acting upon advice of qualified advisors experienced in such matters."

Sarah Graham Kenan is 87 years of age. She has no lineal descendants, no dependents, no debts. She has been adjudged incompetent. The jury has found that condition will continue. The corpus of her estate is worth more than eighty million dollars. The annual income exceeds three million dollars. Why may not the Legislature au-

thorize her trustee, with the approval of the court after full hearing, to do that which a competent owner similarly situated may, should, and usually does do; that is, plan and prepare for the day when the vast estate shall pass to other hands?

The records of this and other courts are replete with cases setting up trusts and making contributions to foundations, educational institutions, churches, and other charities. The trustee seeks to follow these sound business practices, but the Court says this is taking private property. To my single-track mind the only thing taken is the right of the trustee, acting for his beneficiary, to do with this vast estate what the General Assembly of North Carolina authorized him to do. The relatives in this public spirited family who are *sui juris* appear to have joined in the trustee's requests. The authority to follow the plan has been authorized by 170 of the people's representatives in session on Halifax Street. It is now set aside by a majority of the seven on Morgan.

This decision will haunt us. I vote to affirm.

PARKER and SHARP, JJ., join in dissenting opinion.

STATE v. GENE KNIGHT AND JOE WATKINS.

(Filed 17 January 1964.)

1. Indictment and Warrant § 8—

An indictment may jointly charge two defendants with non-burglarious breaking and entry, with larceny, and with receiving, since the offenses may be committed by more than one person at the same time.

2. Same—

An indictment may join a count of non-burglarious breaking and entry with a count of larceny and a count of receiving.

3. Burglary and Unlawful Breakings § 2.1—

An indictment charging the non-burglarious breaking and entry of a certain store, shop, warehouse, dwelling, house and building occupied by a named person is not subject to quashal for failure to inform defendants of the type of structure they are charged with breaking into, defendant's remedy being by motion for a bill of particulars if they desire more specific information to formulate their defense. G.S. 15-143.

4. Criminal Law § 34—

Testimony that some four months prior to the larceny of the safe as charged in the bill of indictment, one of defendants stated that drawings of the working parts of a safe shown to him by the witness belonged to

defendant, that he had memorized them and that if he ever robbed another safe it would be a big one, *held* competent against such defendant in connection with the other evidence adduced by the State tending to show that such defendant's *animus* continued to and through the date of the offense charged and naturally included the commission of such offense.

5. Criminal Law § 90—

Upon a joint indictment of two defendants, evidence tending to incriminate one of the defendants is properly admitted when its admission is restricted by the court exclusively to such defendant alone.

6. Burglary and Unlawful Breakings § 1—

There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key.

7. Larceny § 6—

Upon the prosecution of two defendants jointly for larceny, evidence tending to show that each defendant possessed a quantity of the stolen money shortly after the commission of the theft is competent respectively against each.

8. Burglary and Unlawful Breakings § 4; Larceny § 7— Evidence of defendants' guilt of unlawful entry and larceny held for jury.

Evidence tending to show that a car borrowed by defendants in another municipality was seen several days before the commission of the crime in front of the house that was robbed, that two men, one identified as one defendant and the other who appeared to be about the same size and age as the other defendant, were seen a few hours before the offense was committed in front of the house, that the house was unlawfully entered and a quantity of money was taken from a safe kept therein, and that a day or two after the offense each defendant had in his possession large amounts of money, which money was identified by its musty smell as money taken from the safe in question, *is held* sufficient to be submitted to the jury as to each defendant on charges of both non-burglarious breaking and entry and larceny.

9. Criminal Law §§ 67½, 83, 97—

During the examination of the prosecuting witness defendants have the right to have the witness identify a television recording for the purpose of establishing their right to later introduce the recording in evidence, if they should so elect, but defendants are not entitled to introduce the television recording in its entirety on cross-examination while the State is putting on its evidence, and when defendants are allowed to put the entire recording in evidence without objection, the defendants are putting on evidence so as to entitle the State to the opening and closing arguments to the jury.

10. Jury § 4—

In a prosecution of two defendants jointly for offenses less than capital, the State is entitled to challenge peremptorily four jurors for each defendant. G.S. 15-164.

BOBBITT, J., dissenting in part.

STATE *v.* KNIGHT.

APPEAL by defendants from *Shaw, J.,* 10 June 1963 Regular Criminal Session of ROCKINGHAM.

Criminal prosecution on a three-count indictment charging the defendants with (1) non-burglariously breaking and entry, (2) larceny of a metal safe, of $75,000 in U. S. currency, and of stock and securities of the value of $100,000, and (3) receiving.

Before defendants pleaded, the prosecuting officer for the State announced in open court that he was putting the defendants on trial on the first two counts in the indictment and not on the third count charging receiving. Each defendant pleaded not guilty. The jury returned a verdict that each defendant was guilty as charged in the first two counts in the indictment.

From a judgment that Gene Knight be imprisoned for a term of ten years on his conviction on the first count in the indictment and for a term of five years on his conviction on the second count in the indictment, the sentence on the second count to begin at the expiration of the sentence on the first count, and from a similar judgment against Joe Watkins, each defendant appeals.

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

Robert S. Cahoon and J. Owen Lindley for defendant appellants.

PARKER, J. Defendants assign as error the denial of their motion to quash the indictment, made in apt time before pleading to the indictment. They contend the indictment should be quashed for the following reasons: One, it is improper to charge them jointly in one indictment; two, the three counts of a non-burglariously breaking and entry, of larceny and of receiving are conflicting and broadside and improperly joined; and three, that the first count charges them with a non-burglariously breaking and entry into "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Dr. C. W. McAnally," etc., which does not give them any specific information as to the type of structure they are charged with breaking into. This assignment of error is without merit.

"When an offense is one which may be committed by more than one person at the same time, the several persons engaged in its commission may be jointly charged." 42 C.J.S., Indictments and Informations, sec. 159, a, p. 1106.

In *S. v. Mincher,* 178 N.C. 698, 100 S.E. 339, the Court said: "It has been the uniform practice in this State to join a count for larceny with one for receiving in one indictment, and this has been repeatedly

approved." It is also proper to join a count for a non-burglariously breaking and entry with one for larceny at the same time and with one for receiving at the same time in one indictment in order to meet the evidence which may possibly be adduced at the trial, and this has been the uniform practice in this State. The three counts in the indictment correctly charge in the usual form all the essential elements of the three offenses charged.

The first count charging a non-burglariously breaking and entry charges the breaking and entry into certain buildings specified in G.S. 14-54, which creates the offense. The first count in the indictment charges all the essential ingredients of the offense created by G.S. 14-54, and is good. Where an indictment correctly charges all the essential elements of the offense, but is not as definite as the defendant may desire for his better defense, his remedy is by a motion for a bill of particulars, G.S. 15-143, and not by a motion to quash. *S. v. Everhardt,* 203 N.C. 610, 166 S.E. 738. When a bill of particulars is furnished, it limits the evidence to the transactions or items therein stated. *S. v. Williams,* 211 N.C. 569, 190 S.E. 898.

The next question for decision is whether the State's evidence survives each defendant's motion for judgment of nonsuit, and suffices to carry the case to the jury against both defendants or any one of them on the first two counts in the indictment or either of them.

The State's evidence, considered in the light most favorable to it, presents these facts:

Dr. C. W. McAnally, a practicing dentist for 40 years, lives in his own home in the town of Madison. About 25 or 30 years before 17 January 1963, he bought a metal safe, which he has had in his house since then. On 17 January 1963 this safe was located in a closet adjoining his bedroom, and he had in it bonds, stocks, insurance papers and $75,000 in U. S. money, all his property. This money consisted of hundred dollar bills, fifty dollar bills, twenty dollar bills, and a lesser number of five dollar bills. Some of that money was Series 1937; a large part of it was Series 1950. From time to time he went through his securities and money in the safe. He got some stock out the morning of 17 January 1963. This money, by reason of being kept for years in his safe, had a moldy, stinky odor.

He is a widower and lives alone. On 17 January 1963 his maid was off. On that day he went home for lunch about 11:40 a.m. He kept the key to his front door in a little wicker basket on the right-hand side when one enters the front door. He ate lunch in his kitchen. He then went into his bedroom and sat down in a chair. His house is surrounded by a fence. Between his fence and the street there is a tree. Looking

through his window in his bedroom, he saw standing on the sidewalk behind this tree a man he had never seen before. He watched him about thirty minutes. During this time this man moved once or twice to a little fill adjoining the sidewalk and was watching his house. About 12:55 p.m. he came out of his front door, locked it, put his key in the wicker basket, and started to his office. As he came out of his house, this man, whom he identified at the trial as defendant Gene Knight, looked at him, and he looked at this man. Then Gene Knight walked across the street to another man standing on Tuttle's Chevrolet lot, whom he had seen from the window of his bedroom standing there fifteen or twenty minutes. This man standing on the Chevrolet lot appeared about the same size and age as the defendant Joe Watkins.

He returned home about 5:00 p.m. His front door and the back door were unlocked. The wicker basket and the front door key were lying in the hallway. He went to the closet adjoining his bedroom, and his safe and all its contents were gone.

On 10 or 12 January 1963 John J. McCaskill, who lives in Greensboro, North Carolina, loaned his automobile, a 1956 two-door, two-tone Mercury sedan, to defendants. Between 9 and 10 p.m. on 18 January 1963 Joe Watkins, his first wife Ruby Dunn and her sister Bobbie Dunn, and a man whose name is not stated in the evidence, went to Salisbury, North Carolina, in Watkins' automobile. There Bobbie Dunn got in a 1956 Mercury sedan, drove it back to Greensboro, and parked it where Watkins showed her to park it, which was in front of where John J. McCaskill lives. The next morning McCaskill found his automobile parked in front of his home. It then had a dent in it from the left front door to the back panel. Later Watkins told him he had had an accident with the automobile and gave him three hundred dollars in twenty dollar bills saying that ought to take care of the damage. He spent two hundred dollars of this money and turned one hundred dollars of it over to the State Bureau of Investigation. The State introduced this hundred dollars in evidence. Dr. McAnally examined and smelled the five twenty dollar bills and testified he could identify it.

A few days before 17 January 1963 two men in Madison saw around 10 or 11 a.m. a two-tone automobile with a mashed-in side around the left front door parked in the street near Dr. McAnally's home. Two or three men were in it.

On the afternoon of 14 January 1963 the defendants and another man brought, or had pulled, a 1956 two-tone Mercury automobile into an automobile repair shop in the town of Randleman. They stayed there about an hour while James Brown, the foreman, fixed the starter.

Between 5 and 6 p.m. on 18 January 1963 Joe Watkins went to the home of his sister Mrs. Martha Baynes in Greensboro. He gave his sister $320 in money and told her to send money orders with it. He also left a suitcase with her. When Watkins left, his sister opened the suitcase and found in it a pillowcase looped at the top full of money. She immediately shut the suitcase and called her husband and her father. They called police officers in Greensboro and turned over to them the suitcase and its contents. In the pillowcase was $15,570 in paper money; it was straight or folded, had a musty smell and stunk, and a lot of it was Series 1928-1934. The odor from the paper money was so bad Mrs. Baynes sprayed her bedroom with an air-room deodorizer. This $15,570 was introduced in evidence by the State. Dr. McAnally examined it in detail, smelled it, and testified that this money, by reason of its odor, was his and was in his safe on 17 January 1963.

One Mary Ann Daye had her automobile financed by the Scottish Bank in Salisbury, North Carolina. On 18 January 1963 she and Joe Watkins came in the bank together, and she paid off the loan in money and assigned the title to Joe Thomas Watkins. Joe Watkins signed the certificate of title as purchaser in the bank. A certified copy of the certificate of title from the Department of Motor Vehicles was introduced in evidence. G.S. 20-42. This shows the bank released its lien on 18 January 1963, though the record on page 76 shows the loan was paid off 18 January 1962, which it seems manifest is a typographical error.

About 5:15 a.m. on 19 January 1963 two members of the military police stationed at Fort Bragg stopped an automobile on Highway 87, because it was "weaving" in the road and ran through a red traffic light. The driver, Joe Watkins, was drunk. In the automobile with him was his former wife Ruby Dunn. They carried him to the Military Police Station. Watkins had on his person $1,198, of which $1,180 was in twenty dollar bills. These bills were straight and had a musty smell, and were mildewed. Watkins had a hearing before C. W. Jackson, U. S. Commissioner, who put him under a bond of $300 to appear in U. S. District Court. Watkins gave the commissioner as bail fifteen twenty dollar bills. The commissioner testified, "there was a distinct odor of mustiness, an unpleasant odor to the money." The commissioner later turned over this $300 in money to an officer of the State Bureau of Investigation. This money was introduced in evidence by the State. Dr. McAnally examined it, smelled it, and testified that this money, by reason of its odor, was in his safe on 17 January 1963.

On the afternoon of 18 January 1963 Joe Watkins went to the home of his first wife Ruby Dunn and left with her a shoe box, supposedly

containing clothes for dry cleaning. Later a police officer of Greensboro came to her home, and she turned this box over to him. He opened the shoe box, and it contained $335 in money, most of it in twenty dollar bills. The State introduced this money in evidence. Dr. McAnally examined it, smelled it, and testified that it was in his safe on 17 January 1963.

On the afternoon of 18 January 1963 Gene Knight bought a second-hand Chevrolet automobile from I. M. Leonard, a second-hand car dealer in Lexington, North Carolina. He paid Leonard $2,100 in twenty dollar bills for this automobile. He had this money in a white envelope in an inside pocket. The next morning Leonard deposited this money, and an additional $105 in money and a $425 check, in a local bank, where it was received by Mrs. Jaunita Craver, a teller in the bank. Mrs. Craver testified, "I noticed about the money when I took in the deposit, it had a foul odor. It was kind of a pack-away smell, musty." About a week later Mrs. Craver turned over $920 of this foul-smelling money to Paul Case, chief of police of Madison. The State offered this $920 in evidence. Dr. McAnally examined this money, smelled it, and testified it was in his safe on 17 January 1963.

Paul Case and William H. Jackson, a captain of the Greensboro police department, on 21 January 1963 brought Gene Knight from Charlotte to Greensboro, and he was later carried to the Rockingham County jail. On the way from Charlotte to Greensboro they passed a road sign bearing the name Madison, and Gene Knight said, "There's one damn sign that I wish I had never seen." On one occasion Knight asked Paul Case, "Where did you run across my name in Madison?" and further said: "He could name three SOB's and one of them would be it. * * * if you make a good score, they get jealous. * * * he had not been in Madison since 1952."

John Vanderford, a special agent with the State Bureau of Investigation, testified he talked with Gene Knight on 15 September 1962 in Lincoln County. Defendants objected to anything that was said or done on this occasion. The State announced it was offering it only against Gene Knight. The court overruled Knight's objection and instructed the jury that the evidence was competent against Knight, admitted it against Gene Knight alone and not against Joe Watkins, and the jury should so consider it. Vanderford testified in substance that he had with him some eight drawings of the working parts of safes, and that he showed them to Knight. That Knight told him these drawings "belonged to him, and that he knew I was going to keep them, but that he had memorized them and it didn't make any difference * * * that if he ever robbed another safe, it would be just one big one." Over de-

fendant's objection the court permitted the State to introduce these drawings in evidence. In overruling the objection, the court instructed the jury that these exhibits were admitted in evidence against Knight and not against Watkins, and the jury should so consider them. To all these rulings defendants objected, excepted, and assign them as error.

The closest case in point that we have found is *Commonwealth v. Corkery,* 175 Mass. 460, 56 N.E. 711. Corkery was indicted for the larceny of numerous milk cans from various owners. From a judgment of conviction he appealed. He took an exception to the admission in evidence of a conversation of his in February 1899, with a fellow servant, one Conlon, to the effect that if Conlon was short of cans, he could go out and steal them, and that, if Conlon did not do it, there were others that could do it. In overruling the exception, the Court said:

> "The cans in question were shown to belong to the alleged owners, and were found in the defendant's custody, under suspicious circumstances, not necessary to be detailed. The defendant testified that they were put where they were found about the 1st of May. Evidence of his animus in February, in connection with other circumstances of suspicion, was not too remote. Remoteness depends a good deal on the nature of the case. If the remark was found to have been made seriously, it showed that, less than three months before the cans were traced to his possession, the defendant contemplated with complacency the crime with which he was charged. It could not be presumed by the judge that he had experienced a change of heart in the meantime."

In *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449, on a trial upon an indictment for robbery from the person of a woman, evidence that one of defendants was heard in effect to say some time before the alleged robbery was committed, in a conversation relative to other robberies in the community, that he knew an old woman who kept money under her dress, was held competent. The Court said:

> "This evidence was competent as tending to show that the defendant Ham knew the prosecutrix had money and kept it under her dress, of which money she was subsequently robbed. This was a circumstance, which standing alone may not have had any potency, but when considered in connection with all the other circumstances appearing in the evidence may not have been entirely feckless. In criminal cases every circumstance calculated to throw any light upon the supposed crime is permissible."

The statement of Knight to the effect that the eight drawings of the working parts of safes shown him by John Vanderford were his, that

he had memorized them, and that if he ever robbed another safe it would be just one big one, made a little over four months, according to the State's evidence, before Dr. McAnally's safe was stolen, and the evidence that some of the money therein was traced to Knight's possession, show that Knight "contemplated with complacency the crime with which he is charged" here. The evidence of Knight's *animus* on 15 September 1962, in connection with the other evidence adduced by the State against him, tends to show that such *animus* continued to and through 17 January 1963, and naturally included the commission of the offenses charged in the first and second counts in the indictment. This evidence was competent against Knight. It was not admitted against Watkins. Defendants' assignment of error to the admission of this evidence is overruled.

In respect to the money which the State's evidence tends to show belonged to Dr. McAnally and was in Watkins' possession a day or two after 17 January 1963, the court carefully instructed the jury that this evidence was admitted against Watkins alone and not against Knight, and the jury should so consider it. In respect to the State's evidence tending to show Knight purchased a second-hand automobile from I. M. Leonard on 18 January 1963, his payment of $2,100 for it in twenty dollar bills which had a foul odor, and the identification of $920 of this money as being in his safe on 17 January 1963 by Dr. McAnally, the court carefully instructed the jury that this evidence was admitted against Knight alone and not against Watkins, and the jury should so consider it.

Dr. McAnally's testimony is to the effect that about 12:55 p.m. he came out of his front door, locked it, put his key in the wicker basket, and went to his office. When he returned home about 5 p.m., his front door and back door were unlocked, and the wicker basket and the front door key were lying in the hallway. This evidence permits a reasonable inference that an entry was made into Dr. McAnally's house by unlocking the front door with his key, which was in the wicker basket. There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key. *Creel v. State,* 23 Ala. App. 241, 124 So. 507, reh. den. 25 June 1929, cert. den. 220 Ala. 220, 124 So. 510; *S. v. Wurtz,* Mo., 11 S.W. 2d 1029; *Hawkins v. Com.,* 284 Ky. 33, 143 S.W. 2d 853; *Rippey v. State,* 86 Tex. Crim. 539, 219 S.W. 463; *McGilveray v. State,* 111 Tex. Crim. 256, 12 S.W. 2d 585; 12 C.J.S., Burglary, sec. 3, p. 670. See *S. v. Best,* 232 N.C. 575, 61 S.E. 2d 612.

The State's evidence, considered in the light most favorable to it, tends to show that defendant Knight and a man who appeared about

the same size and age as defendant Watkins were in front of Dr. McAnally's home on 17 January 1963 for fifteen or twenty minutes or more, and that a short time thereafter—some one or two or three hours—Dr. McAnally's house was entered by unlocking the front door with a key and his safe and its contents stolen. A day or two later each defendant had in his possession large amounts of money, which the State's evidence tends to show belonged to Dr. McAnally and were in his safe when it was stolen on 17 January 1963. The Court said in *S. v. Best, supra*: "Then, too, the defendant's possession of the fruits of the crime recently after its commission justified the inference of guilt on his trial for larceny." The State's evidence, considered in the light most favorable to it, further tends to show that on 10 or 12 January 1963 John J. McCaskill loaned his automobile, a 1956 two-door, two-tone Mercury sedan, to defendants; that a few days before 17 January 1963 two men in Madison around 10 or 11 a.m. saw a two-tone automobile with a mashed-in side around the left front door parked in the street near Dr. McAnally's house and that two or three men were in it; that during the night of 18 January 1963 Bobbie Dunn, acting under the direction of the defendant Watkins, parked McCaskill's automobile in front of where he lives; that the next morning McCaskill found his automobile parked in front of his house, and it had a dent in it from the left front door to the back panel. Later Watkins told him he had an accident with the automobile and gave him $300 in twenty dollar bills to pay for the damage. McCaskill spent $200 of this money and turned $100 of it over to the State Bureau of Investigation. The State introduced this $100 in evidence, and Dr. McAnally examined it, smelled it, and testified he could identify it. There is ample evidence adduced by the State to carry the case to the jury against both defendants on the first two counts in the indictment, and the court properly overruled their separate motions for judgment of nonsuit.

On cross-examination of Dr. McAnally by defendants' counsel, he testified in effect: A lot of the money he had in his safe, when it was stolen, was Series 1950 money. He made a statement in his office about his money in his safe, when it was stolen, and it was recorded by the television people. It went on television, and he saw it. He thinks he would recognize himself in that picture on television. He never made the statement that nothing had been put in his safe in the last 25 years. The record shows defendants' counsel asked this question: "Would you come and set that up, please, sir? I want to see if you recognize your statement." Apparently defendants' counsel asked someone to set up a television screen and show or play the recording to see if Dr. McAnally would identify the statement recorded as his own. The

State objected to the showing of the recording, unless defendants wanted to put it on as their evidence. Defendants' counsel said in effect he just wanted Dr. McAnally to say as to whether that is his voice and his statement; he wanted to put the statement in on cross-examination, and cross-examine him about it. The court ruled that when defendants put this statement in evidence, they were putting on evidence. Defendants excepted and assign this as error.

When the State closed its case, defendants called Dr. McAnally, as the record states, "for further cross-examination." The Court stated that it holds defendants are now putting on their own evidence. Defendants excepted and assign this as error. Dr. McAnally took the witness stand, the television recording was shown in its entirety without any objection on the part of the State, and he observed it. This is the television recording:

"Q (By the interviewer) Dr. McAnally, when did the burglary occur?

"A We think it occurred between 2:30 and 3:30.

"Q What day?

"A Thursday.

"Q And how did you discover it?

"A When I went home from the office approximately 4:55, my door was generally locked. The key was not where I generally kept it. I turned the knob, the door was unlocked and the key and the container was laying in the hallway in front of the door. I immediately walked back to my back door and it was unlocked. My back gate was wide open and naturally I supposed something should have or could have happened to this safe and I walked in to see and it was gone.

"Q How much money was stolen?

"A Approximately $75,000.00.

"Q Were there any other securities or bonds?

"A $25,000 or $35,000 in Government bonds.

"Q Have you made an accurate estimate of how much was in the safe since your robbery?

"A No, I have not.

"Q Has it always been your custom to keep large amounts of cash on hand?

"A This amount of money and these bonds have been in that location for 25 or 35 years. There has not been anything new plac-

ed in that safe in that length of time. The money that I have made in the past 25 or 30 years has been placed in banks, Building & Loan, or some type of investment.

"Q Will you keep this large amount of money in the future in your safe?

"A I will not keep $1500.00 in my safe from now on. I won't have a safe.

"Q In other words, you have learned your lesson?

"A Yes, sir, the hard way."

When the showing of the television recording ended, Dr. McAnally said: "That was me. That's my statement. To this extent. I did not place any money in there. My wife placed money in there the past ten or fifteen years." The record shows further cross-examination of Dr. McAnally by defendants' counsel.

When Dr. McAnally left the witness stand, the court ruled that defendants by introducing in evidence the television recording had put on evidence, and the State was entitled to open and conclude the arguments to the jury. To this ruling, defendants excepted and assign this as error.

In 1963 Cumulative Supplement to 20 Am. Jur., sec. 258, pp. 45-6, it is said: "Sounds are most commonly recorded on discs, wire, tape, or sound motion-picture film, and reproduced by various devices such as the phonograph, dictaphone, or sound projector. Usually the recording is effected by an electrical or electro-magnetic process. * * * Sound recordings which are shown to be accurate are admissible for purposes of impeachment, to present statements by witnesses or parties contradicting their trial testimony * * *." See Annotations 58 A.L.R. 2d 1024, Admissibility of sound recordings in evidence, particularly sec. 15, and 168 A.L.R. 927; and also *S. v. Walker,* 251 N.C. 465, 112 S.E. 2d 61, use of a tape recorder. See also 20 Am. Jur., Evidence, sec. 738, in respect to the admissibility of motion pictures as evidence.

In *State v. Porter,* 125 Mont. 503, 242 P. 2d 984, which was a prosecution for embracery, a failure to permit the defendant to introduce three recordings to impeach the credibility of certain prosecuting witnesses by showing that they had made prior contradictory statements different from those sworn to on their direct examination was held error.

In *Com. v. Clark,* 123 Pa. Super. 277, at p. 285, 187 A. 237, at p. 240, the Court said:

"* * * The phonograph, the dictaphone, the talking motion picture machine, and similar recording devices, with reproducing ap-

> paratus, are now in such common use that the verity of their recording and reproducing sounds, including those made by the human voice in conversation, is well established; and as advances in such matters of scientific research and discovery are made and generally adopted, the courts will be permitted to make use of them by way of presenting evidentiary facts to the jury."

This was quoted with approval in *Com. v. Hart,* 403 Pa. 652, 170 A. 2d 850.

Defendants were within their rights in asking Dr. McAnally on cross-examination if he had not made a certain statement to the effect that nothing had been put in his safe in the last 25 years, which statement was inconsistent with, or contradictory to, his testimony in the trial that a lot of that money that he claimed was in the safe was Series 1950 money. *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; 98 C.J.S., Witnesses, sec. 596. When Dr. McAnally denied making such a statement in respect to the subject matter about which he was being examined, the defendants had a right to introduce in evidence a television statement made by him inconsistent with, or contradictory to, his testimony in the trial in order to impeach him, provided a proper foundation was laid for the admission of such television recording by proof of its accuracy and of its being made by Dr. McAnally. *S. v. Patterson,* 24 N.C. 346; *S. v. Wellmon,* 222 N.C. 215, 22 S.E. 2d 437; *Smith v. Telegraph Co.,* 168 N.C. 515, 84 S.E. 796; 98 C.J.S., Witnesses, sec. 573, sec. 598 *et seq.*

The record plainly shows that the court did not limit defendants' cross-examination of Dr. McAnally, while he was a State's witness and before the State closed its case, in respect to prior inconsistent or contradictory statements made by him. It further shows that defendants' counsel desired to have the entire television recording shown or put in evidence, while he was cross-examining Dr. McAnally as a State's witness and before the State rested its case to see if Dr. McAnally recognized his statement. Defendants had a right to have Dr. McAnally identify the television recording as correct and made by himself in order that they could introduce it in evidence when their turn came to introduce evidence, if they so desired, but they had no right to introduce the television recording in its entirety on cross-examination while the State was putting on evidence. However, the ruling of the court that defendants could not show or play the television recording to Dr. McAnally on cross-examination, before the State rested its case, to see if he recognized his statement was not prejudicial to defendants, because they put or played the entire television recording in evidence be-

fore the jury without any objection by the State, and had the full benefit of it, and Dr. McAnally testified after seeing it, "That was me. That's my statement." The court was correct in its ruling that when defendants put this television recording in evidence, they were putting on evidence, and consequently the State was entitled to the opening and closing arguments to the jury. As to opening and closing arguments in a criminal case, see *S. v. Smith,* 237 N.C. 1, 23, 74 S.E. 2d 291, 306. Defendants' assignments of error 4 and 7 are based on exceptions relating to the television recording as set forth above, and to the court's ruling as to argument of counsel set forth above, and are overruled.

Defendants assign as error the court's permitting the State to challenge peremptorily a fifth juror. This assignment of error is overruled. G.S. 15-164 provides that in all criminal cases other than capital "a challenge of four jurors shall be allowed in behalf of the State for each defendant." *S. v. Levy,* 187 N.C. 581, 584, 122 S.E. 386, 388, which speaks of C.S. 4634, which is identical with G.S. 15-164, with the sole exception that more peremptory challenges are allowed by G.S. 15-164.

An examination of defendants' other assignments of error brought forward and discussed in their brief shows no prejudicial error sufficient to warrant a new trial.

All defendants' assignments of error are overruled. In the trial below we find

No error.

BOBBITT, J., dissenting in part as to defendant Knight: In my opinion, the admission over Knight's objection of (1) Mr. Vanderford's testimony as to what Knight said to him on September 15, 1962, and (2) of the drawings referred to in this testimony, was prejudicial error for which Knight is entitled to a new trial. This evidence tended to show that Knight, prior to September 15, 1962, had studied the working parts of safes and had "robbed" one or more safes and was the kind of person you would *suspect* whenever there was a "robbery" of a safe.

The applicable rule is stated as follows: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, North Carolina Evidence, Second Edition, § 91. In my opinion, the general rule controls here and the evi-

dence should have been excluded. Here there is no question as to the *animus* of the person(s) who broke and entered Dr. McAnally's home and carried away his safe and its contents.

EMILY ALLRED v. FRANK GRAVES, WILLIE GRAVES, PERRY CHRISCOE, J. C. CHRISCOE, DEMPSEY FREEMAN, DEMPSEY ODOM, THURMAN CHRISCOE, PETE BEAN AND GLENN CHRISCOE.

(Filed 17 January 1964.)

1. Constitutional Law § 33—

The constitutional guaranties against self-incrimination are to be liberally construed and they apply not only to criminal prosecutions but to any proceedings sanctioned by law, including examinations before trial. Constitution of North Carolina, Art. I, § 11.

2. Damages § 10—

Punitive damages may be awarded in a civil action, not as an award of compensation, but by way of punishment or penalty for conduct intentionally wrongful.

3. Same; Execution § 17—

Punitive damages are recoverable in an action for unlawful and malicious assault and, when awarded, execution against the person of defendants may issue after return of execution against their property wholly or partly unsatisfied, G.S. 1-410(1), G.S. 1-311, in which event G.S. 23-29, 2 applies and defendants are entitled to their discharge only upon payment or upon giving notice and surrender of all property in excess of $50.00 (G.S. 23-23, G.S. 23-30 through G.S. 23-38) which deprives defendants of their homestead and personal property exemptions above the $50.00.

4. Damages § 10; Constitutional Law § 33—

Constitutional guaranties against self-incrimination apply not only to strictly criminal actions but also to civil actions in which defendant may be arrested under G.S. 1-410 and in which execution against the person is authorized by G.S. 1-311, upon return of execution against the property unsatisfied. Constitution of North Carolina, Art. I, § 11, but the constitutional guaranties would not apply to such action if plaintiff relinquishes her claim to punitive damages.

5. Bill of Discovery § 3—

In a civil action to recover compensatory and punitive damages for malicious assault, defendants are not entitled to the denial of plaintiff's application for an examination of defendants prior to trial, G.S. 1-568.11(a)(b), solely because they claim that any answer they might make might subject them to a penalty, since that would rest the matter upon the *ipse dixit* of the party and not the judgment of the court.

6. Appeal and Error § 3—

While an appeal from an order for an adverse examination prior to trial may be subject to dismissal as premature, the Supreme Court in the exercise of its supervisory jurisdiction may consider the appeal on its merits to determine a question of first impression in the interest of the expeditious administration of justice.

BOBBITT, J., dissenting.

APPEAL by defendants from *Walker, S.J.*, 16 September 1963 Civil Session of RANDOLPH.

Plaintiff alleges in her complaint that about 8:30 p.m. on Saturday, 5 May 1962, all nine defendants, pursuant to a preconcerted conspiracy, came to her house and unlawfully and maliciously assaulted her and certain members of her family. She alleges the casualties as follows: Out in the yard her sixteen-year-old son Larry Allred had an open knife pulled on him by J. C. Chriscoe and a pistol pointed at him by Perry Chriscoe, was hit in the jaw by one of them knocking him down and bursting his jaw, and then when he jumped up and ran, he was shot at by Perry Chriscoe. Doug Purvis, a visiting neighbor, was shot at by Perry Chriscoe when he was running. Out in the yard her twenty-five-year-old son Merlin Allred had a double-barreled shotgun drawn on him by Frank Graves, was seized by Willie Graves and two other defendants, and was hit in the mouth and nose by Willie Graves "bursting two teeth." Peggy Allred, while in the house, was shot in the right shoulder by persons in a car. Plaintiff, while in the house, was shot in the back by persons in a car and had a double-barreled shotgun drawn on her by Dempsey Odom while she was in the yard. Shots were fired into plaintiff's home and into the automobiles of her daughter Dorothy and her son Merlin. She prays a recovery of $5,000 compensatory damages and of $25,000 punitive damages from all the defendants.

All the defendants filed a joint answer. In their answer they deny assaulting plaintiff or anyone or shooting. They allege they went to plaintiff's house to buy some non-tax-paid liquor. While they were in the front yard, plaintiff's daughter Dorothy Garner screamed and she and persons unknown to them began fighting. All they did was run away. Their sole casualty was Willie Graves, who was hit in the head with an axe.

On 12 August 1963, and after the complaint and answer had been filed, plaintiff, pursuant to G.S. 1-568.11 (a) and (b), filed an application with the clerk of the superior court for an order to examine all nine defendants in the courthouse at Asheboro, Randolph County, the

County of their residence. On the same day the clerk entered an order for their examination, pursuant to G.S. 1-568.11 (c).

The following appears in Judge Walker's order as facts found by him: On the date of the examination all the defendants, except Dempsey Freeman, were present with their attorney, H. F. Seawell, Jr. Before the defendants present were sworn, their attorney made a motion before the clerk of the superior court to dismiss the order of examination for the reason that plaintiff is seeking punitive damages, and if punitive damages are awarded by a jury, a judgment for punitive damages could affect their liberty, and consequently the order of examination is tantamount to requiring the defendants to give evidence against themselves and is contrary to the provisions of the Federal and State Constitutions. The clerk denied the motion, and defendants excepted and appealed. Defendants were then sworn before the commissioner appointed in the order to hold the examination, and each of them refused to answer questions as to whether or not they were with the other defendants on 5 May 1962, and as to whether or not they went to plaintiff's house on that night. Plaintiff through her attorney gave notice that the defendants would be cited for contempt in refusing to answer questions. Whereupon, the parties and their attorneys agreed that the motion for contempt should be heard by the presiding judge at the 16 September 1963 Session.

The parties stipulated before Judge Walker, "the defendants and each of them had heretofore been tried in the superior court of the State of North Carolina for criminal charges growing out of the same facts and circumstances as alleged in the complaint in this civil action, the defendants, through their attorney, contending, however, that this was in the nature of a quasi-criminal action wherein the plaintiff seeks punitive damages against the defendants, and each of them, and * * * that to require them to give testimony in an adverse examination would be in violation of their rights under Article I, section 11, and Article I, section 29 of the North Carolina Constitution."

Judge Walker ruled as a matter of law that sections 11 and 29 of Article I of the State Constitution apply only to criminal actions and do not apply to a civil action in which punitive damages are sought, and that defendants are required to give testimony as required in the order for their examination. Whereupon, he affirmed the order of the clerk for examination of the defendants and the order of the clerk refusing to dismiss the order of examination, and ordered the defendants to appear before the commissioner appointed to hold the examination at such time as may be set by her to answer questions asked them within the scope of the matters set forth in the complaint and answer.

From this order, defendants appeal.

H. F. Seawell, Jr., for defendant appellants.
H. Wade Yates for plaintiff appellee.

PARKER, J. This appeal presents another facet of the recurring problem of the extent of the constitutional privilege against self-incrimination. Unlike most of the cases which have received the attention of the highest courts, the instant case does not involve a criminal prosecution or the inquisitorial act of a legislative committee. The claim of privilege here is interposed in an examination before trial in a civil action, after filing of the complaint and answer, on the ground that punitive damages are sought.

It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or subject him to fines, penalties or forfeitures. *Ward v. Martin,* 175 N.C. 287, 95 S.E. 621; *Counselman v. Hitchcock,* 142 U.S. 547, 35 L. Ed. 1110; *Brown v. Walker,* 161 U.S. 591, 40 L. Ed. 819; 58 Am. Jur., Witnesses, sec. 43; Annotation 118 A.L.R., p. 628; 98 C.J.S., Witnesses, sec. 431 *et seq.* However, it has been held that this privilege does not apply to penalties of a purely remedial character. 58 Am. Jur., Witnesses, sec. 43. "The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent." 8 Wigmore, Evidence (1961), p. 331. The rule against self-incrimination has existed from an early date in the English common law, and its origin has been said to be based on no statute and no judicial decision but on a general and silent acquiescence of the courts in a popular demand. This rule, it has been said in *Twining v. New Jersey,* 211 U.S. 78, 53 L. Ed. 97, distinguished the English common law "from all other systems of jurisprudence." It was so well established that on the separation of the colonies from Great Britain and the establishment of the United States, it was universally recognized therein as a part of the fundamental law. *Brown v. Walker, supra.* In *Brown v. Walker,* the Court said:

> "So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment."

The constitutional guaranties against self-incrimination should be liberally construed. *Gouled v. United States,* 255 U.S. 298, 65 L. Ed. 647; *Quinn v. United States,* 349 U.S. 155, 99 L. Ed. 964; *Ullmann v. United States,* 350 U.S. 422, 100 L. Ed. 511, 53 A.L.R. 2d 1008; 98 C.J.S., Witnesses, sec. 432.

The privilege against self-incrimination may be exercised by a witness in any proceeding. It has been held that "even though the constitutional provision is worded simply that no person 'shall be compelled in any criminal case to be a witness against himself,' the privilege of refusing to answer extends to all proceedings sanctioned by law and to any investigation, ex parte or otherwise, litigious or not." 98 C.J.S., Witnesses, sec. 433. This is said in 98 C.J.S., Witnesses, p. 246: "The privilege also applies in civil actions and proceedings, as, for example, with reference to an answer in chancery, a proceeding for discovery or for examination before trial, to interrogations of a party in equity before trial, to the examination of a bankrupt, or an insolvent, or a judgment debtor, to the examination of a trustee in bankruptcy before a referee, to proceedings to take a deposition, * * * and to proceedings to enforce forfeitures."

"Punitive damages are not recoverable in any case as a matter of right. If the pleading and evidence so warrant, an issue as to punitive damages should be submitted to the jury. Upon submission thereof, it is for the jury to determine (1) whether punitive damages in *any* amount should be awarded, and if so (2) the amount of the award. These questions are determinable by the jury in its discretion." *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393, 62 A.L.R. 2d 806.

In *Smith v. Myers,* 188 N.C. 551, 125 S.E. 178, the Court said: "Vindictive or punitive damages are treated as an award by way of punishment to the offender and as a warning to other wrongdoers; they are not allowed as a matter of course, but only when there are some features of aggravation, as willfulness, malice, rudeness, oppression, or a reckless and wanton disregard of the plaintiff's rights." In *Transportation Co. v. Brotherhood,* 257 N.C. 18, 125 S.E. 2d 277, *cert. den.* 371 U.S. 862, 9 L. Ed. 2d 100, reh. den. 371 U.S. 899, 9 L. Ed. 2d 131, the Court said: "Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful."

In *Tripp v. Tobacco Co.,* 193 N.C. 614, 137 S.E. 871, the Court quotes with approval from *Day v. Woodworth,* 54 U.S. 363, 371, 14 L.

Ed. 181, as follows: " 'It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. * * * By the common, as well as the statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured'." In *Voltz v. General Motors Acceptance Corp.*, 332 Pa. 141, 2 A. 2d 697, the Court said punitive damages "are, as the nomenclature indicates, penal in character."

In *Life and Casualty Insurance Co. v. McCray,* 291 U.S. 566, 78 L. Ed. 987 (992), Mr. Justice Cardozo speaking for the Court said: " 'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs."

When the penalty lies in the payment of money, the Courts are in conflict. The following cases hold that the privilege against self-incrimination applies: *Lees v. United States,* 150 U.S. 476 (1893) (action to recover statutory penalty for illegal transportation of aliens; privilege applies); *Speidel Co. v. Barstow Co.,* 232 Fed. 617 (D. R. I. 1916) (where a statute imposes triple damages for infringement of a patent, interrogatories for discovery under Equity Rule 58 are privileged from answer); *Wilson v. Union Tool Co.,* 275 Fed. 624 (S. D. Cal. 1921) (treble damages for infringement of a patent); *Bowles v. Trowbridge,* 60 F. Supp. 48 (N. D. Cal. 1945) (action for treble damages under EPCA; privilege applies); *Malouf v. Gully,* 187 Miss. 331, 192 So. 2 (1939) (immunity statute construed to protect against a suit for statutory penalties for illegal liquor sales); *Serio v. Gully,* 189 Miss. 558, 198 So. 307 (1940) (same); *Zambroni v. State,* 217 Miss. 418, 64 So. 2d 335 (1953) (same); *Bailey v. Muse,* 227 Miss. 51, 85 So. 2d 918 (1956) (same); *Boyle v. Smithman,* 146 Pa. 255, 274, 23 Atl. 397, 398 (1892) (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" $1,000 for each act; privilege applied); *City of Philadelphia v. Cline,* 158 Pa. Super. 179, 44 A. 2d 610 (1945) (action under municipal ordinance to recover penalties for failure to file tax returns; privilege applies); Anonymous, 1 Vern. 60, 23 Eng. Rep. 310 (Ch. D. 1682) (bill for tithes; discovery declined, as a treble penalty was collectible; principle apparently sanctioned). These cases hold that the privilege is inapplicable: *Perkins Oil Well Cementing Co. v. Owen,*

293 Fed. 759 (S. D. Cal. 1923) (patent infringement suit for treble damages; privilege inapplicable); *Standard Oil Co. v. Roxana Petroleum Corp.*, 9 F. 2d 453 (S. D. Ill. 1925) (same); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942) (*semble;* "qui tam" for double damages and penalty held not within proscription of double jeopardy clause); *Bowles v. Chew*, 53 F. Supp. 787 (N. D. Cal. 1944) (action for treble damages by Administrator under Emergency Price Control Act; privilege not applicable); *Bowles v. Seitz*, 62 F. Supp. 773 (W. D. Tenn. 1945) (same); *Amato v. Porter*, 157 F. 2d 719 (10th Cir. 1946) (same); *Crary v. Porter*, 157 F. 2d 410 (8th Cir. 1946) (same); *Woods v. Robb*, 171 F. 2d 539 (5th Cir. 1948) (same); *Southern Ry. v. Bush*, 122 Ala. 470, 26 So. 168 (1899) (in an action for death, the damages, though punitive and not compensatory, are not a penalty, and the privilege does not apply to the defendant); *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965 (1895) (administrator's citation of one charged with concealing and embezzling the estate of the deceased; the statute provided for double damages; an order of compulsory examination was held proper, the statute being remedial, not penal).

The complaint alleges that all nine defendants, pursuant to a preconcerted conspiracy, came to plaintiff's house about 8:30 p.m. on Saturday, 5 May 1962, and unlawfully and maliciously assaulted her and certain specified members of her family, and shot into automobiles and into the house.

In this State a person may be arrested and held to bail "in an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly, or maliciously injuring, * * * real or personal property." G.S. 1-410 (1); *Long v. Love*, 230 N.C. 535, 53 S.E. 2d 661. For such acts, when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771. In such cases, if a judgment is rendered against a defendant for a cause of action specified in G.S. 1-410 (1), G.S. 1-311 authorizes an execution against the person of the judgment debtor, after the return of an execution against his property wholly or partly unsatisfied.

G.S. 23-29, 2, provides that "every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever" is entitled to the benefit of G.S. Ch. 23, Art. 4, which is entitled "Discharge of Insolvent Debtors." The provisions of G.S. 23-29, 2, are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the

provisions of G.S. 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of G.S. 1-311. *Burgwyn v. Hall,* 108 N.C. 489, 13 S.E. 222. When a person is taken by authority of an execution against his person by virtue of the provisions of G.S. 1-311, he can be discharged from imprisonment only by payment or giving notice and surrender of all his property in excess of fifty dollars. G.S. 23-23, 23-30 through 23-38. *Oakley v. Lasater,* 172 N.C. 96, 89 S.E. 1063; *Fertilizer Co. v. Grubbs,* 114 N.C. 470, 19 S.E. 597.

In *Oakley v. Lasater,* the Court said: "The effect of an execution against the person, therefore, is to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above $50."

Punitive damages under our decisions are undoubtedly by way of punishment imposed by law, and not compensatory. Considering the provisions of G.S. 1-410, G.S. 1-311, and G.S. Ch. 23, Art. 4, we think that part of the instant case seeking punitive damages for an alleged unlawful and malicious assault on plaintiff and malicious injury to her house is penal in its nature, and not in essence for a civil liability, and under such circumstances the award of punitive damages would be in a broad sense a penalty. Penalty "is an elastic term with many different shades of meaning. The term involves the idea of punishment, either corporal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment." 70 C.J.S., Penalties, sec. 1. The provisions of our Constitution should receive a liberal construction, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both persons and property. *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854, 128 A.L.R. 658. Consequently, liberally construing Article I, section 11, of the North Carolina Constitution, which reads in relevant part, "In all criminal prosecutions, every person charged with crime has the right * * * not (to) be compelled to give self-incriminating evidence * * *," in order to carry out its intent and purpose, it is our opinion, and we so hold, that its provisions protect defendants here from being required to answer questions on the order of examination, which will necessarily tend to subject them to a verdict or an award of punitive damages, and to an execution against the person, the effect of which would be to deprive them entirely of their homestead exemption and of any personal property exemption over fifty dollars. Counsel for appellants vividly states in his brief, "no man should be forced to give evidence against himself to put himself in jail." Judge Walker was in error in ruling that Article I, section 11, of the State Constitution

applies only to strictly criminal actions, and does not apply to a civil action in which punitive damages are sought under the facts of the instant case and in requiring defendants to give testimony in the order for their examination, and his order will be modified by striking this out, and by making it conform to what is said above in this opinion. His ruling that Article I, section 29, of the State Constitution applies only to criminal actions and does not apply to a civil action in which punitive damages are sought seems to be superfluous and needs no comment as to its correctness or incorrectness.

"In order to vacate an order for examination, all those authorities hold that it must be plainly apparent that the evidence sought must *necessarily* tend to convict the party to be examined of a crime or to subject him to a penalty or forfeiture." *Ward v. Martin, supra.* To paraphrase what is said in this case, we are inclined to the view that plaintiff should not be denied a plain statutory right to examine defendants here before trial solely because they claim that any answers they make may subject them to a penalty. This rests the matter upon the *ipse dixit* of each defendant and not upon the judgment of the court. Proceeding with the examination will not deny defendants any constitutional right. If any defendant cannot answer the questions, or any of them, propounded to him on the examination without giving testimony that would necessarily tend to subject him in this case to punitive damages, and to an execution against his person, and to a deprivation of his homestead exemption and of any personal property exemption over and above $50, he can then claim his privilege and refuse to answer, and if plaintiff pursues the matter further pursuant to the provisions of G.S. 1-568.18 and G.S. 1-568.19, his claim of privilege can be properly ruled on according to the provisions of these statutes. *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822. The judge was correct in affirming the clerk's order refusing to dismiss the order of examination.

There are decisions of this Court holding that a party cannot appeal from an order to appear and be examined under oath concerning the matters set out in the pleadings. *Pender v. Mallett,* 122 N.C. 163, 30 S.E. 324; *Holt v. Warehouse Co.,* 116 N.C. 480, 21 S.E. 919; *Vann v. Lawrence,* 111 N.C. 32, 15 S.E. 1031. In the exercise of our discretion, as the question presented is of first impression here, we have concluded to consider the appeal on its merits. *Ward v. Martin, supra.*

It must not be understood that we express any opinion as to whether or not the allegations of the complaint are sufficient as to punitive damages. That question is not before us on this appeal.

If plaintiff here should seek merely compensatory damages, and should relinquish all claim to punish defendants by punitive damages

and to arrest them by virtue of the provisions of G.S. 1-410 (1) and to issue an execution against their persons by virtue of the provisions of G.S. 1-311, defendants' claim of privilege would not apply. In stating this, we assume that the stipulation entered into by the parties is to the effect that all criminal charges against the defendants, and each one of them, in respect to the facts alleged in the complaint have been finally disposed of.

The order of the judge directing the examination of defendants under the statute, as modified above, is affirmed.

Modified and affirmed.

BOBBITT, J., dissenting: The appeal is premature and should be dismissed. In my opinion, discussion of a defendant's constitutional privilege against self-incrimination should be deferred until such time as such defendant refuses to answer specific questions and then with reference to his refusal to answer such questions.

NETTIE LOWE WILSON v. CHARLES CALVIN WILSON.

(Filed 17 January 1964.)

1. Husband and Wife § 2—

The law imposes upon the husband the duty to support his wife, which duty may be enforced by decree of the court, and such duty is a continuing one so that the fact that the husband has performed such duty in the past is no defense against present failure to perform.

2. Husband and Wife § 11—

A separation agreement when properly executed is binding and conclusive on the parties.

3. Cancellation and Rescission of Instruments § 5—

Rescission is an equitable remedy which may be invoked only for a breach of condition or covenant constituting an indispensable part of the contract and without which the agreement would not have been made.

4. Divorce and Alimony §§ 16, 18; Husband and Wife § 11— Where husband breaches separation agreement the wife may recover support.

A properly executed deed of separation under which the husband conveys to the wife certain property, agrees to pay her a certain sum monthly for 18 months and the wife agrees not to seek further support from him after such sums had been paid, *is held* not to bar her suit for alimony without divorce or preclude an order for alimony *pendente lite* therein

when the husband breaches the agreement after eight monthly payments by refusing to make further payments in accordance with the agreement, since in such event he refuses to perform the very condition which is the basis of her promise to surrender her rights, although she must account for the benefits, if any, which she may have received under the agreement.

HIGGINS, J., dissenting.

BOBBITT, J., joins in dissent.

APPEAL by plaintiff from *Johnston, J.*, in Chambers in FORSYTH on 16 May 1963.

This is an action for alimony without divorce. Plaintiff alleges: The parties were married in 1952; defendant abandoned plaintiff in January 1962; in April 1962 the parties executed a seperation agreement, copy of which is annexed to and made a part of the complaint; defendant is an able-bodied man making good wages; plaintiff has had much sickness and many financial reverses; she is not able to subsist on the income she earns, nor does she possess the means to prosecute an action against defendant.

The agreement made a part of the complaint is dated 10 April 1962. It recites: The marriage in 1952; the fact that no children have been born of the marriage; a separation in 1962; the parties owned real property as tenants by the entirety, household and kitchen furniture, and other articles of personal property subject to mortgages for unspecified amounts on the real estate and on the household and kitchen furniture. The acknowledgment complies with the requirements of G.S. 52-12.

The agreement obligated defendant to convey his interest in the real estate and the household and kitchen furniture to plaintiff subject to the recited mortgages. (The record does not indicate the value of the real estate or the amount of the liens thereon.) The agreement declared the husband the owner of designated articles of personalty and the wife the owner of the remaining personalty. (Value of the personalty is not revealed.)

Sec. VIII of the separation agreement reads:

> "It is agreed that the husband will pay to the wife the sum of One Thousand Eight Hundred Dollars ($1,800.00) which payments shall be made in the following manner: The sum of One Hundred Dollars ($100.00) on or before the 30th day of May 1962, and a like sum, to-wit: One Hundred Dollars ($100.00) on or before the 30th day of each succeeding month thereafter until

the full sum is paid. It is further understood and agreed that *after* said sum is paid, the wife will seek no further support from the husband and the husband shall not *thereafter be required* to provide the wife with any maintenance or support whatsoever, it being understood that she will *thereafter* provide her own maintenance and support." (Emphasis supplied.)

Plaintiff alleged defendant had made eight of the eighteen payments called for by the contract, but he "has told the plaintiff that if she ever got anything out of him, she would have to get it in Court."

Defendant has not answered. Notice was given that plaintiff would apply for alimony *pendente lite.*

Judge Johnston found: The separation agreement was duly executed; defendant had not complied with its provisions; the parties had not resumed marital relations. On these findings he concluded: "Now, therefore, upon the foregoing facts, the Court is of the opinion that the Motion of the plaintiff in the present action should not prevail and the Motion of the plaintiff for alimony *pendente lite* and attorney fees pending the final trial of this suit is accordingly denied."

Henderson & Yeager by Frank J. Yeager for plaintiff appellant.

RODMAN, J. When man and woman marry, the law imposes a duty on the husband to support his wife. *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228. Where he separates himself from his wife and fails to perform this duty, the wife may compel performance by judicial decree. G.S. 50-16. He cannot, by merely providing support until he gets beyond the jurisdiction of the court, deprive his wife of this efficacious means of enforcing performance of the obligation imposed on him by law. *Thurston v. Thurston,* 256 N.C. 663, 124 S.E. 2d 852.

An agreement between husband and wife which, recognizing an existing cessation of marital relations, provides for a settlement and adjustment of their respective property rights and obligations upon the assumption that marital relations will not be renewed is, when freely executed, acknowledged by the parties, found by the probating officer not to be unreasonable or injurious to the wife, *and performed,* binding and conclusive on the parties. *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327; *Taylor v. Taylor,* 197 N.C. 197, 148 S.E. 171; *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235; *Williams v. Williams, post,* 48.

The question to be decided evolves upon this situation: The wife contracts to surrender her marital rights upon condition that the husband shall provide for her support in a fixed amount. Thereafter the husband

refuses to perform the very condition which is the basis for the wife's promise to surrender her rights.

Is the wife limited to an action for breach of the contract? Or may she accept her husband's declaration that the instrument is "a mere scrap of paper" and for that reason not binding on either?

Judicial decisions and text books on the law of contract are in agreement that where there is a material breach of the contract going to the very heart of the instrument, the other party to the contract may elect to rescind and is not bound to seek relief at law by an award for damages. This rule was stated by the Supreme Court of Florida in *Steak House v. Barnett,* 65 So. 2d 736, in this language: "A covenant is dependent where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. Black on Rescission and Cancellation, 2d Ed., Vol. I, pp. 555, 601. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances if the remedy at law will not be full and adequate." *Dula v. Cowles,* 52 N.C. 290; *Carrow v. Weston,* 247 N.C. 735, 102 S.E. 2d 134; *Wallace v. Smith,* 240 P. 2d 799; *Wilson Corrugated Kraft Containers,* 256 P. 2d 1012; *Sanders v. Meyerstein,* 124 F. Supp. 77; *Fish v. Valley Nat. Bank of Phoenix,* 167 P. 2d 107; *Village of Wells v. Layne-Minnesota Co.,* 60 N.W. 2d 621; 12 Am. Jur. 972; 17A C.J.S. 517; Restatement of Contracts, sec. 274; Black on Rescission and Cancellation, 2d Ed. Vol. I, secs. 196, 214, 215.

Rescission, an equitable remedy, is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement. *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391; *Jenkins v. Myers,* 209 N.C. 312, 183 S.E. 529; *Highway Comm. v. Rand,* 195 N.C. 799, 143 S.E. 851.

If the wife is content to look to the contract for relief, she may be awarded damages, not for failure to perform a duty, but because of her husband's breach of his contract. Neither the needs of the wife nor hardship imposed on the husband is a defense. Any judgment rendered for nonperformance is a debt. It can only be enforced by a levy on and sale of defendant's property. He cannot be imprisoned. N. C. Const., Art. I, sec. 16; *Daniel v. Owen,* 72 N.C. 340; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118. On the other hand, the duty of a husband to

support his wife is imposed by law. The amount, if any, to be paid is fixed by order of the court, having due regard to the situation of the parties, the ability of the husband to pay, and the needs of the wife. A willful failure of the husband to comply with the court's order is a contempt, and can be punished as such by imprisonment. It is not within the constitutional inhibition against imprisonment for debt. *Pain v. Pain,* 80 N.C. 322; *S. v. Morgan,* 141 N.C. 726.

The duty of the husband to support is a continuing one. The mere fact that a husband has performed his duty in the past is no defense against present failure to perform. Hence this Court rejected the plea of a defendant that his past performance of his separation agreement to provide monthly payments relieved him of his obligation to perform in the future. It said in *Cram v. Cram,* 116 N.C. 288: "If we concede that plaintiff had the right to demand that the agreement mentioned in the answer be enforced, had she chosen to sue upon it, the defendant will not, nevertheless, be allowed, after repudiating it by ceasing to pay or offer to pay according to its provisions, to set it up as a bar to her recovery in this action . . . *It is not the contract to pay a certain sum in lieu which quits the husband of his duty to furnish a support for the wife when he is discharged, but the actual payment or attempt or offer to pay in fulfillment of his agreement.* Kelly's Contracts of Married Women, p. 75, 1 Cord's Legal and eq. Rights of Married Women, secs. 144, 145. Having ceased to perform his agreement to pay the monthly allowance referred to in the pleadings, it will not avail him now as a defense to this proceeding for maintenance on the part of the plaintiff, to whom he admits that he was married, and whom it is conceded that he afterwards deserted." (Emphasis supplied.)

In *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195, plaintiff sought alimony without divorce. As a defense to her action defendant pleaded the separation agreement by which he obligated himself to pay $85 per month for plaintiff's support. He made three payments and then ceased further performance. Clark, C.J., disposed of defendant's contention that the separation agreement defeated plaintiff's right to alimony with this terse sentence: "The defendant having failed to pay the installments as provided by the agreement, the plaintiff can maintain this action. *Cram v. Cram,* 116 N.C. 288."

In *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745, plaintiff, notwithstanding a separation agreement, sought the security of an award of alimony. She alleged that the husband was complying with the provisions of the contract and making the monthly payments there called

for. She also said that the payments so made were sufficient for her support. She predicated her claim to an award of alimony on the fact "that defendant has expressed to plaintiff his intention to obtain an absolute divorce at the end of two years from the date of their separation and has made statements causing plaintiff to anticipate and fear that defendant would not comply with the said separation agreement after obtaining a divorce."

The appellant's brief in the *Butler* case states the question the Court was called upon to decide in this language:

> "Is a wife whose husband has been convicted of an assault upon her resulting in their separation entitled to an order for maintenance *pendente lite* under G.S. 50-16 when her husband is making the payments in conformity with the terms of a valid separation agreement but threatens to obtain a divorce on grounds of two years separation and discontinue payments upon his contract?"

Seawell, J., speaking for the Court, gave this answer:

> "The Court is of opinion that the jurisdiction of the court invoked under G.S. 50-16, is not barred by the separation agreement pleaded, and that within the frame of her present action, the plaintiff may seek such relief as she may be entitled to have."

The existence of a separation agreement is not a bar to an award of alimony *pendente lite*. *Oldham v. Oldham*, 225 N.C. 476, 35 S.E. 2d 332; *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171. If relief is here denied, those cases were erroneously decided.

The conclusion reached by this Court in *Cram v. Cram, supra*, is recognized in decisions elsewhere as correct. *Meyerl v. Meyerl*, 84 N.W. 1109; *Hefele v. Hefele*, 160 A. 368; *French v. French*, 134 N.E. 33; *Bradford v. Bradford*, 4 N.E. 2d 1005; *Walker v. Walker*, 94 A. 346, Ann. Cas. 1916B 934; *Scheinkman v. Scheinkman*, 118 N.Y.S. 775; *Verdier v. Verdier*, 223 P. 2d 214; *Sellers v. Sellers*, 164 S.E. 769; Lindey: SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS, sec. 25.

The contention that the order denying alimony is supported by *Lentz v. Lentz*, 193 N.C. 742, 138 S.E. 12, s. c. 194 N.C. 673, 140 S.E. 440; *Brown v. Brown*, 205 N.C. 64, 169 S.E. 818; *Turner v. Turner*, 205 N.C. 198, 170 S.E. 646; *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819; *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345; and *Spruill v. Nixon*, 238 N.C. 523, 78 S.E. 2d 323, and similar cases, is fallacious.

That these cases do not control the decision in the present case is, we think, apparent from an examination of them. In the first appeal in *Lentz v. Lentz, supra,* the Court held that a husband who had obtained a divorce could not thereafter be required to pay alimony, nor did the divorce constitute a breach of the separation agreement the parties had executed. It is elementary that the husband's legal duty to support his wife, unlike his contractual obligation, terminates when the marriage relationship has been terminated by a divorce *a vinculo.* It was to avoid this very situation that the plaintiff brought her action in *Butler v. Butler, supra.* Both *Lentz* and *Butler* were decided by a unanimous Court.

The decision on the second *Lentz* appeal is an application of the law declared in *Stanley v. Stanley, supra,* that the husband cannot be imprisoned for a breach of his contractual obligation.

In *Brown v. Brown, supra,* the wife sought a divorce *a mensa* and alimony notwithstanding the provision of a valid separation agreement which the husband had "fully performed." Of course she could not, after her husband had performed his part of the contract, obtain an award of alimony.

Here the husband has not only not performed; he has, according to the allegations of the complaint, which are not denied by him, announced that he has no intention of performing.

The conclusion reached in *Turner v. Turner, supra,* is not in conflict with *Cram v. Cram, supra.* The *Cram* case was referred to in the briefs. Manifestly the Court did not intend to overrule it without referring thereto, but instead relied on *Brown v. Brown, supra,* and *Lentz v. Lentz, supra.*

Davis v. Davis, supra, is a mere application of the doctrine declared in the first *Lentz* case that an absolute divorce terminates the husband's legal duty to support. He cannot thereafter be held in contempt for nonsupport even though he has contracted to provide support.

Luther v. Luther, supra, merely holds the wife may not be punished for contempt when she refuses to abide by an agreement which is not approved as required by G.S. 52-12 and is void under the statute of frauds. The statement in that case and in *Spruill v. Nixon, supra,* that a consent judgment is a contract binding on the parties which cannot be vacated unless by consent or for fraud or mistake is undoubtedly a correct statement of the law. It is not here challenged, but that legal principle cannot be expanded so as to require performance by one when the other party declares he has no intention of complying with the condition precedent to his right to bind the other.

It must not be forgotten that the public official who adjudged the contract not injurious to the wife had before him an instrument which

divested her of the right to support only *after* the husband had performed his part of the contract.

When the wife, as here, elects to seek alimony rather than damages for the breach of the contract, she is only entitled to such an award as would be proper if no contract had been signed. If there has been a partial performance, she must account for the net benefits, if any, which she may have received.

Reversed.

HIGGINS, J., dissenting: The plaintiff attached the separation agreement to her complaint and made it a part of her alleged cause of action. The agreement was executed in accordance with the formalities required by law. Among other things, it provided:

> "WITNESSETH: WHEREAS, the parties hereto are husband and wife, having been lawfully married on the 23rd day of December 1952, but WHEREAS, by reason of irreconcilable differences and disagreements, the parties separated on the 20th day of January 1962, and have since said date lived continuously separate and apart from each other and are presently living separate and apart from each other; and WHEREAS, the parties have agreed that they will continue to live separate and apart from each other in the future, each being of the opinion that it will promote their happiness and welfare to live separate and apart in the future";

The agreement required the defendant to convey to the plaintiff the home held by them as an estate by entireties, the deed to be, and presumably was, delivered simultaneously with the execution of the separation agreement. All the personalty belonging to the parties was given to the plaintiff except one incomplete set of dishes, one empty bookcase, one rollaway bed, the 1961 Chevrolet, and "his personal clothing and his purely personal belongings." In so far as the record discloses he left the home without anything else of value except his ability to work. He agreed to pay to the plaintiff $100.00 each month for 18 months. At the time she instituted this suit she had been paid $800.00, and three of the remaining payments were then past due.

Under the facts alleged, the plaintiff was entitled to maintain an action for the recovery of $300.00 and interest for breach of contract and she would have been entitled to amend her complaint after it was filed, alleging any additional payments that were past due up to the time of the trial. Failure to meet the payments does not entitle the plaintiff to have the contract declared void. A breach of the contract

is cause for rescission only when the contract is indivisible and the breach defeats it. *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391. By rescission the whole transaction must be avoided. A party may not rescind in part and affirm in part. "The nonperformance on one side must go to the entire substance of the contract *and to the whole consideration,* so that it may safely be inferred . . ., if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side." *Jenkins v. Myers,* 209 N.C. 312, 183 S.E. 529; *New Orleans v. R.R.,* 171 U.S. 334. Cancellation or rescission of a contract even when the contract is procured by fraud (not even suggested here) requires the return of all consideration. *Kee v. Dillingham,* 229 N.C. 262, 49 S.E. 2d 510. The plaintiff does not offer to return anything.

Assuming all plaintiff's factual allegations are true, she is entitled to maintain a cause of action for breach of contract. Instead, she sues for alimony and counsel fees. Her factual allegations show that in so doing she attempts to assert a defective cause of action. Judge Johnston was correct in so holding.

Valid contracts between husband and wife executed while they are living in a state of separation are binding in the same manner as other contracts. However, in so far as the contract is executory and relates to obligations and duties growing out of the marriage, the resumption of the marriage relationship restores the rights incident thereto. *Fuchs v. Fuchs,* 260 N.C. 635; *Hutchins v. Hutchins,* 260 N.C. 628.

The defendant's failure to pay does not add one cent to the amount he is due under the contract, and as the parties agreed so shall they be bound. I vote to affirm.

BOBBITT, J. joins in this dissenting opinion.

MARGUERITE L. WILLIAMS v. JEROME O. WILLIAMS.

(Filed 17 January 1964.)

1. Divorce and Alimony § 17; Husband and Wife § 11—

The court is without authority to award the wife alimony and counsel fees while a valid deed of separation between the parties remains unimpeached.

2. Same—

A resumption of marital relations rescinds a prior deed of separation.

3. Divorce and Alimony § 18—

Defendant in an action for divorce from bed and board may not contend that the court is without power to award counsel fees and subsistence *pendente lite* until after the validity of a prior deed of separation between the parties had been determined by a jury, but the court may enter the order *pendente lite* upon its finding that the deed of separation had been rescinded by a resumption of the marital relations, although its finding in this respect is not binding on the trial on the merits. G.S. 50-15.

4. Appeal and Error § 35—

Statements in the record disclosing that the order appealed from was duly heard in regular course are controlling notwithstanding statements in appellant's brief to the contrary.

5. Appeal and Error § 22a—

An assignment of error to the denial of a motion to strike portions of the complaint must disclose the matter which appellant sought to have stricken without a voyage of discovery through the record.

6. Appeal and Error § 16—

The granting of *certiorari* does not relieve movant of the necessity of preserving his exceptions and of perfecting his appeal with regard to the assignments of error as required by the Rules of Practice in the Supreme Court.

7. Divorce and Alimony § 18—

Under the 1961 amendment to G.S. 50-15 the lower court is no longer under the necessity of setting forth its findings of fact in detail in awarding subsistence *pendente lite* under G.S. 50-15, and when the evidence is sufficient to sustain an affirmative finding of all the predicate facts it will be presumed on appeal that the court found the facts entitling the wife to subsistence, and that it appeared to the court that the wife lacked sufficient means on which to subside during the pendency of the suit.

8. Divorce and Alimony § 23; Husband and Wife § 11—

A separation agreement does not deprive the court of its authority to enter an order requiring the husband to make specific monthly payments for the support of the minor children of the marriage, and the amounts agreed upon in the deed of separation for the support of the children is merely evidence for the court to consider with other evidence in determining a reasonable amount for their support.

9. Parent and Child § 6—

The primary obligation for the support of a minor child rests upon the father, and such duty does not end with the furnishing of mere necessities if the father is able to afford more, and in addition to the actual needs of the child the father has a legal duty to give the child those advantages which are reasonable, considering his financial condition and position in society.

10. Divorce and Alimony § 23—

The amount to be allowed by the court for the support of the minor children of a marriage rests in the court's sound discretion upon consideration of the needs of the children in the light of the special circumstances of the parties, their station in life, their standard of living and the advantages to which they had become accustomed.

ON writ of *certiorari*, treated as an appeal by defendant to review the order of *McLaughlin, J.*, signed July 20, 1963 in chambers in an action pending in IREDELL.

The plaintiff, wife, instituted this action to obtain a divorce from bed and board. She asked for both temporary and permanent alimony, counsel fees, the custody of the two minor children of the marriage, and an allowance for their support. In the complaint and the two amendments thereto, she alleged that she and the defendant separated on August 8, 1961, resumed marital relations on July 15, 1962 and separated again on August 12, 1962, on which date the defendant wrongfully abandoned her and since which he has willfully refused to provide her and the children with adequate support. She further alleged that each separation was preceded by conduct (detailed in some paragraphs and pungently characterized in others) which rendered her life burdensome and her condition intolerable.

The defendant filed a motion to strike numerous portions of the original complaint and each amendment in its entirety. He has as yet filed no answer to the complaint but, prior to the hearing on plaintiff's application for temporary alimony and counsel fees, he filed a "Plea in Bar" in which he set up a deed of separation, duly executed and acknowledged by the parties on June 8, 1962, as a complete bar to plaintiff's claim for support and counsel fees. A copy of the deed of separation was attached to the plea. It recited that in consideration of ten thousand dollars, plus "certain tangible personal property" which she had removed from their home, plaintiff released defendant from his obligation to support her and conveyed to him all her interest in their joint property. The parties agreed therein that plaintiff should have the custody of the two children of the marriage subject to certain visitation rights in the defendant and that he would pay plaintiff two hundred dollars a month to compensate her for the living expenses of each child while in her custody.

Plaintiff replied to the plea in bar, alleging that after the execution of the deed of separation the parties became reconciled and lived together as man and wife from July 15, 1962 until August 12, 1962 when the defendant, without justification, abandoned her and the minor children.

On July 20, 1963 Judge McLaughlin heard plaintiff's motion for temporary alimony and counsel fees. His Honor found the facts in accordance with the plaintiff's evidence and contentions. It would serve no useful purpose to recapitulate the evidence which covers 150 pages of the record. It recounts in oppressive detail a sad and tragic saga which, if true, fully justified the judge's findings. Only the evidence pertinent to this decision will be referred to in the opinion. On the hearing the judge considered and denied defendant's motion to strike, his appeal from the clerk's order allowing the amendments to the complaint, and the plea in bar. He awarded the custody of the two children to the plaintiff, and denied the defendant any contact whatever with them. Pending the further orders of the court, he directed the defendant to pay the plaintiff $1,500.00 a month—$500.00 for her support and $500.00 for the support of each child. From this order the defendant appealed, assigning nine errors.

Deal, Hutchins & Minor by Fred S. Hutchins and Edwin T. Pullen; Chamblee & Nash by M. L. Nash for plaintiff appellee.

Williams, Willeford & Boger; E. T. Bost, Jr.; and W. R. Battley for defendant appellant.

SHARP, J. Defendant's assignments of error 1, 4, 5, and 8 relate, in substance, to his Honor's ruling that the deed of separation did not constitute a valid plea in bar. A wife who, in a valid deed of separation, has released her husband from his obligation to support is remitted to her rights under the agreement. As long as the deed of separation stands unimpeached, the court is without power to award her alimony and counsel fees. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235; *Brown v. Brown*, 205 N.C. 64, 169 S.E. 818. A resumption of marital relations by the parties, however, will annul and rescind the deed of separation. *Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245; *Reynolds v. Reynolds*, 210 N.C. 554, 187 S.E. 768. The defendant recognizes this rule of law but he contends that since he had denied any resumption of marital relations with the plaintiff, the court was without authority to award her alimony *pendente lite* until that issue had been determined by a jury. When the judge declined to delay the hearing on this ground, defendant attempted to delay it by noting an immediate appeal to the Supreme Court. However, the judge proceeded to hear the entire matter, including the parties' evidence pertaining to the plea in bar. After doing so he found the facts against the defendant.

The defendant's contention with reference to the hearing of his plea cannot be sustained. It was decided adversely to him in *Oldham v.*

Oldham, 225 N.C. 476, 35 S.E. 2d 332, and *Taylor v. Taylor,* 197 N.C. 197, 148 S.E. 171. In each of these cases (actions for alimony without divorce) the defendant contended that a deed of separation between the parties must first be declared invalid before the judge could award alimony *pendente lite.* In each case the court overruled this contention. In *Oldham, Denny, J.* (now C.J.) said, "We know of no defense that limits the power of a trial court to award subsistence *pendente lite* under G.S. 50-16, except the defense specified in the statute (adultery) . . . . Therefore, in an action for alimony without divorce the validity or reasonableness of a separation agreement need not be determined before the court can award temporary allowances. The statute expressly provides that such allowances may be made 'pending the trial and final determination of the issues involved in such action'."

Oldham and *Taylor,* although decided under G.S. 50-16, are equally applicable to a motion for temporary alimony under G.S. 50-15 pending the trial of an action for divorce from bed and board. "The granting of alimony *pendente lite* is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency." 2 Lee, North Carolina Family Law § 138.

The defendant was not entitled either to have his plea in bar determined by a jury or to have this court review the judge's ruling on the plea in bar before the judge could award plaintiff temporary alimony. *Cf. Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 375. The finding of fact by the judge that the parties had resumed marital relations after the execution of the deed of separation is not binding on them upon a trial on the merits, and is not competent in evidence thereon. *Hall v. Hall,* 250 N.C. 275, 108 S.E. 2d 487. Assignments of error 1, 4, 5 and 8 are not sustained.

In the record, defendant's exception No. 2 appears as follows:

> "To the ruling of the Court overruling the defendant's objection and exception to the Orders of the Clerk of the Superior Court allowing amendment to the pleadings by the plaintiff, the defendant excepts."

However, in the grouping of the assignments of error, assignment No. 2 appears as follows:

> "2. To the ruling of the Court overruling the defendant's objection and exception to the orders of the Clerk of Superior Court allowing amendments to the pleadings by the plaintiff, *without notice or hearing thereon.* (Italics ours).

EXCEPTION No. 2 (R. pp. 43-44).

(Petition for Writ of *Certiorari* filed as to this ruling.)"

The record fails to sustain the statement that the ruling complained of was "without notice or hearing thereon." The order appealed from recites that this matter was "heard upon all the motions filed herein as appears of record and all appeals from the Clerk of Superior Court as appears of record and upon the plea in bar. . . ." Statements in the appellant's brief to the contrary cannot be considered or accepted. The allowance of the motion to amend the complaint was in the sound discretion of the court and no abuse appears.

Assignment of error No. 3 is to "the ruling of the Court in denying the defendant's motions to strike. . . ." The omission indicated is identical with the italics in assignment No. 2 above. Plaintiff's complaint and the amendments thereto constitute fourteen pages of the printed record. Defendant's motion to strike portions of the complaint relates to words, phrases, whole paragraphs, and parts of paragraphs. Nowhere in the record are these segregated nor are they delineated in the complaint itself. Assignment of error No. 3 is equivalent to an assignment relating to a motion to strike which the court characterized as "broadside" in *Harris v. Light Co.*, 243 N.C. 438, 90 S.E. 2d 694. It was to review the ruling of the trial judge in denying defendant's motion to strike in its entirety that this court allowed *certiorari* thereby granting defendant the right to an immediate appeal from the order of Judge McLaughlin. However, in perfecting this appeal, so far as it pertains to the ruling on the motion to strike, the defendant has totally disregarded Rules 19(3) and 21 of the Rules of Practice of the Supreme Court which apply to all appeals whether they come to this Court by writ or in regular order. *Products Corporation v. Chestnutt*, 252 N.C. 269, 113 S.E. 2d 587. See *Nichols v. McFarland*, 249 N.C. 125, 105 S.E. 2d 294. In order to review his Honor's ruling on the motion to strike it would be necessary for this Court to perform a mapping operation before undertaking a "voyage of discovery" through the record. We will do neither. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597. However, we assume that the motion to strike was not made because defendant apprehended any prejudice from the challenged allegations in any hearing before the judge.

Assignment of error No. 7 is to "the failure of the Court to find facts to the effect that the plaintiff has not sufficient means wherein to subsist during the prosecution of the suit as the basis for the award of alimony *pendente lite* under G.S. 50-15." It is not necessary to decide whether this assignment challenges the award to the wife because

assignment of error No. 9 to the entry of the order allowing plaintiff temporary alimony raises the question whether the facts found are sufficient to support the order. *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; 1 Strong, N. C. Index, *Appeal & Error* § 21.

The judge found these facts: On August 12, 1962 the defendant "willfully and wrongfully abandoned and deserted the plaintiff and has willfully failed and refused to provide adequate support for plaintiff and the children in keeping with his financial ability and station in life and before, at and since said time has offered such indignities to the person of the plaintiff as to make her condition intolerable and her life miserable as set out in detail in her complaint and amendments thereto and in her other affidavits filed herein, and the Court further finds as a fact and conclusion of law that the resumption of the marital relationship on July 15, 1962 voids (the) deed of separation executed prior thereto on June 8, 1962." He further found that plaintiff is without the necessary funds with which to prosecute her action.

Prior to 1961 when the statute was amended, for a wife to obtain temporary alimony under G.S. 50-15, the requirement of the statute was that she set forth in her complaint facts which would entitle her to the relief demanded, which facts *"shall be found by the judge to be true. . . ."* This Court consistently held that when an award of temporary alimony was made under G.S. 50-15 the statute required the judge to find the essential and issuable facts and set them out in detail so that, upon appeal, the court could determine from the facts whether the judge's conclusion that the wife had a right to alimony was legally correct. *Easeley v. Easeley,* 173 N.C. 530, 92 S.E. 353; *Moody v. Moody,* 118 N.C. 926, 23 S.E. 933; *Griffith v. Griffith,* 89 N.C. 113. The court frequently pointed out the difference between G.S. 50-15 and G.S. 50-16 which contains no requirement that the judge make specific findings with reference to the facts upon which he bases his order for temporary alimony except when the adultery of the wife is pleaded in bar. *Caudle v. Caudle,* 206 N.C. 484, 174 S.E. 304; *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9; *Price v. Price,* 188 N.C. 640, 125 S.E. 264.

As amended by Chapter 80 of the Session Laws of 1961, G.S. 50-15 now provides that it shall be lawful for the judge to order the husband to pay alimony if the facts set forth in her complaint *"shall probably entitle her to the relief demanded."* Apparently, the purpose of this amendment was to eliminate the distinction between G.S. 50-15 and G.S. 50-16 insofar as finding the facts with reference to the truth of the allegations of the complaint is concerned. It removed from G.S. 50-15 the requirement that the judge make specific findings that the

facts set forth in the complaint are true and entitle plaintiff to the ultimate relief demanded therein as a condition precedent to an award *pendente lite.* It is noted, however, that the amendment does not dispense with the requirement that the judge hear the evidence of both parties and determine in his sound legal discretion whether movant is entitled to the relief sought. *Parker v. Parker, post,* 176.

The 1961 amendment did not materially change the wording of G.S. 50-15 with reference to the wife's *need* for temporary alimony as a requirement for an award. After she has satisfied the judge of her right to alimony under the first portion of the statute, it formerly provided that if "it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, *the judge may* order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper. . . ." (Italics ours). The only change which the 1961 amendment made in that portion of the statute quoted above was to substitute for the italicized words the following: "it shall be lawful for the judge to. . . ." Thus, there is, and has been, no requirement in G.S. 50-15 that the judge shall find specific facts with reference to the wife's financial condition.

When the judge, after hearing the evidence upon a motion for temporary alimony in an action instituted under G.S. 50-16, either makes an award of alimony or declines to make one, it is presumed that he found the facts from the evidence presented to him according to his convictions about the matter and that he resolved the crucial issues in favor of the party who prevailed on the motion. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158. This presumption now applies in all respects to an award under G.S. 50-15.

When the trial judge allows alimony under this section, and there is evidence sufficient to sustain his action, it is presumed (1) that he found the facts and resolved them in the wife's favor and (2) that it appeared to him that the wife lacked sufficient means on which to subsist during the pendency of the suit. The evidence in this case is sufficient to sustain his Honor's order.

Nevertheless, as the court has from time to time emphasized, *Price v. Price, supra, Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436, where the facts are in dispute, the better practice is for the judge to make specific findings on all material points. Ordinarily the attorney for the prevailing party prepares the judgment. As this case demonstrates, good technique would require that he incorporate findings as to all

the material facts upon which the judgment is based. Facts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that the appellant has offered evidence to the contrary. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443; *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349. Assignments of error 7 and 9 are overruled.

Assignment of error No. 6 presents this question: Is the award of $500.00 a month for the support of each child excessive as a matter of law under the evidence and findings of this case? The evidence of the plaintiff tends to show that prior to their separation the parties had enjoyed a very high standard of living, one in keeping with defendant's income. They belonged to the Country Club. In addition to a home on Country Club Drive in Concord, the defendant owned a farm. The children were brought up to love horses, to ride and to show them. The defendant is, by profession, a pathologist. He receives a percentage of the net operating income from the Cabarrus Memorial Hospital. The judge found that he has a gross annual income of at least $76,120.53. The plaintiff maintained that his annual net income is in excess of $40,000.00. In an affidavit offered at evidence at the hearing, defendant averred that in 1962 he had an "expendable income" after taxes of $30,385.65. In 1961 he declared it to be $38,369.70.

By affidavit, the plaintiff asserted that in order to live in the manner to which she and the two children, now aged fifteen and ten respectively, had become accustomed before the separation, she must receive at least $1,500.00 a month. Her itemization of expenses corroborated this figure. The judge found the facts to be as set forth in plaintiff's affidavit and ordered the defendant to pay this amount. *Inter alia,* the rent on the home the plaintiff and the two children occupy is $200.00 a month; one of the children is being treated by an orthodontist; and they still have their two horses—a luxury or advantage which their father had initiated.

The primary obligation for support of a minor child rests upon the father. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113; *Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726. While a husband and wife can bind themselves by a separation agreement "they cannot thus withdraw children of the marriage from the protective custody of the court," *Fuchs v. Fuchs,* 260 N.C. 635, ... S.E. 2d .....; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136, or deprive a minor child of support in accordance with the standards established by law. The concensus of the myriad decisions on the subject is that the measure of the father's obligation is the child's needs in relation to the father's station in life, his pecuniary resources, and his earning ability honestly exercised.

Coggins v. Coggins, 260 N.C. 765, 133 S.E. 2d 700; *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721; *De Brauwere v. De Brauwere,* 203 N.Y. 460, 96 N.E. 722, 38 L.R.A. (N.S.) 508; 39 Am. Jur., *Parent and Child* § 36; 67 C.J.S., *Parent and Child* § 15. The following statement from 3 Lee, North Carolina Family Law § 229 is pertinent:

> ". . . . It is frequently said that the parent must supply his minor children with necessaries, but the word 'necessaries' is a relative and elastic term. Necessaries are not limited to those things which are absolutely necessary to sustain life, but extend to articles which are suitable in view of the rank, position, fortune, earning capacity and mode of living of the parent. Articles that might be a luxury to one person may very well be a necessary to another. The customs and fashions of the time as to articles in general use may be a factor to be considered. Many articles which at one time were commonly regarded as luxuries for the few have at a later time become reasonable necessaries for the many. The standard of living has been constantly improving. The law requires the parent to do no more than the best he can do to support his child in the manner suitable to his station and circumstances."

Whatever may have been the rule at common law, a father's duty of support today does not end with the furnishing of mere necessities if he is able to afford more. In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.

In *Hecht v. Hecht,* 189 Pa. Super., 276, 283, 150 A. 2d 139, 143, Woodside, J., observed:

> "Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. . . . It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the 'advantages,' but most parents strive and sacrifice to give their children 'advantages' which cost money. . . . Much of the special education and training which will be of value to people throughout life must be given them when they are young, or be forever lost to them."

What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties.

Things which might properly be deemed necessaries by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. *Coggins v. Coggins, supra.* In determining that amount which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse. *Harris v. Harris,* 258 N.C. 121, 128 S.E. 2d 123; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555.

It is never the purpose of a support order to divide the father's wealth or to distribute his estate. Furthermore, even though the father be a man of great wealth, an excessive award which would encourage extravagant expenditures either by the child or in his behalf would not be in his best interest.

As the court pointed out in *Libby v. Arnold,* 161 N.Y.S. 2d 798, 803:

> " 'Additional advantages' do not justify providing luxuries or fantastic notions of style adapted to a tempo of living not normal for the stable, conservative, natural upbringing of a child according to the comfort, dignity and manner in which the father over the years has been accustomed to live. 'Additional advantages' do not mean that even where a father has unlimited means, extravagant demands must be created for the child. The Court may, in its discretion and judgment, on the facts adduced, after as complete a disclosure as is reasonably and realistically available of the essential elements that reveal true insight into the father's income, means and station in life, evaluate and determine the fair measure of support to be ordered."

There is nothing in this record to indicate that Judge McLaughlin did not evaluate and determine "the fair measure of support" when he fixed the allowances in this order.

We have not overlooked the fact that the allowances are more than double the amount which the parties agreed upon in the deed of separation. When a wife petitions the judge to increase the amount which the Court itself has previously fixed for the support of minor children, she assumes the burden of showing that circumstances have changed between the time of the order and the time of the hearing upon the petition for the increase. In such case, she must show either that the need of the children or the cost of their support has increased, or that the ability of the father to pay has increased if the amount originally fixed was inadequate because of the father's inability to pay more. However, prior to the entry of the order appealed from in this case, the defendant's support payments for the children had been made pur-

suant to the terms of a deed of separation which was in no way binding on the court insofar as it applied to the children. Therefore, plaintiff's only burden was to show the amount reasonably required for the support of the children at the time of the hearing. The amount which the parties fixed on June 8, 1962 was merely evidence for the judge to consider, along with all the other evidence in the case, in determining a reasonable amount for support of the children.

In *Fuchs v. Fuchs, supra,* this Court held that *in the absence of evidence to the contrary,* there is a presumption that the amount mutually agreed upon in a deed of separation is just and reasonable and that a judge is not warranted in ordering an increase in the absence of *any* evidence of the need of such increase. Obviously an award for children's support should never be based solely on the ability of a wealthy father to pay. Such action would disregard both the rights of the father and the welfare of the children. Here, however, there is evidence that the amount agreed upon in the deed of separation was inadequate, considering the income of the defendant, the mode of life to which he had accustomed the children prior to the separation, and the station in life of the parties. In view of all the circumstances disclosed by the evidence in this case we cannot say that Judge McLaughlin abused his judicial discretion in fixing the amount he did for the support of the defendant's children. There is no contention that the allowance for the plaintiff herself is excessive. Assignment of error No. 6 is overruled.

The order of the court below is

Affirmed.

LAURA TAYLOR HONEYCUTT, BY HER NEXT FRIEND, A. A. HONEYCUTT, PLAINTIFF v. JERRY WAYNE STRUBE AND RALPH NEIL STRUBE, DEFENDANTS.

AND

A. A. HONEYCUTT, PLAINTIFF v. JERRY WAYNE STRUBE AND RALPH NEIL STRUBE, DEFENDANTS.

(Filed 17 January 1964.)

1. Automobiles § 38—

Evidence disclosing that the attention of the witness was attracted to a car with a loud muffler which passed her home a quarter of a mile from the scene of the collision, that no other car with a loud muffler passed her home that morning, and that the collision occurred shortly thereafter, with evidence tending to identify the car she saw with that driven by defen-

dant, *is held* to render competent her testimony from her observation of the car as to its speed.

2. Automobiles § 41b— Evidence of excessive speed constituting proximate cause of injury held sufficient to take the issue to the jury.

The accident in suit occurred immediately north of a one-way bridge on a two-lane highway, between a car driven south by plaintiff and a car driven north by defendant. Opinion testimony as to the speed of defendant's car immediately prior to the collision together with testimony as to the physical facts at the scene immediately after the collision, *held* sufficient to show that defendant was operating his car at an excessive and unlawful speed and that notwithstanding he saw, or by the exercise of due care should have seen, plaintiff's car in motion or standing on the north side of the bridge, defendant did not bring his car under control but continued across the bridge at such unlawful speed until the moment of collision, and that such negligence was a proximate cause of the collision.

3. Negligence § 21—

The burden is upon defendant to prove contributory negligence.

4. Automobiles § 44—

Where the physical facts at the scene of the collision permit inferences that immediately before the impact plaintiff's car was on its right side of the highway and also that it was to the left of its center of the highway, there being no eyewitness to the collision, the position of plaintiff's car immediately prior to the collision rests in mere surmise, and the evidence is insufficient to be submitted to the jury on the contention that plaintiff was guilty of contributory negligence in failing to keep her car on the right side of the highway, and therefore any error in the court's instruction upon the issue of contributory negligence is harmless upon defendant's appeal.

APPEAL by defendants from *Olive, Emergency Judge,* February 1963 Civil Session of CABARRUS.

These civil actions, consolidated for trial, grow out of a collision that occurred September 6, 1960, about 11:00 a.m., between a 1950 Chevrolet (Honeycutt car) and a 1956 Ford (Strube car). The Honeycutt car was owned by A. A. Honeycutt and was being operated by his wife, Laura Taylor Honeycutt. The Strube car was owned by Ralph (Neil) Strube and was being operated by his minor son, Jerry (Wayne) Strube.

The pleadings establish the following facts: The collision occurred in Cabarrus County, North Carolina, on a paved two-lane highway known as Roberta Mill Road, which extends between the Roberta Mill community (Roberta) and Concord. This highway, at the place where the collision occurred, runs generally north-south. The Honeycutt car was proceeding in a southerly direction approaching (*from* the direction of Concord) the bridge (approximately sixteen feet wide) across

Meadow Branch. The Strube car, proceeding in a northerly direction *toward* Concord, crossed the Meadow Branch bridge and collided with the Honeycutt car at a point north of the bridge. At each end of the bridge, and some distance therefrom, the State of North Carolina had erected a sign bearing the legend, "One Lane Bridge"; and one of these signs was visible to drivers approaching the bridge from each direction. In approaching the bridge *from the south,* "there is a curve to the right and then a downgrade for several hundred feet . . . before reaching the bridge."

Mrs. Honeycutt's action is to recover damages for serious and permanent injuries she sustained as a result of said collision. Her husband's action is to recover (1) damages for alleged destruction of the Honeycutt car and (2) for amounts he paid or is obligated to pay for expenses (hospital, medical, nursing, drugs, special equipment) necessarily incurred by him in connection with the care and treatment of his wife.

The complaints contain identical allegations as to the alleged actionable negligence of defendants. Each plaintiff alleged the collision and resulting injuries and damages were proximately caused by the negligence of defendants in that Jerry Strube, in approaching and crossing the bridge and in colliding with the Honeycutt car, operated the Strube car (1) at excessive and unlawful speed; (2) failed to keep a proper lookout; (3) failed to keep his car under proper control; (4) failed to drive on his right half of the highway; and (5) in general, under existing conditions, operated his car in a reckless and heedless manner.

In each action, Jerry Strube, by his guardian *ad litem,* Ralph Strube, and Ralph Strube, individually, filed joint answers. They denied all allegations as to the alleged actionable negligence of Jerry Strube. Conditionally, they pleaded contributory negligence, alleging as a basis for such plea that the collision was proximately caused by the negligence of Mrs. Honeycutt in that (1) she failed to drive her car on her right half of the highway, (2) failed to keep a proper lookout and (3) failed to keep her car under proper control.

Counterclaims alleged by defendants are not now involved. A settlement thereof was made, without the consent or approval of plaintiffs, by and between plaintiff's liability insurance carrier and defendants "without prejudice to the rights of the plaintiffs to proceed with the prosecution of their respective causes of action against the defendants to final adjudication."

The cases came on for trial on issues relating solely to plaintiffs' causes of action.

It was admitted that Ralph Strube is liable for damages caused by the actionable negligence, if any, of Jerry Strube.

The only evidence was that offered by plaintiffs. Pertinent portions thereof will be set forth in the opinion.

The issues submitted and the jury's answers are as follows: "1. Was the plaintiff, Laura Taylor Honeycutt, injured by the negligence of the defendants as alleged in the complaint? ANSWER: Yes. 2. If so, did the plaintiff by her own negligence contribute to her injuries as alleged in the answer? ANSWER: No. 3. What amount, if any, is the plaintiff, Laura Taylor Honeycutt, entitled to recover of the defendants on account of said injuries? ANSWER: $25,000.00. 4. What amount, if any, is the plaintiff, A. A. Honeycutt, entitled to recover of the defendants a. For property damage? ANSWER: $250.00. b. For medical expenses? ANSWER: $9,000.00."

A (consolidated) judgment for plaintiffs, in accord with the verdict, was entered. Defendants excepted and appealed.

Craighill, Rendleman & Clarkson; Hartsell, Hartsell & Mills and John R. Ingle for plaintiff appellees.

Williams, Willeford & Boger for defendant appellants.

BOBBITT, J. The occupants of the Honeycutt car were Mrs. Honeycutt and a little boy (aged fifteen months) whom she was keeping. Since the collision, as a result of the brain injury she received, Mrs. Honeycutt has been and is now *unconscious*, unable in any respect to take care of herself. She is fed artificially. Artificial means are required for the functioning of her kidneys and bowels. Constant nursing has been and is required. In the opinion of the physician who has treated her from the day she was injured, "the prognosis is completely hopeless as far as ever recovering any consciousness or ever becoming aware of her surroundings. . . . she has complete, total disability as a result of the wounds which I saw that she had on the 6th day of September, 1960."

The foregoing explains (1) why Mrs. Honeycutt was not and could not be a witness and (2) why this action is being prosecuted in her behalf by a next friend. It is noted that defendants do not assign error in respect of the *amount of damages* awarded in either case.

Defendants assign as error (1) the denial of their motions for judgments of involuntary nonsuit, (2) the admission of certain testimony as to the speed of the Strube car, and (3) the failure of the court to apply the law to the facts in the instructions given the jury with reference to the contributory negligence issue.

No person who saw the collision testified. The evidence indicates there was no eye witness other than the occupants of the two cars.

There was evidence tending to show the following:

The Reverend Howard Taylor lives on the Roberta Mill Road approximately one mile south of the Meadow Branch bridge. On September 6, 1960, about 11:00 a.m., the Strube car, a 1956 dark blue Ford, headed toward Concord, approached and passed the Taylor home, attracting attention by the noise of its "loud mufflers."

Mrs. Nancy Easley lives on the Roberta Mill Road, "approximately middleways" between the home of the Reverend Howard Taylor and the Meadow Branch bridge. Mrs. Easley's testimony includes a statement that she lived "a little under a quarter of a mile from the Meadow Branch bridge." Approaching the bridge from the south, Mrs. Easley's home is on the left side of the road. Her attention was attracted by the roar of the motor of "a '55 or '56 model dark blue Ford" which, in her opinion, approached and passed her house at a speed of "(a)round eighty miles an hour." Mrs. Easley testified it passed her house "approximately between quarter to eleven and eleven o'clock" on the morning of September 6, 1960. No other car with a loud muffler passed her home that morning.

Mrs. Rachel Crisco lives on the Roberta Mill Road "at least 300 feet" south of Meadow Branch bridge, "on the left going towards Concord." A "few seconds" before the collision, a car, headed toward Concord, "whizzed by" Mrs. Crisco's home, attracting her attention by the loud and unusual "noise" and "racket" it was making. "Right after" the car passed, Mrs. Crisco heard "the crash." She testified: "It sounded like it was just tearing it all to pieces." Mrs. Crisco went to the road. From there she saw "the baby" standing "on the edge of the bridge." She did not go to the scene of the collision until after an ambulance had taken Mrs. Honeycutt to the hospital.

Mr. and Mrs. William Taylor saw and identified the Strube car while standing in the front yard of the Reverend Howard Taylor. They had stopped while on their way from Roberta to Concord and were getting into their car when the Strube car passed. Resuming their trip, they arrived at the scene of collision "about two minutes" after the Strube car had passed the Taylor home. Meanwhile, the collision had occurred. Upon arrival at the scene, one Jerry Cochrane "was picking up the baby about middle way of the bridge." Jerry Cochrane handed the baby to Mrs. Taylor.

In addition to the foregoing, evidence (set forth below) descriptive of the contour of the highway south of the Meadow Branch bridge and of the consequences of the impact bears upon whether the Strube car was being operated at excessive and unlawful speed.

It seems appropriate now to consider defendants' assignment of error based on their exception to the admission over their objection of the opinion evidence of Mrs. Easley as to the speed of the " '55 or '56 model dark blue Ford," with loud mufflers, that passed her home headed toward Concord about 11:00 a.m. on September 6, 1960.

Defendants contend the opinion testimony of Mrs. Easley was inadmissible on account of "remoteness, lack of observation, failure of identity, and lack of foundation."

"It is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile." *Lookabill v. Regan,* 247 N.C. 199, 201, 100 S.E. 2d 521, and cases cited; *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394.

There was plenary evidence that the dark blue Ford ('55 or '56), the subject of Mrs. Easley's testimony, was the Strube car. There was ample foundation for her opinion in that, her attention having been attracted by the roar of the motor, she observed the Strube car as it approached, as it passed and as it moved on toward the Crisco home and the Meadow Branch bridge. As to remoteness, we think the evidence affords a sufficient basis for a finding that there was no appreciable interval between the time the Strube car passed from Mrs. Easley's vision until the collision. The approach of the Strube car attracted the attention of Mrs. Crisco in the same manner it had attracted Mrs. Easley's attention and "(r)ight after" it passed Mrs. Crisco's home the crash was heard. Too, when the Taylors arrived at the scene of collision, "about two minutes" after they saw the Strube car pass the home of the Reverend Howard Taylor, sufficient time had elapsed for Jerry Cochrane to get to the bridge and pick up the baby.

In our view, the opinion testimony of Mrs. Easley was not inadmissible on account of remoteness or otherwise. Defendants' contentions bear on the weight rather than the competency of this testimony. Decisions supporting the view that Mrs. Easley's opinion testimony was not inadmissible on the ground of remoteness include the following: *S. v. Leonard,* 195 N.C. 242, 251, 141 S.E. 736; *S. v. Peterson,* 212 N.C. 758, 194 S.E. 498; *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Adkins v. Dills,* 260 N.C. 206, 132 S.E. 2d 324. The only case cited by defendants is *Corum v. Comer,* 256 N.C. 252, 123 S.E. 2d 473. Suffice to say, the law as stated therein is in accord with present decision but the facts are quite different.

All testimony concerning the Honeycutt car relates to physical facts observed *after* the collision. Plaintiffs' allegations that the Honeycutt car was brought "to a stop, or substantially to a stop," prior to

collision, was denied by defendants. There is no evidence, unless inferences from physical facts, bearing upon whether the Honeycutt car was stopped or in motion when the collision occurred.

There was testimony tending to show the following:

In approaching Meadow Branch bridge from Concord, there is "a slight curve" and then "for several hundred feet" the road is straight.

In approaching the bridge from Roberta, there is "a pretty sharp curve" to the right. Before you get to this curve, a sign gives warning that you are approaching a one-way bridge. From the apex of this curve to the bridge, the road is straight for 250 feet. You can see the bridge "approximately 250 to 300 feet before you get to it." Generally, from Roberta to the bridge "the road is up and down right smart, right smart unlevel."

The road was dry. The weather was clear. The maximum speed limit was 55 miles per hour. The width of the paved portion of the road was sixteen feet and ten inches. The width of the bridge was seventeen feet. The center of the road was not marked "right at the bridge." The pavement "had been put down in two sections" and you could "pretty generally tell from looking at the pavement where the center was"—"the breaking point was about the center of the road." There was no evidence as to the length of the bridge.

With reference to conditions existing at the scene after the collision, there was evidence tending to show the following:

Both cars were north (on the Concord side) of the bridge. The patrolman testified "(t)he skid marks and debris were approximately 15 feet from the end of the bridge." The Honeycutt car was on the right side of the road going toward Roberta. The front wheels were near or "just off" the edge of the pavement. The rear of the Honeycutt car "was near the center of the road." According to one witness, the Honeycutt car "was facing the woods." Another testified the Honeycutt car was "pointed towards the banister of the bridge." One witness testified the Honeycutt car was "about two foot from the corner of the bridge."

The right door of the Honeycutt (two-door) car was open. The left door was closed. The baby was on the bridge. Mrs. Honeycutt was on the left side of the road going toward Roberta. She was "laying across a barbed wire fence" with her head "against that post in the grass," near the northeast corner of the bridge, approximately 21 feet from the Honeycutt car. The motor from the Honeycutt car, which weighed 200-300 pounds, and the battery ("busted all to pieces") were to the right of the road going toward Roberta, down the bank and near the branch, some 25-45 feet from the Honeycutt car.

The Strube car was headed at an angle into a ditch and bank "off to the right hand side of the road" going toward Concord. The rear of it was toward the road. It was 160 feet or more north of the Honeycutt car. A witness testified he went to the Strube car and that Jerry Strube, the only person he saw there, told him "he couldn't lift his leg."

The Honeycutt car blocked the right side of the road going toward Roberta. The greater part of the debris was on that side of the road. The right side going toward Concord was not blocked. Traffic could move on the paved portion thereof.

The front portions of both cars were damaged. The more extensive damage was to the right front of the Honeycutt car and to the left front of the Strube car. Apparently, the Strube car struck the Honeycutt car with such force as to cause it to spin around and make nearly a complete circle. There was much evidence concerning the circular shape of certain lateral tire or skid marks. There was evidence a portion of such marks extended a short distance to the left of the center of the road going toward Roberta. As described by the investigating patrolman, "the circular skid marks" were "in a counter-clockwise motion as you are looking towards the bridge from the Concord side. . . . As to the center of the highway, the skid marks ranged from the right side of the road over . . . just a little bit across the center . . . of the road and back."

Further statement of the evidence is unnecessary. It is noted that neither Jerry Strube nor Jerry Cochrane testified. The evidence does not disclose how and when Jerry Cochrane arrived at the scene of collision.

When considered in the light most favorable to plaintiffs, the evidence was sufficient to support findings that Jerry Strube, when approaching Meadow Branch bridge, was operating the Strube car at excessive and unlawful speed; that notwithstanding he saw or by the exercise of due care should have seen the Honeycutt car in motion or standing still on the north side of the bridge he did not bring the Strube car under control but continued across the bridge at such speed until the moment of collision; and that such negligence of Jerry Strube was a proximate cause of the collision and resulting injuries and damage. Hence, defendants' motions for judgment of nonsuit were properly denied.

Even so, defendants contend a new trial should be awarded for error in the charge in respect of the contributory negligence issue.

The burden was on defendants to prove their allegations in respect of contributory negligence. No person testified who observed (or should have observed) the Honeycutt car prior to the collision. There

is no evidence as to Mrs. Honeycutt's alleged failure to keep a proper lookout or her alleged failure to keep her car under proper control. The question is whether there is evidence that she operated her car on her left half of the highway in violation of G.S. 20-146 (b) and G.S. 20-148 and whether such negligence was a proximate cause of the collision.

There is no evidence as to the positions of the cars as they *approached* the scene of collision. Was the Strube car in the act of turning from its left to its right side of the highway when the collision occurred? There is no evidence this occurred. On the other hand, the evidence is not inconsistent with such occurrence.

Plaintiffs attempt to draw conclusions from physical facts observable after the collision as to the positions of the cars *at the moment of collision.* While there is evidence as to physical facts consistent with theories favorable to plaintiffs and other theories favorable to defendants as to the positions of the cars *at the moment of collision,* where the cars were *as they approached* the scene of collision and *when the collision occurred* remains the subject of theory, conjecture and surmise.

Under well settled legal principles stated in *Boyd v. Harper,* 250 N.C. 334, 339, 108 S.E. 2d 598, and in cases cited therein, the evidence was insufficient to justify the submission of the contributory negligence issue. In this connection, see *Parker v. Flythe,* 256 N.C. 548, 124 S.E. 2d 530. Hence, error, if any, in respect of the court's instructions bearing upon the contributory negligence issue is harmless. *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312.

No error.

RALPH WILLIAMS HARDIN v. THE AMERICAN MUTUAL FIRE INSURANCE COMPANY.

(Filed 17 January 1964.)

1. Pleadings § 12—

Whether allegations set forth as the basis for a plea in bar to plaintiff's entire cause of action are sufficient for that purpose may be tested by demurrer. G.S. 1-141.

2. Appeal and Error § 3—

A judgment sustaining plaintiff's demurrer to defendant's plea in bar affects a substantial right of defendant and is appealable, G.S. 1-277, Rule of Practice in the Supreme Court No. 4 being applicable only when the demurrer is overruled.

3. Insurance § 3—

Where the language of a policy is plain and unambiguous it must be given its plain and commonly accepted meaning, and there is no room for construction.

4. Insurance § 47.1—

The fact that the carrier of liability insurance on the other vehicle involved in the collision becomes insolvent subsequent to the collision does not constitute such other vehicle an uninsured vehicle within the meaning of a personal injury policy protecting insured against damages inflicted as the result of the negligent operation of an uninsured vehicle. G.S. 20-279.21.

APPEAL by defendant from *Gambill, J.*, April 1963 Civil Session of DAVIDSON.

Civil action upon an automobile liability policy of insurance heard upon a demurrer to defendant's Third Further Answer and Defense alleged in its answer as a complete bar to any liability in this action.

From a judgment sustaining the demurrer, defendant appeals.

Walser & Brinkley by Walter F. Brinkley for defendant appellant.
Charles F. Lambeth, Jr., for plaintiff appellee.

PARKER, J. Plaintiff commenced this action by the issuance of summons on 4 January 1963, which was served on defendant on 10 January 1963. In his complaint he alleges in substance:

On 18 November 1961 he was injured while riding as a passenger in his Ford automobile, which at the time was being driven by Ruby Blackwell, when his automobile was involved in a collision in the intersection of U. S. Highway 74 and North Carolina Highway 226 in the town of Shelby, North Carolina, with a Plymouth automobile which was registered in South Carolina and was being operated by Ronnie Lee Bradley. Specific acts of negligence on the part of Bradley are alleged as the proximate cause of the collision and of personal injuries sustained by plaintiff in the collision. The particular personal injuries sustained by plaintiff are alleged in detail.

On or about 11 October 1961 the defendant insurance company had issued to plaintiff an automobile liability policy No. ACF 43 34 11, under the terms of which plaintiff was the named insured, which policy was in effect at the time of the collision, covering the Ford automobile in which plaintiff was riding. This policy of automobile liabilty insurance has attached to it an endorsement effective 11 October 1961, and forming a part thereof, entitled "PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE." A copy of this endorsement is

attached to the complaint and marked Exhibit A. Its provisions relevant to this appeal are as follows:

> "In consideration of the payment of the premium [$2.00] for this endorsement, the company agrees with the named insured, subject to the limits of liability, exclusions, conditions and other terms of this endorsement and to the applicable terms of the policy:
>
> INSURING AGREEMENTS
>
> "I. DAMAGES FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED BY UNINSURED AUTOMOBILES: To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of:
>
> "(a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured;
>
> "(b) [Relates to property damage and is not applicable.]
>
> caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.
>
> * * *
>
> "II. DEFINITIONS.
>
> * * *
>
> "(c) UNINSURED AUTOMOBILE. The term 'uninsured automobile' means:
>
> "(1) with respect to damages for bodily injury and property damage an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the North Carolina Motor Vehicle Safety and Financial Responsibility Act, neither (i) in cash or securities on file with the North Carolina Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile, or * * *."

Ronnie Lee Bradley was an uninsured motorist, and the automobile he was operating at the time of the collision resulting in injuries to plaintiff was an uninsured automobile within the meaning of the provisions of the uninsured motorists endorsement made a part of the policy issued by the defendant insurance company to plaintiff, and that under the terms of this endorsement plaintiff is entitled to recover

the sum of $5,000 as the insured's portion of the damages he sustained. He duly notified defendant of his claim, but it has refused and still refuses to pay it, and the defendant is now indebted to him in the sum of $5,000 with interest.

Defendant in its answer admits the allegations of the complaint relating to the residence of plaintiff, its existence as an insurance corporation, and the ownership of the automobiles, but it denies that plaintiff was injured by the negligence of Ronnie Lee Bradley. Defendant further admits that it issued to plaintiff the automobile liability insurance policy described in the complaint, with an endorsement attached thereto and made a part thereof, as set forth in plaintiff's exhibit attached to the complaint, providing protection against uninsured motorists, and that said policy with its endorsement was in effect on 18 November 1961, but it denies that the automobile operated by Ronnie Lee Bradley was an uninsured automobile within the provisions of the endorsement attached to its policy. It further admits receipt of notice of claim from plaintiff and its denial of any liability.

For a First Further Answer and Defense, it pleads contributory negligence of plaintiff as a bar to recovery. For a Second Further Answer and Defense, it pleads its right to have Ronnie Lee Bradley and the owner of the automobile he was driving at the time of the collision made defendants in this action.

For a Third Further Answer and Defense, it alleges that at the time of the collision in which plaintiff was injured, a policy of automobile liability insurance insuring Ronnie Lee Bradley against liability for damages caused by the negligent operation of the automobile which he was driving at that time had been theretofore issued by the Guaranty Insurance Exchange. This policy had been issued to Richard Bradley, the father of Ronnie Lee Bradley, covered the Plymouth automobile which Ronnie Lee Bradley was operating at the time of the collision, and was in full force and effect at such time. This policy provided for the payment of damages in an amount equal to or in excess of the amount specified in the North Carolina Motor Vehicle Safety and Financial Responsibility Act and qualified under the provisions of Paragraph II (c) (1) (i) and (ii) of the Insuring Agreements of the endorsement forming a part of the automobile liability insurance policy as set forth in Exhibit A as a "bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile."

The Guaranty Insurance Exchange became insolvent, and on 29 August 1962 was placed in receivership in the State of Kansas where its

principal office was located. It was further placed in receivership in the State of South Carolina on 4 September 1962. Subsequent to 18 November 1961 and until the date of its insolvency, the Guaranty Insurance Exchange engaged in the normal course of its business, including the investigation, determination and settlement of claims against it, and the defense of any claims which were determined to be unfounded. The Guaranty Insurance Exchange investigated the claim of plaintiff. The plaintiff instituted suit against Ronnie Lee Bradley and Richard Bradley, and the Guaranty Insurance Exchange employed counsel to defend this suit.

It is informed and believes that this action is still pending in the superior court of Davidson County, but that counsel employed by the Guaranty Insurance Company have withdrawn from the defense, and that the Guaranty Insurance Exchange is not now in a position to provide a defense for its insureds or to pay at this time any judgment which may be recovered against them to the extent provided by the Motor Vehicle Safety and Financial Responsibility Act of North Carolina.

There was at the time of the occurrence of the accident upon which plaintiff's claim is based a bodily injury and property damage liability insurance policy in effect on the automobile which collided with the automobile of the plaintiff, and the subsequent insolvency of the company which issued this policy does not invoke the coverage of an uninsured motorists endorsement issued by defendant to plaintiff, and the defendant pleads the existence of this automobile liability policy issued by the Guaranty Insurance Exchange covering the automobile which Ronnie Lee Bradley was driving at the time of the accident as a complete defense and plea in bar to plaintiff's entire action and to any liability of the defendant in this action.

Defendant alleges as a Fourth Further Answer and Defense that the extent of the insolvency of Guaranty Insurance Exchange is unknown to it, but it is advised and believes it has substantial assets which are available to creditors, and its affairs are being administered by a receiver of a court of competent jurisdiction. That even if it should be held that the endorsement forming a part of the policy of automobile liability insurance issued by it to plaintiff obligates it to plaintiff in this action, which it denies, it is impossible to determine its amount of liability until a determination has been made of assets of Guaranty Insurance Exchange available for claims of plaintiff in this action. Plaintiff has not recovered a judgment against Ronnie Lee Bradley or Richard Bradley and has not pursued his claim against Guaranty Insurance Exchange. Its liability would not accrue, if there is any, until

plaintiff has exhausted all his remedies against Guaranty Insurance Exchange, and it has been finally determined that his claim against this company will not be paid in full by the receiver of Guaranty Insurance Exchange.

Defendant's Third Further Answer and Defense is a plea in bar that extends to plaintiff's entire cause of action and denies his right to maintain it, and if established, will destroy his action. *Brown v. Clement Co.*, 217 N.C. 47, 6 S.E. 2d 842. Whether the allegations therein contained are sufficient as such a plea in bar can be tested by a demurrer. G.S. 1-141; *Bumgardner v. Groover*, 245 N.C. 17, 95 S.E. 2d 101. The judgment sustaining plaintiff's demurrer to this plea in bar of defendant affects a substantial right of the defendant, and the defendant may appeal therefrom. G.S. 1-277; *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E. 2d 554. As pointed out in the *Mercer* case, Rule 4 (a), Rules of Practice in the Supreme Court, 254 N.C. 783, 785, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is overruled.

The 1961 General Assembly enacted "an act to amend G.S. 20-279.21 defining motor vehicle liability insurance policy for financial responsibility purposes so as to include protection against uninsured motorists." This act became effective 1 August 1961. 1961 Session Laws, Chapter 640. The part of this act revelant on this appeal is the new subdivision added to G.S. 20-279.21, which is codified as G.S. 20-279.21 (b) (3), and reads as follows:

> "3. No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Subsection (c) of paragraph 20-279.5, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of five thousand dol-

lars ($5,000.00) and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. The coverage required under this Section shall not be applicable where any insured named in the policy shall reject the coverage."

Pursuant to this amendment to our Motor Vehicle Safety and Financial Responsibility Act, the motor vehicle liability policy issued by defendant to plaintiff on or about 11 October 1961 has an endorsement forming a part of the policy designated as "PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE."

Our Motor Vehicle Safety and Financial Responsibility Act defines a "motor vehicle liability policy," G.S. 20-279.21, but it does not define an uninsured motor vehicle or an uninsured motorist. The endorsement on the motor vehicle liability policy issued by defendant to plaintiff clearly defines an "uninsured automobile" as follows:

"The term 'uninsured automobile' means:

"(1) with respect to damages for bodily injury and property damage an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the North Carolina Motor Vehicle Safety and Financial Responsibility Act, neither (i) in cash or securities on file with the North Carolina Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile, or * * *."

It seems clear that any cause of action which plaintiff may have acquired against Ronnie Lee Bradley and his father Richard Bradley, either or both, as a result of the collision in question arose at the time of the collision, to wit, 18 November 1961, and any right which he may claim against defendant here under the laws of this State and under the uninsured motorists insurance coverage of the policy in the instant case must be determined by the facts existing at the time of the collision, 18 November 1961. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508; *Adams v. Mills*, 286 U.S. 397, 76 L. Ed. 1184; *Federal Insurance Co. v. Speight*, 220 F. Supp. 90; 1 Am. Jur. 2d, Actions, sec. 88. This statement of law is supported by the provisions of G.S. 20-279.21 (f) (1), which is a part of the same statute requiring the issuance of uninsured motorists coverage as a part of each policy of automobile liability insurance written in the State of North Carolina subsequent to 1 August 1961, and provides as follows:

"(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

"(1) The liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs * * *."

Plaintiff contends that the uninsured motorists coverage of the policy here defines with particularity an uninsured automobile, but it does not have "a provision to the effect that an uninsured automobile shall not include an automobile which has liability coverage by an insurance company at the time of an accident, which insurance company subsequently becomes insolvent," although the endorsement on its policy excludes from the term "uninsured automobile" a number of automobiles, for instance, an automobile defined as an "insured automobile," an automobile owned by the named insured or by any resident of the same household, an automobile owned by the United States, Canada, a state, a political subdivision of any such government or any agency of the foregoing, that the definition of an "uninsured automobile" is ambiguous, and consequently construing the endorsement on the policy liberally in his favor it should be interpreted to mean that at the time of the collision the Bradley automobile was an "uninsured automobile." Plaintiff's contention is ingenious, but not convincing. The definition of an "uninsured automobile" set forth in the endorsement on the policy here is plain and unambiguous, there is no occasion for construction, and the language used must be given its plain and commonly accepted meaning. *Johnson v. Casualty Co.*, 234 N.C. 25, 65 S.E. 2d 347; 7 Am. Jur. 2d, Automobile Insurance, sec. 2, p. 294.

For the purposes of the demurrer, accepting the allegations of fact of defendant's Third Further Answer and Defense as true, it seems clear that at the time of the collision here the Bradley automobile was an "insured automobile" covered by an automobile liability insurance policy issued by Guaranty Insurance Exchange, which policy at the time was in full force and effect, providing for the payment of damages proximately caused by its negligent operation by Ronnie Lee Bradley, in an amount equal to or in excess of the amount specified in our Motor Vehicle Safety and Financial Responsibility Act. It is further admitted by the demurrer that plaintiff instituted suit against Ronnie Lee Bradley and his father Richard Bradley, and that Guaranty Insurance Exchange employed counsel to defend this suit.

It is our opinion, and we so hold, that as the demurrer admits that the Bradley automobile was an "insured automobile" as alleged in the

Third Further Answer and Defense at the time of the collision here, it did not become an "uninsured automobile" under the language of the statutes of this State and the defendant's policy provisions so as to extend the coverage of the provisions of the endorsement on the policy here providing "PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE" to plaintiff for injuries sustained in a collision on 18 November 1961, by reason of the fact that Guaranty Insurance Exchange, which did not deny coverage under its policy of automobile liability insurance covering the negligent operation of the Bradley automobile, went or was thrown into receivership on 29 August 1962, over nine months subsequent to the collision in which plaintiff was injured, and if the facts alleged in defendant's Third Further Answer and Defense are established, the plea in bar therein is good.

To date, so far as our investigation and the briefs of counsel disclose, comparatively few cases involving uninsured motorists have received the attention of the courts outside of New York, and these cases have presented a variety of questions relating to different phases of such coverage. Annotation 79 A.L.R. 2d 1252, "Rights and liabilities under 'uninsured motorists' coverage."

We are fortified in the conclusion we have reached here by the fact that the following cases, which are the only cases having a substantially similar factual situation that we have found in our research and in studying the briefs of counsel, have reached a similar conclusion as we have: *Uline v. Motor Vehicle Accident Indem. Corp.*, 213 N.Y.S. 2d 871 (10 April 1961); *Federal Insurance Co. v. Speight, supra* (2 August 1963); *Fidelity Insurance Co. v. Crosland, County Court for Richland County, South Carolina*, which is apparently not reported but is set forth in the opinion in *Federal Insurance Co. v. Speight;* and by what is said in 7 Am. Jur. 2d, Automobile Insurance, sec. 136, "What constituted an 'uninsured' automobile or motorist."

The General Assembly in the future may feel that our Motor Vehicle Safety and Financial Responsibility Act should be amended so as to provide coverage under the circumstances of the instant case. However, if the coverage is to be extended or broadened, it is for the General Assembly to do so, and not the courts.

The judgment sustaining the demurrer below is

Reversed.

HOUSING AUTHORITY OF THE CITY OF WILMINGTON, NORTH CAROLINA v. W. A. JOHNSON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 17 January 1964.)

1. Declaratory Judgment Act § 1; Taxation § 36—

The Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act to determine liability for a tax.

2. Taxation § 36—

The rights granted under G.S. 105-266.1 are in addition to the rights provided by G.S. 105-267, and a taxpayer may sue to recover sales taxes paid within ninety days from the denial of its claim for refund of said taxes notwithstanding more than ninety days may have elapsed since the payment of the sales tax on specific items purchased, since the limitation envisions the computation of time from a decision rendered applicable to a specific factual situation in a quasi-judicial hearing.

3. Taxation § 15—

A housing authority is not entitled to a refund of sales taxes paid by it on purchases made by it, since G.S. 157-26 has no application to sales taxes but applies to ad valorem taxes, and although a housing authority is a municipal corporation, it is not a county or unincorporated city or town which are the only agencies entitled to a refund under G.S. 105-164.14(c), and since a housing authority is a municipal corporation, it is not a charitable organization entitled to a refund under G.S. 105-164.14 (b), nor is 42 U.S.C.A., § 1405(e) applicable.

APPEAL by defendant from *Latham, Special Judge,* March Regular Civil Session 1963 of WAKE.

The plaintiff Housing Authority of the City of Wilmington, North Carolina, instituted this action to recover sales taxes paid on purchases of supplies between 1 July 1961 and 31 December 1961 in the sum of $643.46. A claim for refund of said taxes was filed with the defendant Commissioner of Revenue on 8 February 1962. This claim was denied on 10 April 1962. Within 90 days thereafter the plaintiff began this action in the Superior Court of Wake County, alleging that the defendant is subject to suit pursuant to the provisions of G.S. 105-266.1, for refund of said taxes.

It is alleged that the plaintiff is a housing authority created and existing under the provisions of the Housing Authorities Law of North Carolina, and is an independent, nonprofit, charitable corporation with the powers granted by the aforesaid law; that the plaintiff is entitled to a refund of the sales taxes involved pursuant to the provisions of G.S. 105-164.14, and that the plaintiff is entitled to a declaratory judgment if the action cannot be maintained pursuant to the provisions of G.S. 105-266.1.

The defendant demurred to the complaint for that, it fails to state a cause of action; that the plaintiff is not a taxpayer under the provisions of G.S. 105-266.1; and that the court lacked jurisdiction because the State has not consented to be sued under the Declaratory Judgment Act, Chapter 1, Article 26, codified as G.S. 1-253, *et seq.*

Plaintiff was allowed to amend its complaint to allege it was exempt from sales tax under the provisions of G.S. 157-26 and 42 U.S.C.A. 1405 (e), and alleged that it is entitled to judicial review of the Commissioner's decision denying the refund under G.S. 143-306, *et seq.* The defendant again demurred and the demurrer was overruled.

The cause was tried by the judge, jury trial having been waived. The court found that the plaintiff Housing Authority was not operated for profit but for the benefit of low-income families; that the tax was paid as alleged; that a claim for refund was properly filed under G.S. 105-164.14; that defendant had denied claim; that plaintiff had properly brought suit under G.S. 105-266.1; and that the action was instituted within the time allowed by G.S. 143-309 because the defendant did not serve a written copy of the decision denying the refund on the plaintiff.

The court below held that the plaintiff is a taxpayer under the provisions of G.S. 105-266.1; that plaintiff is controlled by the Federal government, and is not a charitable organization under the provisions of G.S. 105-164.14 (b); that plaintiff is entitled to recover the taxes paid; that plaintiff was exempted from the payment of said taxes by G.S. 157-26 and 42 U.S.C.A. 1405 (e); and that it is entitled to recover under G.S. 105-266.1 or 105-267.

Judgment was entered accordingly. The defendant appeals, assigning error.

Attorney General Bruton; Deputy Attorney General Peyton B. Abbott; Asst. Attorney General Charles D. Barham, Jr., for the State.

Royce S. McClelland; Daniel K. Edwards; and Allen, Steed & Pullen for plaintiff.

DENNY, C.J. It is apparent from the facts set out above that the plaintiff brought this action pursuant to the provisions of G.S. 105-266.1, and alleged in its complaint that it is entitled to a refund of the sales taxes paid in the sum of $643.46 pursuant to the provisions of G.S. 105-164.14. In its prayer for relief, it prayed that should it be determined that this is not a proper action for refund under the provisions of G.S. 105-266.1, that the court render judgment under the provisions of the Declaratory Judgment Act. However, when the de-

fendant demurred to the complaint, the plaintiff moved for leave to amend its complaint in order to allege its exempt status under the provisions of G.S. 157-26, 42 U.S.C.A. 1405 (e), and G.S. 105-164.13 (17), and requested the court to consider the amended complaint a petition filed under the provisions of G.S. 143-306, *et seq.*, or if the court should determine that this is not a proper action for refund under the provisions of either G.S. 105.266.1 or G.S. 143-306, *et seq.*, that the court render judgment under the provisions of the Declaratory Judgment Act. The defendant again demurred and the demurrer was overruled.

This Court has held in a number of cases that the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act.

In the case of *Buchan v. Shaw, Comr. of Revenue,* 238 N.C. 522, 78 S.E. 2d 317, it is said: "An action against the Commissioner of Revenue, in essence, is an action against the State. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619. Since the State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute, the court properly sustained the demurrer. *Insurance Co. v. Unemployment Compensation Com., supra.* See also *Bunn v. Maxwell, Comr. of Revenue,* 199 N.C. 557, 155 S.E. 250; *Rotan v. S.*, 195 N.C. 291, 141 S.E. 733.

"Plaintiff's only remedy is provided by G.S. 105-267. He must follow the procedure there prescribed." The rights granted in G.S. 105-266.1 are in addition to the rights provided by G.S. 105-267. See 1957 Session Laws of North Carolina, chapter 1340.

Likewise, this Court in considering the provisions of G.S. 143-306 in the case of *Duke v. Shaw, Commissioner of Revenue,* 247 N.C. 236, 100 S.E. 2d 506, said: "Manifestly this statute contemplated a quasi-judicial hearing in which the parties were permitted an opportunity to offer evidence and a decision rendered applicable to a specific factual situation. *In re Berman,* 245 N.C. 612, 97 S.E. 2d 232.

"It does not authorize the filing of a petition in the Superior Court seeking an advisory opinion on the correctness of an executive interpretation of a statute."

The plaintiff Housing Authority when it filed its claim for refund on 8 February 1962, based its claim for refund solely upon the provisions of G.S. 157-26, being a portion of the provisions of the Housing Authorities Law enacted by the General Assembly of North Carolina, Chapter 456, Public Laws of 1935, and which reads as follows: "The authority shall be exempt from the payment of any taxes or fees to the

State or any subdivision thereof, or to any officer or employee of the State or any subdivision thereof. The property of an authority shall be exempt from all local and municipal taxes and for the purposes of such tax exemption, it is hereby declared as a matter of legislative determination that an authority is and shall be deemed to be a municipal corporation. Bonds, notes, debentures and other evidences of indebtedness of an authority heretofore or hereafter issued are declared to be issued for a public purpose and to be public instrumentalities and, together with the interest thereon, shall be exempt from taxes."

The plaintiff cited as authority in support of its claim for refund, *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693 (which construed the statute with respect to ad valorem taxes only), and 42 U.S.C.A., sections 1401, 1409 and 1410 of the National Housing Act.

On 10 April 1962, the defendant Commissioner of Revenue denied that the plaintiff Housing Authority was exempt from the payment of sales tax on its purchases of tangible personal property, notwithstanding the provisions of G.S. 157-26, and cited Chapter 826 of the Session Laws of 1961 which provides for the refund of such taxes to "counties and incorporated cities and towns," and further provides that "The refund provisions contained in this subsection shall not apply to any bodies, agencies or political subdivisions of the State not specifically named herein." The only agencies named in the subsection are counties and incorporated cities and towns. G.S. 105-164.14 (c).

The 1961 Act referred to hereinabove likewise provides, in pertinent part, in subsection (b) of G.S. 105-164.14 as follows: "The Commissioner of Revenue shall make refunds annually to hospitals not operated for profit, educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this article by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions or organizations. * * * The refund provisions contained in this subsection shall not apply to organizations, corporations and institutions which are governmental agencies, owned and controlled by the federal, State or local governments. In order to receive the refund herein provided for, such institutions and organizations shall file a written request for said refund within sixty days of the close of each calendar year, and such request for refund shall be substantiated by such proof as the Commissioner of Revenue may require, and no refund shall be made on applications not filed within the time allowed by this section and in such manner as the Commissioner may otherwise require."

It is clear that the plaintiff in its complaint, as amended, alleges it is exempt from the payment of taxes or fees to the State or any subdivision thereof under the provisions of G.S. 157-26. That in addition thereto, the plaintiff, by virtue of the provisions of 42 U.S.C.A., section 1405 (e), is exempt from all taxation imposed by the United States or by any State, and by reason of such law, the plaintiff is within the exempt status group prescribed by the provisions of G.S. 105-164.13 (17) of the North Carolina Sales Tax Act.

The provisions of 42 U.S.C.A., section 1405 (e), are as follows: "The Administration, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority. Obligations, including interest thereon, issued by public housing agencies in connection with low-rent-housing or slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States."

The first part of the above statute exempts the "Administration" from being taxed by the United States or by any State, county, municipality or local taxing authority. The term "Administration" is an entirely different entity from a local housing authority and means the "Public Housing Administration." 42 U.S.C.A., section 1402, subsection (13).

Subsection (11) of the foregoing section provides: "The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in the development or administration of low-rent-housing or slum-clearance. The Administration shall enter into contracts for financial assistance with a State or State agency where such State or State agency makes application for such assistance for an eligible project which, under the applicable laws of the State, is to be developed and administered by such State or State agency."

The latter part of section 1405 (e) makes no reference to any tax imposed by any State, county, municipality or local taxing authority. It merely provides that the obligations, including interest thereon, issued by public housing agencies in connection with low-rent-housing or slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States.

Therefore, as we construe the provisions of 42 U.S.C.A., section 1405 (e), they have no bearing whatever on the questions presented on this appeal.

G.S. 105-164.13 (17) reads as follows: "Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State." Certainly, neither the Constitution of this State nor the Constitution and laws of the United States prohibit the collection of a sales tax on purchases of tangible personal property made by a housing authority duly created, organized and existing under and by virtue of the Housing Authorities Law enacted in 1935 by the General Assembly of North Carolina.

The plaintiff was allowed a refund of sales taxes paid on the purchase of tangible personal property used in connection with the operation of its housing project prior to the enactment of Chapter 826 of the Session Laws of 1961, which became effective 1 July 1961. The provisions under which the plaintiff obtained refunds until their repeal by the enactment of the 1961 Act, were set out in G.S. 105-164.13 (30) as follows: "Sales made to the State of North Carolina or any of its subdivisions, including sales of tangible personal property to agencies of State or local government for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the State or local governments. Sales of building materials made directly to State and local governments in this State shall be exempt from the tax on building materials levied in this article, and sales of building materials to contractors to be used in construction work for State or local governments shall be construed as direct sales."

While the plaintiff in its complaint, as amended, alleges it is exempt from the payment of any tax pursuant to the provisions of G.S. 157-26, 42 U.S.C.A. 1405 (e), and G.S. 105-164.13 (17), it alleges its right to a refund of the sales taxes paid under the provisions of G.S. 105-164.14.

We have held that a housing authority created pursuant to the provisions of our Housing Authorities Law is a municipal corporation. *Wells v. Housing Authority, supra.* Even so, such a corporation is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of G.S. 105-164.14 (c).

Since the plaintiff is a municipal corporation or public agency created, organized and existing under and by virtue of the laws of North Carolina, more particularly the Housing Authorities Law, codified as G.S. 157-1, *et seq.*, we concur in the conclusion reached by the court below that the plaintiff is not a charitable organization within the meaning of the refund provisions of G.S. 105-164.14 (b).

We concur in the ruling of the court below that the plaintiff is a taxpayer within the meaning of G.S. 105-266.1, and had the right to institute this action. However, in our opinion, the plaintiff is not entitled to recover the taxes paid pursuant to the provisions of the statute upon which it relies, to wit, G.S. 105-164.14 (b) (c). The statute contains no provision whatever authorizing such refund, but on the contrary, by its terms, it expressly excludes governmental agencies.

It would seem that since the plaintiff is a nonprofit organization and a public housing agency, and could not exist were it not subsidized by the annual contributions of approximately $200,000 by the Public Housing Administration, in our opinion, there is no meritorious reason why such agencies should not be included within the refund provisions of G.S. 105-164.14 (b) (c). However, they are not, and such inclusion or exclusion is a legislative matter and not one for the courts.

The judgment of the court below is

Reversed.

JAMES T. STRICKLAND v. RICHARD A. SHEW.

(Filed 17 January 1964.)

1. Easements § 8—

The grantor of an easement of access may not obstruct the easement so as to interfere with its reasonable enjoyment by the grantee, and he has no right to do or permit the doing of anything which results in the impairment of the easement granted.

2. Same— Whether grantor interferred with reasonable use of easement held for jury on evidence.

The deed in suit conveyed a lot with an easement in a street to be opened along the side of the lot. The evidence disclosed that the grantor, under the provision of a restrictive covenant in the deed, approved plans for middle, opposite the carport, there was a cut of some six feet, so that a street to be constructed, and that when the street was constructed its grade was approximately even with the lot at each end, but that in the middle, opposite the carport there was a cut of some six feet, so that a driveway useable by automobiles could not be constructed from the street to the carport. *Held:* The evidence requires the submission to the jury of the question whether the street so constructed afforded reasonable ingress, egress, and regress with respect to plaintiff's lot.

MOORE, J., concurring in result.

PARKER and BOBBITT, JJ., join in concurring opinion.

APPEAL by plaintiff from *Parker, J.*, March 1963 Session of NEW HANOVER.

Action for damages for interference with an easement of access.

These facts are established by the pleadings: In 1956 defendant was the owner and developer of a residential subdivision in Wilmington known as Sherwood Forest. On September 19, 1956 he sold plaintiff a lot fronting on East Lake Shore Drive in the subdivision. At that time the defendant exhibited to plaintiff a plat showing the general layout of Sherwood Forest and agreed that a street would be constructed along the south side of the lot. The deed which defendant delivered granted plaintiff an easement in and to that street in the following language:

> "The parties of the first part hereby give, grant, and convey unto the said parties of the second part a right-of-way and easement of egress, ingress and regress over and upon that said road or roads, adjoining the above described lot and bounded and described as follows." (Description of the street is set out by metes and bounds.)

The deed also contained, *inter alia*, the following restrictions:

> "2. No building shall be located on said lot nearer than fifty (50) feet to the front of said lot and not nearer than ten (10) feet from the side of said lot, or nearer than ten (10) feet from the rear of said lot."
>
> "5. The plans and specifications of all buildings which shall be erected or moved on any lot shall be subject to approval by the developer, and the lot cannot be subdivided without the approval of the developer."

Plaintiff submitted the plans for his house to the defendant who approved them on January 30, 1957. Thereafter plaintiff constructed a house on the lot in accordance with the plans which included a carport on the south side of the house.

At the trial, plaintiff's evidence was sufficient to show the following: His lot fronts west 95 feet on Lake Shore Drive and South 201 feet on Robin Hood Drive. At the time plaintiff submitted his plans to the defendant, it was understood between them that the house was to be located near the center of the lot and that the carport would open to the south on the new road to be constructed (Robin Hood Drive). The house, when completed in July 1957, was situated 70 feet back from Lake Shore Drive, 10 feet from the north property line, and the entrance to the carport was 18 feet from Robin Hood Drive.

At the time of the sale, a dirt road ran from East Lake Shore Drive along the south side of plaintiff's lot, cutting across it at the rear. This road was level with plaintiff's lot but was considerably higher than the lot across the road on the south. As an inducement to the plaintiff to purchase the lot for $2,300.00, defendant pointed out the enhanced value it would have as a corner lot when the new road was opened. They did not discuss the manner in which the road was to be constructed.

Defendant began the construction of Robin Hood Drive about September 18, 1961. Over plaintiff's protest, the road was graded in such a way that there is now a perpendicular drop of from 3 to 6 feet along the south side of the lot. At the entrance to the carport the drop is 6 feet. The dirt removed when the road was graded was used to fill in the lots across the street as well as another low area in the development. The low grade of Robin Hood Drive has made the plaintiff's carport inaccessible. Any driveway constructed to it from the street would have to be so steep that a car would drag upon entering the carport. If the carport is ever to be used, it must be rebuilt so that it can be entered from the east over a drive constructed from the rear of the lot. This construction would cost $1,121.85. As a result of the grading of Robin Hood Drive the market value of plaintiff's property has been reduced $2,750.00. On August 30, 1963 the State Highway Commission took over the maintenance of Robin Hood Drive.

At the conclusion of plaintiff's evidence, the defendant's motion for judgment as of nonsuit was allowed and the plaintiff appealed.

Poisson, Marshall, Barnhill & Williams for plaintiff appellant.
Aaron Goldberg and John J. Burney for defendant appellee.

SHARP, J. At all times pertinent to a decision of this case Robin Hood Drive was not a public road. While the State Highway Commission is now maintaining it, the rights and liabilites of the parties are to be determined by their deed and not the rules applicable to a governmental agency when it opens or changes the grade of an existing street or highway. See *Smith v. Highway Commission,* 257 N.C. 410, 126 S.E. 2d 87; *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37; *Wood v. Land Co.,* 165 N.C. 367, 81 S.E. 422; *Cf. Bennett v. R.R.,* 170 N.C. 389, 87 S.E. 133; *McGarrity v. Commonwealth,* 311 Pa. 436, 166 A. 895.

By purchasing a lot within a subdivision with reference to the plat thereof, plaintiff acquired the private right to have each and all of the streets shown on the plat kept open or available for opening as occa-

sion might require. *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102; *Somersette v. Stanaland,* 202 N.C. 685, 163 S.E. 804. Here, however, plaintiff is not relying upon any rights which he might share in common with other property owners in the subdivision or upon any implied right of access as an abutting landowner. By his deed from defendant, plaintiff acquired a specific easement of access in the road *adjoining his lot* on the south. Access from the street was not limited to any particular portion of the lot.

One, who by his deed has specifically granted to another an easement of access, may not obstruct the easement in such manner as to prevent or to interfere with its reasonable enjoyment by his grantee. The grantor is obligated to refrain from doing, or permitting anything to be done, which results in the impairment of the easement. 17 A. Am. Jur., *Easements* § 137.

It is apparent that the parties contemplated direct, practical, and reasonable access to *all* parts of the lot from the street whenever it was opened. Such use in a residential development today necessarily includes access by automobile. At the time plaintiff purchased the property in question a dirt road, level with the lot, ran from East Lake Shore Drive along a portion of its south line. Prior to the construction of Robin Hood Drive defendant approved house plans for the plaintiff which showed that access to the carport could be had only from that street. The fact that plaintiff's property would eventually become a corner lot, with access from two streets, was one of the material inducements of the sale. Obviously a second street would add nothing to the value of a lot if, when opened, it provided only a jumping off place for children to disport themselves.

Under the evidence in this case it is for the jury to say whether the defendant constructed Robin Hood Drive so as to afford reasonable ingress, egress, and regress with respect to the plaintiff's lot. If he did not, the plaintiff would be entitled to recover the depreciation in the market value of his lot which was proximately caused by his failure to provide such access.

The judgment of nonsuit is

Reversed.

MOORE, J., concurring in result:

When land is subdivided into lots and a map is made thereof showing streets, and lots are sold with reference to such map, the owner of the subdivision thereby dedicates the streets to the use of those who purchase the lots for ingress and egress. The lot purchasers acquire easements of ingress and egress, but are entitled to exercise only such

rights thereunder as may be necessary to a reasonable and proper enjoyment of their premises. *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458; *Rudolph v. Glendale Improvement Co.,* 137 S.E. 349 (W. Va.). In the instant case, the deed from defendant to plaintiff sets out this right of ingress and egress in express terms, as follows: "The parties of the first part give, grant, and convey unto the parties of the second part a right of way and easement of egress, ingress and regress over and upon that certain road or roads, adjoining the above described lot . . . ."

Nothing passes by implication as incident to the grant of easement except what is reasonably necessary to its fair enjoyment. *Hine v. Blumenthal, supra.* In construing the grant of easement, the court will look to the circumstances attending the transaction, the situation of the parties and the object to be obtained. *Stevens v. Bird-Jex Co.,* 18 P. 2d 292 (Utah).

Plaintiff's lot is residential property and restricted to one residence. It was undoubtedly contemplated that plaintiff might own one or more automobiles for use of himself and family, and would require one or more entrances to the street and road abutting his lot on the west and south, respectively, for the car or cars. It was not contemplated that plaintiff would be permitted to enter the street at every point along the 205 feet of south frontage. *Barrett v. Duchaine,* 149 N.E. 632 (Mass.). This is true for two reasons. Such extensive use is not necessary to the fair and reasonable enjoyment of the easement. An easement must not unreasonably interfere with the rights of the owner of the servient estate. *Ingelson v. Olson,* 272 N.W. 270, 110 A.L.R. 167 (Minn.).

Plaintiff's easement as set out in the deed does not fix the location of the entrance or entrances to plaintiff's lot. When an express easement does not fix the location of the way, the grantor of the easement has the right to designate the location in a reasonable manner with due regard to the rights of grantee. If grantor does not locate the way, grantee may do so if he takes into consideration the interest and convenience of grantor. *Andrews v. Lovejoy,* 247 N.C. 554, 101 S.E. 2d 395; *Cooke v. Electric Membership Corp.,* 245 N.C. 453, 96 S.E. 2d 351; Anno: 110 A.L.R. 176-178.

"When the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances." 110 A.L.R. 175. When plaintiff purchased his lot the road in question had not been opened. There was a "dirt road from East Shore Drive (the street along the west end of plaintiff's lot) along the south of plain-

tiff's lot, cutting across it at the rear," but there is no contention that this was the road shown on the map, or that the proposed road when opened would be the same in construction, elevation or exact location —"They did not discuss the manner in which the road was to be constructed." Plaintiff's lot was low at the east and west ends and high in the middle. At the place where the proposed road was to be constructed the terrain sloped downward to the south so that the lot on the south side of the proposed road was a low place, much lower than the high point on plaintiff's lot. The purchaser of a lot is fixed with notice of its natural condition. 41 A.L.R. 1443. In constructing the street it was necessary for defendant to take many things into consideration. Plaintiff's witness, Mr. Von Oesen, a civil engineer, testified:

> "The streets and roadways in a subdivision, in being graded, after they are located are generally governed by several factors, each of which has a certain kind of bearing on the elevations and grading of the streets. The natural factor is always economy, and it is necessary to build a good street economically, and that means you would balance your cuts and fills so that the areas you cut down can fill the areas you have to fill in. The next governing factor would probably be drainage, and the roadway levels to provide adequate drainage to remove rain waters from surrounding areas of the street. There must be a surface sufficient to drive on, and also as for the elimination of sight obstructions. Another factor which is involved is the matter of conformity to adjacent lands, and access thereto, for the street is built primarily for the people building nearby; the access to adjacent lands. Normally the roadways serve areas they pass through.

Thus defendant was required to consider the suitability of the road as a thoroughfare, drainage and obstructions, as well as its adaptability to access to plaintiff's lot and the lot directly opposite. Whether defendant could reasonably provide an entrance to plaintiff's lot at the point plaintiff desired and also meet the other requirements is a question for the jury. When the road was opened, it was about at even grade with plaintiff's lot at the east and west ends of the lot; in the center the lot was much higher than the street. The difference in elevation between the edge of the pavement and the floor of plaintiff's carport is 6 feet—it does not appear how far above the surface of the lot the *floor* of the carport is. Plaintiff could not enter his carport from a driveway (if constructed) leading directly to the street because the elevation is such that a car would "scrape." But at many points both east and west of the carport a car can enter the lot at grade or by an

entrance of slight elevation. The door of the carport is 18 feet from the edge of the lot and at least 20 feet from the point where the cut begins. A car entering the lot to the east or west of the carport "could go in (the carport) with a skillful driver." It does not appear in evidence how wide the door to the carport is, but it is common knowledge that ordinary automobile operators drive cars into narrow driveways and parking spaces at right angles from highways and streets with less turning space than 18 to 20 feet. Plaintiff is not entitled, at all events, to the most convenient and direct route to his *carport,* else all streets and roadways in subdivisions must be approximately at lot grade regardless of the natural contour of the land. What plaintiff is entitled to is a reasonably convenient and proper entrance or entrances to his lot under the circumstances.

The location of an easement of way may be determined and fixed by implied agreement, acquiescence, or by parol agreement. 110 A.L.R. 178-180. And once it is located and fixed, it may not be altered except by mutual consent. *Smith v. Jackson,* 180 N.C. 115, 104 S.E. 169; *Mullen v. Canal & Water Co.,* 130 N.C. 496, 41 S.E. 1027; *International Pottery Co. v. Richardson,* 43 A. 692 (N.J.); *Tripp v. Bagley,* 276 P. 912, 69 A.L.R. 1417 (Utah). Plaintiff contends that by approving his house plans, including the plans for the carport, and by an "understanding" that the house would be built near the center of the lot with the carport facing the road in question, defendant assented to an entrance from the road directly into the carport. Defendant, of course, contends otherwise. This is also a question for jury determination.

I do not agree with the following statements in the majority opinion, as legal conclusions and principles: (1) . . . "Access from the street was not limited to any particular portion of the lot." (2) "It is apparent that the parties contemplated direct, practical, and reasonable access to *all* parts of the lot from the street whenever it was opened." For reasons already stated, it is my opinion that these statements are too broad and assume the truth of much plaintiff must prove by the greater weight of the evidence if he is to prevail.

PARKER and BOBBITT, JJ. join in this concurring opinion.

FLOYD F. CORRELL AND WIFE, HESSIE W. CORRELL v. DAVID L. HARTNESS, T/A HARTNESS REALTY COMPANY, AND J. CARROLL ABERNETHY, JR., AS TRUSTEE.

(Filed 17 January 1964.)

1. Cancellation and Rescission of Instruments §§ 2, 10½—

Where the agreement between the parties as contended by defendant and supported by his evidence is to the effect that plaintiffs were under contractual obligations to sign the note and deed of trust in question, the submission of the issue of fraud solely on the basis of plaintiff's contention that the execution of the note and deed of trust was procured by defendant's false representation that the papers were releases relating to other property owned by plaintiffs, is error, since the court is required to charge on all substantive features of the case arising on defendant's pleadings and evidence as well as on plaintiffs'.

2. Trial § 33—

The court is required to charge the law on every substantive feature of the case arising on the allegations and evidence, even in the absence of a special request for instructions.

APPEAL by defendant Hartness from *Campbell, J.*, April 1963 Session of CATAWBA.

Civil action instituted January 26, 1962, to have adjudged null and void (1) a deed of trust to J. Carroll Abernethy, Jr., Trustee, and (2) the $6,000.00 note described therein and purportedly secured thereby, on the ground the execution thereof by plaintiffs was procured by false and fraudulent representations of defendant Hartness.

Uncontroverted evidence discloses the following background facts:

Prior to August 28, 1960, David L. Hartness, hereafter called defendant, or David L. Hartness and wife, Mathalda A. Hartness, owned Lot 9 of Belle View Acres Subdivision on which a new house had been constructed, hereafter referred to as the Belle View property. Plaintiffs then owned a lot on Sandy Ridge Road Extension on which there was a five-room house in which they lived, hereafter referred to as the Correll property. There was another lot on Sandy Ridge Road Extension on which there was a four-room house in which the mother of the feme plaintiff lived. This property, for reasons indicated below, will be referred to hereafter as the Lail property. Mrs. Wilma C. Lail is the daughter of plaintiffs.

The Lail property was the subject of a lease-option agreement executed in June, 1957, by C. R. Looper and wife as lessors and by Robert E. Lail and wife, Wilma C. Lail, as lessees. The lease was from August 1, 1957, through July 31, 1962. It provided for the payment by the lessees of a rental of $80.00 per month and all taxes, assessments

and fire insurance premiums. The lessees were granted the option to purchase the property at any time during the term of the lease at the price of $5,000.00. In the event the lessees exercised this option, the amount theretofore paid as rent (with certain deductions) was to be credited as part payment of the purchase price.

Plaintiffs alleged they and defendant (on or about August 28, 1960) entered into the following agreement: Plaintiffs agreed to purchase the Belle View property from defendant at $15,500.00 and pay therefor as follows: (1) Plaintiffs would obtain a loan of $9,500.00 from a building and loan association, to be secured by a first mortgage on the Belle View property, and pay this amount to defendant. (2) Plaintiffs would convey to defendant the Correll property subject to a mortgage of $1,914.34. (3) Plaintiffs would have the Lails transfer their lease and option to defendant so that defendant, upon payment of a balance of $3,612.00, could obtain a deed for the Lail property. (4) Defendant agreed to pay plaintiffs $500.00 (a total of $1,000.00) as and when defendant sold each of said properties, to wit, the Correll property and the Lail property. (Note: There is nothing in plaintiffs' allegations or evidence purporting to relate the conveyance of the Correll property and the assignment of the lease-option agreement on the Lail property to the specific sum of $6,000.00, to wit, the balance due on the agreed purchase price of $15,500.00, or to the effect the Correll property or the Lail property was accepted by defendant at any agreed valuation.)

Plaintiffs alleged they obtained the $9,500.00 mortgage loan as agreed and paid the amount to defendant; that they conveyed the Correll property to defendant; and that the Lails assigned the lease and option on the Lail property to defendant.

The note and deed of trust plaintiffs attack are not set out in the record. A stipulation discloses the following: Plaintiffs executed the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, both dated September 23, 1960. The deed of trust is on a standard printed form. The deed of trust recites that plaintiffs are indebted to David L. Hartness and wife, Mathalda A. Hartness, in the sum of $6,000.00, for which they executed and delivered to David L. Hartness and wife, Mathalda A. Hartness, their note in the sum of $6,000.00 payable three years after date, with interest from date at the rate of 6% per annum, payable annually. The deed of trust provides that plaintiffs convey to Abernethy, Jr., Trustee, as security for the payment of their said $6,000.00 note, the real estate they had purchased from David L. Hartness and wife, Mathalda A. Hartness, to wit, the Belle View property. Plaintiffs' execution of the deed of trust "was notarized" by

W. E. Frye, a notary public, on September 27, 1960; and the deed of trust was filed for record and recorded on October 17, 1960, in the Catawba County Registry.

Plaintiffs alleged Floyd F. Correll executed the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, in reliance upon defendant's false and fraudulent representations that the papers he was requested to sign and did sign were releases relating to the Correll and Lail properties and upon defendant's assurance that the papers would not be presented to his wife, Hessie W. Correll, for her signature unless and until submitted to and approved by Mrs. Lail, their daughter; and that Hessie W. Correll executed the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, in reliance (1) upon defendant's false and fraudulent representations that the papers she was requested to sign and did sign were releases relating to the Correll and Lail properties and (2) that said papers had been submitted to and approved by Mrs. Lail. Plaintiffs alleged they did not learn the papers they had signed were a note and deed of trust on the Belle View property until "several months after this occasion" when a party who was interested in purchasing the $6,000.00 second mortgage note came to inspect the Belle View property.

Plaintiffs prayed (1) that "the said deed of trust and note be declared void and marked canceled from the record"; (2) that "the defendant pay to the plaintiffs the sum of $500.00"; and (3) that the defendant be taxed with the costs of the action.

In a separate answer J. Carroll Abernethy, Jr., Trustee, denied all allegations of the complaint (except those relating to the residence of the parties) for lack of knowledge or information sufficient to form a belief as to the truth thereof.

Answering, defendant denied categorically all of plaintiffs' allegations that their execution of the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, was procured by false and fraudulent representations of defendant. As to the terms of their agreement, defendant alleged the purchase price for the Belle View property was, as alleged also by plaintiffs, the sum of $15,500.00 of which $9,500.00 was to be and was obtained by plaintiffs from the First Savings and Loan Association of Hickory on a first mortgage on said property and paid over to defendant. Too, defendant alleged, also in accord with plaintiffs' allegations, that plaintiffs were to convey the Correll property to defendant and were to assign or cause to be assigned to defendant all rights of the lessees under the lease-option agreement on the Lail property. Defendant alleged further that plaintiffs agreed to execute a note and deed of trust for the balance of the purchase price for the

Belle View property, to wit, $6,000.00, and that the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, were executed by plaintiffs in exact accord and compliance with their agreement. Defendant alleged further that the Correll property and the Lail property were each valued in the trade at $4,500.00 and that, under their agreement, as each of these properties was sold by defendant the difference between $4,500.00 and the debt on such property was to be credited on plaintiffs' said $6,000.00 balance purchase price note. Defendant alleged further that he had sold the Correll property and, in accordance with said agreement, had entered a credit of $1,517.61 on said $6,000.00 note. Defendant alleged the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, are valid obligations.

Defendant prayed (1) that "the plaintiffs recover nothing of the defendants and that this action be dismissed"; (2) that the costs of this action be taxed against plaintiffs; and (3) that "the defendant have and recover from the plaintiffs such other and further relief as this defendant may be entitled to receive in the premises."

The court, without objection, submitted one issue, namely: "Did the defendant procure the execution and delivery of the Deed of Trust recorded in Book 641, at Page 350, and the note in the amount of $6,000 by fraud?" The jury answered, "Yes."

Upon said verdict, the court entered judgment as follows:

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that that certain Deed of Trust recorded in Book 641, at Page 350, and that certain promissory note dated September 23 (*sic*), and signed by Floyd F. Correll and wife, Hessie W. Correll, made payable to David L. Hartness be, and the same are declared hereby to be null and void and of no effect and that the aforesaid Deed of Trust is hereby ordered canceled from the public records of this State.

"The Court takes judicial notice of the fact that David L. Hartness is the defendant referred to in the above issue and that the other defendant named in this case, being J. Carroll Abernethy, Jr., as Trustee, has no liability nor interest in the case except as having been named trustee in the Deed of Trust specified above.

"It is FURTHER ORDERED that the defendant, David L. Hartness, be taxed with the cost of this action as same may be determined by the Clerk."

Defendant excepted and appealed.

Joe P. Whitener for plaintiff appellees.

George D. Hovey and G. Hunter Warlick for defendant appellant Hartness.

BOBBITT, J. *In limine,* it is noted that Mathalda A. Hartness is not a party to this action. Hence, her interest, if any, in the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, is not affected by the verdict and judgment.

The verdict, whether considered alone or in conjunction with the charge, does not establish the terms of the agreement entered into between plaintiffs and defendant. While the court adjudged the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, null and void, whether plaintiffs are now indebted to defendant for any part of the agreed purchase price of $15,500.00 for the Belle View property has not been determined.

The single issue submitted relates solely to whether the execution by plaintiffs of the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, was procured by false and fraudulent representations of defendant. The following is typical of instructions to which defendant excepted and assigns as error: "Now, the Court instructs you if you are satisfied from this evidence and by its greater weight that Hartness did make a misrepresentation to Mr. and Mrs. Correll—that he wilfully and purposely made a misrepresentation to them and that he misled them and misinformed them that they were signing a release, when in truth and in fact he knew that they were signing a Deed of Trust and a note, and that he purposely misled them and that they (Mr. and Mrs. Correll) reasonably, by the exercise of due care on their part . . . that they reasonably relied upon these representations by Mr. Hartness and they signed under those circumstances, then the Court instructs you that you would answer that first question 'Yes.' If you are not so satisfied from this evidence and by its greater weight that they were misled and that they exercised reasonable care—the care of a reasonable business person in signing papers—then you would answer it 'No'."

With reference to whether defendant represented the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, to be a release or releases, the evidence for plaintiffs and defendant, respectively, is in sharp conflict.

Apart from conflicting allegations and evidence as to whether such representations were in fact made, defendant alleged and offered evidence tending to show that plaintiffs were obligated by the terms of their agreement to execute the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, and that their execution thereof was merely a compliance with their contractual obligation. If the jury accepted this view, the issue should have been answered, "No." However, the issue was submitted and the jury was instructed solely with reference

to whether the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, were signed by plaintiffs on account of alleged misrepresentations by defendant as to what they were and without reference to whether plaintiffs were obligated by their agreement to sign them.

In our view, the validity of the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, must be determined in the context of the entire agreement entered into between plaintiffs and defendant. Whether plaintiffs were obligated by their agreement to execute the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, was a substantive feature of the case arising on defendant's pleading and evidence. Failure to charge the law on such substantive feature, even in the absence of special request for such instruction, was prejudicial error for which defendant is entitled to a new trial. *Whiteside v. McCarson,* 250 N.C. 673, 680, 110 S.E. 2d 295, and cases cited.

Defendant assigns as error the overruling of his motion for judgment of involuntary nonsuit. In this connection, defendant relies on *Isley v. Brown,* 253 N.C. 791, 117 S.E. 2d 821, on cases cited therein and other decisions of like import. However, as indicated above, the trial proceeded on an erroneous theory. Clearly, whether plaintiffs were obligated by their agreement with defendant to execute the $6,000.00 note and the deed of trust to Abernethy, Jr., Trustee, was of material significance in passing upon the sufficiency of plaintiffs' evidence to warrant submission of the single issue on which the case was tried. In these circumstances, defendant's assignment of error is overruled. Upon retrial, the court will be free to consider defendant's motion for judgment of nonsuit, if interposed, without direction or restraint by any statement in this opinion.

While not the basis of decision on this appeal, it seems appropriate to call attention to the matters set out below.

There is a variance between plaintiffs' *allegation* that defendant agreed to pay them $500.00 (a total of $1,000.00) as and when defendant sold each of said properties, to wit, the Correll property and the Lail property, and plaintiffs' *evidence.* Plaintiffs' evidence is to the effect that these amounts were to be loans to enable plaintiffs to consolidate certain outstanding small obligations. Plaintiff Floyd F. Correll testified: "I was to pay the $1,000.00 back to Mr. Hartness at the rate of $30.00 a month." The evidence tends to show plaintiffs did receive $500.00 from defendant when defendant sold the Correll property.

All the evidence tends to show defendant did not obtain a deed from Looper for the Lail property and did not advance to plaintiffs the second $500.00. The causes and consequences of defendant's failure in

these respects are not pertinent on this appeal. Suffice to say, defendant contends he was without fault in connection with his failure to obtain a deed for the Lail property and contends further that any failure on his part in this respect would at most entitle plaintiffs to a credit of some undetermined amount on their $6,000.00 note.

Whether the parties should ask leave to file amendments to the pleadings to the end that all of their rights and liabilities *inter se* may be determined in this action should receive consideration.

New trial.

ANNE AUSTIN MURPHY v. DELEON TIMOTHY MURPHY, JR.

(Filed 17 January 1964.)

1. Divorce and Alimony § 23—

A complaint alleging that defendant had abandoned the children of the marriage and was in default in the monthly payments he had agreed to make for their support under the terms of a deed of separation executed by the parties, but without seeking or alleging facts constituting grounds for divorce, either absolute or from bed and board, does not allege a cause of action under G.S. 50-13 or G.S. 50-16, to adjudicate the right to the custody and support of the children, the remedy under the statutes being ordinarily collateral to an action for divorce or for alimony without divorce.

2. Pleadings § 4—

The facts alleged in the complaint determine the relief to which plaintiff is entitled and not the prayer for relief.

3. Pleadings § 19—

If the complaint presents facts sufficient to constitute a cause of action or if facts sufficient for that purpose can be fairly gathered from it, it is good as against demurrer, notwithstanding the prayer for relief is for an inapposite remedy.

4. Husband and Wife § 13; Habeas Corpus § 3—Allegations held to state cause of action for breach of separation agreement or for habeas corpus.

A complaint in an action by the wife alleging that defendant had executed a separation agreement under which he agreed to pay a stipulated sum monthly for the support of his children, that defendant had refused to comply with this provision in the agreement and had abandoned the children, *is held* sufficient to state a cause of action in favor of the wife upon contract to recover the amount in default under the separation agreement and also sufficient to support the issuance of a writ of *habeas corpus*,

G.S. 17-39, G.S. 17-39.1, for the custody and support of the children, and the court may *ex mero motu* so consider it.

5. Trusts § 6—

A trustee of an express trust may sue without joining his *cestui que trust.*

6. Appearance § 2— Action may not be dismissed for want of service during 90 day period for alias summons or extension of time for service.

Where there has been no personal service of process, defendant's motion to dismiss an *in personam* action for want of jurisdiction must be allowed, notwithstanding defendant's later demurrer for failure of the complaint to state a cause of action, if at the time of the demurrer more than the ninety days has elapsed during which plaintiff was entitled to procure the issuance of an alias summons or an extension of time for service of the original summons, G.S. 1-95, but if at the time of the demurrer the ninety days allowed by the statute has not expired, defendant is not entitled to dismissal, and the demurrer for failure of the complaint to state a cause of action constitutes a general appearance waiving the service of process. G.S. 1-131.

7. Judgments § 2—

Where defendant files a demurrer for failure of the complaint to state a cause of action, which demurrer constitutes a general appearance waiving service of process, the court may not, upon overruling the demurrer, enter an order on the merits without giving defendant an opportunity to plead and to a hearing on the motion.

8. Habeas Corpus § 3—

While a reasonable allowance for attorney's fees may be made a part of the costs in a *habeas corpus* proceeding, this may not be done until there is a proper hearing or an opportunity for defendant to be heard. G.S. 6-21.

9. Receivers § 1—

Receivership is a harsh remedy and ordinarily will be granted only where there is no other safe or expedient remedy.

10. Same—

In an action by the wife against her husband to recover support for the minor children of the marriage, the appointment of a receivership to take possession of bank deposits of the husband is inappropriate, even though the complaint alleges that the husband had abandoned the children and was about to dispose of his property for the purpose of defeating plaintiff's claim for support of the children, since plaintiff has an expedient and appropriate remedy by attachment.

APPEAL by defendant from *Johnston, J.,* July 19, 1963, Session of FORSYTH.

Clyde C. Randolph, Jr., for plaintiff.

Harold R. Wilson for defendant.

MOORE, J. This is an action for subsistence and support for minor children.

The action was commenced 23 May 1963 by issuance of summons which was returned 28 May 1963 by the sheriff of Forsyth County endorsed, "After due and diligent search and inquiry Deleon Timothy Murphy, Jr., is not to be found in Forsyth County, N. C., whereabouts unknown."

The complaint in substance alleges: Plaintiff and defendant were married in December 1952, and are residents of Forsyth County, North Carolina. Three children, ages now 8, 5 and 3, were born to this union. Plaintiff and defendant were separated 7 May 1962 pursuant to a separation agreement of that date. By virtue of the separation agreement "defendant is obligated to pay $40 per month for the support of each of the children . . . until such child reaches the age of 21 years." Defendant's contributions to the support of the children have been irregular, and he is in arrears in the amount of $240. Defendant refuses to comply with the agreement with respect to the support of the children. Plaintiff needs and is entitled to the security and protection of a court order providing to her reasonable subsistence for the minor children. Defendant has abandoned the children and left the State, is in parts unknown and is about to dispose of his property for the purpose of defeating plaintiff's claim for support of the children. Defendant has an account in a substantial amount in the Wachovia Bank and Trust Company. Plaintiff is a fit and suitable person to have the custody of the children. Plaintiff prays for an award of custody, an allowance of "reasonable subsistence to plaintiff for the use and benefit of the . . . children . . . pursuant to the provisions of G.S. 50-16," temporary support without notice to defendant who has left the State and is in parts unknown, the application of the bank deposit to such support, and reasonable attorney fees.

On 24 May 1963 there was a hearing "upon plaintiff's application for an order awarding to her child support from the estate of the defendant, pursuant to . . . G.S. 50-16," and the judge, finding that defendant had abandoned the children, left the State and was in parts unknown, awarded plaintiff custody of the children, appointed George E. Clayton, Jr., receiver to take charge of defendant's funds on deposit in the First Union National Bank and any other property or funds of defendant he might find within the jurisdiction of the court, the receiver to pay therefrom costs of the receivership and of this action, including an allowance of $100 to plaintiff's counsel, and $40 per month for the support of each child.

Pursuant to orders of 29 May, 1 June, 4 June and 19 June, 1963, the receiver took charge of the bank deposit of $395.76 and a deposit of $1000 which defendant had at Wake Forest College. It does not appear whether any of these funds have been disbursed by the receiver.

The defendant on 20 June 1963 made a special appearance through counsel and moved to dismiss the action "on the ground that the court does not have jurisdiction over said defendant in that no service has been had on said defendant, either personally, by publication, or by any other means."

Thereafter, defendant demurred to the complaint on the grounds that (1) plaintiff is not the real party in interest, and (2) the facts alleged fail to state a cause of action, and particularly do not state a cause of action under the provisions of G.S. 50-16.

At a hearing on 19 July 1963 the court overruled both the motion to dismiss and the demurrer. Defendant excepted and appeals to this Court.

Certain language in the prayer for relief, quoted above, indicates that plaintiff assumes that the facts alleged constitute a cause of action under the provisions of G.S. 50-16, entitled "Alimony without Divorce." This statute in its original form was enacted in 1872 (Laws of North Carolina, 1871-72, Ch. 193, § 39). Prior thereto there was no statutory provision for alimony. *Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E. 2d 790. To state a cause of action under G.S. 50-16 it is necessary to allege (1) the marriage, (2) the separation of the husband from the wife and his failure to provide the wife and children of the marriage reasonable subsistence, i.e., abandonment, *or* some conduct on the part of the husband constituting cause for divorce, either absolute or from bed and board, and (3) want of provocation on the part of the wife. *Schlagel v. Schlagel, supra; Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Trull v. Trull,* 229 N.C. 196, 49 S.E. 2d 225; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909.

Plaintiff's complaint does not allege that defendant has abandoned plaintiff, has failed to provide her with subsistence, or is guilty of any conduct which would be a ground for divorce, either absolute or from bed and board. On the contrary, it is alleged that plaintiff and defendant separated 7 May 1962 pursuant to a separation agreement. There is no suggestion that plaintiff is not satisfied with the agreement or that defendant has breached the agreement relative to plaintiff individually. The complaint is that defendant has abandoned the children and is in default in the monthly payments he agreed to make for the benefit of the children. At most the complaint states a cause of action for custody of and support for the minor children.

Prior to 1953 custody of children could not be determined in a proceeding under G.S. 50-16. S.L. 1953, Ch. 925, provided for such determination in lieu of habeas corpus (G.S. 50-16, second paragraph). In 1955 it was enacted that "The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant *in the same manner as such orders are entered by the court in an action for divorce,* irrespective of what may be the rights of the wife and the husband as between themselves in such proceedings. S.L. 1955, Ch. 1189—G.S. 50-16, third paragraph. These amendments (of 1953 and 1955) mean that when a wife has instituted an action, upon proper allegations, for alimony without divorce she may in the original complaint, or either party may by motion in the cause, seek and thereby obtain a determination of the custody of the children of the marriage and an order for the support of such children, even if it be determined that the wife is not entitled to alimony. But an action for custody of and support for children of a marriage may not be maintained under G.S. 50-16 in the absence of a claim, upon proper allegations, of alimony by the wife. Custody and support of children are determined under G.S. 50-16 "in the same manner . . . as in an action for divorce." In *Cox v. Cox,* 246 N.C. 528, 530, 98 S.E. 2d 879, we said: "When a divorce action is instituted, jurisdiction over the custody of the children of the marriage vests . . . in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action." Thus, a controversy concerning child custody and support accompanies, is collaterally connected with, and is incidental to an action for divorce or for alimony without divorce, but may not be determined under G.S. 50-13 and G.S. 50-16 when it is the only cause of action alleged (except in those special and unusual circumstances provided for in the second paragraph of G.S. 50-13, not applicable here. See *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35).

The complaint does not state a cause of action under G.S. 50-16, but this does not require that the demurrer be sustained. Plaintiff prays for relief in accordance with G.S. 50-16, but "The relief to which plaintiff is entitled is to be determined by the facts alleged in the complaint and established by the evidence, and not the prayer for relief. The fact that the prayer for relief demands relief to which plaintiff is not entitled does not preclude recovery on a theory supported by the facts alleged." 3 Strong: N. C. Index, Pleadings, § 4, p. 610. 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. *Bailey v. Bailey, supra.*

Plaintiff alleges that she and defendant entered into a separation agreement whereby "defendant is obligated to pay $40 per month for the support of each of the children . . . until such child reaches the age of 21 years." From other allegations it is inferred that the payments were to be made, and some of them were made, to plaintiff for the benefit of the children. It is also alleged that at the time of the institution of the action defendant was $240 in default. Plaintiff may maintain an action upon the contract to recover the $240 default. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113; *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672. Of course, plaintiff is not the beneficiary of the fund, she is merely trustee for the children. *Goodyear v. Goodyear, supra.* A trustee of an express trust may sue without joining his *cestui que trust. Ingram v. Insurance Co.,* 258 N.C. 632, 129 S.E. 2d 222.

We note that the relief primarily sought by plaintiff is a court order awarding her the legal custody of the children and providing for their future support. Juvenile courts and domestic relations courts, where established, have jurisdiction. G.S., Ch. 110, art. 2; G.S., Ch. 7, art. 13. A habeas corpus proceeding is also available to plaintiff. G.S. 17-39; G.S. 17-39.1. The facts alleged are sufficient to support the issuance of a writ of habeas corpus. We perceive no reason why the court, upon motion of plaintiff or *ex mero motu,* may not treat the complaint as a petition for writ of habeas corpus and proceed accordingly. It is optional with the superior court whether it will proceed in the cause of action referred to in the next preceding paragraph or by habeas corpus. The demurrer is not sustained.

Defendant entered a special appearance and moved to dismiss the action for want of jurisdiction of defendant, no summons having been served upon him personally, by publication or otherwise. Defendant did not waive the motion to dismiss by later filing demurrer. G.S. 1-134.1.

Summons was issued 23 May 1963 and returned by the sheriff 28 May 1963 with the endorsement that defendant is not to be found in Forsyth County and his whereabouts is unknown. So far as the record discloses nothing further was done with respect to service of process. However, the court properly denied the motion to dismiss. Plaintiff had by statute 90 days within which to procure the issuance of an alias summons or an extension of time for service of the original summons (G.S. 1-95) and the attachment of defendant's property as a basis for service by publication (G.S., Ch. 1, art. 35, part 1). The hearing on the motion and notice of appeal to this Court occurred 57 days after the issuance of the original summons.

Demurrer on the ground that the complaint does not state a cause of action or for defect of parties is a general appearance. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E. 2d 592. Not being entitled to a dismissal of the action for want of service of summons, defendant's demurrer brings him in by general appearance and waives service of process. *Harmon v. Harmon*, 245 N.C. 83, 95 S.E. 2d 355. He is entitled to time for answering. G.S. 1-131.

If so advised defendant may move to set aside and vacate the orders awarding the custody and care of the children of the marriage to plaintiff, decreeing the payment of support for the children, allowance of counsel fee, and appointing a receiver to take over the assets of defendant within the State.

At the time the custody and support order was entered, the court was without authority to make it. Defendant had not been served with summons or notice and had not made a general appearance. In a habeas corpus proceeding custody or support of children may not be determined until defendant has been served with process, personally or by publication, or has made a general appearance, and then only after time for answering has expired or after notice duly given. In an action upon a separation agreement, such as may be maintained upon the pleadings herein, custody is not involved. A reasonable allowance for attorney's fees may be made as a part of the costs in habeas corpus proceedings (G.S. 6-21), but not until there is a proper hearing or an opportunity for defendant to be heard.

By statute and under general equitable principles a receiver may be appointed before judgment when plaintiff establishes an apparent right to specific property which is the subject of the action and is in possession of the adverse party or where specific property, or its rents and profits, are in danger of being lost or materially injured or impaired. G.S. 1-502; *Sinclair v. R.R.*, 228 N.C. 389, 45 S.E. 2d 555. A receiver may be appointed *pendente lite* in the discretion of the court. *Hanna v. Hanna*, 89 N.C. 68. But receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. *Scoggins v. Gooch*, 211 N.C. 677, 191 S.E. 750; *Neighbors v. Evans*, 210 N.C. 550, 187 S.E. 796; *Woodall v. Bank*, 201 N.C. 428, 160 S.E. 475. Receivership is ordinarily ancillary to some equitable relief. *Sinclair v. R.R., supra.* Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E. 2d 491; *Perkins v. Perkins*, 232 N.C. 91, 59 S.E. 2d 356. In the instant case the property consists of two small cash deposits. Upon the pleadings, attachment is the safe, expedient and appropriate remedy. G.S., Ch. 1, art. 35. Receivership overreaches the bounds of discretion.

The judgment below, overruling the motion to dismiss and the demurrer, is affirmed and the cause is remanded for further proceedings not in conflict with this opinion.

Remanded.

TINA M. SCOTT, EXECUTRIX OF THE ESTATE OF W. H. SCOTT, DECEASED v. WILLIAM THOMAS CLARK AND CHARM P. CLARK.

(Filed 17 January 1964.)

1. Automobiles § 21—

The owner of an automobile is not an insurer of the safety of the tires on the vehicle but is required to use reasonable care to see that each tire is in a safe and proper condition for operation on the highways, and may be held liable for injuries proximately resulting from a defective condition of a tire when he has actual or implied knowledge of such unsafe condition, but otherwise an accident resulting from a blowout is usually considered unavoidable.

2. Automobiles § 41r— Evidence held sufficient to present question for jury as to negligence in operating vehicle with defective tire.

Evidence tending to show that one of the tires on defendant's car had imprinted on it the words "mobile home tire", that such tires were intended to be used on mobile homes exclusively and that they did not have as much insulation on the cord and insulation between the plies as tires manufactured for use on motor vehicles, that the tire had only 15 or 20 per cent of the tread on it at the time of the collision, that it had heat and impact breaks in the center of the tread and in the side wall, that it had been bought as a used tire almost three years prior to the collision in suit, and that the collision resulted when the tire blew out when the vehicle operated by plaintiff's testate was approaching on the highway from the opposite direction and was distant only by a car length, causing the vehicles to collide on the left of defendant's center of the highway, *is held* sufficient to raise the question whether defendant knew or in the exercise of reasonable care should have known of the dangerous condition of the tire and should have foreseen that consequences of a generally injurious nature would result from the operation of the vehicle on the highway with the tire in such condition.

APPEAL by plaintiff from *McKinnon, J.*, June 1963 Session of CHATHAM.

Civil action to recover damages for the alleged wrongful death of plaintiff's testate. G.S. 28-173.

Plaintiff's testate, W. H. Scott, met his death on 29 June 1961 at about 3:45 p.m. as a result of a collision of motor vehicles, when a

1950 Chevrolet pickup truck operated by William Thomas Clark in an easterly direction on U. S. Highway 64, a two-lane highway, about 1300 feet east of its intersection with N. C. Highway 55 in Wake County, crossed to its left of the white center line on the highway and its left front collided with the left front of a 1956 Chevrolet pickup truck, which W. H. Scott was driving in a westerly direction on the same highway. The hard-surfaced part of the highway was about twenty feet wide and on each side were shoulders six feet wide. At the scene of the collision, the maximum speed limit was 55 or 60 miles an hour. The weather was fair and the highway was dry. During the trial the parties stipulated that the 1950 Chevrolet pickup truck was owned by the defendant Charm P. Clark, and that at the time of the collision the defendant William Thomas Clark was operating it as agent of Charm P. Clark and within the scope of his agency.

Plaintiff alleges in her complaint and amendment thereto that defendants were negligent in the operation of the 1950 Chevrolet pickup truck, which proximately caused her testate's death, in the following respects: One, reckless driving in violation of G.S. 20-140; two, driving at a speed greater than was reasonable and prudent under the existing conditions, in violation of G.S. 20-141 (a); three, failing to keep a proper lookout; four, failing to keep it under proper control; five, driving into its left lane of traffic without ascertaining that it could be done in safety; six, driving into its left lane of traffic directly in front of the approaching pickup truck operated by her testate; seven, driving with steering equipment in a worn and defective condition; eight, driving it equipped with old, worn, defective and unsafe tires, when each of the defendants had, or by the exercise of ordinary care should have had, knowledge of the defective and unsafe condition of the tires; and nine, failing to give to her testate's approaching pickup truck one-half of the main-traveled portion of the highway as nearly as possible, in violation of G.S. 20-148.

Defendants in their joint answer deny that they were negligent in any respect. As a further answer and defense, they allege that William Thomas Clark was operating the 1950 Chevrolet pickup truck at a reasonable rate of speed, that it was in good repair and condition according to the best of their knowledge, and that as he came near Scott's approaching pickup truck, the left front tire of his pickup truck suddenly blew out, causing it to veer suddenly to its left and into the approaching Scott pickup truck causing a collision, and that the collision was a pure accident caused by no negligence on their part.

Plaintiff and defendants offered evidence. The jury found by its verdict that the death of plaintiff's testate was not caused by the negligence of defendants as alleged in the complaint.

From a judgment, in accord with the verdict, that plaintiff take nothing by this action and taxing her with the costs, she appeals.

Barber & Holmes and Dupree, Weaver, Horton & Cockman by Jerry S. Alvis for plaintiff appellant.

Teague, Johnson & Patterson by C. Woodrow Teague and Ronald C. Dilthey for defendant appellees.

PARKER, J. The court charged the jury in part as follows:

> "The plaintiff further alleged that the defendants did drive the pickup on the highway while the steering gear thereof was in a worn and defective condition and did operate with tires that were old, worn and defective and unsafe.
>
> "(As to those last two specifications of negligence, gentlemen, with respect to operating with defective steering gear and operating with defective, worn and unsafe tires, I instruct you that there is not here sufficient evidence of any defect of steering condition or of tires existing prior to the accident and known to the defendants or should have been known to them in the exercise of reasonable care, for you to consider and for those two specifications of negligence to be submitted to you. However, the plaintiff contends that the defendant was negligent in all of the other respects alleged, or at least some of them, and that you should be so satisfied from the evidence and by its greater weight.)"

Plaintiff assigns as error the part quoted above in parentheses.

During the trial and before plaintiff rested, the parties stipulated that the tire on the left front wheel of the Chevrolet pickup truck owned by Charm P. Clark was manufactured by Mansfield Tire Company in June 1956, and that on 6 August 1958 Charm P. Clark bought it as a used tire from the Siler City Tire Company in Siler City, North Carolina.

Plaintiff's evidence tended to show the following facts: Her testate about 3:45 p.m. on 29 June 1961 was driving a Chevrolet pickup truck in a westerly direction on U. S. Highway 64 at a speed of between 40 and 45 miles an hour where the maximum speed limit was 55 or 60 miles an hour. Meeting him on the highway was a Chevrolet pickup truck driven by William Thomas Clark at a speed of about 35 or 40 miles an hour. Just before the pickup trucks met, there was a loud noise and the Clark pickup truck veered to the left, and its left front part collided with the left front part of the Scott pickup truck. As a result of the collision, plaintiff's testate was instantly killed.

The court found that Sion D. Jennings, a witness for plaintiff, was an expert in the manufacture and repair of automobile tires. He testified in substance, except when quoted, as follows: The Mansfield tire that was on the left front wheel of the Clark pickup truck at the time of the collision, and which is marked defendants' Exhibit 6, has imprinted on it the words "mobile home tire." "Mobile home tires are manufactured and marketed to haul mobile homes exclusively. * * * There is a difference in the manufacture of a mobile home tire and a tire to be used on wheels of a motor vehicle. There is not as much insulation to the cord and there is not as much insulation between the plies of the tire." This Mansfield tire has between 15 and 20 per cent of tread on it; it has not been recapped. It has five holes in it; one in the crown, another in the bead, and the other three here and here and here, pointing them out to the jury. There are four patches in the inner tube, which has been marked defendants' Exhibit 1.

Charm P. Clark, testifying in his own behalf, said on cross-examination: "I recall that I bought the tire [the Mansfield tire on the left front wheel of his pickup truck] from Mr. Whitehead in Siler City, and the date of that was August 6, 1958. At the time I bought it it was put on by Mr. Whitehead in Siler City. The tube was put in it from the other tire. I did not put a new tube in at the time I put the Mansfield tire on. The tube was in good condition. It had one or two patches on it. I had used that tube at that time approximately two years. It had been used approximately two years, and that was the same tube in the Mansfield tire the date of the collision. It had been in there continuously."

William T. Clark, testifying in his own behalf, said on direct examination: "On June 29, 1961, a Thursday, I believe, I took my father's pickup truck and started toward Raleigh. * * * I had driven that truck before that day, at least three times a week. The condition the truck was in with respect to brakes and steering equipment was all O. K. * * * As I approached this point where the accident occurred, I was driving on the right side of the road. As to the first thing that happened out of the ordinary, the tire blew, which caused me to swerve over. The left front tire blew out. I was on my right side of the road at that time. * * * At that time, I was going approximately 40 or 45 mph. When the tire blew out, the truck I was driving swerved into the oncoming traffic on the lane. When the tire blew, I attempted to pull it back to the right but I just could not do it. I pulled into the other lane. I attempted to pull it to the right, but I kept going to the left side. I attempted to pull it to the right, but I just couldn't do it. At the time the tire blew out on the left front wheel of my truck, the

Scott truck was on his side of the road approaching me. * * * The left front of my truck and the left front of the Scott truck collided." He testified on cross-examination: "When I had what I call a blow-out, my distance from the Scott truck was then a car-length or a car-length-and-a-half. I am positive of that."

The court found that W. M. Shaffer, a witness for defendants, was an expert in automobile tire construction and tire failure. He testified in substance on direct examination that he examined the Mansfield tire that blew out, and that it had a heat and impact break practically in the center of the tread all the way through the tire. In addition, he found another break through the tire on the sidewall. In describing a heat and impact break, Shaffer testified: "It would break the cords on the inside and they will be damaged sometimes for a week or longer before the actual blow. That is commonly known as a road hazard, the one in the center of the tread, which is the one I am describing." In response to hypothetical questions, Shaffer expressed the opinion that there was a blowout in the heat and impact break of the tire before the collision. He testified on cross-examination in substance that this Mansfield tire had on it the words "mobile home tire."

The allegation in plaintiff's complaint that defendants were negligent in operating the pickup truck with old, worn, defective and unsafe tires, when each of them had, or by the exercise of ordinary care should have had, knowledge of the defective and unsafe condition of the tires, which proximately resulted in her testate's death, and the evidence and stipulations above set forth present a factual situation presenting in terms of realities the abstract legal principle that although the owner or driver of a motor vehicle does not at common law owe to other users of the highway the absolute duty to keep the tires, and each one of them, on his vehicle or the vehicle driven by him in a safe and proper condition, he is, nevertheless, required by law to use reasonable care to see that the tires, and each one of them, are in a safe and proper condition for operation on the highway, and is generally held liable for an injury or death which proximately results from a defective condition of the tires, or any one of them, of which condition the owner or operator had knowledge express or implied. Where there is no evidence that the owner or operator had knowledge or should have had knowledge of the defective condition of the tires, or any one of them, by a reasonably careful inspection, the resulting accident is usually considered to have been unavoidable, and there is no liability. 8 Am. Jur. 2d, Automobiles and Highway Traffic, sec. 703; Annotations, 24 A.L.R. 2d, p. 177, and 79 A.L.R. 1218. The following cases involving injuries alleged to have been due to defective tires, although

the factual situations are variant from the facts in the instant case, support the general rule: *Sherman v. Frank,* 63 Cal. App. 2d 278, 146 P. 2d 704; *Dostie v. Lewiston Crushed Stone Co.,* 136 Me. 284, 8 A. 2d 393; *Zarrillo v. Stone,* 317 Mass. 510, 58 N.E. 2d 848; *Delair v. McAdoo,* 324 Pa. 392, 188 A. 181; *Saxon v. Saxon,* 231 S.C. 378, 98 S.E. 2d 803.

In *Delair v. McAdoo, supra,* the Supreme Court of Pennsylvania said:

> "It is common experience that the blow-out of an automobile tire is a hazardous occurrence. A blow-out has a known tendency to cause the vehicle to swerve and become unmanageable, rendering possible injury to others due to the lack of control. See *Seligman v. Orth,* 205 Wis. 199, 236 N.W. 115, 117. In *Klein v. Beeten,* 169 Wis. 385, 172 N.W. 736, 737, 5 A.L.R. 1237, the court stated:
>
> " 'It is familiar knowledge that the blow-out of the * * * tire of an automobile is a dangerous occurrence, the degree of danger of course depending upon the rate of speed, and, we apprehend, somewhat upon the character of the car.'
>
> "While blow-outs may result from untoward accidents for which no responsibility exists such as from spikes and other causes [citing authority], where they result from defects in the tire arising from age or wear, there seems little doubt that responsibility should attend the dereliction of the vehicle owner in using such equipment, if the faults would be disclosed on reasonable inspection."

In Huddy, The Law of Automobiles, Vol. 3-4, p. 127 *et seq.* (1931), it is stated:

> "Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers.
>
> "To this end, the owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, and is chargeable with notice of everything that such inspection would disclose."

In the Restatement, Torts, sec. 307, it is stated: "It is negligence to use an instrumentality, whether a human being or thing, which the actor knows or should know to be so incompetent, inappropriate, or de-

fective, that its use involves an unreasonable risk of harm to others." In the same section of this text it is pointed out that there are certain relations, of which that of Master and Servant is an instance, in which the actor is required to take reasonable care to ascertain by inspection the actual character of a thing turned over to him by even a careful person, and that even in the absence of such a special relation, there is a similar duty of inspection where the work in hand threatens serious danger unless the instrumentality used is appropriate and in good condition, and then it goes on to state: "* * * the duty of preparation includes a generally operative duty of inspection where the circumstances are such as would lead a reasonable man to believe that an inspection is necessary, as where the thing used is one likely to deteriorate by previous use or other causes or where the actor has some other reason for suspecting that the article may be defective."

There is no evidence that the steering gear of the Clark pickup truck was in a worn and defective condition, and the judge correctly instructed the jury that he would not submit the allegation of negligence in plaintiff's complaint in respect thereto to the jury.

However, an entirely different factual situation exists in respect to the left front tire on the Clark pickup truck. The parties stipulated that it was manufactured by Mansfield Tire Company in June 1956, and that on 6 August 1958 Charm P. Clark bought it as a used tire. The evidence of plaintiff and defendants is that this Mansfield tire is a "mobile home tire," and that such words are imprinted on it. Such evidence would permit a reasonable inference by the jury that an ordinary inspection of this tire by the defendants, or either one of them, would disclose that it was a "mobile home tire." Plaintiff's evidence and defendants' evidence favorable to her and the stipulations would permit a jury to find that this "mobile home tire" had only 15 or 20 per cent of tread on it at the time of the collision, had five holes in it at such time, was old, worn, dangerous and unsafe for use on a pickup truck on the highway, was not manufactured and marketed for use on a motor vehicle on the highway, and that such old, worn, dangerous and unsafe condition of this "mobile home tire" on the left front wheel of the Clark pickup truck was known to Charm P. Clark or should have been known to him by a reasonable inspection of it, and was also known to William Thomas Clark, the operator, or should have been known to him by a reasonable inspection of it, because he testified he "had driven that truck before that day, at least three times a week," that the defendants in the exercise of the reasonable care of an ordinarily prudent person should have foreseen that consequences of a generally injurious nature would result from the operation of the Clark

pickup truck due to such condition of this "mobile home tire" on its left front wheel, that this "mobile home tire" on the left front wheel of the Clark pickup truck blew out by reason of such condition, which caused it to veer into its left lane of traffic and to collide with the Scott pickup truck, proximately resulting in the death of plaintiff's testate.

The trial judge committed prejudicial error against plaintiff in instructing the jury that there was not sufficient evidence of any defect of tires existing prior to the accident and known to the defendants or should have been known to them in the exercise of reasonable care for them to consider, and that he would not submit the allegation of negligence in respect to the tires in plaintiff's complaint to them. Such prejudicial error entitles plaintiff to a

New trial.

EDWARD A. BASSINOV v. MAX FINKLE.

(Filed 17 January 1964.)

1. Malicious Prosecution § 3—

An action for malicious prosecution must be based upon a valid warrant, and the validity of the warrant may be challenged by motion to nonsuit.

2. Same—

The law does not require the same particularity in warrants as in indictments, and, in an action for malicious prosecution, a warrant charging the larceny of goods of a value constituting a felony will not be held void for failure to use the word "feloniously" if the clerk issuing the warrant had authority to issue warrants for felonies and the court has the power to bind defendant over on felony charges. G.S. 7-395, G.S. 7-396.

3. Malicious Prosecution §§ 4, 5—

The rule in North Carolina is that advice of counsel upon a full disclosure of the facts will not of itself afford protection from a suit for malicious prosecution as a matter of law, but is only evidence to be considered on the issue of probable cause and malice. However, in the instant case, the evidence *is held* not to show that defendant acted on the advice of counsel in instituting the prosecution.

4. Pleadings § 25—

The court has discretionary power to allow an amendment to a pleading provided the amendment does not set up a wholly different or inconsistent cause of action, and the allowance of an amendment for the recovery of punitive damages on the cause of action originally stated does

not change the cause of action but merely permits a new kind of relief in the same cause, and is within the discretion of the court.

APPEAL by defendant from *Bundy, J.*, November 1962 Civil Session of PERSON.

Action to recover damages for malicious prosecution.

Plaintiff Bassinov and his wife moved to Roxboro in 1948. About 1954 they decided to purchase a new home. Plaintiff discussed the matter with defendant Finkle, his father-in-law, who agreed to make the down payment. Finkle resided in Raleigh. The purchase was consummated, Finkle made the down payment and took title in his (Finkle's) name. Plaintiff and his wife and children occupied the house and plaintiff made monthly payments to a savings and loan association which had financed the balance of the purchase price. From time to time defendant Finkle either carried or sent articles of household furniture and equipment to the Bassinov home. Plaintiff contends these items were gifts to the family but defendant insists he loaned them to the Bassinovs. In June 1960 plaintiff's wife, and children, left Roxboro ostensibly for a three-weeks visit with her sister in Arizona. They have not returned and plaintiff and his wife have been separated since that time. Soon after the separation defendant requested plaintiff to vacate the home in Roxboro and leave the furnishings in it. Plaintiff vacated the premises and had all furniture and equipment removed and stored.

On 14 September 1960 defendant caused a warrant to issue charging plaintiff with the larceny of household furniture and equipment of a value of more than $100. Plaintiff was arrested thereunder and released on bail. In the county court of Person County on 27 September 1960 the State took a nol pros and Bassinov was discharged.

On 25 January 1961 defendant swore out a warrant charging plaintiff with the embezzlement of $450 from a sale of a station wagon jointly owned by plaintiff and his wife, the sale having been procured at the instance of plaintiff without authority from his wife. The county court of Person County on 7 March 1961 dismissed the action for want of probable cause.

Plaintiff instituted the present suit alleging two causes of action for malicious prosecution, (1) based upon the larceny prosecution, and (2) based upon the embezzlement prosecution. Plaintiff asked for punitive damages in the second cause of action. At the trial the court allowed defendant's motion for nonsuit of the second cause of action at the close of plaintiff's evidence, but denied such motion as to the first cause of action. The judge in his discretion then allowed plaintiff to amend

the complaint so as to allege grounds, and ask, for punitive damages in the first cause of action.

The jurors found for their verdict that defendant prosecuted plaintiff for the felony of larceny, maliciously and without probable cause, and that defendant was motivated by actual malice. They awarded $3000 compensatory damages and $12,000 punitive damages. Judgment was entered accordingly. Defendant appeals.

Melvin H. Burke and Blackwell M. Brogden for plaintiff.
Jordan & Toms for defendant. (In the Supreme Court only.)

MOORE, J. Defendant assigns as error the denial of his motion for nonsuit made at the close of all of the evidence.

First, defendant contends that the action is not maintainable for the reason that the larceny warrant is fatally defective and invalid.

An action for malicious prosecution must be predicated upon a valid warrant. *Caudle v. Benbow*, 228 N.C. 282, 45 S.E. 2d 361. A motion for nonsuit in an action for malicious prosecution challenges the validity of the warrant upon which plaintiff was prosecuted. *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609; *Young v. Hardwood Co.*, 200 N.C. 310, 156 S.E. 501.

The challenged warrant charges that plaintiff on 1 August 1960 "did wilfully, maliciously and unlawfully take, steal and carry away household & kitchen furniture; venitian (*sic*) blinds; two television sets; kitchen utensils and linens, having a value of over $100.00, the property of Max Finkle, with intent to deprive the owner of same, against the statute," etc. The warrant was signed under oath by Max Finkle before Norma G. Clayton, "Dep. Clerk County Court" of Person County, on 14 September 1960. On the date of the alleged offense, the date of the warrant, and the date nol. pros. was entered, the larceny of goods of a value in excess of $100 was a felony. S.L. 1949, Ch. 145, § 2. The value element was raised by S.L. 1961, Ch. 39 § 1 effective 1 July 1961. See G.S. 14-72.

Defendant's specific contention is that the omission of the word "feloniously" renders the warrant invalid. The complaint alleges in effect, and the trial proceeded on the theory, that the offense charged in the warrant was a felony. This Court has repeatedly held that bills of indictment charging criminal offenses punishable with death or imprisonment in the State's Prison, in which there has been a failure to use the word "feloniously," are fatally defective, unless the Legislature otherwise expressly provides. *State v. Callett*, 211 N. C. 563, 191 S.E. 27. In a malicious prosecution case, *Moser v. Fulk*, 237 N.C. 302, 74

S.E. 2d 729, it is said: "A *warrant* is insufficient and void if, on its face, it fails to state facts sufficient to constitute an offense. However, the strictness required in an indictment is not essential."

In *State v. Jones*, 88 N.C. 671, defendant was charged with the murder of an officer who had served on defendant a warrant, issued by a justice of the peace, charging him with larceny of an ox. In attempting to escape from custody, defendant killed the officer. Defendant contended that the officer was without authority to arrest and detain him for that the larceny warrant was defective in omitting the word "feloniously." The court held that the law does not require the same particularity in warrants as indictments, and the officer was bound to obey the warrant, and said: "The conclusion we deduce from the authorities is, if the warrant is for an offence within the jurisdiction of the justice (jurisdiction to issue warrant), and the crime charged is described with sufficient precision to apprise the accused of the offence with which he is charged, the warrant is good and will protect the officer. But this applies only to those cases where the justice acts ministerially, as in warrants to arrest offenders where he has no final jurisdiction. Where he takes cognizance of criminal actions within his jurisdiction, the warrant is 'the indictment,' and must set out the facts, constituting the offence, with such certainty that the accused may be enabled to judge whether they constitute an indictable offence or not, and that he may be able to determine the species of offence with which he is charged." (Parentheses added).

The county court of Person County was established pursuant to P.L. 1931, Ch. 78 (codified as G.S., Ch. 7, art. 36). It does not have final jurisdiction of felonies. G.S. 7-393. But the clerk may issue warrants in felony cases, and the court is empowered to determine whether probable cause exists in such cases. G.S. 7-395; G.S. 7-396. The warrant in question describes the crime charged with sufficient precision to apprise plaintiff of the offense he was required to answer; it was the sheriff's duty to execute it; it was sufficient to bring plaintiff to trial. The warrant was drawn on a form in common use in the county court, and the printed portion does not contain the word "feloniously." The mere omission of that word does not defeat the action for malicious prosecution.

Defendant recognizes that the long established rule in North Carolina is "that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury" on the issues of probable cause and malice. *Bryant v. Mur-*

ray, 239 N.C. 18, 23, 79 S.E. 2d 243; *Downing v. Stone,* 152 N.C. 525, 530, 68 S.E. 9.

The North Carolina rule is not in accord with the weight of authority in other jurisdictions. 32 N.C.L. Rev. 504. Defendant considers the North Carolina rule a harsh one and requests that it be re-examined. A similar request was made in the *Bryant* case (1953), and the Court, quoting from the *Downing* opinion, said: "it has been too long accepted and acted on here to be now questioned, and we are of the opinion, too, that ours is the safer position."

The majority rule is that defendant makes out a complete defense by showing that he truly and correctly stated to counsel fully, fairly, and in good faith, all of the facts bearing upon the guilt or innocence of the accused, that in good faith he received advice justifying the prosecution, and that he acted on that advice in instituting the proceedings of which plaintiff complains. 54 C.J.S., Malicious Prosecution, §§ 46, 49, pp. 1010, 1014. Even if this were the rule in North Carolina it would not avail the defendant in this case. He did not testify. Mr. R. B. Dawes, Jr., County Solicitor, testified that defendant related to him facts bearing upon the accusations against Bassinov, and he (Mr. Dawes) suggested that defendant consult Mr. Charles Wood, a private attorney, "with a view toward investigation." Nowhere in the evidence does it appear that Mr. Dawes advised defendant either to prosecute or not to prosecute. Mr. Wood testified that he gave no advice prior to the issuance of the warrant whether the facts would justify a prosecution for larceny. He was under the impression that defendant "had elected a course of action." After the issuance of the warrant, and after he had learned the facts, Mr. Wood advised that the case be dismissed. No inference may be drawn from the evidence that defendant acted upon the advice of counsel in instituting the prosecution.

Plaintiff's evidence upon each of the elements of malicious prosecution is sufficient to withstand the motion for nonsuit.

Defendant contends that the judgment relating to punitive damages should not be permitted to stand for the reason that the court erred in permitting the amendment to the complaint as a basis for recovery of such damages.

The court in its discretion may, before or after judgment, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change substantially the claim, by conforming the pleading or proceeding to the facts. G.S. 1-163. *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565, discusses this statute fully and establishes some guidelines for its application. We do not undertake to repeat the discussion here; we merely refer to a few established prin-

ciples. Since the authority is discretionary, there are no inflexible rules. But the court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion. *Parker v. Realty Co.*, 195 N.C. 644, 143 S.E. 254. In the case at bar the amendment does not change the cause of action but merely permits a new kind of relief in the same cause. In this respect it is analagous to the *Parker* case. Furthermore, it is not at all clear that the pleadings as originally cast would not permit a recovery of punitive damages. This assignment of error is not sustained.

There are 96 assignments of error and most of them are brought forward and discussed in the briefs. Suits involving penalties are not favored by the courts. Therefore, we have given utmost consideration to defendant's assignments of error and discussions of legal questions involved, and to each of them. Even so, we find no prejudicial error. The case was carefully and patiently tried. The charge of the court is in full compliance with the requirements of G.S. 1-180; it clearly states all applicable principles of law and applies the law to the facts. The jury resolved the issues against defendant. We find no ground for disturbing the judgment.

No error.

A. J. ABDALLA AND WIFE, BETSY ABDALLA v. STATE HIGHWAY COMMISSION.

(Filed 17 January 1964.)

1. Appeal and Error § 40—

Where as a matter of law plaintiff is not entitled to recover on the record, judgment dismissing the action, even though entered on an erroneous ground, will not be disturbed.

2. Eminent Domain § 2; Highways § 5—

At common law the owner of land abutting a highway, while not entitled to access at all points along the boundary between his land and the highway, has a special right of easement for access purposes, and substantial interference with this free and convenient access to the highway is a "taking" of a property right for which he may recover just compensation.

3. Same—

The common law right of access of the owner of property abutting a highway does not apply when the owner has conveyed a right of way to

the Highway Commission, since in such instance the respective rights of the parties must be ascertained from the construction of the right of way agreement.

4. Same; Easements § 7—

Where the Highway Commission purchases the right of way from an abutting owner, with provision that the owner should have access to the highway, the Highway Commission is in effect the servient owner with respect to the right of access, and it has the right to locate the access road under the general rule that, where the grant does not fix the location of an easement, the owner of the servient estate has the right in the first instance to designate the location, subject to the limitation that it must exercise the right in a reasonable manner with due regard to the rights of the abutting owner.

5. Same— Restricted access to service road and denial of access along interchange ramp held in conformity with right of way agreement.

The right of way agreement in suit provided that the owners of abutting land should have "no right of access to the highway" except by way of service roads and ramps built in connection with the project. The project was an overpass of one highway over another with connecting ramps. The Commission provided plaintiffs access at the point where a service road was adjacent to plaintiffs' property, from which point plaintiffs had access to the highway by way of a ramp, but completely denied plaintiffs direct access to the ramp. *Held:* Plaintiffs were given reasonable access to the highways by way of the service road and ramp in conformity with the right of way agreement, and plaintiffs were not entitled to additional compensation on the ground that the denial of access to the ramp at all points contiguous to their property was an additional "taking."

APPEAL by plaintiffs from *Braswell, J.,* May 1963 Session of JOHNSTON.

Proceeding for compensation for the alleged taking by eminent domain of an easement of access to a public highway.

In 1956 defendant, State Highway Commission, in furtherance of a project to construct that portion of Interstate Highway 95 in the vicinity of its proposed intersection with U. S. Highway 70A near Selma, North Carolina, negotiated with the heirs at law of Tom Abdalla, including male plaintiff, for the purchase of an easement of right-of-way on and over a portion of a tract of land owned by them. As a result of the negotiations, the heirs at law of Tom Abdalla, and their spouses, on 23 October 1956 entered into a "Right of Way Agreement," in writing, with defendant, conveying the latter an easement of right-of-way on and over approximately 14 acres of land, for which defendant paid them $15,000. There remained to grantors adjoining the right-of-way 3.67 acres which they conveyed to plaintiffs herein.

The "Right of Way Agreement" provides that grantors "and their heirs and assigns shall have no right of access to the highway constructed on said right-of-way except by way of service roads and ramps built in connection with this project in the vicinity of survey station O+OO" (the intersection of Interstate 95 and Highway 70 A).

The highway project in question, a link of Interstate 95, was completed 17 December 1959. Interstate 95 overpasses Highway 70A and access from one to the other is by interchange ramps.

According to a map introduced in evidence by plaintiffs, the 3.67 acre tract is on the north side of the right-of-way of Interstate 95 and is about 400 to 500 feet northeast of Highway 70A. It extends northwardly from the right-of-way of Interstate 95 an average width of about 200 feet. The boundary line between the right-of-way of Interstate 95 and plaintiffs' 3.67 acre tract is 718.7 feet long. This boundary is irregular and for convenience we describe it as consisting of two arcs, the eastern end (Arc E) is 170.5 feet long, the western end (Arc W) is 548.2 feet long. Defendant has established along Interstate 95 a "control of access line" which coincides with Arc W, but runs to the south of Arc E and inside the right-of-way of Interstate 95, crosses a service road and continues eastwardly, leaving the eastern extension of the service road outside the "control of access line." The service road, proceeding westwardly a short distance from its intersection with the "control of access line" is south of and within said line and connects with an interchange ramp. The ramp runs generally parallel to plaintiffs' south boundary, but is at all points south of the "control of access line" and within the "no access" area established by defendant.

Defendant restricts plaintiffs' access as follows: Plaintiffs may enter upon that part of the right-of-way on Interstate 95 which is adjacent to Arc E and which lies north of the "control of access line," and in said portion of the right-of-way enter the service road, and from there proceed along the service road and ramp to the main highways; but they shall have no access to the service road or ramp, for direct entrance purposes, at any point south of the "control of access line." Defendant contends that this disposition of the matter is consistent with the provisions of the "Right of Way Agreement."

On the other hand, plaintiffs contend that the "Right of Way Agreement" gives them direct access, for entrance purposes, to the ramp and service road at all points along the ramp and service road opposite their southern boundary (Arc E and Arc W). They so contended in conversations with officials of the Highway Commission, but were advised by a letter, dated 9 February 1961, written to their attorney by defendant's Area Right-of-Way Agent, that defendant insists on the access control it established.

It is plaintiffs' position that the letter of 9 February 1961 amounts to a taking by defendant for public use of plaintiffs' rights of direct access to the ramp and service road. Plaintiffs instituted this proceeding on 24 July 1961 and filed petition setting out the transactions between the parties and asking for compensatory damages for the alleged taking. Defendant, answering, denied liability, alleged that it was in compliance with the contract, and pleaded the six months and twelve months statutes of limitation, G.S. 136-19 (as in effect on 17 December 1959). Commissioners were appointed by the clerk of superior court and they assessed $16,000 damages. Defendant filed exceptions. The clerk affirmed the report of the commissioners and defendant excepted and appealed to superior court.

The cause came on for trial in superior court. At first the judge announced that only the issue involving the plea in bar would be tried. During the course of the trial, the judge, deciding that a construction of the "Right of Way Agreement" was necessary preliminary to a determination of the plea in bar, ruled in favor of plaintiffs' contention and interpretation of the "Right of Way Agreement." At the close of plaintiffs' evidence the court allowed defendant's motion for nonsuit on the ground that the plaintiffs' evidence was insufficient to make a *prima facie* showing, by any inferences to be drawn therefrom, that the action had been instituted within one year of the completion of the project.

Plaintiffs appeal.

Levinson & Levinson and Knox V. Jenkins, Jr., for plaintiffs.

Attorney General Bruton, Assistant Attorney General Harrison Lewis, Trial Attorney Edwin S. Preston, Jr., Norman C. Shepard and Robert A. Spence for defendant.

MOORE, J. Plaintiffs assign as error the action of the court in entering the judgment of nonsuit.

The action was nonsuited on the theory that it is barred by the statute of limitations. Conceding for the purpose of this appeal, but not deciding, that the court erred in its ruling on the plea in bar, we nevertheless hold that the judgment must be affirmed for it clearly appears from the record that the defendant is entitled to a dismissal of the action as a matter of law. The rights of the parties are fixed and controlled by the "Right of Way Agreement" and defendant has accorded to plaintiffs all the rights to which they are entitled thereunder. It is not after the manner of appellate courts to upset judgments when the action of the trial court, even if partly erroneous, could by no possi-

bility injure the appellant. *Justice v. Mitchell,* 238 N.C. 364, 78 S.E. 2d 122; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; *Munday v. Bank,* 211 N.C. 276, 189 S.E. 779; *Bank v. McCullers,* 201 N.C. 440, 160 S.E. 494.

It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782; *Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630; *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748; *State v. Department of Highways,* 8 S. 2d 71 (La. 1942); *Breinig v. County of Alleghany,* 2 A. 2d 842 (Penn. 1938); *Genazzi v. Marin County,* 263 P. 825 (Cal. 1928). But a landowner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interferred with by the public, he has no cause of complaint. *Genazzi v. Marin County, supra; Warren v. Iowa State Highway Commission,* 93 N.W. 2d 60 (Iowa 1958); *King v. Stark County,* 266 N.W. 654 (N.D. 1936); *State Highway Board v. Baxter,* 144 S.E. 796 (Ga. 1928); *Gilsey Buildings, Inc. v. Incorporated Village,* 11 N.Y.S. 694 (1939).

In *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732, plaintiff owned land abutting the highway. On his land were three business establishments—a service station, a bulk oil plant and a frozen custard place. The Highway Commission constructed curbing along the edge of the highway at certain points in front of these establishments and left spaces for ingress and egress. The opinion, delivered by *Bobbitt, J.,* states the following principle of law (at p. 517): " 'While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway; if he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint.' 39 C.J.S., Highways, § 141; . . ." The opinion concludes that plaintiff "is entitled to recover compensation on account of injury to . . . his . . . property to the extent, *if any,* such curbing substantially impairs free and convenient access thereto and the improvements thereon." (Emphasis added).

The principles stated in the two preceding paragraphs relate to a landowner's common-law right of access. In the instant case plaintiffs

do not, and cannot, rely on the common-law right of access; such rights as they have are embodied in and limited by the "Right of Way Agreement." The agreement provides that plaintiffs "shall have *no right of access* to the highway constructed on said right-of-way *except* . . . ." Thus, the parties knew at the time of making the contract that the highway to be constructed was one of limited and restricted access and they were contracting with respect to the question of access. Yet plaintiffs contend they reserved under the contract the right of direct access to all points along the service road and ramp opposite their property, which is a greater right than they would have had at common law had the contract been silent as to access. Under the terms of the contract plaintiffs first gave up all right of access and then by way of exception reserved a specific right of access to the highway "by way of service roads and ramps." Defendant has made available to plaintiffs exactly what the contract calls for, access from plaintiffs' land to the highway *by way* of service roads and ramps.

Easements of right-of-way acquired by the Highway Commission for public highways are, under existing law, so extensive in nature and the control exercised by the Commission so exclusive that the servient estate in the land, for all practical purposes, amounts to little more than a right of reverter in the event the State's easement is abandoned. It is for this reason that an abutting landowner's right of access to a public highway is generally defined as an easement, even though he may own the fee in the land over which the highway runs. Hence, a right of access to a public highway is an easement appurtenant to land. *Williams v. Highway Commission, supra; Hedrick v. Graham, supra.* The Highway Commission is in effect the servient owner and has the right to locate the access route under the general rule that where an easement is granted or reserved in general terms which do not fix its location, the owner of the servient estate has the right in the first instance to designate the location of such easement, subject to the limitation that he exercise such right in a reasonable manner and with due regard to the rights of the owner of the easement. *Andrews v. Lovejoy*, 247 N.C. 554, 101 S.E. 2d 395; *Cooke v. Electric Membership Corp.*, 245 N.C. 453, 96 S.E. 2d 351. Indeed, the Highway Commission, as trustee for the public, has greater right of control than a private servient owner.

Plaintiffs do not complain that they have been denied access; they complain that they are not permitted to designate and locate the route of access. It is their position that the word "highway," as used in the "Right of Way Agreement," refers to the main highway and not to service roads and ramps, that their access to the main highway *is* re-

stricted and limited to access "by way of service roads and ramps," but, as to the service road and ramp on the right-of-way near and parallel to their boundary, direct access thereto is not limited by contract or otherwise. However, according to the map introduced by plaintiffs and the information and explanation thereon and attached thereto, the Highway Commission has made available to plaintiffs direct access to all of the service road opposite their boundary except a very short segment at the junction of the service road and ramp. The ramp has a specific purpose and function. It is not established for the accommodation of abutting landowners; it is for the interchange of traffic between two heavily travelled highways (one overpassing the other). It is indeed the junction or joinder of the two highways. For all practical purposes it is a part of the main highway within the meaning of the word "highway" as set out in the "Right of Way Agreement." Under the circumstances clearly disclosed by plaintiffs' evidence, we hold as a matter of law that plaintiffs' access to the service road is free and convenient and defendant has not substantially interfered therewith, and under the contract between the parties plaintiffs are not entitled to direct access to the ramp.

Affirmed.

IN RE APPEAL OF M. R. TADLOCK AND WIFE, LURA S. TADLOCK, FROM THE ZONING BOARD OF ADJUSTMENT FOR THE CHARLOTTE AREA.

(Filed 17 January 1964.)

1. Municipal Corporations § 25—

Where the facts are not in dispute, whether the activities of the owner amount to a completion of a project started before the enactment of the zoning ordinance or amount to an enlargement of a nonconforming use, is a question of law.

2. Same— Landowner is entitled as a matter of law to complete project already begun at the time of the enactment of ordinance.

The uncontradicted evidence was to the effect that petitioners were engaged in developing their land into a trailer-park, having divided it into three areas, and that at the time of the enactment of the ordinance in question had actually completed construction of fourteen units and were proceeding to construct the eleven other units of the first area when the building inspector gave notice to stop construction and to remove four units constructed subsequent to the passage of the ordinance. *Held:* Petitioners are entitled as a matter of law to complete the construction of

the units on the first area, but, since the matter had not progressed beyond the planning stages as to the other two areas, the construction of units on them would amount to an enlargement of a nonconforming use within the prohibition of the ordinance, unless allowed as a matter of discretion as a hardship case.

APPEAL by M. R. Tadlock and wife, Lura S. Tadlock, from *Copeland, S.J.*, February 4, 1963, Special "B" Civil Session, MECKLENBURG Superior Court.

This controversy grew out of the following:

"ORDER OF ZONING INSPECTOR, City of Charlotte, North Carolina, August 16, 1962.

"Mr. Ralph Tadlock, Route 7, Box 474, Charlotte, North Carolina. Dear Mr. Tadlock: An inspection of the property on Perkins Road, located in a R-12 District as established by the Charlotte Zoning Ordinance has revealed a mobile home court. The ordinance specifically prohibits this type of use in this District. It is the duty of this Department to enforce the provisions of the Ordinance. All units that have been established after January 29, 1962 will have to be removed. This letter is, therefore, official notice to move non-conforming units within (15) days from the date of this letter. Your prompt cooperation will make further action by this Department unnecessary. Yours truly, /s/ D. W. Long, Zoning Inspector."

"NOTICE OF APPEAL.

"Notice is hereby given the Board of Adjustment and the Building Inspector relative to an appeal from the ruling of the Building Inspector on the 10th day of September 1962, for ten acres of land in Mallard Creek Township lying on the westerly side of Perkins Road located at: in the City of Charlotte, North Carolina, (Perimeter area). Title to this property is in the name of M. R. Tadlock and wife, Lura S. Tadlock. The grounds for this appeal are as hereinafter set forth:

"The appellants allege and contend that prior to January 30, 1962, they had begun the development of a trailer park on the above described ten acre tract; that said trailer park was in the process of completion on January 30, 1962, and that they have the right to complete the development thus started.

"Signature of Appellants: Lura S. Tadlock, M. R. Tadlock."

The Board of Adjustment held a hearing on November 27, 1962, at which Mr. and Mrs. Tadlock offered evidence of which this is a short

summary: On November 29, 1957, they completed the purchase of an unimproved tract of land containing 10 acres in Mallard Creek Township, Mecklenburg County. Their purpose was to construct a trailer or mobile home park to accommodate 75 units, each on a site approximately 40 by 100 feet. Their plan was to complete the entire development in three stages, beginning at Perkins Road and extending eastward until the entire construction was completed. Area 1, as surveyed and mapped, was designed to accommodate 25 units.

Soon after the purchase in 1957, development work on Area 1 began. The owners graded the entire area. They graded and surfaced a street from Perkins Road eastwardly near the center of this area, dead-ending near its eastern boundary. Two wells were bored, of sufficient capacity to meet the needs of 25 units. The wells were on the south side of the street. Water and sewer lines were laid, a septic tank was installed, power lines were erected, and concrete patios and footings were poured on the 14 sites north of the street. A mobile home was in place on each of these sites. A third, or reserve, well was being completed, also on the south side of the street. The owners were moving toward the installation of 11 sites south of the street. Already they had spent $12,000.00 to $15,000.00 at the time the inspector gave the order on August 16, 1962.

From the beginning, it was the purpose of the owners to develop Area 2 directly to the rear and to the east as soon as Area 1 was completed; and, likewise, to complete Area 3 upon the completion of Area 2. However, actual construction was confined to Area 1. The evidence indicated that Areas 2 and 3 are of little value, or will be of little use except as parts of the development. Both areas are cut off from Perkins Road by Area 1.

The City Council passed a zoning ordinance effective January 30, 1962. According to all the evidence, the Tadlocks had no knowledge their development had been zoned until the inspector issued the notice dated August 16, 1962. The owners asked the Board of Adjustment for a hearing. After notice, the Board of Adjustment held a hearing on November 27, 1962. The owners presented evidence in substance as stated above, none of which was controverted. Neighbors appeared in opposition to the granting of a nonconforming use permit to complete the development. Their objections were upon the ground that a trailer park would make their neighborhood a less desirable place in which to live, increase the traffic hazards, and reduce the value of their properties due to the undesirable type of people who would live in the mobile homes.

The Board of Adjustment concluded:

"In accordance with Section 23-95 Paragraph (a) 'the Board shall not grant a variance whose effect would be to allow the establishment of a use not otherwise permitted in a District by this Ordinance, to extend a non-conforming use of land,' the decision of the Building Inspection Department is therefore upheld."

The Superior Court, on *certiorari,* reviewed and entered the following order:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of the Board of Adjustment in denying the appeal of M. R. Tadlock and wife, Lura S. Tadlock and affirming the Zoning Inspector's denial of the petitioners' request for approval of additional trailer sites is sustained. This the 12th day of February 1963. J. William Copeland, Judge Presiding."

The property owners appealed.

Dockery, Ruff, Perry, Bond & Cobb by James O. Cobb for petitioner appellants.

John T. Morrisey, Sr., by T. LaFontine Odom, Sr., for respondent appellee.

HIGGINS, J. The Board of Adjustment for the Charlotte Zoning Area, and the Superior Court on reviewing its order, based decision on the Zoning Ordinance which provided: "A non-conforming open use of land shall not be enlarged to cover more land than was occupied by that use when it became non-conforming." The ordinance, however, authorized the Board of Adjustment, in its discretion and upon application, to allow a variance in hardship cases. The latter provision is not here involved. The landowners contend they have the legal right not only to complete the 11 additional patios for 11 home units on the south side of the street opposite the 14 units already installed, but to install 50 units on Areas 2 and 3. The zoning authorities contend any additional installations subsequent to January 30, 1962, would be an enlargement of the use and hence prohibited by the ordinance.

According to the evidence, which is not in conflict, the owners planned to develop the entire acreage in three area stages. Area 1 was surveyed, mapped and graded. Actual construction of home foundations, streets, water, sewer, and light were completed, or were under way for all of Area 1 before January 30, 1962. The wells from the south side of the street furnish water for the units installed on the north side. The evidence not being in dispute, questions of law and not of fact arise. *Johnson v. Board of Education,* 241 N.C. 56, 84 S.E. 2d 256; *Jarrell v.*

Board of Adjustment, 258 N.C. 476, 128 S.E. 2d 879. What is said here is not in conflict with the case *In Re Appeal of Hasting,* 252 N.C. 327, 113 S.E. 2d 433. In that case the evidence as to essential facts was in conflict, permitting the Board of Adjustment to make the findings.

Inasmuch as the evidence is free of conflict as to the determinative facts, whether completion of Area I as planned is an enlargement of a nonconforming use becomes a question of law. "An entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning law." 58 Am. Jur., "Zoning," § 151.

The case of *Kessler v. Smith,* 104 O.A., 213, 142 N.E. 2d 231, appeal dismissed, 146 N.E. 2d 308, appears to be exactly in point, although in factual situation not as strong in favor of the landowners. The owners had planned a trailer park for 200 units, 28 of which were completed at the time the ordinance became effective. The court said: "While Smith's business was not completely established at the time of the initiation of these proceedings in November of 1952, still there was such a substantial establishment and development thereof prior to the enactment of the ordinance that we think it comes within the protection of the due process clauses of both the Federal and State Constitutions." The owners were permitted to complete the project.

In *Commissioners v. Petsch,* 172 Neb. 263, 109 N.W. 2d 388, the court said: "In other words, where a trailer-court project is partially completed when zoning regulations become effective, and the evidence is clear as to the extent of the project, the completed project will ordinarily determine the scope of the nonconforming use." *Meuser v. Smith,* 74 Abs. 417 (Court of Appeals of Ohio), 141 N.E. 2d 209, citing McQuillan on Municipal Corporations, 3rd Ed., Vol. 8, § 25.157, p. 272.

The undisputed evidence in this case discloses the Tadlocks, from the date of their purchase in 1957, were continuously thereafter engaged in completing plans for 25 units covering the whole of Area 1. The 14 units were completed and in use on the north side of the access road or street which they graded and surfaced with the clear intent of placing 11 other units on the south side of the street. All wells were actually located on the south side. Apparently financial limitations and not a change of plans account for the delay in completing the installations. But the evidence is plenary that the owners at all times were working towards the completion of all the installations on Area 1. "(T)he criterion is whether the nature of the incipient nonconforming use, in the light of its character and adaptability to the use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." C.J.S., Vol. 101, "Zoning," § 192, p. 954.

At no time after purchase was the plan abandoned or changed. Work continued until the inspector gave notice to stop and to remove four units constructed subsequent to January 30, 1962.

Under the evidence and applicable rules of law, the appellants are entitled to complete the installation of 11 additional units in Area 1. However, by planning the development in three stages and confining actual construction to Area 1 only, the applicants as to Areas 2 and 3 fall within the rule that planning a development alone is insufficient to enlarge a nonconforming use. We have no doubt the landowners intended the full ten acres as a trailer park and that its value for other purposes is greatly reduced. However, any extension of the use beyond Area 1 rests in the discretion of the Board of Adjustment as a hardship case.

Judge Copeland should have reversed so much of the Board of Adjustment's order as denied the owners the right to complete their plans by constructing 11 additional units in Area 1. With respect to the area outside of No. 1, the Board's order should be affirmed.

The Superior Court of Mecklenburg County will remand this cause to the Board of Adjustment for the Charlotte Zoning Area with instructions to proceed as here directed.

Reversed in part — Affirmed in part.

J. ALTON BASS v. PATSY ALEASE ROBERSON AND C. A. ROBERSON.

(Filed 17 January 1964.)

1. Automobiles § 41l—

Evidence in this case held sufficient to be submitted to the jury on the question of defendant motorist's negligence in failing to use due care to avoid colliding with a pedestrian he saw, or in the exercise of reasonable care, should have seen, in the street, notwithstanding that defendant had the right of way.

2. Appeal and Error § 51—

Where a new trial is awarded on other exceptions, the Supreme Court will refrain from discussing the evidence in sustaining the denial of nonsuit except to the extent deemed necessary in the disposition of the other assignments of error.

3. Automobiles § 33—

It is unlawful for a pedestrian to cross a street between intersections at which traffic signals are maintained unless there is a marked crosswalk between the intersections at which he may cross and on which he has the

right of way over vehicular traffic, and his failure to observe the statutory requirements is evidence of negligence but not negligence *per se.*

4. Automobiles § 14—

Evidence tending to show that a truck parked diagonally at the curb was backed into defendant's lane of travel as defendant approached on her right side of the street, that no traffic was approaching from the opposite direction, and that defendant pulled to her left to go around the truck, *held* not to reveal a violation of G.S. 20-149(a), and an instruction to the effect that the right to pass to the left under G.S. 20-149 and G.S. 20-150 did not apply, is error.

5. Automobiles § 46—

Where all of the evidence tends to show that a pedestrian attempted to cross a street within a municipality between intersections at a place where there was no marked crosswalk, an instruction leaving it to the jury to determine whether a motorist had the right of way over the pedestrian is error, since the law gives the motorist the right of way upon the uncontradicted facts.

APPEAL by defendants from *Braswell, J.,* February Civil Session 1963 of HARNETT.

This action was instituted by the plaintiff to recover for personal injuries sustained under the circumstances hereinafter set out.

On 8 November 1960, at approximately 7:55 a.m., the plaintiff was injured when struck by a car driven by defendant Patsy Alease Roberson (now Carroll) on South Wilson Avenue in Dunn, North Carolina. The car was owned by defendant C. A. Roberson, father of Patsy Carroll.

J. Alton Bass, the plaintiff, was crossing South Wilson Avenue diagonally, approximately in the middle of the block. Traffic at the intersections at either end of the block was controlled by electric signals and there was no crosswalk at any point within the block other than at the intersections. The block in which the accident occurred is 300 feet long and the street 43 feet wide. The weather was fair and the pavement was dry. It was stipulated that the speed limit was 20 miles per hour.

At the time in question, the plaintiff J. Alton Bass had alighted from a pick-up truck which had been parallel parked against the west curb of Wilson Avenue headed southward. From this point, he walked southward along the west sidewalk until he reached a point in front of a soda shop located on the west side of Wilson Avenue directly across the street from the Dunn Police Station, which is 153 feet south of the intersection of Broad Street and Wilson Avenue.

Adjoining the soda shop on the south was the Dunn Theatre in front of which there was a marked "No Parking" zone. There was

parked in the no parking area in front of the theatre a Curtis Candy walk-in truck headed southward. Between the rear of this truck and the intersection of Broad and Wilson the only other vehicle parked on the west side of Wilson Avenue was the pick-up truck from which the plaintiff had alighted.

Plaintiff testified he stopped at the curb in front of the soda shop, looked both ways, saw no traffic coming from either direction and stepped off the curb to cross the street and heard a noise to his right. "I stepped sideways one step, looked both ways, and then stepped on out into the middle of the southbound lane and looked both ways. * * * I was in the middle of the southbound lane the last time I looked to my left to observe traffic approaching from the north going south."

Plaintiff further testified that he had reached the middle of the northbound lane of Wilson Avenue when "I heard something to my left and turned as quick as I could and tried to hold the car off of me and it knocked me down in the east lane."

On cross-examination, this plaintiff testified he never saw the car operated by defendant Patsy Carroll until it hit him.

Defendant Patsy Carroll testified that she was driving southward on Wilson Avenue at a speed of not more than 10 miles per hour; that she was driving on her right-hand side of the street; that the Curtis Candy truck was parked "diagonal-like" with its back portion extending into the traveled portion of Wilson Avenue, and that as she approached it it began to back up and she thereupon pulled to the left a little to go around it. At this time she saw Mr. Bass. She further testified: "When I first saw him, he was on the right-hand side of my car, and he was jumping to the left-hand side of my car. At that time I jerked the car and applied my brakes at the same time. I jerked it to the left some. My automobile struck Mr. Bass. I had applied brakes at that time. It hit him as it stopped. After striking him it immediately stopped. At that time, with respect to the approximate center of Wilson Avenue, my car was in the middle of the street, partly on the right-hand side and partly on the left. It was headed straight—sort of diagonal, like it was going around. It was headed to the left side."

The jury returned a verdict in favor of the plaintiff. From the judgment entered on the verdict, the defendants appeal, assigning error.

Everette L. Doffermyre and James M. Johnson for plaintiff.
Dupree, Weaver, Horton & Cockman for defendants.

DENNY, C.J. This is a borderline case. However, when the evidence adduced in the trial below is considered in the light most favorable to

the plaintiff, as it must be on a motion for judgment as of nonsuit, in our opinion it is sufficient to warrant its submission to the jury.

Since a new trial is awarded for reasons hereinafter stated, we refrain from a discussion of the evidence set forth in the record except to the extent deemed necessary in the disposition of other assignments of error. *Powell v. Clark,* 255 N.C. 707, 122 S.E. 2d 706; *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637.

It is unlawful for a pedestrian to cross a street between intersections at which traffic signals are maintained unless there is a marked crosswalk between the intersections at which he may cross and on which he has the right of way over vehicular traffic, and his failure to observe the statutory requirements is evidence of negligence but not negligence *per se. Templeton v. Kelley,* 216 N.C. 487, 5 S.E. 2d 555; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649, and cited cases; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817; G.S. 20-174.

Appellants' assignment of error No. 16 is to the following portion of the charge: "Now, gentlemen, we have a statute in this State, General Statutes 20-146, that I wish to read to you in connection with the allegations of the complaint. It is as follows: Upon all highways of sufficient width, except one-way streets, the driver of a vehicle shall drive the same upon the right-hand half of the highway and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway unless it is impractical to travel upon such side of said highway, except when overtaking or passing another vehicle, subject to the limitations applicable in overtaking and passing set forth in General Statutes 20-149 and 20-150, which I charge you you are not to be concerned with in this case. I further instruct you, gentlemen of the jury, that if the defendant violated this statute just read to you, that it would constitute negligence. I charge you in this connection, if the defendant Patsy Carroll operated her automobile to the left of the center of said street, on the left half of said street, and she was not in the act of overtaking and passing another vehicle at that time, and that it was practical for her at that time to drive on the right half of said street, that this would be evidence of negligence."

The defendants in their further answer and defense allege that suddenly and without warning the plaintiff darted into the street immediately in front of the car being driven by defendant Patsy Carroll; that upon being confronted with this emergency which had been solely caused by the negligence of the plaintiff, defendant Patsy Carroll applied the brakes and "made every effort to avoid the plaintiff and had brought the car to a virtual stop when it lightly bumped against the plaintiff causing him to fall to the pavement."

It is further alleged that the plaintiff at the time of the accident was suffering from defective eyesight which kept him from observing approaching vehicles. Evidence was introduced by the defendants tending to support these allegations.

In our opinion, there was error in the foregoing instruction to the jury. The court pointed out that the jury was not to be concerned with the limitations applicable in overtaking and passing another vehicle as set forth in G.S. 20-149 and 20-150.

The evidence of the driver of the Roberson car was to the effect that the Curtis Candy truck was parked half in and half out of the parking place, on the right-hand side of the street; that the back of the truck extended into the traveled portion of Wilson Avenue. "As I proceeded southward on Wilson Avenue, I was driving on the right-hand side. When this white (Curtis) truck began to back up, I pulled over to the left a little to go around." The record also reveals that at the time of the accident there were no other vehicles being operated in the block in which the accident occurred.

G.S. 20-149 provides as follows: "(a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle. This subsection shall not apply when the overtaking and passing is done pursuant to the provisions of G.S. 20-150.1. (b) The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction, but his failure to do so shall not constitute negligence or contributory negligence *per se* in any civil action; although the same may be considered with the other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence."

The pertinent part of G.S. 20-150 reads as follows: "(a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety."

We think the evidence supports the view that the accident occurred while the driver of the Roberson car was in the act of passing the Curtis Candy truck, and the evidence reveals no act in connection therewith in violation of the statutes with respect to such attempted passing. The negligence, if any, on the part of the driver of the Rober-

son car must be determined in light of the plaintiff's presence in the street and whether or not Patsy Carroll used due care to avoid colliding with plaintiff after she observed him or should have observed him in the street. G.S. 20-174 (e).

Assignment of error No. 22 also challenges the correctness of the following portion of the court's instruction to the jury: "I charge you that if the plaintiff, Mr. Bass, crossed South Wilson Avenue at a point other than on a marked crosswalk, that it was his duty under General Statutes 20-174 (a) to yield the right of way to all vehicles upon the roadway, and if you find from the evidence and by its greater weight that he failed to yield the right of way to the defendant Patsy Roberson Carroll, and you find that she had the right of way, then this would be evidence of negligence on the part of the plaintiff, Mr. Bass."

It was error to leave it to the jury to determine whether or not defendant Patsy Carroll had the right of way. The law gave her the right of way. G.S. 20-174 in pertinent part provides: "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. * * * (c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

We deem it unnecessary to discuss the remaining assignments of error since they may not recur on another trial.

New trial.

TREASURE CITY OF FAYETTEVILLE, INC., A CORPORATION, ON BEHALF OF ITSELF AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY NORTH CAROLINA GENERAL STATUTE 14-346.2 v. W. G. CLARK, SHERIFF OF CUMBERLAND COUNTY.

(Filed 17 January 1964.)

1. Constitutional Law § 4—

While ordinarily the constitutionality of a statute may not be challenged in an action to enjoin its enforcement, injunction will lie as an exception to this rule to prevent the deprivation of constitutional rights.

2. Statutes § 2—

A statute proscribing the sale on Sunday of merchandise falling within certain classifications is a statute regulating trade under the purview of Article II, § 29 of the State Constitution.

3. Same—

G.S. 14-346.2 proscribing the sale of merchandise of specific classifications within the State but exempting designated counties and parts of counties therefrom, with provision that the areas exempted were exempted upon the classification of such areas as resort or tourist areas, but which does not define "resort area" and which as a matter of common knowledge does not exempt all recognized tourist areas of the State or by its classifications of goods, permit in the exempted area only such merchandise as is appropriate to the tourist trade, *is held* void as a local law in violation of Article II, § 29 of the State Constitution.

APPEAL by plaintiff from *Braswell, J.*, July 24, 1963, Session of CUMBERLAND.

Plaintiff's action is to restrain defendant, the Sheriff of Cumberland County, North Carolina, from making arrests for alleged violations of Chapter 488, Session Laws of 1963, which provides:

"AN ACT TO REWRITE G.S. 14-346.2 TO PROHIBIT CERTAIN BUSINESS ACTIVITIES ON SUNDAY.

"*The General Assembly of North Carolina do enact:*

"Section 1. G.S. 14-346.2, as the same appears in the 1961 Cumulative Supplement of the General Statutes, is hereby rewritten to read as follows:

"'§ 14-346.2. Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale on such day, clothing and wearing apparel, clothing accessories, furniture, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments or recordings, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"'Each separate sale or offer to sell shall constitute a separate offense: Provided this Section shall not be applicable to Avery, Currituck, Wilkes, Madison, Yancey, Watauga, Graham, Cherokee, Clay, Hyde, Henderson, Mitchell, Camden, Swain, Pamlico, Carteret, Brunswick, Dare, Haywood, Jackson, Macon, New Hanover, Pender, Polk, and Transylvania Counties.'

"This Act shall not apply to Chimney Rock Township of Rutherford County, Colly Township of Bladen County, or Edneyville Township of Henderson County.

"This Act shall not apply to facilities within the right-of-way of the Blue Ridge Parkway in Ashe, Alleghany and Watauga

Counties as shown on recorded plats of the same and this Act shall not apply to Blowing Rock Township of Watauga County.

"The areas that are exempted from this Act by the foregoing provisions are so exempted upon the classification of such areas as resort or tourist areas, the General Assembly recognizing that different considerations apply to such areas. By exempting such areas from this Act the General Assembly hereby classifies such areas as resort or tourist areas.

"Sec. 1½. In the event the provisions of this Act exempting certain areas of less than county size from the effect thereof be held unconstitutional, such provisions shall be considered as severable from the other provisions of this Act and such exemptions shall then be void and be disregarded in determining the constitutionality of the other provisions of this Act.

"Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 3. This Act shall become effective July 1, 1963.

"In the General Assembly read three times and ratified, this the 22nd day of May, 1963."

Plaintiff, a North Carolina corporation, has its principal office in Mecklenburg County, North Carolina. It operates a general retail merchandising store in Cumberland County, North Carolina, approximately one mile from the city limits of Fayetteville. On Sundays, in said store, plaintiff engages in the business of selling many of the articles referred to in said 1963 Act and derives "a substantial dollar volume of business" from such Sunday sales.

Plaintiff alleges the 1963 Act is unconstitutional and therefore void; that it has no adequate remedy at law; and that, unless defendant is restrained, plaintiff will suffer irreparable damage and injury by "substantial loss of dollar volume of business on Sunday" and by a multiplicity of arrests and criminal prosecutions.

When the cause came on for hearing as to whether a temporary restraining order theretofore issued should be continued in effect pending final determination of the action, defendant demurred to the complaint on the ground the 1963 Act is valid and therefore the complaint did not allege facts sufficient to constitute a cause of action.

After hearing, the court entered judgment sustaining the demurrer, dissolving the temporary restraining order and dismissing the action. Plaintiff excepted and appealed. Thereupon, the court, exercising the discretionary power conferred by G.S. 1-500, ordered that the temporary restraining order remain in effect pending disposition of plaintiff's appeal.

McDougle, Ervin, Horack & Snepp for plaintiff appellant.

Clark & Clark and Lester G. Carter, Jr., for defendant appellee.

Smith, Leach, Anderson & Dorsett for North Carolina Merchants Association, amicus curiae.

Warren C. Stack for Clark's Charlotte, Inc., amicus curiae.

BOBBITT, J. In *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764, this Court on May 23, 1962, held void the 1961 Act (S.L. 1961, Chapter 1156) codified as G.S. 14-346.2 (1961 Supplement), on the ground it was "unconstitutionally vague, uncertain and indefinite." The 1963 Act now challenged by plaintiff as unconstitutional is entitled "AN ACT TO REWRITE G.S. 14-346.2 TO PROHIBIT CERTAIN BUSINESS ACTIVITIES ON SUNDAY." Even so, the 1963 Act is an entirely new, independent and complete statute.

As in *Surplus Store, Inc. v. Hunter, supra,* and for like reasons, this Court deems it appropriate to pass now upon the validity of the 1963 Act, notwithstanding the *general* rule that the constitutionality of a statute may not be challenged in an action to enjoin its enforcement.

Plaintiff alleges and contends the 1963 Act is void on the ground, *inter alia,* it violates Article II, Section 29, of the Constitution of North Carolina, which, in pertinent part, provides: "The General Assembly shall not pass any local, private, or special act or resolution . . . regulating labor, trade, mining, or manufacturing; . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

The 1963 Act, within the portions of North Carolina to which it applies, *regulates trade* by prohibiting the sale on Sunday of certain articles of merchandise. For a definition of "trade," see *S. v. Dixon,* 215 N.C. 161, 164, 1 S.E. 2d 521, and *Speedway, Inc. v. Clayton,* 247 N.C. 528, 533, 101 S.E. 2d 406.

The crucial question is whether the 1963 Act is a "local, private or special act" as contended by plaintiff, or a general law as contended by defendant. If a "local, private or special act," the 1963 Act, by the express provisions of Article II, Section 29, is void.

In *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888, this Court, in opinion by *Moore, J.,* discussed and defined local and special legislation in contradistinction to general laws. The legal principles there stated control decision as to the validity of the 1963 Act.

The 1963 Act does not apply to any portion of twenty-five counties, to wit, Avery, Currituck, Wilkes, Madison, Yancey, Watauga, Graham, Cherokee, Clay, Hyde, Henderson, Mitchell, Camden, Swain,

Pamlico, Carteret, Brunswick, Dare, Haywood, Jackson, Macon, New Hanover, Pender, Polk and Transylvania. It does not apply to portions of four other counties, to wit, Chimney Rock Township of Rutherford County, Colly Township of Bladen County, and the portions of Ashe and Alleghany Counties within the right of way of the Blue Ridge Parkway. (Note: The separate provisions for the exemption of Edneyville Township of *Henderson County,* Blowing Rock Township of *Watauga County* and the portion of *Watauga County* within the right of way of the Blue Ridge Parkway may be disregarded as surplusage.)

The 1963 Act does not define a resort area *or* a tourist area. Nor does it contain a general statewide exemption of resort areas or tourist areas. It purports to classify specific counties or portions of specific counties and no other portions of North Carolina "as resort or tourist areas."

Mindful of the slogan, "Variety Vacationland," it is doubtful whether there is any county in North Carolina which does not have within its borders an area which could be reasonably described as a resort area or as a tourist area. Reference to the following matters of common knowledge (among many such instances) will suffice. Portions of Buncombe County fall within any reasonable definition of a resort area and of a tourist area. This is true as to portions of Moore County. Onslow County, to which the 1963 Act applies, and coastal counties exempted therefrom, contain areas equally indentifiable as resort areas or tourist areas. Any list of outstanding tourist attractions in North Carolina would include the Old Salem Restoration, the North Carolina Museum of Art and Tryon Palace. Yet no portion of Forsyth, Wake or Craven Counties is exempted from the 1963 Act. It is clear there are many areas within the portions of North Carolina to which the 1963 Act applies which would fall within any reasonable definition of a resort area or a tourist area as well as or better than many of the areas exempted from its operation.

Moreover, the 1963 Act applies to the sale of articles of merchandise appropriate primarily to the needs of permanent residents rather than to the distinctive needs of patrons of a resort area or of a tourist area. It contains no prohibition with reference to food, drugs, lodgings, automotive supplies and services or other articles or services appropriate to the distinctive needs of tourists. Nor does it prohibit the operation of places of amusement, entertainment or recreation or the sale of merchandise appropriate to the distinctive needs of patrons thereof. Consideration of the articles of merchandise to which the 1963 Act applies (e.g., business or office furnishings) dispels the suggestion that there exists in a resort area or in a tourist area a need for the sale of such merchandise on Sunday sufficiently distinctive to constitute a reason-

able basis for the separate classification of such areas with reference to the sale of such articles of merchandise. In *McGowan v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101, cited in support of defendant's position, the constitutionality of a Maryland statute was challenged on grounds different from that now under consideration. Even so, it is noteworthy that the Maryland statute exempted from its operation in Anne Arundel County the retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks, etc.

The 1963 Act is not general because it does not apply to and operate uniformly "on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." *S. v. Dixon, supra,* concurring opinion of Barnhill, J. (later C.J.); *McIntyre v. Clarkson, supra.* On the contrary, it applies to and operates only on merchants in designated counties or portions thereof and not on similarly situated merchants in other counties or portions thereof and no reasonable basis exists for the attempted classification of the exempted counties or portions thereof as resort areas or tourist areas. *Cf. Sarner v. Union Twp.* (N.J. Super.), 151 A. 2d 208. Hence, the 1963 Act must be considered a local and special act in violation of Article II, Section 29, and therefore void. Accordingly, the judgment of the court below is reversed and the cause is remanded for further proceedings consistent with the law as stated herein.

Decision on the ground stated above renders unnecessary a discussion of other grounds on which plaintiff attacked the 1963 Act as unconstitutional.

Reversed and remanded.

VALERIA ROBERSON, ADMINISTRATRIX OF THE ESTATE OF EARLINE ROBERSON, DECEASED v. THE CITY OF KINSTON, NORTH CAROLINA, A MUNICIPAL CORPORATION, AND THE HOUSING AUTHORITY OF THE CITY OF KINSTON, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 17 January 1964.)

1. Negligence § 36—

Since the attractive nuisance doctrine generally is not applicable to natural bodies of water, and since the owner of land is not under duty to erect a fence or other obstruction to protect small children from obtaining access to a branch or creek flowing in its natural state, a Housing Authority may not be held liable for the death of a child of one of its tenants who

drowned when she fell into a stream, swollen by heavy rains, flowing adjacent the property.

2. Municipal Corporations § 12; Waters and Water Courses § 1—

A hastening of the flow of surface waters necessarily results from the construction of streets and gutters by a municipality, and the city may not be held liable for injuries resulting from such acceleration in flow if the surface waters are not diverted from their natural direction of flow.

3. Same—

The failure of a municipality to provide adequate culverts to take care of the drainage of surface water through a natural stream in ordinary and foreseeable storms cannot be a contributing cause of the drowning of a child who fell into the stream when the evidence discloses that there was no backup of waters at the point where the child fell in, but to the contrary, that the water was flowing rapidly at that place and that the child's body was recovered some two blocks downstream.

APPEAL by plaintiff from *Morris, J.*, February Civil Session, 1963, LENOIR Superior Court.

The plaintiff, administratrix of her daughter, Earline Roberson, age eight years, instituted this civil action to recover damages for her daughter's death, allegedly resulting from the actionable negligence both of the City of Kinston and the Housing Authority of that city. Both defendants, by answer, denied negligence.

At the conclusion of the plaintiff's evidence, the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

White & Aycock by Chas. B. Aycock; H. E. Beech for plaintiff appellant.

Geo. B. Greene for City of Kinston defendant appellee.

Whitaker & Jeffress for defendant Housing Authority of The City of Kinston, appellee.

HIGGINS, J. The evidence discloses the following: In the year 1940 the Housing Authority of the City of Kinston was chartered by the State of North Carolina as a municipal corporation. The charter authorized it to acquire property in the City of Kinston on which were located unsanitary and unsafe buildings and to replace them with sanitary and safe buildings for rent to families of low income. The Authority acquired 9.69 acres of land in Kinston, bounded on the north for a distance of 418 feet by Adkin Branch, or Canal. The plaintiff's complaint described it as "Adkin Ditch." The canal had its source north of the city and emptied into the Neuse River to the south. It drained the entire City of Kinston and surrounding area. The plain-

tiff's witness described the canal as four to four and one-half feet in depth, and 10 to 12 feet in width.

The Housing Authority erected a number of housing units, in one of which the plaintiff and her daughter lived. The rear of this unit was 20 to 25 feet from the canal. The Authority built a concrete driveway between the building and the canal.

On July 9, 1956, 1.69 inches of rain fell in the Kinston area. Geraldine Rooks, nine at the time involved, gave this account of what happened on the 10th: "We (the witness and Earline Roberson) went to the Adkin Canal to see how far the water had come up, and there were a number of other children standing around; and there was a young boy, Donald Bradshaw, throwing pecans in Adkin Canal and she (Earline Roberson) was bending over to get one and when she stepped from the street to the dirt, the ground caved in and she fell in the water. The depth of the water was about an inch less than the paved street. . . . With reference to the water, it was going downstream in a swift manner."

The distance between the road and the canal, "about a foot and a half." The body was recovered about two hours later, three blocks downstream.

The evidence disclosed that in case of unusually heavy rainfall Adkin Canal overflowed its channel. Mr. Sutton, who was familiar with the area, testified: "I have seen the water high enough on one occasion that it came inside the apartment building."

The Housing Authority had provided a playground and a recreation building for the children of the tenants. The rear of the plaintiff's apartment was not in the playground area. However, children frequently played along the canal.

Prior to 1956, the City of Kinston had engaged in an extensive program of street widening and paving. These improvements had hastened the flow of surface water into Adkin Canal. Several blocks downstream from the housing project the City had placed three 72-inch tile culverts under the Caswell Street crossing. The plaintiff's evidence was to the effect that these were insufficient to carry the flow of Adkin Canal in case of rainfall of 1.69 inches.

The plaintiff alleged the death of her intestate resulted from the joint and concurrent negligence of the two defendants: (A) The Housing Authority was negligent in building the roadway too close to the canal, and in failing to erect a fence or barricade along its banks to protect the children from the dangers incident to the canal. (B) The City of Kinston was negligent in failing to deepen and widen Adkin Canal to accommodate the accelerated flow of surface water resulting

from its extensive street paving program, and in failing to erect suitable barricades along the canal.

The defendants filed separate answers, each denying its negligence. The answers make it unnecessary to consider any question of misjoinder. Likewise, the City of Kinston does not claim any governmental immunity. Hence liability is determined by the application of the rule of due care under existing circumstances and conditions.

The Housing Authority, by its demurrer to the evidence, presents essentially the defense interposed by demurrer to the complaint in *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255. The rule of law declared in *Fitch,* and followed in many cases, sustains the Housing Authority's demurrer to the evidence: "The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location . . . But, we know of no decision in this or any other jurisdiction, where the owner of land has been held liable for failure to erect a fence or other obstruction to protect small children from obtaining access to a branch or creek upon his premises which flows in its natural state. . . . If it should be conceded that a branch or creek is inherently dangerous to children of tender years, it must be conceded that such streams cannot be easily guarded and rendered safe." See also, *Matheny v. Mills Corp.,* 249 N.C. 575, 107 S.E. 2d 143; *Lovin v. Hamlet,* 243 N.C. 399, 90 S.E. 2d 760; *Ford v. Blythe Bros. Co.,* 242 N.C. 347, 87 S.E. 2d 879; *Stribbling v. Lamm,* 239 N.C. 529, 80 S.E. 2d 270; 65 C.J.S., "Negligence," § 29(12), p. 475.

In determining the liability of the City of Kinston, it must be conceded the planning and construction of streets are necessary public functions. There is neither allegation nor proof of defects in the plans, nor negligence in their execution. The complaint is the paving of streets hastened the flow of surface waters from rain and melting snow into the Adkin Canal. Hastening the flow, causing a more rapid rise in the natural and only outlet, is a physical necessity resulting from the improvements. It is not negligence. "First, we are of the opinion that, in respect to the drainage or diversion of surface water, a railroad company enjoys the same privileges as any other landowner, but no greater, to be exercised under the same restrictions. . . . Secondly, a railroad company or any other landowner has a right to cut ditches and conduct the surface waters into a natural watercourse passing through its land, and if this right is exercised in good faith, and in a reasonable manner, for the better adaptation of the land to lawful and proper uses, no damage can be recovered if the lands of a lower own-

er are injured. . . . 'No doubt, the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner'." *Jenkins v. R.R.*, 110 N.C. 438, 15 S.E. 193; *Waffle v. R.R.*, 53 N.Y. 11.

". . . (B)ut in regard to the flow and disposal of surface water incident to the grading and paving of streets, a different rule is recognized, and a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow . . . unless there has been negligence . . . causing the damage complained of." *Yowmans v. Hendersonville*, 175 N.C. 574, 96 S.E. 45.

Drainage is as necessary for a town or city as for a railroad or an individual. The surface water must not be diverted from its normal outlet. Acceleration is necessarily involved in drainage. The evidence, however, failed to show negligence on the part of Kinston in its street construction work.

Was the City of Kinston negligent in failing to widen and deepen Adkin Canal? On the occasion giving rise to this action the banks of the canal were practically full. On rare occasions there was some overflow. On one occasion the water backed up to the first floor of apartment building No. 12. We must remember a city does not own the land enclosed within its boundaries. Incorporation follows the location and expansion of a settlement. Likewise, the city cannot control rainfall. It cannot guarantee safety from floods on the natural watercourses. It may be liable if it negligently impedes the flow, causing damage. A city on a natural watercourse is not responsible for damage caused by a downpour. The doctrine of reasonable foreseeability implicit in negligence cases removes a city even farther away from liability for a death by drowning in a natural watercourse.

The plaintiff offered evidence that culverts under Caswell Street, several blocks below the housing development, were inadequate on July 10, 1956, to carry the flow of Adkin Canal. However, there was no backup of water at the housing development. The little girl who saw the plaintiff's intestate fall into the stream said: "The water . . . was going downstream in a swift manner." The body was found and recovered three or four blocks downstream. So, any impounding of water at the Caswell Street crossing had no bearing on the flow at the housing project where the little girl fell into the current and was swept to her death. Regrettable and sad as the case is, liability on the part of either defendant is not established by the evidence. The judgments of nonsuit are

Affirmed.

BLAKE C. CLARK v. A. L. MEYLAND, CHAIRMAN GUILFORD COUNTY BOARD OF ELECTIONS; FRED M. UPCHURCH AND ARTHUR UTLEY, MEMBERS OF THE GUILFORD COUNTY BOARD OF ELECTIONS; AND MARGARET SCHECTER, SECRETARY OF THE GUILFORD COUNTY BOARD OF ELECTIONS.

(Filed 17 January 1964.)

1. Elections §§ 2, 14—

That part of G.S. 163-50 which requires an elector desiring to change his party affiliation to swear that he desires to make the change in good faith *held* constitutional and valid in having as its purpose the prevention of raids by one political party into the ranks of another in primary nominations, but the remainder of the statutory oath requiring the elector to swear or affirm that he will support the nominees of the party at that and in future elections until he should again change his affiliation, is void as preventing a voter from casting his ballot according to the dictates of his conscience. Art. I, § 10 of the Constitution of North Carolina.

2. Statutes § 4—

Where that part of a statute imposing an unconstitutional limitation is divisible from other parts of the statute, which are constitutional, the statute stands with the unconstitutional provision deleated.

APPEAL by plaintiff from *Shaw, J.*, September 9, 1963 Civil Session, GUILFORD Superior Court, Greensboro Division.

The plaintiff instituted this civil action to have the court determine by declaratory judgment his right to change his political party affiliation on the registration books of Guilford County Board of Elections without making oath "that I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law." The plaintiff prayed for a writ of *mandamus* to compel the election officials to permit the requested change without requiring him to take the (to him) objectionable part of the loyalty oath above quoted.

The pleadings and stipulations establish the following: On and prior to October 3, 1962, plaintiff was a qualified and registered elector in Guilford County. He was registered as a Democrat. The defendants at all times pertinent to this inquiry held offices as stated in the caption. The plaintiff applied to the Secretary of the County Board of Elections for a change in party affiliation from "Democrat" to "Republican." He agreed to take the oath prescribed in G.S. 163-50, except the part above quoted, to which he objected upon the ground he did not know who the Republican nominees would be, their views on public questions at the time of the election, nor who the party candidates would be in future elections. Hence, in good conscience, he could

not swear that he would support them. He offered to take the oath if the objectionable clause were eliminated. The officials of the Board of Elections refused to permit the change without the full oath. The plaintiff exhausted all administrative remedies prior to the institution of this action, in which Judge Shaw entered the following:

> "2. The oath required by G.S. 163-50, does not abridge, modify or deprive any registered elector of any constitutional Rights, State or Federal, to which he is lawfully entitled.
>
> "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiff's action be dismissed, the relief sought by the plaintiff be denied, and the costs of this action be taxed against the plaintiff.
>
> "This 18th day of September 1963.
>
> "/s/ Eugene G. Shaw, Judge Presiding."

William L. Osteen, J. Halbert Conoly, Charles E. Dameron, Jordan J. Frassineti for plaintiff appellant.

Durwood S. Jones, for defendant appellees.

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General, Amicus Curiae.

HIGGINS, J. In this case the plaintiff, a registered Democrat, sought to change his party affiliation and to qualify himself to vote in the Republican Primary. The election officials, as a condition precedent to the change, demanded that he take the oath prescribed by G.S. 163-50, as follows:

"I, ..., do solemnly swear (or affirm) that I desire in good faith to change my party affiliation from the.....to the..... party, and that such change of affiliation be made on the party registration books, *and I further solemnly swear (or affirm) that I will support the nominees of said party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law, so help me God.*" (emphasis added).

The plaintiff refused to take that part of the oath above in italics. The election officials refused to make the requested transfer. The case presents this question: Did the General Assembly act within its competence in requiring, as a condition of the party transfer, that the plaintiff make oath in the manner set forth in the statute? The plain wording of the oath obligated the plaintiff to support the nominees of

the Republican Party "in the next general election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law." For additional emphasis to this *in futuro* commitment, the Legislature by G.S. 163-197, provided that any person shall be guilty of a felony who knowingly swears falsely with respect to any matter pertaining to any primary or election.

The true intent and purpose of the primary laws are stated in *States' Rights Democratic Party v. Board of Elections,* 229 N.C. 179, 49 S.E. 2d 379: "But they (primary laws) do not undertake to deprive the voter of complete liberty of conscience or conduct in the future in the event he rightly or wrongly comes to the conclusion subsequent to the primary that it is no longer desirable for him to support the candidates of the party in whose primary he has voted. Besides, the Legislature has expressly declared that nothing contained in the laws governing primary elections 'shall be construed to prevent any elector from casting at the general election a free and untrammeled ballot for the candidate or candidates of his choice.' G.S. 163-126." The court held illegal rules of the State Board of Elections disqualifying those registered to vote in the primary from filing a petition for a new party.

Many of the cases in other states hold that obligation to support the nominees of the primary imposes a moral obligation which is already implicit in the very act of taking part in the primary. "(T)he primary voter, with or without the statute, incurred a moral obligation binding on his honor." The court concluded that the obligation was no greater with than without the oath. "The voter's conduct must be determined largely by his own peculiar sense of propriety and of right. It is for such reasons that the courts do not undertake to compel performance of the obligation." *Westerman v. Mims,* 111 Tex. 29, 227 S.W. 178; *Ray v. Garner,* 257 Ala. 168, 57 S.E. 2d 824; *Chapman v. King,* 154 Fed. 2d 460 (5th Ct. denied), 327 U.S. 800; *State v. Michel,* 121 La. 374.

Without the binding commitment to support the "next" and the "thereafter" candidates of the party, the remaining parts of the oath would seem to furnish adequate means by which to determine good faith membership in the party and to prevent raids by one party into the ranks of the other in primary nominations. Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a deterrant to his exercising a free choice among available candidates at the election—even by casting a write-in ballot.

His membership in his party and his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.

When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of freedom of conscience. It denies a free ballot—one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

The oath as prescribed by G.S. 163-50 is divisible. It stands, but with the objectionable part eliminated. *Banks v. Raleigh*, 220 N.C. 35, 16 S.E. 2d 413. And, as stated in *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E. 2d 278, "We apply to this Act the law so frequently declared with respect to partially invalid legislative acts." Citing *Constantian v. Anson County*, 244 N.C. 221, 93 S.E. 2d 163; *Commissioners v. Boring*, 175 N.C. 105, 95 S.E. 43; *Smith v. Wilkins*, 164 N.C. 135, 80 S.E. 168.

No doubt, the authorities, upon a new application, will permit the plaintiff to change his party affiliation without requiring that part of the oath herein declared to be invalid.

The judgment of the Superior Court of Guilford County is

Reversed.

BARBARA LEE WATT (NOW WAGSTAFF) v. WILLIAM VERNON CREWS AND THE TRANSPORT CORPORATION, ORIGINAL DEFENDANTS, AND WILLIAM O'BRIEN, ADDITIONAL DEFENDANT.

(Filed 17 January 1964.)

1. Trial § 22—

Contradictions, even in plaintiff's evidence, do not justify nonsuit.

2. Automobiles § 41c—

Evidence tending to show that defendant's tractor-trailer was left standing on the hardsurface, unattended at nighttime without lights, flares, or

warning, and that a motorist was unable to see the vehicle in time to stop before colliding with its rear, takes the issue of negligence to the jury, notwithstanding contradictory evidence that there were lights on the vehicle and reflectors up to 200 feet to its rear.

3. Automobiles § 43—

In determining the question of the sufficiency of one defendant's evidence to go to the jury on its cross-action against the other defendant, the first defendant's evidence must be taken as true, and where its evidence tends to show that its driver left lights and reflectors back of its stalled tractor-trailer as required by statute and that the other defendant drove his car into the rear of the tractor-trailer, its evidence is sufficient to be submitted to the jury on the cross-action.

4. Trial § 35—

The court is not required to give the contentions of the litigants in its charge, but when it undertakes to do so the court must give equal stress to the respective contentions of the parties, and the giving of the contentions of one party alone must be held for prejudicial error.

5. Trial § 34—

The court is required to charge the jury as to which party has the burden of proof on each issue, and the failure of the court to charge the jury that the burden is on the original defendant to prove the negligence of the additional defendant and that such negligence was a proximate cause of the injury, must be held for prejudicial error.

APPEAL by Transport Corporation and additional defendant O'Brien from *Williams, J.*, 6 May 1963 Civil Session of WAKE.

The plaintiff instituted this action to recover for personal injuries sustained in a collision between a tractor-trailer, operated by defendant Transport Corporation, and an automobile in which the plaintiff was riding and which was owned and operated at the time of the collision by the additional defendant O'Brien.

On 23 August 1961, about 11:00 p.m., defendant Transport Corporation's tractor-trailer was being operated by its driver, defendant William Vernon Crews, in a westerly direction on U. S. Highway 70 near the bridge over Interstate Highway 95. The truck stalled due to a defective switching mechanism on the gas tank; the driver pulled the tractor-trailer on the side of the highway as far as its momentum would carry it, but succeeded only in getting the right wheels of the tractor not more than a few inches off the pavement while the right wheels of the trailer remained on the pavement. After trying unsuccessfully to start the motor, according to the testimony of the driver of the tractor-trailer, he placed reflector flares at intervals to the rear of the truck, turned on the left turn signal, and left the clearance lights burning on the rear of the truck. All the clearance lights were on the bed

of the truck which was loaded with 21 hogsheads of tobacco and covered by a dark green canvas. The driver of the truck left for Smithfield to get gas. The collision occurred just before the driver returned to his truck.

About 11:45 p.m., the plaintiff and the additional defendant O'Brien were proceeding in a westerly direction on U. S. Highway 70 in O'Brien's car, which was being operated at a speed of approximately 50 to 60 miles per hour. The night was dark and cloudy. O'Brien failed to see the truck in time to stop, and struck the rear of the truck after skidding 69 feet.

The plaintiff Barbara Lee Watt (now Wagstaff) brought this action against the Transport Corporation, and defendant Transport Corporation had O'Brien joined as an additional defendant. The Transport Corporation filed a cross-action against O'Brien pursuant to the provisions of G.S. 1-240. O'Brien filed a counterclaim against defendant Transport Corporation for his personal injuries and property damage.

The jury found that the plaintiff was injured by the negligence of the Transport Corporation and O'Brien and assessed her damages at $5,000. Judgment was entered for the plaintiff against the Transport Corporation for $5,000, for the Transport Corporation against O'Brien for contribution in the sum of $2,500, and against O'Brien on his counterclaim.

Defendant Transport Corporation and O'Brien appeal, assigning error.

Yarborough, Blanchard & Tucker for plaintiff.

Maupin, Taylor & Ellis for Transport Corporation.

William T. Crisp; Howard F. Twiggs; Smith, Leach, Anderson & Dorsett for O'Brien.

DENNY, C.J. We shall first consider the appeal of the Transport Corporation. This appellant has abandoned all its exceptions and assignments of error except those challenging the action of the trial judge in refusing to grant its motion for judgment as of nonsuit as to plaintiff at the close of all the evidence.

The evidence is in sharp conflict with respect to lights on the rear of the parked tractor-trailer at the time of the accident. The Highway Patrolman who arrived at the scene of the accident about 20 minutes after it occurred testified: "When I arrived at the scene of the accident there were three reflectors behind the truck on the east side of the truck. The furtherest reflector was approximately 200 feet from the rear of the trailer. * * * The reflectors were 3-½ to 4 inches in

diameter and had a base so that they would sit on the pavement. The reflector part, when a light would shine on it, would reflect a red light. There was no lighted portion, no electric light and no flare connected with the reflector. * * * The only light that I saw burning on the tractor-trailer when I arrived there was one light up on it, the best I recall, up on the hogshead itself and it was mighty dim. * * * I was there when the tractor-trailer was moved from the scene, and they had to use a wrecker to do that because the battery was dead."

The plaintiff testified that at the time of the accident she was looking straight ahead through the windshield; that the car was traveling from 50 to 55 miles per hour; that "As we started up the incline suddenly I saw there was a big object in front of me. * * * Mr. O'Brien applied his brakes quickly, then the crash. * * * The car crashed into the rear end of the tractor-trailer. I did not see any lights, reflectors, or flares behind that tractor-trailer before the car hit it."

On cross-examination, this witness testified: "Before we reached the incline there were no flares or lanterns or anything like that out there in front of us. * * * As we were going up the incline, I really didn't notice the curve too much; but I know that I suddenly saw the object, the black object, in front of us. It suddenly came into view, within range of our headlights. At the time I saw it there were no lights of any type on it."

Contradictions, even in the plaintiff's evidence, do not justify nonsuit. *Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492; *Whitley v. Jones*, 238 N.C. 332, 78 S.E. 2d 147; *Graham v. Spaulding*, 226 N.C. 86, 36 S.E. 2d 727; *Ward v. Smith*, 223 N.C. 141, 25 S.E. 2d 463; *Chestnutt v. Durham*, 224 N.C. 149, 29 S.E. 2d 339.

A careful consideration of all the evidence adduced in the trial below leads us to the conclusion that it was sufficient to carry the case to the jury against this appellant.

Furthermore, the court submitted an issue to the jury to determine whether or not the plaintiff was guilty of contributory negligence as alleged in the answer of defendant Transport Corporation. This issue was answered in favor of the plaintiff upon a charge unexcepted to by this appellant.

We hold that the court below properly overruled this appellant's motion for judgment as of nonsuit as to the plaintiff. *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825; *Scarborough v. Ingram*, 256 N.C. 87, 122 S.E. 2d 798.

Appeal of additional defendant William O'Brien.

O'Brien assigns as error the denial of his motion for judgment as of nonsuit on the cross-action of the Transport Corporation for contribution.

We think the evidence offered by defendant Transport Corporation was sufficient to take the case to the jury on its cross-action against this appellant. The Transport Corporation is the plaintiff in this cross-action and its evidence with respect to lights on the rear of its parked trailer and the reflectors placed on the highway to the rear of its parked trailer must be considered as true on a motion for judgment as of nonsuit and considered in the light most favorable to it. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Register v. Gibbs*, 233 N.C. 456, 64 S.E. 2d 280; *Bridges v. Graham, supra; Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338.

Among this appellant's 64 assignments of error, assignment of error No. 55 challenges the correctness of the court's charge in that the court failed to give the contentions of this appellant on the second issue, and assignment of error No. 58 is to the failure of the court to instruct the jury that the burden of proof on the second issue was on the defendant Transport Corporation.

The second issue reads as follows: "Was plaintiff injured by the negligence of the additional defendant, William O'Brien, as alleged in the cross-action of defendant Transport Corporation? Answer: Yes."

This was a vital issue insofar as this appellant was concerned. However, an examination of the charge on this issue reveals that the court gave the contentions of the Transport Corporation at considerable length and in detail, but gave no contention whatever of the defendant O'Brien.

We have held that a trial judge is not required by law to give the contentions of litigants to the jury. *S. v. Colson*, 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Insurance Co.*, 204 N.C. 282, 167 S.E. 854. When, however, a judge undertakes to state the contentions of one party, he must give the equally pertinent contentions of the opposing party. *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196; *S. v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768; *In re Will of Wilson*, 258 N.C. 310, 128 S.E. 2d 601.

G.S. 1-180 provides that "the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action and to the State and defendant in a criminal action."

In the trial below, the jury was not instructed that the burden of proof on the second issue was on the defendant Transport Corporation.

In *Tippite v. R.R.*, 234 N.C. 641, 68 S.E. 2d 285, this Court said: "G.S. 1-180, as amended, requires that the judge 'shall declare and explain the law arising on the evidence given in the case.' This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. It is said that ' "the

rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary and burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. *S. v. Falkner,* 182 N.C. 793, and cases cited." *Hosiery Co. v. Express Co.,* 184 N.C. 478.' *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831."

Assignments of error Nos. 55 and 58 were well taken and must be sustained.

In our opinion, in the trial below there was no error that would justify a new trial of the plaintiff's cause of action, and we so hold.

As to Transport Corporation—Affirmed.

As to O'Brien—New trial.

JAMES EDWARD TEELE v. CLAYBORNE K. KERR AND LUTHER W. KERR.

(Filed 17 January 1964.)

1. Limitation of Actions § 18—

Where all of the relevant facts are admitted, the question of the bar of a properly pleaded statute of limitations is a question of law.

2. Judgments § 43—

The cause of action is merged in the judgment rendered therein, and the judgment is a debt of record so that an action on the judgment is a new action on a debt separate and distinct from the original cause of action.

3. Guardian and Ward § 3; Infants §§ 5, 6—

The powers of a next friend or a guardian *ad litem,* as distinguished from a general guardian, are coterminous with the beginning and ending of the prosecution of the particular suit in which he is appointed so that the entry of judgment renders him *functus officio,* and he is not authorized to receive payment of the judgment for the minor. G.S. 1-64.

4. Judgments § 43—

Where judgment is recovered in favor of an infant in an action brought by the next friend, the infant having no general guardian, the ten year limitation on an action on the judgment, G.S. 1-47(1), begins to run when the infant reaches his majority. G.S. 1-17.

APPEAL by defendant, Clayborne K. Kerr, from *Carr, J.,* March 1963 Civil Session of DURHAM.

Action to renew a judgment.

These facts are either stipulated or established by the record proper: Plaintiff was born on October 25, 1938 in Durham County. He was struck by an automobile driven by the defendant on March 13, 1946 when he was seven years old. Thereafter, on August 25, 1947, the Clerk of the Superior Court of Durham County duly appointed plaintiff's father, James Henry Teele, as his next friend to bring an action against the defendant to recover for plaintiff's personal injuries. He instituted the action on the same day. At the April 1948 Civil Term of the Superior Court of Durham County a judgment was rendered in favor of the plaintiff and against the defendant Clayborne K. Kerr in the amount of $1,177.83. This judgment was docketed on April 19, 1948 when the plaintiff was nine years old. No part of this judgment has ever been paid. On October 25, 1959 plaintiff attained his majority. On February 28, 1962 he instituted this action to renew the judgment. By answer, the defendant plead the ten-year statute of limitations, G.S. 1-47(1), in bar of plaintiff's right to maintain the action. Upon the trial the jury found that the plaintiff's action was not barred by the statute of limitations and that defendant was indebted to the plaintiff in the amount of $1,177.83 with interest from April 19, 1948. From judgment entered on the verdict, defendant Clayborne K. Kerr appealed.

Bryant, Lipton, Bryant & Battle for plaintiff appellee.
Blackwell M. Brogden for Clayborne K. Kerr defendant appellant.

SHARP, J. Where the statute of limitations is properly pleaded, and all the facts with reference to it are admitted, the question whether it constitutes a bar becomes a matter of law. *Mobley v. Broome*, 248 N.C. 54, 102 S.E. 2d 407. This appeal presents one question: Does the statute limiting the time to bring an action on a judgment to ten years from the date of its rendition, begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose? If the answer to this question is NO, G.S. 1-17 would permit the plaintiff to bring an action on the judgment secured when he was nine years old within the time limited by G.S. 1-47(1), i.e., ten years, after he became twenty-one years old.

To answer this question we must first consider the nature of an action upon a judgment. "When a judgment is obtained, the precedent cause of action is merged into and extinguished by the judgment. 2 Black, Judgm. §§ 674, 675, 677; Freem. Judgm. §§ 215, 216. The judgment is a debt of record,—a new cause of action,—upon which a new suit may be maintained." *Williams v. Merritt*, 109 Ga. 213, 34 S.E. 312.

In *Reid v. Bristol,* 241 N.C. 699, 86 S.E. 2d 417, it was pointed out by *Bobbitt, J.* that in this State, since 1866, if not before, the only way to secure a judgment on a judgment was by an independent action commenced as is every action to recover judgment on a debt. Hence the suit instituted by plaintiff on February 28, 1962 on the judgment was a new action on a debt; it was separate and distinct from the personal injury suit in which it had been obtained on April 19, 1948.

The next question is whether the authority and duties of a next friend terminate when he reduces plaintiff's claim to judgment or whether his authority continues to collect the judgment and to bring an action on it for that purpose if necessary. If the authority of a next friend terminates with the judgment, plaintiff may maintain this action; if, however, it continues, he may not. *Rowland v. Beauchamp,* 253 N.C. 231, 116 S.E. 2d 720.

It is the rule in North Carolina that, except in suits for realty where the legal title is in the ward, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring, at the time the cause of action accrues. If he has no guardian at that time, the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided in G.S. 1-17 whichever occurs first. *Trust Co. v. Wills,* 257 N.C. 59, 125 S.E. 2d 359.

There is, however, a vast difference between the authority of a general guardian and a next friend. A guardian is authorized by G.S. 30-20 to take possession of all his estate for the use of his ward and to bring *all* necessary actions therefor. G.S. 1-64 merely authorizes infant plaintiffs without a general guardian to appear by their next friend when it is necessary for them to prosecute an action. The power of a next friend is strictly limited to the performance of the precise duty imposed upon him by the order appointing him, that is, the prosecution of the particular action in which he was appointed. It is his duty to represent the infant, see that the witnesses are present at the trial of the infant's case, and to do all things which are required to secure a judgment favorable to the infant. *Roberts v. Vaughn,* 142 Tenn. 361, 219 S.W. 1034, 9 A.L.R. 1528. When he has done that, his authority in the suit is at an end unless some attack should be made upon the judgment by motion in the cause.

In the absence of a special statute it is the general rule that the next friend of an infant has no authority to receive payment of the judgment he has secured for the infant. "Either or both of two reasons are given for this rule. First, the duties of the next friend or guardian *ad litem* are coterminous with the beginning and end of the prosecution of

the suit, so that upon entry of final judgment he has no further interest in the case. Second, payment to the next friend or guardian *ad litem* might result in the loss of the benefit of the recovery, since a bond is not ordinarily required of him in prosecuting the action." 27 Am. Jur., *Infants* § 134; *Paskevic v. East St. L. & S. Ry. Co.*, 281 Ill. 385, 117 N.E. 1035, L.R.A. 1918 C. 52. Under our statutes only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant. G.S. 1-39. See *Tate v. Mott*, 96 N.C. 19, 2 S.E. 176. In practice, the defendant pays the judgment to the Clerk of the Superior Court who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him unless the sum is $1,000.00 or less when he may disburse it himself under the terms of G.S. 2-53.

The status, function, and authority of a next friend of a minor were reviewed in *Johnston County v. Ellis*, 226 N.C. 268, 38 S.E. 2d 31. In that case E. was appointed next friend to act for his minor brothers and sisters, movants in a tax foreclosure action to set aside a tax foreclosure. Thereafter the mortgagee also intervened and filed a similar motion. A judgment was entered setting aside all orders and decrees made in the case as well as the deed to the purchaser. Ten months later, without notice to the next friend, the Clerk of the Superior Court determined the amount due on the mortgage, entered judgment for it against the owners of the land, including the minors, and appointed a commissioner to sell the land under the mortgage. Approximately ten years later the minors, having become of age, moved to set aside this judgment and the sale made under it. The Superior Court denied the motion; the Supreme Court reversed, saying:

> "A next friend is not an all-time and all-purpose representative through whose action or failure to act his infant suitors may be bound by orders and judgments which have no connection with the purpose of his appointment, or the rights of the minors which by virtue of such appointment it is his office to assert. The scope of his representation lies within and is determined by that purpose, the necessities of its prosecution and the procedure reasonably incident thereto. In 27 Am. Jur., p. 839, sec. 118, is a summarized expression of the law as we conceive it to be here: 'The next friend has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end, although his power is strictly limited to the performance of the precise duty imposed upon him by law.' *Roberts v. Vaughn*, 142 Tenn., 316, 219 S.W., 1034, 9 A.L.R., 1528. No doubt in the

assertion of such right the next friend may have to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim.

"The next friend came into the tax suit for the purpose of making a motion to set aside a judgment and annulling a deed in the tax suit, in which the minors were admittedly equitable owners of the property and at the time unrepresented. His appointment did not require him to defend against the foreclosure suit thrust into this proceeding in the manner stated, and his representation of the minors in that matter did not legally exist.

"Moreover, the record discloses that Ellis had successfully accomplished his mission as next friend, performed all the duty imposed upon him by law, and his office as next friend had become *functus officio*. If the holder of the mortgage desired to foreclose, it was necessary to do so in an orderly proceeding, instituted for that purpose, and to secure the appointment of a guardian *ad litem* to defend the owners of the equitable estate."

The reasoning of the language quoted above is applicable to this case. We hold that the authority of plaintiff's next friend in the personal injury case ended on April 19, 1948 and that this suit, instituted on the judgment obtained in the former action, is a new and independent action. The plaintiff, having instituted it within ten years after reaching his majority, is entitled to maintain it.

This holding does not impinge upon any statement in *Rowland v. Beauchamp, supra,* as defendant contends. *Rowland* involved a question of the application of the statute of limitations to the specific action which the next friend was appointed by the court to bring. The instant case is a new and independent action; hence, *Rowland* is inapplicable.

The judgment of the lower court is

Affirmed.

BILL R. PRICE v. STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 17 January 1964.)

1. Insurance § 28—

Provision of a policy for benefits if a person covered is confined to a hospital by reason of sickness refers to an existing illness which is the cause

of the hospitalization, and does not cover an operation to prevent future illness.

2. Same—

The evidence disclosed that plaintiff's wife had arrested tuberculosis, that she became increasingly nervous and depressed during each successive pregnancy, and that after the delivery of her fourth child her physician was of the opinion she was headed for a post-partum psychosis unless a tubal ligation was performed. *Held:* If the operation was to prevent future illness it was not within the coverage of the hospital policy, but if the post-partum depression was serious enough to be classified as a sickness, the operation was within the coverage, and the issue should be submitted to the jury.

3. Same—

Serious emotional depression even though not amounting to insanity, is akin to it, and insanity is generally held to be a sickness within the meaning of a health and accident policy.

4. Trial § 22—

Discrepancies in the evidence are for the jury and not the court.

APPEAL by plaintiff from *Sink, E. J.*, at the July 1963 Civil Term of DAVIDSON.

Plaintiff instituted this action upon a policy of hospital insurance to recover $372.75, surgical and hospital expenses incurred when an operation known as a tubal ligation was performed upon his wife. Defendant admitted that the policy in suit was in full force and effect between the parties at the time of the operation; that plaintiff's wife is an "eligible dependent" covered by the policy; and that proof of loss was duly filed. Defendant alleged, however, that hospitalization and surgery for an "elective tubal ligation" was not compensable under the terms of the policy.

By stipulation the parties designated the pertinent portions of the insurance contract. In summary, they provide for surgical and hospital benefits when the surgery is performed by a legally qualified physician upon an insured "as a result of accidental bodily injuries or sickness."

Plaintiff's evidence, viewed in the light most favorable to him, tended to show the following facts: He and his wife have four children between the ages of two and thirteen years. Mrs. Price became increasingly depressed and disturbed emotionally during each pregnancy after her first. During her fourth, she was emotionally unstable throughout the entire pregnancy. She wept continuously, required drugs in order to sleep or eat, and remained in bed for most of the nine months. She narrowly escaped a complete nervous breakdown. Mrs. Price had

twice been in a sanatorium for tuberculosis, the last time being four or five months after the birth of her first child.

Dr. E. L. Jones, Mrs. Price's physician, testified in substance as follows: Mrs. Price wanted the operation performed immediately following the delivery of her fourth child. Ordinarily ligations are done within three days following delivery; however, to be sure that such an operation was necessary, Dr. Jones postponed it for four weeks. She improved but did not recover completely. He came to the conclusion that she was headed for a post-partum psychosis unless the operation was performed. He had treated her for some emotional depression between her third and fourth pregnancies, although it was less severe than that which developed after she became pregnant. In summary, he advised the operation because (1) Mrs. Price continued extremely nervous and he diagnosed her condition as "severe emotional depression"; (2) there was a danger that another pregnancy would activate her arrested tuberculosis; (3) she had four young children who needed her and (4) she had become increasingly nervous following each pregnancy and delivery, and another pregnancy would cause medical debility.

The operation was successfully performed on May 14, 1961—five or six weeks after the delivery of Mrs. Price's fourth child. Since then, she has suffered no emotional disturbance and is now in good health so far as this sympton is concerned. In the opinion of Dr. Jones she would not have recovered completely without the operation.

At the conclusion of plaintiff's evidence, the trial judge allowed defendant's motion for nonsuit and the plaintiff appealed.

Charles F. Lambeth, Jr., for plaintiff appellant.

Allen, Steed & Pullen and William B. Mills by Thomas W. Steed, Jr., for defendant appellee.

SHARP, J. Whether plaintiff offered any evidence tending to show that the operation performed upon Mrs. Price was the result of an existing sickness is the question posed by this appeal.

Webster's New International Dictionary, Second Edition, Unabridged, defines sickness: "1. a Diseased condition; illness; ill health. b A disordered or weakened condition in general. 'A great *sickness* in his judgment.' Shak. 2. a A malady; a form of disease . . . ." This definition was approved in *Reserve Life Insurance Company v. Lyle*, Okl. 288 P. 2d 717. This Court has several times quoted, with approval, the following definitions of disease:

> ". . . . 'an alteration in the state of the human body . . . or of some of its organs or parts interrupting or disturbing the per-

formance of the vital functions, or of a particular instance or case of this'; as 'deviation from the healthy or normal condition of any of the functions or tissues of the body'; and as a 'morbid condition of the body'." *Bailey v. Insurance Co.*, 222 N.C. 716, 24 S.E. 2d 614; *McGregor v. Assurance Corporation*, 214 N.C. 201, 198 S.E. 641.

While the words "sickness" and "disease" are technically synonymous, "when given the popular meaning as required in construing a contract of insurance, 'sickness' is a condition interfering with one's usual activities, whereas disease may exist without such result; in other words, one is not ordinarily considered sick who performs his usual occupation, though some organ of the body may be affected, but is regarded as sick when such diseased condition has advanced far enough to incapacitate him." 29 A. Am. Jur., *Insurance* § 1154; 10 Couch on Insurance 2d § 41:801.

Closely analogous to the instant case is that of *Reserve Life Insurance Company v. Whitten*, 38 Ala. App. 455, 88 So. 2d 573. There suit was brought upon an insurance policy which provided for benefits for hospital confinement "resulting from sickness." A tubal ligation was performed on the plaintiff because she had hemorrhaged very seriously during past pregnancies and another would endanger her life. When asked if an existing illness necessitated the operation, plaintiff's physician testified that the operation was performed to prevent a potential illness; that if plaintiff did not again become pregnant she would have no further trouble. In denying recovery, the Alabama Court said, ". . . . (W)e are of the opinion his (the doctor's) testimony shows conclusively that the operation for which plaintiff is seeking to recover was not performed to relieve any existing condition, but was performed solely for the purpose of preventing a possible future pregnancy and a possible severe hemorrhaging resulting therefrom."

We think it clear that the policy involved herein does not cover an operation to prevent a potential sickness but was intended to include only hospitalization resulting from an actual existing illness. Therefore, if the operation upon plaintiff's wife was performed solely to prevent a future pregnancy, either because it might activate the arrested tuberculosis or cause another emotional disturbance, it clearly was not within the policy coverage. However, if one of the purposes proximately contributing to the decision to perform the operation was to eliminate a post-partum depression serious enough to be classified as a sickness, the operation was covered. The expression "confined to a . . . hospital by reason of . . . sickness," contained in the policy in

suit, connotes an active state of illness or a condition which itself is the cause of hospital confinement. *Reserve Life Insurance Company v. Lyle, supra.*

Certainly during the nine months of her fourth pregnancy, Mrs. Price had an illness connected with, but in addition to, her pregnancy. The evidence of Dr. Jones tended to show that following the birth of the child she improved but did not completely recover. He observed her for one month and came to the conclusion that she was headed for a post-partum psychosis if the tubal ligation was not performed.

A morbid condition of the mind, a deviation from its healthy and normal state, can be a disease or illness as well as a morbid condition of the body. Severe emotional depression, while not necessarily amounting to insanity, is akin to it. It is generally held that insanity is a sickness within the meaning of a health and accident policy. See 29A Am. Jur., *Insurance* § 1154 and 10 Couch on Insurance 2d § 41:802 where the cases are collected.

While there is evidence that a few weeks after the birth of her child Mrs. Price had made a normal recovery and was in good health again, discrepancies in the evidence are for the jury and not the court. *High v. R.R.*, 248 N.C. 414, 103 S.E. 2d 498. The evidence of the attending physician was sufficient to take the case to the jury.

The judgment of nonsuit is

Reversed.

DIEMAR & KIRK COMPANY v. SMART STYLES, INC.

(Filed 17 January 1964)

1. Bills and Notes § 1—

A check is a bill of exchange drawn on a bank and payable on demand, G.S. 25-192, and is an acknowledgment of indebtedness and an unconditional promise to pay if the drawee refuses payment on presentment.

2. Bills and Notes § 4—

A negotiable instrument is deemed *prima facie* to be supported by a valuable consideration and want of consideration is an affirmative defense which must be pleaded.

3. Bills and Notes § 17—

Where defendant admits the issuance of checks in stipulated amounts to plaintiff in payments on account, and that one check was returned for insufficient funds and the other returned after defendant had stopped pay-

ment, and defendant does not plead want of consideration, plaintiff is entitled to judgment on the pleadings, and the court correctly excludes evidence of want of consideration.

4. Bills and Notes § 10—

The drawer of a check has the right prior to acceptance by the bank to stop payment, but his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder.

5. Pleadings §§ 29, 30—

Allegations of the complaint admitted in the answer are not in issue, and when the answer admits all facts essential to plaintiff's cause of action and fails to set up any defense or new matter sufficient in law to avoid plaintiff's claim, judgment on the pleadings is proper.

APPEAL by defendant from judgment entered against it on the pleadings by *Walker, J.*, May 1963 Session of RANDOLPH.

The plaintiff, alleging that it is a Georgia corporation and the exclusive sales representative of the defendant manufacturer in fourteen states, including North Carolina, instituted this action to recover sales commissions allegedly due under defendant's agreement to pay plaintiff five percent of the gross price of all its merchandise sold by plaintiff. Only the following portions of the complaint are pertinent to this appeal:

"5. On or about March 20, 1961, the defendant tendered to the plaintiff, as payee, a check signed by its authorized representative, drawn on the First National Bank of Asheboro, North Carolina, in the amount of Nine Hundred Sixty-Six and 20/100 Dollars ($966.20), which amount represented payment on account to plaintiff under the aforementioned Sales Agreement. Subsequently, on March 27, 1961, payment on said check was refused, and the said check was returned to the plaintiff with a memorandum indicating that there were insufficient funds available to pay the said check in the aforesaid amount."

"6. On or about April 15, 1961, the defendant tendered to the plaintiff, as payee, a check, signed by its duly authorized representative, drawn on the First National Bank of Asheboro, North Carolina, in the amount of Eight Hundred and Twenty and No/100 Dollars ($820.00), which amount represented payment, on account, to the plaintiff under the aforesaid Sales Agreement. Subsequently, on April 24, 1961, payment was refused on the said check, and the said check was returned to the plaintiff accompanied by a memorandum noting that payment on said check had been stopped by the defendant."

"9. The defendant is justly indebted to the plaintiff in the amount of $1,934.84, comprised of the following: the check representing commissions, dated March 24, 1961, in the amount of $966.20, which was unpaid and returned due to insufficient funds; the check representing commissions, dated April 15, 1961, in the amount of $820.00, payment on which was stopped; . . . ."

In its answer defendant denied that plaintiff was a corporation organized under the laws of Georgia. It admitted, however, that plaintiff was engaged in the business of representing manufacturers and that it had agreed to pay plaintiff a five-percent commission on the gross sales price of all merchandise which it sold for defendant. The defendant answered paragraphs 5, 6, and 9 of the complaint as follows:

"5. The allegations contained in paragraph 5 of plaintiff's complaint are not denied.

"6. The allegations contained in paragraph 6 of plaintiff's complaint are not denied.

"9. The allegations contained in paragraph 9 of plaintiff's complaint are denied."

Defendant's prayer for relief is that the plaintiff should be taxed with the cost and recover nothing.

The trial judge ruled that the only issue raised by the pleadings was whether plaintiff was a corporation as alleged in the complaint. Plaintiff offered in evidence its certificate of incorporation duly certified by the Secretary of State of Georgia, paragraphs 5 and 6 of the complaint and answer, and the checks referred to therein. It then rested its case. The president of the defendant corporation was sworn as a witness for defendant and, if permitted by the court, would have testified that according to defendant's records it owed plaintiff nothing; that merchandise in the amount of $1,414.43, sold by the plaintiff had been returned to the defendant and those accounts were unpaid. This evidence was excluded upon plaintiff's objection.

The defendant tendered an issue of indebtedness which the judge declined to submit. The jury answered the issue with reference to plaintiff's incorporation in favor of the plaintiff. His Honor entered judgment for the plaintiff on the pleadings in the amount of $1,786.20 and the defendant appealed.

Miller and Beck for plaintiff appellee.
Ottway Burton for defendant appellant.

SHARP, J. The complaint alleges, and the answer admits, these facts: Defendant executed and delivered to the plaintiff the two checks upon which this suit is brought as payment on account. Both checks were duly presented to the drawee bank for payment. Both were returned unpaid—one because defendant had insufficient funds on deposit with which to pay it, and the other because defendant had stopped payment on it. Defendant's appeal raises this question: Do these specific admissions, followed only by a general denial in the answer that the defendant is indebted to the plaintiff, entitle plaintiff to a judgment on the pleadings for the amount of the two checks?

A check is an instrument by which a depositor seeks to withdraw funds from a bank. It is a bill of exchange drawn on a bank and payable upon demand. G.S. 25-192; *State v. Ivey*, 248 N.C. 316, 103 S.E. 2d 398. Ordinarily a check is given for a debt contracted or money borrowed and, in a commercial transaction as well as in law, it is equivalent to the drawer's promise to pay the payee or holder. An action may be brought on it as upon a promissory note payable on demand. *Camas Prairie State Bank v. Newman*, 15 Idaho 719, 99 Pac. 833, 21 L.R.A. (N.S.) 703, 128 Am. St. Rep. 81, 88; 11 Am. Jur. 2d, *Bills and Notes* § 591. As a practical matter, in business transactions, there is little difference between a check and a demand note. Both are acknowledgments of indebtedness and an unconditional promise to pay. *Smith v. Treuthart*, 223 N.Y.S. 481; 11 Am. Jur. 2d, *Bills and Notes* § 591; *Deal v. Atlantic Coast Line R. Co.*, 225 Ala. 533, 144 So. 81, 86 A.L.R. 455.

A check is a contract within itself. By the act of drawing and delivering it to the payee, the drawer commits himself to pay the amount of the check in the event the drawee refuses payment upon presentment. *Deal v. Atlantic Coast Line R. Co., supra; Permenter v. Bank of Green Cove Springs, Fla.*, 136 So. 2d 377; *Williams v. Lowe*, 62 Ind. App. 357, 113 N.E. 471. A negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration and not as a gift unless the circumstances indicate otherwise. G.S. 25-29; *Francis' Executor v. Francis, Ky.*, 280 S.W. 2d 192.

The drawer of a check has the right, at any time prior to acceptance by the bank, to stop its payment. *In re Will of Winborne*, 231 N.C. 463, 57 S.E. 2d 795; *Trust Co. v. Raynor*, 243 N.C. 417, 90 S.E. 2d 894. However, his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder. 10 C.J.S., *Bills and Notes* § 35. The situation becomes the same as if the check had been dishonored and notice thereof given to the drawer. *Flynn v. Currie*, 130 Me. 461, 157 A. 310; Annot., 14 A.L.R. 562.

The execution, delivery, presentment and nonpayment of the two checks in suit were not issuable facts. They were alleged in the complaint and admitted by the answer. *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210. The checks were deemed *prima facie* to have been issued for a valuable consideration—and, in addition, the answer admitted that they represented payment on account.

Failure of consideration was a defense available to the defendant if he desired to plead it. G.S. 25-33; *Mills v. Bonin,* 239 N.C. 498, 80 S.E. 2d 365. However, this is an affirmative defense and therefore must be specifically pleaded by setting out the applicable facts. *Godwin v. Cooper,* 227 N.C. 700, 41 S.E. 2d 734. Failure of consideration may not be shown under a general denial of indebtedness. 1 McIntosh, N. C. Practice and Procedure, § 1236(9); 11 C.J.S., *Bills and Notes* § 649(b).

Where new matter constituting a defense to a negotiable instrument is properly alleged in the answer, the plaintiff is not entitled to a judgment on the pleadings even though the answer admits the execution and nonpayment of the instrument. *Carroll v. Brown,* 228 N.C. 636, 46 S.E. 2d 715; *Stelling v. Trust Co.,* 213 N.C. 324, 197 S.E. 754. However, "(a)n answer is fatally deficient in substance and subject to a motion by the plaintiff for judgment on the pleadings, if it admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiff's claim." *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. Such is the situation in the instant case. It is controlled by *Godwin v. Cooper, supra.*

The judgment on the pleadings is

Affirmed.

MRS. PEARL WOODELL v. C. R. DAVIS AND WIFE, LILLIAN B. DAVIS.

(Filed 17 January 1964.)

1. Mortgages and Deeds of Trust §§ 19, 26—

Allegations that the purchaser of a note secured by a deed of trust promised not to foreclose so long as the interest was paid on the note and not to foreclose without giving the maker of the note personal notice so that she could refinance, *held* insufficient to allege a defense to foreclosure in the absence of allegation that such promises were supported by consideration, there being no contention that the notice required by statute was not given. G.S. 45-21.17.

2. Appeal and Error § 40—

Where the allegations of the complaint fail to state a cause of action the Supreme Court may take notice thereof *ex mero motu*, and judgment dismissing the action will not be disturbed even though defendants' demurrer may have been sustained for the wrong reason.

PARKER, J., dissents.

APPEAL by plaintiff from *Braswell, J.*, April 1963 Session of JOHNSTON.

Plaintiff denominates this an action for the wrongful foreclosure of a deed of trust. She sues the purchasers of the property who are the holder of the note and deed of trust and his wife. The case was heard on a motion to strike and a demurrer to the complaint.

In summary, the allegations remaining in the complaint after the judge ruled upon the motion to strike are: On October 7, 1957, plaintiff and her husband purchased a house and lot as tenants by the entireties in Bladen County from F. L. Poole. To secure the balance of the purchase price they executed a note and deed of trust to him in the amount of $2,370.21. On August 19, 1959, Poole transferred the note and deed of trust to the defendant C. R. Davis and thereafter plaintiff paid him various sums on both the principal and interest, the last payment having been made on January 6, 1962, leaving a balance of $1,510.00 then due. On March 31, 1962, without notifying plaintiff as he agreed to do, Davis called on the trustee to foreclose the deed of trust. The foreclosure was completed on May 21, 1962 and a deed was executed to the defendant C. R. Davis and his wife who had conspired to withhold from the plaintiff all notice of the foreclosure and thereby wrongfully and fraudulently obtained title to the property. On July 18, 1962, after plaintiff had discovered the sale, she called on defendants to reconvey the property to her upon payment in full of the indebtedness but they refused to do so. The fair market value of the property was $5,000.00 and she is entitled to recover the difference between its value and the amount due on the note or $3,490.00. Plaintiff also prayed for punitive damages.

Over plaintiff's objection and exception, paragraphs 6, 7, 8, 9, 10, 12, 13, and 14 of the complaint, or portions thereof, were stricken. Except when quoted, these stricken portions are summarized as follows: At the time defendant C. R. Davis acquired the plaintiff's note and deed of trust the defendants knew that plaintiff's husband "was an alcoholic and completely irresponsible with respect to the payment of debts." The plaintiff was gainfully employed and informed defendants "that she would continue to do the best she could in view of the condition

of her husband." After the assignment, C. R. Davis "contracted and agreed with the plaintiff that so long as she kept the interest paid on the aforesaid indebtedness he would not attempt to foreclose her house and lot, and that she and her children could stay in the home so long as the interest was paid, and that in any event he would give her ample notice of his intention to foreclose her property, so that she would have an opportunity to refinance said indebtedness with someone else." Pursuant to the "new arrangement entered into between the plaintiff and the said C. R. Davis," and relying upon it, she performed her part of the new contract. C. R. Davis "reaffirmed and acknowledged his contract and agreement with plaintiff" every time she made a payment. About the time of the last payment on January 6, 1962, plaintiff left her husband because of his excessive drinking and moved to Johnston County with her children. C. R. Davis "could have easily ascertained her whereabouts and her address in Clayton."

After allowing the motion to strike the above allegations, the judge sustained the defendants' demurrer *ore tenus* to the complaint for failure to state a cause of action. In response to his Honor's question, plaintiff announced that she did not desire to amend the complaint. He entered a judgment dismissing the action and plaintiff appealed.

Lyon and Lyon for plaintiff appellant.
Albert A. Corbett for defendant appellee.

SHARP, J. The motion to strike was properly allowed. The stricken paragraphs alleged the breach of an agreement to delay foreclosure as long as plaintiff paid the interest on the indebtedness and, in any event, not to foreclose without giving plaintiff sufficient notice so that she could refinance. However, plaintiff alleges no consideration for this promise. Therefore, it will not support a contract enforcible in law or sustain an action for damages for its breach. *Craig v. Price,* 210 N.C. 739, 188 S.E. 321, a case in which the plaintiff alleged an agreement similar to the one averred here, is decisive and supports his Honor's ruling.

A foreclosure made under a power of sale in the instrument must be made in strict conformity with it and with the pertinent statutory provisions which are by operation of law included in all mortgages and deeds of trust. *Foust v. Loan Asso.,* 233 N.C. 35, 62 S.E. 2d 521; *Jenkins v. Griffin,* 175 N.C. 184, 95 S.E. 166; 37 Am. Jur., *Mortgages* §§ 663, 664. The plaintiff has alleged no failure by the defendant to observe either the statutory requirements or the provisions of the deed of trust. If there was any failure to advertise properly, the bur-

den was on the plaintiff to allege it. *Jenkins v. Griffin, supra; Cawfield v. Owens,* 129 N.C. 286, 40 S.E. 62. She merely alleges that defendant's failure to give her notice of the sale after he had promised to do so constituted a breach of contract and was fraudulent.

In the absence of a valid contract so to do, there is no requirement that a creditor shall give personal notice of a foreclosure by sale to a debtor who is in default. Plaintiff has alleged no valid contract nor has she alleged any facts which would taint the foreclosure with fraud. The mortgagor is always entitled to notice of sale under foreclosure, but notice is given when the advertisement required by the statute (G.S. 45-21.17) is made. 1 Glenn, *Mortgages* § 110. This is true even though "the principal object in publishing notice of sale of mortgaged property in the exercise of a power of sale is not so much to notify the grantor or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained; . . . ." 59 C.J.S., *Mortgages* § 563.

In *Biggs v. Oxendine,* 207 N.C. 601, 603, 178 S.E. 216, we find the following statement: "While it is proper and desirable for a trustee or a mortgagee to give notice of sale to the mortgagor, nevertheless such notice is not required." In sustaining a judgment of nonsuit upon this and other grounds in *Craig v. Price, supra,* the Court said, "Plaintiff complains that he did not receive personal notification of the foreclosure sale, but there was no evidence that the provisions of the deed of trust or of the statute, with respect to advertisement, were not fully complied with." In *Carter v. Slocomb,* 122 N.C. 475, 29 S.E. 720, it was held that a sale of land made by a mortgagee under the provision of sale in the mortgage, after the death of the mortgagor and without notice to his heirs, conveyed a good title. The Court said, "The mortgagor cannot demand any notice of intention to sell under the power, and the heir at law stands in the place of his ancestor."

It is noted from the stricken portions of the complaint that the plaintiff vacated the mortgaged property about January 6, 1962 and from then until July 1962 she was out of touch with the defendants leaving it up to them to discover her whereabouts as best they could.

His Honor sustained the demurrer *ore tenus* on the grounds that there was a defect of parties plaintiff. The property was originally purchased by plaintiff and her husband as tenants by the entireties and the husband was not a party plaintiff. However, at this stage of the proceedings, plaintiff's allegation that she is now the owner of the equity of redemption in the property eliminated the necessity for his presence in the suit. The demurrer *ore tenus* was properly sustained albeit for the wrong reason. Even if the husband were a party plaintiff

the complaint would still state no cause of action. When this is the situation the court may raise the question *ex mero motu*. *Skinner v. Transformadora, S. A.*, 252 N.C. 320, 113 S.E. 2d 717; *Lamm v. Crumpler*, 233 N.C. 717, 65 S.E. 2d 336.

The judgment of the lower court is

Affirmed.

PARKER, J. dissents.

JOHN N. HOWDERSHELT v. ANNETTA LOUISE HANDY.

(Filed 17 January 1964.)

Automobiles §§ 13, 41j—

While the mere skidding of a motor vehicle does not imply negligence, where there is evidence that the driver was passing a preceding car at almost the maximum lawful speed on wet pavement and that she thought she saw a vehicle approaching from the opposite direction move out of line, causing her to cut more quickly and at a sharper angle to her right, with positive evidence that no vehicle was approaching out of line, *is held* sufficient to be submitted to the jury as to whether the skidding of the vehicle and subsequent injuries to plaintiff passenger were caused by negligence.

APPEAL by defendant from *McKinnon, J.*, February, 1963 Regular Civil Session, ALAMANCE Superior Court.

The plaintiff, a guest passenger in defendant's Austin-Healy automobile, instituted this civil action to recover damages for personal injury sustained as a result of an automobile accident allegedly caused by defendant's negligence. The accident occurred about 2:30 in the afternoon of August 31, 1961, on Highway No. 29, a few miles north of Greensboro. The hard surface of the highway was wet from a slight drizzle. However, for a considerable distance both north and south of the point of the accident the road was straight and reasonably level.

The adverse examination of the defendant was placed in evidence by the plaintiff. She testified, (speed) "I would say about 52 miles per hour, . . . I glanced up and way ahead of me, it happened like this (indicates) I thought I saw somebody pull out and back in—I had passed the vehicle . . . and I was back in my lane of travel and I glanced at my register to see my speed and I glanced up, back on the road, and I thought I saw someone pull out of the lane of travel and

that is when my car skidded and I don't remember anything else. When I thought I saw someone pull out of the lane of travel it was approaching me. At that time I do not know what I did to my car. I do not recall. No sir, I do not know whether at that time I turned the car or put on brakes or what I did. All I know is that the car began to skid and then it overturned. . . . I told Officer Miller that it had started to rain and I told him truthfully that I had two beers as I have told you. I told him that I did not think it materially affected my driving. Yes I had a handbag in the car with me at the time of the accident. It was a large handbag. Yes, there was a bottle of gin or some clear colored alcoholic beverage in that handbag. I don't remember whether it was gin, vodka, or what. I think it was vodka. I had not had anything to drink out of that bottle that morning. Yes, I think the seal had been broken on the bottle."

The defendant first told Officer Miller that Howdershelt was driving. Later she told him that she was driving at the time of the accident. "As to how she told me the accident happened, she said she was passing this automobile and as she was pulling back into her lane of traffic another vehicle started to pull out of some oncoming traffic and she didn't know exactly what she did do, she didn't know whether she put on brakes or drifted to the right or what she did, but she left the road and turned over, she does not remember what action she took to avoid this as she described it, the oncoming car."

According to the positive evidence of plaintiff's eyewitnesses to the accident, the defendant was not confronted with any approaching vehicle pulling out of its line of travel.

The court submitted issues of negligence and damages which the jury answered in favor of the plaintiff. From the judgment in accordance with the verdict, the defendant appealed.

McLendon, Brim, Holderness & Brooks by L. P. McLendon, Jr., for plaintiff appellee.

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

HIGGINS, J. The defendant, by Assignment of Error No. 1, presents the question whether the plaintiff's evidence was sufficient to survive the motion to dismiss. The defendant contends the evidence shows she was observing the speed limit; that in attempting to pass the way was clear for her to do so; but in moving the vehicle back to her side of the road after passing, the Austin-Healy skidded on the wet road surface; that the evidence is insufficient to permit an inference of driver negligence. She contends the skidding of the vehicle resulted from the con-

dition of the road and not from any fault on her part; hence not enough to go to the jury. *Fox v. Hollar*, 257 N.C. 65, 125 S.E. 2d 334; *Wise v. Lodge*, 247 N.C. 250, 100 S.E. 2d 677; *Clodfelter v. Wells*, 212 N.C. 823, 195 S.E. 11.

The evidence disclosed the road was wet and slippery. The vehicle skidded and wrecked. The plaintiff was injured. In addition, the evidence permits these inferences: The defendant had been drinking—beer by her own admission. In passing the vehicle in front, and with knowledge of the slippery condition of the road, nevertheless she drove near the maximum lawful speed. She thought she saw an approaching vehicle move out of line, causing her to cut more quickly and at a sharper angle to her right. On the wet road surface the vehicle skidded and wrecked, causing the injury. Evidence is positive that no vehicle approached out of line. The acceleration of the vehicle awakened the plaintiff who was asleep beside the driver. Actually, therefore, more appears than a skidding vehicle. The evidence was sufficient to go to the jury that driver negligence was a proximate cause of the accident and injury.

The evidence in this case falls in the category considered in *Durham v. Trucking Co.*, 247 N.C. 204, 100 S.E. 2d 348. "While the mere skidding of a motor vehicle does not imply negligence (*Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406) nevertheless, skidding may be caused or accompanied by negligence on which liability may be predicated. Accordingly, skidding may form the basis of a recovery where it results from some fault of the operator amounting to negligence on his part." (citing many cases).

Defendant's Assignment of Error No. 1 is not sustained.

We have examined the other assignments relating to the admissibility of evidence and to the judge's charge. The case appears to have been tried in accord with the authoritative cases decided by this Court. The other assignments likewise are not sustained by the record.

No error.

JAMES C. GREENE COMPANY, A NORTH CAROLINA CORPORATION v. L. E. KELLEY, JR.

(Filed 17 January 1964.)

1. Injunctions § 14—

Where injunction is the sole relief sought and plaintiff's evidence at the final hearing fails to make out a cause of action for the relief, dismissal of the action is proper.

2. Contracts § 7—

A contract not to engage in competitive employment with the employer after termination of the employment ordinarily must be in writing, be supported by a valid consideration, and be reasonable as to terms, time, and territory.

3. Same—

Where plaintiff's evidence establishes that defendant had been working at the same employment for more than a year when defendant signed the contract containing a covenant restricting activities by defendant in competition with plaintiff after the termination of the employment, and plaintiff's evidence fails to show that any increase in defendant's salary was related to the covenant.

APPEAL by plaintiff from *Williams, J.*, April, 1963 Civil Session, WAKE Superior Court.

The plaintiff instituted this civil action to restrain the defendant from violating his covenant not to engage in the business of adjusting insurance claims and losses in competition with plaintiff within 75 miles of Morehead City for a term of four years after leaving plaintiff's employment.

The allegations and proof disclose the parties entered into a written contract on December 11, 1953, and another in substitution thereof on September 27, 1954, in each of which the defendant agreed not to engage in competition with plaintiff within 75 miles of Morehead City for a period of four years from the termination of his employment. The contract provided that either party might terminate upon 30 days notice. The allegations and proof disclose the defendant terminated the contract and immediately thereafter engaged in the adjustment of insurance claims and losses in competition with the plaintiff in Morehead City.

The defendant, by way of defense, alleged that he had been employed by the plaintiff for more than one year before the first of the written contracts was executed, and, further, that the contract was without consideration. He further contended the contract was in restraint of trade, too extensive as to time, territory, and unreasonably deprived him of his opportunity to earn support for his family, and was void for these reasons.

On the plaintiff's application, the court entered an order restraining the defendant from competing with the plaintiff in violation of the terms of the written contract, and continued the restraint until the final hearing. Upon that hearing Judge Williams entered judgment of nonsuit, from which the plaintiff appealed.

Smith, Leach, Anderson & Dorsett, for plaintiff appellant.

Lake, Boyce and Lake by Eugene Boyce, Harvey Hamilton, Jr., Luther Hamilton, Sr., for defendant appellee.

HIGGINS, J. The plaintiff sought to restrain the defendant from engaging in the business of adjusting insurance claims and losses within 75 miles of Morehead City for a period of four years after the termination of his employment. No other relief was sought. If the plaintiff's proof fails to entitle it to the relief sought, nonsuit was proper. Failure to make out a case requires dismissal by the court *Yandell v. American Legion,* 256 N.C. 691, 124 S.E. 2d 885.

The defendant admitted he signed a paper writing containing a provision that he would not engage in competition in the manner alleged. He admitted he had not observed these restrictions. The admissions made out a *prima facie* case. Hence, nonsuit would not be proper unless the plaintiff's evidence, as a matter of law, made out a complete defense.

The courts generally have held that restrictive covenants not to engage in competitive employment are in partial restraint of trade, and hence to be enforceable they must be (1) in writing, (2) supported by a valid consideration, and (3) reasonable as to terms, time, and territory. Failure in either requirement is fatal. *Exterminating Co. v. Griffin,* 258 N.C. 179, 128 S.E. 2d 139; *Asheville Associates v. Miller,* 255 N.C. 400, 121 S.E. 2d 593; *Welcome Wagon v. Pender,* 255 N.C. 244, 120 S.E. 2d 739; *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431; *Thompson v. Turner,* 245 N.C. 478, 96 S.E. 2d 263; *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910; *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352; *Kadis v. Britt,* 224 N.C. 154 29 S.E. 2d 543, 152 A.L.R. 405.

It is generally agreed that mutual promises of employer and employee furnish valuable considerations each to the other for the contract. However, when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. *Kadis v. Britt, supra.* Therefore, the employer could not call for a covenant not to compete without compensating for it.

The defendant, as a further defense, alleged he had been working for the plaintiff, and for its predecessor who assigned the contract to the plaintiff, for approximately one year, and that the written contract dated December 11, 1953, did not change his employment status; that he received no consideration whatever for the added covenant not to compete.

The plaintiff, by a reply, entered a general denial. Both the original and the succeeding contracts, however, contained this provision: "This Contract, when executed by both Employer and Employee, supersedes all previous written and oral agreements between the parties hereto." The plaintiff's witness Fornes testified: ". . . I went back to New Bern, North Carolina, with James C. Greene Company about February 1, 1953. . . . Mr. Kelley was working in the New Bern office. He had been working there about three months." So, according to the plaintiff's evidence, the defendant had been working at the same employment for more than one year before the first written contract was executed. While the defendant from time to time received increases in salary, the evidence fails to relate any of them to the covenant not to compete. The new contract with the restrictive covenant was without consideration—hence invalid. Upon the plaintiff's own evidence, Judge Williams was justified in entering the judgment of nonsuit.

Affirmed.

PHILIP E. LUCAS, PUBLIC ADMINISTRATOR OF THE ESTATE OF ABRAHAM FELDER v. JESSIE DINKINS FELDER, WIDOW; THOMAS FELDER, AND WIFE, EMMA FELDER; ANDREW CLESE FELDER AND WIFE, DOROTHY MAE FELDER; PEARL PERSTEAL FELDER BUTLER AND HUSBAND, KING BUTLER; JESSIE MAE FELDER HART AND HUSBAND, GEORGE HART; AND O'NEIL FELDER, SINGLE.

(Filed 17 January 1964.)

1. Executors and Administrators § 17; Appeal and Error § 3—

Where the widow elects to take a life estate in the real estate as permitted by G.S. 29-30 and admits that a sale of the real estate is necessary to pay debts of the estate and asks that the cash value of her life estate be computed and paid from the proceeds of sale, the appeal of an heir on the ground that the widow had forfeited any interest in the estate is premature, the rights of the parties in the distribution of the proceeds of the sale not being adjudicated by the order of the sale. G.S. 1-271.

2. Judgments § 29—

Persons who are not properly before the court are not bound by its orders and such orders are void as to them.

APPEAL by defendants Andrew Clese Felder and wife, from *Riddle, S. J.*, April 22, 1963 Session of FORSYTH.

Oliver T. Denning for respondent appellants Andrew Clese Felder and Dorothy Mae Felder.

White and Crumpler by Leslie G. Frye, Harrell Powell, Jr., and Fred G. Crumpler, Jr., for defendant appellee Jessie Dinkins Felder.

RODMAN, J. Plaintiff, administrator of the estate of Abraham Felder, filed his petition seeking to sell realty for the purpose of making assets to pay debts of his intestate. The petition lists personal assets worth slightly less than $700; specific debts in excess of $2500, and a balance owing on the widow's allotted year's support of $1000, and real estate owned by decedent estimated to be worth $10,000.

It is alleged in the petition that Jessie Dinkins Felder, widow of the intestate, has elected to take a life estate in realty as permitted by G.S. 29-30; and the heirs of the intestate are his five children: Thomas Felder, Andrew Felder, Pearl Butler, Jessie Hart, and O'Neil Felder.

Jessie Dinkins Felder answered. She admitted a sale was necessary and her election to take a life estate as permitted by G.S. 29-30. She asked that the cash value of her life estate be computed and paid to her from the proceeds of sale.

Defendant Andrew and wife denied, for want of information, the allegations with respect to the value of the personalty and the amount of the debts. They admitted the heirs were the five children named in the petition. They alleged Jessie Dinkins Felder had forfeited any interest in the estate of intestate by (a) her abandonment of deceased in 1931 and (b) an absolute divorce obtained by deceased in 1946.

The clerk heard the matter on the answers. He found that answering defendants admitted that the personal assets were insufficient to pay the debts. He found as a fact that Jessie Dinkins Felder had sought and been allotted her year's support and that defendant Andrew had participated in that proceeding, but had abandoned his appeal from the order allotting support. The clerk did not, however, make any adjudication of the rights of the parties other than to order a sale of realty. He directed the commissioner to report any sale made for confirmation.

On appeal the clerk's order was affirmed by the judge.

Not until there has been an adjudication of the rights asserted by Jessie and denied by Andrew can either appeal with respect to those rights. Neither, in view of the admissions made, is a party aggrieved. The appeal is premature. G.S. 1-271; *Roberts v. Barlowe,* 260 N.C. 239; *Ingle v. McCurry,* 243 N.C. 65, 89 S.E. 2d 745; *Smith v. Matthews,* 203 N.C. 218, 165 S.E. 350.

It must not be inferred that we give our approval to the order of sale because we dismiss the appeal. The order is proper as to all who were served with process or who voluntarily entered an appearance. It appears from the petition that intestate left five children entitled to participate in the distribution of the estate. Four of the five are nonresidents. The record does not show service of process on these four or that they have entered an appearance. It may be the parties to the present appeal did not deem it necessary to include in the record sent here those portions of the record of the Superior Court showing how remaining defendants have become subject to the court's orders. Unless they are properly before the court the order of sale would be void as to them. *Card v. Finch,* 142 N.C. 140; *Harrison v. Harrison,* 106 N.C. 282. The Superior Court is directed to set aside the order of sale unless it has in fact obtained jurisdiction of all of the parties named as defendants in the petition.

Appeal dismissed.

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 17 January 1964.)

1. Appeal and Error § 60—

The decision on appeal becomes the law of the case.

2. Partition § 9—

The amount of commission allowed by the Superior Court to the commissioner selling lands for partition is governed by G.S. 1-408 and rests in the discretion of the court, and the court's order will not be disturbed in the absence of a showing of abuse of discretion.

3. Appeal and Error § 46—

The action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof.

APPEAL by defendants from *Gambill, J.,* regular June 10, 1963, Session, DAVIDSON Superior Court.

This proceeding was here at the Spring Term, 1963. The Court remanded with direction that the Superior Court Judge fix the amount

to be paid to M. E. Gilliam, as Commissioner, for his services in the proceeding. In a *de novo* hearing, Judge Gambill found $5,500.00 to be reasonable compensation and ordered payment from the proceeds of the sale. The defendants Kearns and Green excepted and appealed.

W. H. Steed for defendant appellants.

E. W. Hooper, Fred H. Morrison, Jr., for M. E. Gilliam, Commissioner, appellee.

HIGGINS, J. The facts are fully set forth by the Chief Justice. See 259 N.C. 367. In the first instance the Clerk Superior Court had awarded the Commissioner $7,000.00 for his services. On appeal, the Superior Court Judge concluded as a matter of law that commissions were governed by G.S. 28-170, could not exceed five per cent, and reduced the allowance to $3,500.00. The Commissioner appealed.

This Court held that G.S. 1-408—not G.S. 28-170—controlled, and remanded the proceeding for trial *de novo* before the judge holding the Superior Court of Davidson County. That decision is the law of the case. When Judge Gambill, on the *de novo* hearing, in his discretion, fixed $5,500.00 as just and reasonable compensation, his decision can only be set aside for abuse of discretion. "The rule is universal that the action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof; or, as it is frequently stated, the appellate court will not review the discretion of the trial court. This rule, or rather this statement of the rule, does not give the trial judge an entirely free hand in what might be termed discretionary matters. The exercise of judicial discretion which may not be reviewed implies conscientious judgment, not arbitrary action, takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge toward a just result." 3 Am. Jur., Appeal and Error, § 959.

The judgment challenged by this appeal is

Affirmed.

STATE v. SAM WILLIAMS.

(Filed 17 January 1964.)

1. Larceny §§ 1, 10—

Larceny from the person is a felony, G.S. 14-72, and the punishment therefor can be imprisonment for ten years. G.S. 14-70.

2. Criminal Law § 131—

Where defendant seeks and obtains a new trial he takes the risk of conviction of the crime charged in the bill of indictment even though the original conviction may have been for a less offense embraced therein, and the fact that different judges impose different punishment does not invalidate the sentence imposed at a second trial.

3. Indictment and Warrant § 17—

The fact that the indictment charges that the crime was committed on one day and the evidence sets the date five days thereafter ordinarily is not a material variance.

4. Criminal Law § 131—

The court is not compelled to give defendant credit for the period defendant spent in prison before a valid trial was had.

APPEAL by defendant from *Campbell, J.*, July 29, 1963 Regular Schedule "A" Criminal Session of MECKLENBURG.

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

Plumides & Plumides by Michael G. Plumides for defendant appellant.

PER CURIAM. Counsel for appellant and the solicitor entered into a stipulation with respect to the crime with which defendant was charged, the crime of which he was convicted, and the dates on which the trials were had. This stipulation was not only insufficient to determine whether defendant had been denied constitutional rights but was in direct conflict with the record proper as certified to this Court.

Because of manifest inaccuracies in the stipulation, we ordered the clerk of the Superior Court of Mecklenburg County to certify to this Court a complete transcript of the minutes and records of his court as they relate to the trials of defendant on the charge of larceny in December 1962. The clerk has complied with our order.

The record as originally certified, supplemented as it now is, shows these facts: In February 1963 the grand jury returned a true bill charging defendant with the larceny of property of a value in excess of $200 from the person of Genevieve Wilkie; defendant was tried on that bill on 19 February 1963. The jury found defendant "guilty as charged."

Based on that verdict the court imposed a two-year prison sentence. Defendant gave notice of appeal to this Court. The appeal was dismissed at the May Term 1963 because of defendant's failure to perfect his appeal.

On 30 May 1963, acting under Art. 22, c. 15, General Statutes, defendant filed a petition seeking a new trial because of a denial of his constitutional rights in that he had not been afforded the advice of counsel. He was given a hearing on 8 July 1963. The court found that he was not represented or advised that he was entitled to counsel. It ordered a new trial and directed that he have the benefit of counsel.

He was, at the July 29, 1963 Session, again put on trial on the bill of indictment returned in February 1963. He was again found "Guilty as charged." A prison sentence of ten years was imposed.

The record refutes the contention of counsel that defendant was first convicted of stealing property valued at less than $200. He was in each instance convicted of the crime of larceny from the person. That is a felony. G.S. 14-72. For that crime the guilty person can be imprisoned for ten years. G.S. 14-70. *S. v. Stevens*, 252 N.C. 331, 113 S.E. 2d 577.

Even if defendant had in the first instance been convicted of a lesser degree of the crime charged, when he sought and obtained a new trial he took the risk of conviction of the crime charged in the bill. *S. v. Correll*, 229 N.C. 640, 50 S.E. 2d 717. The mere fact that different judges imposed different punishment does not invalidate the sentence imposed at the second trial.

The bill of indictment charges the crime was committed on 12 December 1962. The evidence fixes the date as 17 December 1962. The variance is immaterial. *S. v. Baxley*, 223 N.C. 210, 25 S.E. 2d 621.

Defendant's contention that the judge was compelled to allow him credit for the period spent in prison before a valid trial was had is also without merit.

Affirmed.

RUTH HELEN COE v. WINFRED T. COE.

(Filed 17 January 1964.)

1. Pleadings § 2—

The relief to which plaintiff is entitled is determined by the facts alleged and established, and plaintiff may not be afforded relief totally inconsistent with the facts alleged in his complaint.

2. Divorce and Alimony § 18—

Where plaintiff's amended complaint in an action for alimony without divorce alleges that the prior separation agreement between the parties was void, first because obtained by fraud and second because defendant

had not made the payments as therein stipulated, it is error for the court, upon the hearing of plaintiff's application for counsel fees and subsistence *pendente lite*, to decree that defendant pay the sums due under the separation agreement, since the court may not award plaintiff what amounts to specific performance of the separation agreement which plaintiff has alleged was void.

APPEAL by defendant from *Shaw, J.*, in Chambers in GUILFORD (Greensboro Division) on 5 April 1963.

This is an action for alimony without divorce. Plaintiff also asks for counsel fees and subsistence *pendente lite*. She alleges in her complaint facts which, if established, would support an award of alimony.

Defendant by answer admitted the alleged marriage and birth of a child. He denied the remaining allegations necessary for an award of alimony. As an additional defense he alleged a separation of the parties by mutual consent; an agreement terminating his obligation to support his wife; and the performance of his obligations under the separation agreement.

The agreement, in addition to fixing the rights of the parties with respect to specific pieces of property, contained a provision for monthly payments in specified amounts to plaintiff for her support and maintenance "until such time as the party of the second part (plaintiff) shall remarry or die and, then and in either event, said payments shall cease and terminate."

Plaintiff, by leave of court, was, after the filing of the answer, permitted to file an amended complaint. She there alleged: The separation agreement was procured by false and fraudulent representations of defendant that he would make the monthly payments specified in the contract for the support of plaintiff and the child of the marriage, knowing when the contract was executed that he had no intention of complying with the contract; the contract was void because of defendant's false and fraudulent representations relied on by plaintiff and also because of defendant's failure to perform his obligation under the contract.

On plaintiff's motion for subsistence *pendente lite* and for counsel fees, the court found: The parties executed the agreement referred to in the pleadings; it was not unjust or unreasonable to plaintiff; the amount which the contract obligated defendant to pay was, to the date of the hearing, $2900; defendant had paid $2090, leaving a balance owing of $810.

On his findings the court adjudged that defendant "pay to the plaintiff, Ruth Helen Coe, the sum of $810.00 without prejudice to the rights of either party under the Deed of Separation; that commenc-

ing as of April 10, 1963, he pay into the Office of the Domestic Relations Court of Guilford County the sum of $250 each month as required by paragraphs 2 and 3 of the Deed of Separation. Said sum when so paid to be paid by the Clerk of said Court over to Ruth Helen Coe for the support of herself and Melissa Francine Coe." The court declined at that time to make any award for counsel fees but retained the cause for such other orders as might be appropriate.

Defendant excepted and appealed.

Douglas, Ravenel, Josey & Hardy by C. Kitchin Josey and G. S. Crihfield for plaintiff appellee.

Cahoon, Egerton & Alspaugh by James B. Rivenbark for defendant appellant.

PER CURIAM. It is manifest that the court here in an action for alimony has not, on plaintiff's motion for subsistence, determined the amount reasonably necessary for that purpose. On the contrary, the court decrees specific performance of a contract which plaintiff alleges is void. The relief to which a plaintiff may be entitled is determined by the facts alleged and established. A plaintiff may not obtain a decree affording relief totally inconsistent with the facts alleged. The allegations that defendant had failed to make the monthly payments for the support of his wife and child would support an action by her for the amounts which defendant had promised but failed to pay for her support. (Defendant's obligation to provide support for his minor child is not here involved.)

Here plaintiff does not seek performance of the contract; she alleges the contract which defendant interposes as a defense is void for two reasons: first, because it was obtained by false and fraudulent representations relied on by her, and, second, because of defendant's failure to make the monthly payments for her support as there promised. She seeks not to enforce but to disregard the contract. She cannot in this action obtain what in effect is a decree for specific performance of an alleged void contract.

Reversed.

ANNE McKOY PARKER v. WILLIAM MARVIN PARKER.

(Filed 17 January 1964.)

1. Divorce and Alimony § 18—

It is error for the court upon the hearing of the wife's application for alimony *pendente lite* to confine the hearing to the respective earnings of

the parties and refuse to hear the husband's affidavit or evidence in support of his contentions that he had not abandoned his wife but had been forced to leave home because the wife's conduct made it impossible for him to live with her, since a wife who has abandoned her husband without justification has no right to alimony. G.S. 50-16.

APPEAL by the defendant from *Phillips, J.*, May 27, 1963 Session of WAKE.

The plaintiff wife, alleging that defendant had wilfully abandoned her and the minor child of their marriage, instituted this action under G.S. 50-16 to recover a reasonable subsistence and counsel fees. She alleged, *inter alia,* that defendant had purposely relinquished employment by a chemical company at an annual salary of ten thousand dollars to operate a bonded warehouse for his mother at reduced earnings in order to evade his marital responsibilities. Answering, the defendant denied all material allegations of the complaint except the marriage and birth of the child. He alleged that he had been forced to leave home because plaintiff's conduct made it impossible for him to live with her. He requested the court to determine a reasonable amount for the support of the child only and to award him appropriate custodial and visitation rights.

Upon the hearing on plaintiff's application for alimony *pendente lite,* she offered in evidence seven affidavits, including her own, and testified in person. On direct examination, she stated that defendant had moved out of the home without any excuse on April 5, 1963, and had since contributed only twenty-four dollars a week for the combined support of his wife and child.

After a few preliminary questions on his cross-examination of the plaintiff, the court interrupted defendant's attorney with the pronouncement, "This hearing will be limited only to evidence of the earnings and income of the parties." The defendant objected; he was overruled, and his exception is brought forward on this appeal as assignment of error No. 3. Thereupon, plaintiff testified that her gross income for a forty-hour week was seventy-eight dollars. The defendant testified that his gross monthly salary was four hundred dollars and that his employer owed him more than one thousand dollars for unpaid travel expenses.

The judge found that the defendant had abandoned his wife and child without providing them with adequate support according to his means and capacity. He awarded plaintiff the custody of the minor child and ordered that defendant pay two hundred and fifty dollars a month for their support. He also ordered the defendant to pay plaintiff's counsel the sum of two hundred dollars. The defendant,

contending that the award was excessive considering the respective earnings of the parties and that he had been denied a hearing on the plaintiff's right to alimony, appealed from the order.

George M. Anderson for plaintiff appellee.
Emanuel & Emanuel for defendant appellant.

PER CURIAM. Defendant's assignment of error No. 3 must be sustained. G.S. 50-16 does not authorize the judge, in passing on a motion for alimony *pendente lite,* to award a wife subsistence and counsel fees merely because she and her husband have separated. A wife who has abandoned her husband without just cause or who, by her wrongful conduct has forced him to leave home, has no right to alimony. *Reece v. Reece,* 232 N.C. 95, 59 S.E. 2d 363. The instant case is controlled by *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283, in which *Denny, J.,* (now C. J.) said:

> ". . . . (I)t is expressly provided in G.S. 50-15, 'That no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony *pendente lite* under this or section 50-16, whether in or out of term, it shall be permissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint.'
>
> "Consequently, in passing on such motion the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. (Citations omitted). And where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, the exception thereto will be sustained. (Citation omitted)."

Upon another hearing, when the evidence of both parties has been heard and considered, should the judge conclude that the plaintiff is entitled to alimony *pendente lite* and that the defendant is deliberately refusing to exercise his capacity to earn, specific findings with reference to this situation will be in order. *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912.

The defendant is entitled to a rehearing on the motion and it is so ordered.

Error and remanded.

CONFERENCE *v.* MILES.

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 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 GOODWIN, CLYDE POWELL, ALL DEFENDANTS PURPORTING TO BE MEMBERS OF THE BOARDS OF DEACONS OF THE EDGEMONT ORIGINAL 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 RONALD CREECH.

(Filed 17 January 1964.)

APPEAL by plaintiffs from *Latham, S. J.*, August 1963 Special Civil Session of DURHAM.

Arthur Vann and R. Roy Mitchell, Jr., for plaintiffs.

Bryant, Lipton, Bryant & Battle and Lake, Boyce and Lake for defendants.

PER CURIAM. We have heard appeals in this case, and related cases, on two prior occasions—at the Fall Term 1961, and the Fall Term 1962. *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619; *Conference v. Miles,* 259 N.C. 1, 129 S.E. 2d 600. These prior opinions set out the pleadings and the law applicable to the matters in controversy. The latter opinion (filed 6 March 1963) summarizes the evidence adduced at the trial in Superior Court held in March 1962. That opinion is the law of the case. We ordered a new trial for reasons set out in the opinion.

There was a retrial in August 1963. From this the present appeal arises. This trial was begun on 5 August and terminated on 22 August.

Plaintiffs and defendants introduced voluminous evidence. Defendants moved for nonsuit at the end of plaintiffs' evidence and again at the close of all of the evidence. The motions were overruled. The court charged the jury and submitted the case to them upon proper issues. After the jury had deliberated about two hours, the judge withdrew the case from the jury, entered a judgment of nonsuit and therein dismissed the action and made other decrees bearing upon the matters in controversy. In allowing the motion for nonsuit and entering the judgment, the court fell into error. The evidence, considered in the light most favorable to plaintiffs, makes out a *prima facie* case for plaintiffs on all material issues of fact. No purpose can be served by a review of the evidence here.

The ruling of the court on the motion to nonsuit is reversed and the judgment below will be vacated.

Reversed.

MRS. FRANK L. HALTIWANGER v. CHARLOTTE AMUSEMENT COMPANY T/A CAROLINA THEATRE.

(Filed 17 January 1964.)

APPEAL by plaintiff from *MacRae, S. J.*, 15 April 1963 Civil "B" Session of MECKLENBURG.

Civil action by plaintiff, a paying patron of defendant's theatre, to recover damages for personal injuries sustained by her when she fell in descending a stairway from the second floor of the theatre where the rest room was. She alleges that her fall and injuries were proximately caused by defendant's negligence in having the stairway inadequately lighted, in removing the carpet from the steps, and leaving a raised wooden strip on the front edge of each step, and in maintaining a fragile, inadequate, and unstable railing along the outer edge of the stairs.

Each party offered evidence in support of the allegations in her or its pleading.

The trial court submitted to the jury the customary issues in such cases of negligence, contributory negligence, and damages. The jury answered the first issue, as to whether plaintiff was injured by the negligence of defendant as alleged in the complaint, No.

From a judgment that plaintiff recover nothing from defendant and taxing her with the costs, she appeals.

Barnes & Olive by W. Faison Barnes for plaintiff appellant.

Helms, Mulliss, McMillan & Johnston by E. Osborne Ayscue, Jr., for defendant appellee.

PER CURIAM. Plaintiff's sole assignment of error brought forward and set out in her brief is the failure of the court to comply with the provisions of G.S. 1-180. The facts are not complicated. We have examined the charge in its entirety and sufficient prejudicial error has not been made to appear therein to justify a new trial.

The verdict and judgment below will be upheld.

No error.

STATE OF NORTH CAROLINA v. DAVE LOUIS GOLDBERG AND STEVE LEKOMETROS.

(Filed 31 January 1964.)

1. Indictment and Warrant § 4; Constitutional Law § 28— Court will not inquire into extent of incompetent evidence before grand jury.

The mere fact that the sole witness before the grand jury was an agent of the State Bureau of Investigation and that the agent was not called as a witness upon the trial does not disclose that all of the testimony of the agent was incompetent as hearsay, notwithstanding the agent never talked with the defendants on trial for conspiracy, since the agent might have procured competent testimony in conversations with other of the conspirators and the State might have elected not to have him testify so as to protect his methods or sources of procuring evidence, or for other reasons, and therefore motion to quash the indictment on the ground that the only evidence before the grand jury was incompetent is properly denied, since the court will not inquire into the extent of incompetent evidence before the grand jury and there being no contention that the agent was personally disqualified as a witness.

2. Bill of Discovery § 1—

There is no common law right of discovery in criminal prosecutions.

3. Same; Constitutional Law § 30—

Where there is no contention that anything in the files of the State Bureau of Investigation was admitted in evidence and the record shows

that no member of the Bureau testified during the trial, defendants' contention that they were entitled to an inspection of the files of the Bureau in regard to its investigation of the case is untenable, G.S. 114-15, and denial of their petition for such inspection does not violate any of their rights under Art. I, §§ 11, 17 of the Constitution of North Carolina, or under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the Federal Constitution.

4. Bribery § 3; Athletic Contests—

In this prosecution of defendants under G.S. 14-373 on eight indictments containing twenty-nine counts of conspiracy to bribe and bribery of players on a college varsity basketball team, the evidence *is held* sufficient to sustain conviction on all but one count under one indictment as to one defendant and as to all but five counts in another indictment as to the other defendant, and therefore conviction on all other counts is sustained and the judgment on these counts reversed upon defendants' exceptions to the denials of their motions to nonsuit.

5. Conspiracy § 5—

The acts and declarations of each conspirator in furtherance of the common design is competent not only against the conspirator making them but also as to each co-conspirator.

6. Same—

The introduction by the State of evidence to the effect that one of the defendants stated he was withdrawing from the conspiracy does not render incompetent evidence of subsequent acts and declarations of co-conspirators in furtherance of the common design when the evidence that such defendant had withdrawn from the conspiracy is not unequivocal and the State introduces other evidence tending to show that he had not withdrawn from the conspiracy.

7. Criminal Law § 98—

Contradictions in the State's evidence are to be resolved by the jury and not the court.

8. Criminal Law § 99—

On motion to nonsuit, the State's evidence must be considered in the light most favorable to it.

9. Conspiracy § 3—

A criminal conspiracy is an agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, and since the agreement itself is the offense no overt act in furtherance thereof is necessary to complete the crime.

10. Conspiracy § 4—

Any one or more of a group of conspirators may be tried alone.

11. Conspiracy § 5—

A co-conspirator is an accomplice and is a competent witness if he is *compos mentis.*

12. Criminal Law § 14—

Our courts have jurisdiction over a conspiracy if any one of the conspirators commits within this State an overt act in furtherance of the common design, even though the conspiracy may have been entered into outside of the State.

13. Conspiracy § 5; Criminal Law § 34—

In a prosecution of defendants for conspiracy to bribe and bribery of college varsity basketball players, evidence tending to show that a co-conspirator had bribed a number of basketball players in other states is competent as tending to show *animus* or intent.

14. Criminal Law § 91—

The admission of incompetent evidence will not be held so prejudicial that its later withdrawal cannot cure the error in its admission when the incriminating part of such evidence is amply established by other competent evidence introduced at the trial and the irrelevant part is in no way connected with defendants so as to prejudice them.

15. Criminal Law § 94—

The record in this case *is held* to disclose that the questions asked the witnesses by the court were solely for the purpose of clarification of the witnesses' testimony and did not constitute an expression of opinion by the court in violation of G.S. 1-180.

16. Same—

In a trial of two defendants on eight indictments containing twenty-nine counts it will not be held for prejudicial error that the court had delivered to the jurors blank tablets for the purpose of enabling them to list the indictments and the counts as recited to them by the court.

17. Criminal Law § 101—

The jury may convict a defendant upon the unsupported testimony of an accomplice or a co-conspirator, but it should do so only after scrutinizing the testimony and ascertaining that the witness was telling the truth.

18. Criminal Law § 161—

An instruction which is more favorable to defendants than that to which they are entitled cannot be held prejudicial to them on their appeal.

19. Same—

A sentence from the charge cannot justify a new trial when the charge read contextually is without prejudicial error.

20. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendants Goldberg and Lekometros from *Clark, J.*, November 1962 Regular Criminal Term of WAKE.

Criminal prosecution tried upon eight indictments, containing twenty-nine counts and taking thirty-four pages of the record to reproduce them,

charging defendants Goldberg and Lekometros and other persons, who were not on trial, with conspiracy to bribe and bribery of certain players of the North Carolina State College basketball team, with intent to influence the play, action and conduct of the players named in the indictments as such players, in eight basketball games played in the State of North Carolina and in the State of South Carolina within the period from 5 December 1959 to 7 January 1961, in violation of G.S. 14-373. The trial court ordered that all of these eight indictments be consolidated for trial. Defendants have no exception to this order. Appellants pleaded not guilty.

After certain motions of nonsuit made by defendants at the close of the State's evidence were allowed, fourteen counts contained in seven indictments Nos. 8139 through 8145, both inclusive, were submitted to the jury as to both defendants. As to the eighth indictment, No. 8149, which contains six counts, defendants' motion for judgment of nonsuit was allowed as to defendant Lekometros, and allowed as to defendant Goldberg on two of its counts and overruled on four of its counts.

This is a summary of the seven indictments and the counts therein submitted to the jury against both defendants:

INDICTMENT 8139

Player
Donald M. Gallagher

Game
N. C. State v.
Wake Forest

Place and Date
Winston-Salem, N. C.
5 December 1959

Count One: Conspiracy to bride Donald M. Gallagher.
Count Three: Bribery of Donald M. Gallagher.

INDICTMENT 8140

Player
Donald M. Gallagher

Game
N. C. State v.
South Carolina

Place and Date
Columbia, S. C.
8 December 1959

Count One: Conspiracy to bribe Donald M. Gallagher.

INDICTMENT 8141

Player
Donald M. Gallagher

Game
N. C. State v.
Kansas

Place and Date
Raleigh, N. C.
12 December 1959

Count One: Conspiracy to bribe Donald M. Gallagher.

INDICTMENT 8142

Player
Donald M. Gallagher

Game
N. C. State v.
Dayton

Place and Date
Raleigh, N. C.
28 December 1959

Count One: Conspiracy to bribe Donald M. Gallagher.
Count Three: Bribery of Donald M. Gallagher.

INDICTMENT 8143

Player
Donald M. Gallagher

Game
N. C. State v.
Duke

Place and Date
Durham, N. C.
9 January 1960

Count One: Conspiracy to bribe Donald M. Gallagher.
Count Three: Bribery of Donald M. Gallagher.

INDICTMENT 8144

Player
Donald M. Gallagher

Game
N. C. State v. Duke

Place and Date
Raleigh, N. C.
9 February 1960

Count One: Conspiracy to bribe Donald M. Gallagher.
Count Three: Bribery of Donald M. Gallagher.

INDICTMENT 8145

Player
Donald M. Gallagher
Stanley Niewierowski

Game
N. C. State v. Maryland

Place and Date
Raleigh, N. C.
13 February 1960

Count One: Conspiracy to bribe Donald M. Gallagher.
Count Three: Bribery of Donald M. Gallagher.
Count Four: Conspiracy to bribe Stanley Niewierowski.
Count Six: Bribery of Stanley Niewierowski.

This is a summary of Indictment 8149 and the counts therein submitted to the jury against defendant Goldberg alone:

Player
Anton F. P. Muehlbauer
Stanley Niewierowski
Game
N. C. State v. Duke
Place and Date
Durham, N. C.
7 January 1961

Count One: Conspiracy to bribe Anton F. P. Muehlbauer.
Count Three: Bribery of Anton F. P. Muehlbauer.
Count Four: Conspiracy to bribe Stanley Niewierowski.
Count Six: Bribery of Stanley Niewierowski.

The jury returned the following verdict:

"Defendants Dave Louis Goldberg and Steve Lekometros, guilty as charged in Cases numbers 8139, the first and third counts; 8140, the first count; 8141, the first count; 8142, the first and third counts; 8143, the first and third counts; 8144, the first and third counts; and 8145, the first, third, fourth and sixth counts.

"Defendant Dave Louis Goldberg guilty as charged in Case Number 8149, the first, third, fourth and sixth counts."

From judgments of imprisonment of each defendant, each defendant appeals.

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

Newsom, Graham, Strayhorn & Hedrick; Bunn, Hatch, Little & Bunn; E. Richard Jones, Jr.; and Josiah S. Murray, III, for defendant appellants.

PARKER, J. Before pleading to the eight indictments, defendants Goldberg and Lekometros filed eight separate verified written motions to quash the indictments. Each motion alleges in identical words the same ground to quash, except as to the number of the indictment, and this is the allegation:

"These defendants, Dave Louis Goldberg and Steve Lekometros aver that Bill of Indictment Number 8139 in this cause returned by the Grand Jury was, according to their information and belief, obtained upon incompetent evidence, to wit: hearsay testimony of W. S. Hunt, Jr., Agent of the State Bureau of Investigation, Raleigh, North Carolina. That said indictment returned against the two above-named defendants was solely upon the testimony of W. S. Hunt, Jr. That these defendants have never at any time discussed with W. S. Hunt, Jr., the charges pending against them."

Each motion requests that it be treated as an affidavit. Defendants here offered no other evidence on their motions to quash. The trial court denied each motion, and the defendants here excepted to each denial and assign this as error.

Each indictment set forth in the record indicates that William S. Hunt, Jr., was the only witness sworn by the foreman of the grand jury and examined before it, and that the indictment was returned a true bill. In this State the foreman of every duly organized grand jury has the power to administer oaths to persons to be examined before it as witnesses. G.S. 9-27. Defendants here do not suggest or state that Hunt personally was disqualified to be a witness before the grand jury; they merely state that according to their information and belief his testimony was hearsay, and they have never at anytime discussed with him the charges pending against them. In *S. v. Levy*, 200 N.C. 586, 158 S.E. 94, Adams, J., for the Court points out the distinction between incompetent evidence and testimony of disqualified witnesses before a grand jury. There is no allegation in defendants' motions that none of the co-conspirators charged in all the indictments with the defendants here had not discussed the charges pending against these defendants with Hunt, or that he had not overheard them talking about the alleged conspiracy in furtherance of the alleged conspiracy and during its pendency. The evidence for the State shows that defendants here and others of their alleged co-conspirators were registered in the Sir Walter Hotel on 9 February 1960 to see the N. C. State-Duke game, and in the hotel they had a conversation about this game, in which conversation Joseph Eugene Greene said he needed some money to give Donald M. Gallagher, a player of the N. C. State basketball team, before the game, and either Lekometros or Goldberg gave Greene a thousand dollars to give Gallagher on the day of this game. Defendants contend that the failure of the State to call Hunt as a witness during the trial demonstrates that all Hunt's testimony before the grand jury was hearsay. This is a *non sequitur;* the State may have thought it had sufficient evidence without calling Hunt as a witness during the trial or it may have deemed it

proper to keep Hunt off the stand during the trial so as not to disclose how he obtained his information in respect to the charges in the indictments. Defendants have not shown that all the knowledge Hunt had of these cases was incompetent as evidence.

It is a well-settled principle of law in this State that an indictment will not be quashed, on a motion made in apt time, when some of the testimony before the grand jury given by a witness who is not disqualified is competent and some incompetent, because a court will not go into the barren inquiry of how far testimony which was incompetent contributed to the finding of an indictment as a true bill. *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. See also 37 N.C.L.R. 309.

Defendants here contend that the failure to quash the indictments violated their rights under the Fifth Amendment to the United States Constitution. In *Costello v. United States,* 350 U.S. 359, 100 L. Ed. 397, Costello was indicted by a grand jury on a charge of wilfully attempting to evade payment of income taxes; the indictment was based solely upon the evidence of government witnesses having no firsthand knowledge of the transactions upon which they based their computations showing that Costello and his wife had received far greater income than they had reported. Costello was convicted and challenged his conviction on the ground that the indictment was based solely on hearsay evidence and for that reason should have been dismissed. The Supreme Court unanimously held that the indictment was valid. In an opinion by Mr. Justice Black, six members of the Court rested the decision on the ground that neither the Fifth Amendment, in making a grand jury indictment a prerequisite of a federal trial for a capital or otherwise infamous trial, nor justice and the concept of a fair trial, required that indictments be open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury. Mr. Justice Black in his opinion said:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The assignment of error to the failure of the trial court to quash the indictments is overruled.

Defendants' first assignment of error is:

> "The trial Court committed prejudicial and reversible error by denying the defendants' petition for the State Bureau of Investigation to show cause why the reports of the investigations bearing all the indictments listed herein should not be made available to the petitioners for the reason that such investigations and reports were compiled by the State Bureau of Investigations against the petitioners without their knowledge or information. That in order to be prepared to prepare a defense against the charges against them the petitioners were entitled to examine said reports and investigation by authority of North Carolina General Statutes 114-15. That the denial of the trial Court to make such reports and investigation available to these defendants amounts to a violation of their rights guaranteed in Article I, Section 11 and Section 17 of the Constitution of the State of North Carolina, and their rights as guaranteed by the Fifth Amendment, Sixth Amendment, Seventh Amendment and Fourteenth Amendment to the Constitution of the United States of America."

G.S. 114-15 appears in G.S., Ch. 114, Department of Justice, under Art. 4, State Bureau of Investigation. G.S. 114-15 empowers the Director of the State Bureau of Investigation and his assistants, under certain circumstances, to investigate any crime committed anywhere in the State, when such services may be rendered with advantage to the enforcement of the criminal law. G.S. 114-15 specifically states:

> "All records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records within the meaning of § 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the Director of the Bureau and his assistants shall, upon request, be made available to the solicitor of any district if the same concerns persons or investigations in his district."

Defendants here in their petition allege that "in order that they be prepared to defend against the charges pending against them, it is necessary that said report of investigation prepared by the State Bureau of Investigation pertaining to the petitioners herein be made available to the petitioners as authorized and contemplated" by G.S. 114-15. The record shows no member of the State Bureau of Investigation testified during the trial. Defendants in their brief do not contend anything in the

files of the Bureau was admitted in evidence against them. Defendants are not seeking an inspection of any documents or articles which form the basis of the charges against them and which are admissible in evidence, e.g., when a defendant is charged with forgery and requests an inspection of the alleged forged document, 23 C.J.S., Criminal Law, sec. 955 (2), b, p. 793-4. What they are seeking is an order permitting them before trial to go on a word-by-word and line-by-line and unlimited voyage of discovery through the files of the State Bureau of Investigation in respect to these cases here, without any allegation on their part that anything therein is the basis of the charges against them and is admissible in evidence against them, in the fervent hope that something might turn up to benefit them, or that thereby they might obtain an inspection of the State's evidence. In the absence of statutes or rules of practice providing otherwise, it is generally held that a defendant is not entitled under such circumstances to an order of inspection. 23 C.J.S., Criminal Law, sec. 955 (1) and (2); Wharton's Criminal Evidence, 12th ed., vol. 2, secs. 671 and 672; 17 Am. Jur., Discovery and Inspection, sec. 32.

The common law recognized no right of discovery in criminal cases. *Rex v. Holland,* 4 TR 691, 100 Eng. Reprint 1248; Wharton's Criminal Evidence, 12th ed., vol. 2, sec. 671.

In *United States v. Krulewitch,* 145 F. 2d 76, 156 A.L.R. 337, Judge Learned Hand delivering the opinion said:

> "It is one thing to say that an accused shall in advance of trial have inspection of statements of witnesses taken by the prosecution in preparation of its case; it is another to deny him the benefit of so much of such statements as is shown to be inconsistent with the witnesses' testimony on the stand, and would impeach them."

In *Goldman v. United States,* 316 U.S. 129, 86 L. Ed. 1322, the Court held:

> "A defendant in a criminal case in a Federal court has no absolute right, either at the preliminary hearing or at the trial, to inspect notes and memoranda made by Federal agents during their investigation of the case and afterwards used by them to refresh their recollections prior to testifying in the case, where such notes and memoranda, constituting a part of the government's files, are not themselves introduced in evidence."

In the majority opinion Mr. Justice Roberts wrote: "Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case."

In brief, defendants contend they have an unqualified right to an inspection of all papers and documents, if any, in the files of the State Bureau of Investigation in these cases. There is a fundamental difference between criminal and civil proceedings. In *S. v. Tune,* 13 N.J. 203, 98 A. 2d 881, Vanderbilt, C. J., speaking for the Court said:

> "In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. [Citing authority.] Another result of full discovery would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. [Citing authority.] All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. [Citing authority.] To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice."

"The burden of showing facts justifying inspection before trial is on the moving party." 23 C.J.S., Criminal Law, sec. 955 (2), c, p. 796.

In our opinion, G.S. 114-15 gives to a defendant in a criminal action no unqualified right to have a court of competent jurisdiction to enter an order permitting him an inspection of "all records and evidence collected and compiled" by the State Bureau of Investigation in a criminal case pending against him, nor do we know of any statute of this State that gives such a right to a defendant in a criminal case, and no such statute has been called to our attention. In our opinion, and we so hold, defendants here have not shown facts which would have warranted the trial court to enter an order in its discretion or as a matter of right allowing them to inspect the files of the State Bureau of Investigation in these criminal cases pending against them as prayed in their petition, and the denial of their petition does not violate any of their rights under Article

I, sections 11 and 17 of the North Carolina Constitution, and under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution. Consequently, their assignment of error to the denial of their petition for inspection is overruled.

Both defendants assign as error the denial of their motions for judgment of nonsuit of indictment 8139 counts one and three, of indictment 8140 count one, of indictment 8141 count one, of indictment 8142 counts one and three, of indictment 8143 counts one and three, of indictment 8144 counts one and three, and of indictment 8145 counts one, three, four, and six, made at the close of the State's evidence; defendants offered no evidence. Defendant Goldberg assigns as error the denial of his motion for judgment of nonsuit of indictment 8149 counts one, three, four, and six, made at the close of the State's evidence.

In all eight indictments Aaron Wagman, Joseph Eugene Greene, Joseph Hacken, Dave Louis Goldberg and Steve Lekometros are charged with a conspiracy to bribe the basketball player or players named in each indictment as having been bribed.

All the indictments and every count therein are based on G.S. 14-373, the relevant part of which on this appeal is as follows: "If any person shall bribe, or offer to bribe, any player in any athletic contest with intent to influence his play, action, or conduct in any athletic contest * * *, such person shall be guilty of a felony."

The only conspirators charged in the indictments on trial were Dave Louis Goldberg and Steve Lekometros. The State's evidence in narrative form appears in 283 pages of the record. Its principal witnesses were the alleged co-conspirators Joseph Eugene Greene and Aaron Wagman, whose testimony appears in 159 pages of the record, and the alleged bribed basketball players Donald M. Gallagher, Stanley Niewierowski, and Anton F. P. Muehlbauer, whose testimony appears in 72 pages of the record. Donald M. Gallagher, a student at North Carolina State College, played basketball on the varsity team from 1956 through 1960. Stanley Niewierowski, a student at North Carolina State College from 1957 until 1961, played on the varsity basketball team. Anton F. P. Muehlbauer, a student at North Carolina State College, played on the varsity basketball team during the 1959-1960 season.

The testimony of the State's witness Aaron Wagman shows these facts: He has been in the business of bribing basketball players since 1957. He and Greene were partners and lived in the same neighborhood in the Bronx, New York. They bribed various basketball players in 1957 and 1958. In the summer of 1959 Joseph Hacken sent them to the Catskill Mountains to talk to some basketball players working there about fixing games, shaving points, and dumping games. Joseph Eugene Greene

testified that while there he met Donald M. Gallagher, a member of the varsity basketball team of N. C. State College who was working at a hotel, and talked to him about shaving points in basketball games for the coming season. In October 1959 Greene, according to the testimony of Donald M. Gallagher, came to Gallagher's home in Raleigh and asked him if he had considered what they talked about earlier in the summer in the Catskill Mountains. Gallagher testified: "I told him I had considered it and that it sounded like a pretty good deal. I was quite in need of money, needed money * * *. He [Greene] stated he could give $1,000.00 a game to shave points in basketball games for the coming season, and I said that I had considered that and that it sounded like a pretty good deal and he said he would get in contact with me at a later date."

INDICTMENT 8139

This indictment in brief charges in the first count a conspiracy on the part of Aaron Wagman, Joseph Eugene Greene, Joseph Hacken, Dave Louis Goldberg and Steve Lekometros to bribe Donald M. Gallagher, a student at N. C. State College and a player on its varsity basketball team, with intent to influence his play, action and conduct in a basketball game to be played between N. C. State College and Wake Forest College in Winston-Salem, North Carolina, on 5 December 1959, so as to limit the number of points with respect to which N. C. State College would defeat Wake Forest College in said game, and the third count charges the payment to Gallagher of a bribe of $1,000 with such intent pursuant to the carrying out of the alleged conspiracy.

In support of this indictment the State has the evidence above stated and also evidence to this effect based upon the testimony of Wagman, Greene, and Gallagher: On 5 December 1959 Wagman and Greene flew to Winston-Salem. They were met at the airport by Hacken and Lekometros; Hacken introduced Lekometros to them. A few hours earlier Greene had given Gallagher the point spread in respect to shaving points in the N. C. State College-Wake Forest College game, and had given him $500 and told him he would give him the rest of the money after the game in Columbia, South Carolina, between N. C. State and South Carolina to be played on 8 December 1959—this is the game which gave rise to indictment 8140. Greene testified, "I gave the money to Donald Michael Gallagher for the purpose of shaving points for the Wake Forest-North Carolina State game." Later in Greene's testimony he said he gave the remaining $500 to Gallagher in Columbia, South Carolina, on 8 December 1959. Wagman testified in substance that Hacken or Lekometros gave Greene this $500 in Columbia to give to Gallagher. At the airport Wagman told Lekometros about Gallagher, gave him the

point spread, and said everything was set. After the game Wagman, Greene, Hacken and Lekometros went to a steak house for food. There they discussed the game and Gallagher, and Lekometros, according to the testimony of Wagman, said: "Gallagher in the second half really did a terrific job and they liked the way he worked and he said, 'This kid is going to be real good. We will make a lot of money with this guy this year'." Gallagher's testimony was to the same effect as Greene's as to his having been paid $1,000 on this game—in two payments of $500 each —one $500 payment in Raleigh and the other $500 in Columbia.

The State offered evidence in respect to the conspiracy charged in all the indictments as follows: The morning after the N. C. State College-Wake Forest College game in Winston-Salem on 5 December 1959, Lekometros, Hacken, Wagman, and Greene flew to Washington, D. C. Greene testified in substance that on this trip he talked with Lekometros about future games, and Lekometros gave Wagman and himself some telephone numbers in St. Louis, Missouri, to call to get in touch with him. Wagman testified in substance, except when quoted, that on 10 December 1959 he, in Columbia, South Carolina, talked with Lekometros in St. Louis, Missouri, over long distance telephone, that Lekometros "said his partner wanted Greene and me to come out to St. Louis, that he wanted to meet us, and that he owed us some money for that game" (apparently the Georgia Tech-South Carolina game), and that he would pick us up at the airport. On the following day Wagman and Greene flew to St. Louis, and Lekometros met them at the airport and drove them to the Belair Motel and carried them to a room. Lekometros made a telephone call, and in ten or fifteen minutes a man came in, and Lekometros said, "This is Dave Goldberg." Wagman testified: "As to what transpired in that room that afternoon, well Steve left right then and said he had to go some place and that just left Greene, myself and Dave Goldberg and first of all we had to pick up some money that was due us from the South Carolina game. $4,250.00 was due us from that game."

Wagman then told Goldberg of many players in many colleges and universities that he had arranged with to dump games or shave points and the money each was to receive for such acts, and then testified: "We told Goldberg that we had North Carolina State, and told him about Don Gallagher, told him that Don Gallagher was to get a thousand dollars for each game that was fixed and that Greene and myself were to get a thousand dollars apiece for each game; told him about Tom Scott, an intermediary, that he was supposed to get $250.00 for each game that Don Gallagher would dump. * * * And Dave Goldberg agreed to pay all expenses; and said that we had been paying a lot of money to intermediaries and gave us practically a lecture on trying to cut down the

money paid to intermediaries. And that was actually the whole conversation that took place at the Belair Motel. * * * After we finished the discussion, I remember that Dave Goldberg was making a lot of calls over the telephone, long-distance calls, and he was getting a lot of calls, but I don't know who he was talking to, of course. He was talking mostly points on different games and he was asking what the price on certain games was."

Phillip King, a member of the FBI and a witness for the State, after stating that in November or December 1961 he had a conversation with Dave Louis Goldberg about some indictments against Goldberg in North Carolina, testified: "With respect to whether or not he [Goldberg] had given any money to Wagman or Greene, my recollection is that he said that he gave the money to one or the other, Wagman or Greene. The money he gave to these individuals, they in turn gave to basketball player or players. He did say that he was in North Carolina at that time."

INDICTMENT 8144

The first count in this indictment is similar to the first count in indictment 8139, except that the game was between N. C. State College and Duke University, and the date 9 February 1960. This indictment alleges the game was played in Raleigh. The third count charges the bribery of Donald M. Gallagher, a player on the varsity basketball team of N. C. State College in this game. In support of counts one and three in this indictment, the State has all the evidence of conspiracy above stated and this additional evidence.

Lekometros, Goldberg, Greene and Wagman met in Raleigh on 8 February 1960 for the N. C. State College-Duke University game to be played there 9 February 1960.

Greene testified:

> "The next day Steve Lekometros, Dave Goldberg, Aaron Wagman and myself and the other party went outside [the hotel] when we ate and conversed about the North Carolina State game to be played in Raleigh that night. Dave Goldberg said that he wasn't going to get Don to bet the game until later on in the afternoon, real late; and early in the afternoon when the bets first started coming in and the game seems to start to move a point or a point and a half, and it was still very early in the daytime then, and there was a discussion about whether we should go ahead with that game. So I said, 'If you don't want to go ahead with it,' I said, 'Let's forget about the whole thing. I'd just as soon have it that way anyway, I guess,' because I had given the game to another party that day.

"As to whom I had given it to, I had called Joe Hacken in New York. I had gotten the point spread from Goldberg that day. We got the point spread as soon as it came out. North Carolina was a slight favorite but I don't recall just what the point spread was.

"Wagman and Goldberg and Lekometros and myself had a discussion about Don Gallagher that day before the game. We discussed as to whether or not we were going to go for the game, discussed as to whether or not I should go to see Gallagher and give him some money for the game. As a result I did go to see Don Gallagher. I went to see him somewhere over near the bus station here in Raleigh, somewhere in that locality. I gave him at least one thousand dollars, maybe twelve hundred fifty for that game. My reason for giving him that money was for the Duke-North Carolina State game that night. The purpose of giving him the money was for shaving points in the game that night. After I saw Gallagher I returned to see Wagman, Goldberg and Lekometros. When I left to go to see Gallagher they were in the hotel, and I received the money from Dave Goldberg and I went over to give the money to Don Gallagher * * *.

"After I got back, after I left Gallagher, I talked to Goldberg, Lekometros and Wagman about giving Gallagher the money and told them I gave Gallagher the money and that I gave him the point spread on the game."

Wagman testified:

"After my conversation with Sherwood, I went back to the Stafford Hotel and met Steve, Dave and Sammy. I told them that Sherwood didn't want to shave points, that he thought he couldn't lose by 7 points. Goldberg or Lekometros said 'Okeh, we'll go on from here, we'll go to Raleigh for the Duke-North Carolina State game.' There was a Duke-North Carolina State game played in Raleigh on the 9th day of February, 1960. * * *

"They met me at the hotel in Atlanta and from there we drove to the airport in Atlanta, Georgia and flew to Raleigh, North Carolina, and on the way Goldberg and Lekometros and I discussed the North Carolina State-Duke game to be played in Raleigh on the 9th day of February, 1960. Dave said that he wasn't doing too well, that he had lost some money, and he, in fact, said he was doing very badly, and said he wanted to make sure that this next game won, said he would come to the game in person and said he wanted to make sure that everything goes well because he was losing a lot of money. When we got to Raleigh we met Joe Greene at the Sir Walter Hotel. I was

with Sammy, Dave and Steve. We arrived at the Sir Walter Hotel late in the evening, around midnight or close to midnight. This was before the Duke game. Dave, Steve and Sammy registered at the Sir Walter Hotel, but I didn't register. I do not know the name that Dave Louis Goldberg used to sign the register there. I had a discussion with Joe Greene, Dave Goldberg and Steve Lekometros with respect to that game, which actually took place, I think, in the lobby of the Hotel, the Sir Walter. Greene said that he needed some money to give Gallagher before the game, and either Steve or Dave gave Greene a thousand dollars to give Gallagher on the day of the game, the 9th day of February. Greene left us and said that he was going to meet Gallagher and give him the money. Greene later returned and said he gave Gallagher the money and said that Gallagher was going to call him at the room at the Andrew Johnson Hotel, so that Greene could give him the price of the game at some time around 5:00 o'clock in the evening. Goldberg went to eat, all of us went to a cafeteria about a block from the Sir Walter Hotel to eat. Goldberg got the point spread by making a phone call right outside of the Court House, but I don't know where he called to. He made the call at approximately 4:30 or 5:00 o'clock in the afternoon. He stated that the game was very hot and a lot of people were betting against North Carolina State and he thought someone else gave this game out, but he said that it wasn't that hot that we couldn't work the game."

Gallagher testified:

"Approximately the next time I saw Joseph Greene was just prior to our ball game again with Duke which was to be played in Raleigh, North Carolina. That was the game between North Carolina State and Duke University which was played February 9, 1960, in Raleigh, North Carolina.

"Q. Did you see Joseph Eugene Greene prior to that game so as to talk with him?

"A. Yes, Sir, I did. He explained that the point spread was once again either twelve or thirteen points and I have forgotten which.

"And the favorite team once again was Duke. For me to participate my particular job that the game was to be purposely lost, to lose the ball game, to make sure to insure that Duke won the game by at least twelve or thirteen points. He gave me $1,000.00 prior to that game."

INDICTMENT 8142

This indictment in count one charges a conspiracy to bribe Gallagher in the North Carolina State College-University of Dayton basketball game played in Raleigh on 28 December 1959, and in count three charges bribery of Gallagher. In support of this indictment the State has the evidence of conspiracy above stated and this additional evidence: Greene testified in substance he called Goldberg in St. Louis over long distance telephone from Raleigh, and Goldberg gave him the point spread for this game, that Dayton had to win the game by four points; there were no money arrangements made over the telephone, that was not necessary. Wagman testified he paid Gallagher $1,000 on this game. Gallagher's testimony is to the effect that Greene told him the point spread in this game was three and one-half points and instructed him how he was to play in this game with respect to shooting and missing and laying off on defense. Then Gallagher testified: "He said that if I participated in this he would give me $1,000.00, and he did this."

INDICTMENT 8143

This indictment in count one charges a conspiracy to bribe Gallagher in the N. C. State College-Duke University basketball game played in Durham on 9 January 1960, and in count three charges the bribery of Gallagher. In support of this indictment the State has the evidence of conspiracy above stated and this additional evidence: Greene testified to the effect that he gave Gallagher $1,000 to shave points in this game. Gallagher testified in effect that he received $1,000 from Greene for his acts in this game.

INDICTMENT 8145

This indictment in count one charges a conspiracy to bribe Gallagher in the N. C. State College-University of Maryland basketball game played in Raleigh on 13 February 1960, and in count three charges the bribery of Gallagher in this game, and in count four charges a conspiracy to bribe Stanley Niewierowski, a player on the N. C. State College varsity basketball team in this game, and in the sixth count charges the bribery of Niewierowski. This game was played in Raleigh on 13 February 1960, four days after the N. C. State College-Duke University game was played in Raleigh (Indictment 8144), the evidence in which is set forth above. Greene and Wagman met in Miami prior to 9 February 1960. Greene in respect to this meeting testified: "We were making arrangements for the North Carolina State-Maryland game, the South Carolina game at College Park, Maryland, between North Carolina

State and—between South Carolina and Maryland. I talked to Goldberg about that game." Gallagher testified in substance that the day before this State-Duke game Greene arranged a meeting with Niewierowski and himself in Raleigh and told them how to work in this game, how to miss shots, how to slough off on defense, and the point spread, and gave him $1,000 for this game. Niewierowski testified in substance he agreed with Greene to shave points in this game, and Greene gave him $1,250. Sometime after the N. C. State-Maryland game, Greene talked over long distance telephone with Goldberg. He testified: "I asked him for the money for the Maryland-North Carolina State game and I asked him for money for the other game, the Mississippi State game * * *. I asked him to send us four thousand dollars. * * * I can't remember exactly what Goldberg did say." It is true that Greene testified: "After the Duke Game in Raleigh and before the Maryland game I had a conversation with the defendant Goldberg with respect to backing games. * * * Dave said he wouldn't want to back any more games, any more games that we had in the future, said that he would give us a thousand dollars apiece for the games if we would obtain another backer." There is no unequivocal statement in the evidence by Goldberg that he was withdrawing from the conspiracy. Contradictions in the State's evidence are a matter for the twelve. *S. v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425. Considering all the State's voluminous and interlocking evidence in the light most favorable to it, as we are required to do on a motion for judgment of nonsuit, *S. v. Roop,* 255 N.C. 607, 122 S.E. 2d 363, we think the State's evidence was sufficient to carry the case to the jury on indictment 8145.

INDICTMENT 8149

This indictment is in respect to the North Carolina State College-Duke University basketball game on 7 January 1961. The trial judge nonsuited the case set forth in this indictment as to Lekometros. The Attorney General candidly states in his brief that while there is adequate evidence on the part of the State of the bribery of Muehlbauer and Niewierowski, there is an insufficiency of evidence on the part of the State to connect Goldberg with the offenses charged in this indictment. After a close study of the State's evidence, we concur in the statement by the Attorney General in his brief. The trial court erred in overruling Goldberg's motion for judgment of nonsuit in respect to indictment 8149.

INDICTMENT 8140

This indictment is based on the N. C. State College-University of South Carolina basketball game in Columbia, South Carolina, on 8 December 1959. The trial court submitted count one in this indictment,

conspiracy to bribe Gallagher, to the jury, but nonsuited the other counts in this indictment alleging the bribery of Gallagher pursuant to the alleged conspiracy. Gallagher testified in respect to this game: "I was not engaged in sloughing or shaving points or dumping that game and I received no money for it." Greene testified to the effect he did not know who the backers were for this game. In our opinion, there is insufficient evidence on the part of the State to support the first count in this indictment, and the trial court erred in overruling defendants' motion for judgment of nonsuit of this indictment.

INDICTMENT 8141

This indictment is based on the N. C. State College-University of Kansas basketball game in Raleigh on 12 December 1959. The trial court submitted count one in this indictment, conspiracy to bribe Gallagher, to the jury, but nonsuited the other counts in this indictment alleging the bribery of Gallagher pursuant to the alleged conspiracy. In respect to this game, Greene testified in substance as follows: On the visit of Wagman and himself to St. Louis on 10 December 1959, he told Lekometros and Goldberg that Wagman and himself were going down to Raleigh to attempt to obtain Don Gallagher for the University of Kansas-N. C. State College game to be played in Raleigh on 12 December 1959. At that time Greene discussed with Goldberg and Lekometros that Gallagher was supposed to receive $1,100 and Wagman and himself were supposed to get $1,000 apiece minus whatever it cost them. Goldberg said he was going to give them $1,000 apiece for the game. The money for Gallagher was given to them by Goldberg. From St. Louis Wagman and he flew to Raleigh. On the afternoon of the game in Raleigh, he talked with Goldberg over long distance telephone, and Goldberg gave him the point spread, that the University of Kansas was to win by at least two points or one. In Raleigh he tried without success to contact Gallagher by telephone. He could not contact Gallagher, and he notified Goldberg by long distance telephone that he could not contact Gallagher, and Goldberg told him to keep trying. After that he called Gallagher some six or eight times without success. He tried to find him but could not locate him. He then told Goldberg over long distance telephone that he had not been able to locate Gallagher and told Goldberg that he would continue to try to contact him so as to give him the necessary point spread. He called Goldberg again and told him that he had not contacted Gallagher, and Goldberg told him he would have to get in touch with Gallagher no matter what happened. He told Goldberg that he would do everything he could to get in touch with him, and Goldberg said they had already bet money on the game. The evidence shows that Greene did not contact Gallagher and consequently paid Gallagher no money.

A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. The conspiracy is the crime and not its execution. *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737. No overt act is necessary to complete the crime of conspiracy. *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *S. v. Knotts,* 168 N.C. 173, 83 S.E. 972.

> "No formal agreement between the parties to do the act charged is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged, although such agreement is not manifested by any formal words, or by a written instrument. If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan." 15 C.J.S., Conspiracy, p. 998.

In *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508, the Court said:

> "The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. [Citing authority.] 'Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any one of the others, in furtherance of such common design.' *S. v. Jackson,* 82 N.C. 565; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Summerlin—'Hole-in-the-wall' Case,*—232 N.C. 333, 60 S.E. 2d 322; *S. v. Anderson,* 208 N.C. 771, *loc. cit.* 786, 182 S.E. 643; *S. v. Herndon,* 211 N.C. 123, 189 S.E. 173."

It was permissible to try Lekometros and Goldberg alone on the indictments here. *S. v. Davenport, supra.*

A co-conspirator is an accomplice, and is always a competent witness; assuming of course he is *compos mentis.* 15 C.J.S., Conspiracy, p. 1145.

Our courts have jurisdiction of a prosecution for criminal conspiracy, if any one of the conspirators commits within the State an overt act in furtherance of the common design, even though the unlawful conspiracy was entered into outside of the State. The rationale of this principle of law is that the conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350; *S. v. Lea, supra;* 22 C.J.S., Criminal Law, sec. 136, i, p. 361; 11 Am. Jur., Conspiracy, sec. 23.

The evidence for the State comes from the inside of the conspiracy, and is quite revealing of the corruption of college basketball players by big-time gamblers and of their argot and of their *modus operandi* in betting large sums of money on rigged games. The acts and words of the alleged conspirators in the indictments here done and said in furtherance of the common design of the alleged conspiracy and while it was in operation are so interwoven in the 159 pages of testimony given by the co-conspirators Wagman and Greene that all of them cannot be summarized or quoted without extending this opinion to a burdensome and intolerable length. We have attempted to state the most crucial parts of their testimony. The State's evidence would permit a jury to make these findings: Wagman and Greene were partners and engaged in bribing basketball players. In the summer of 1959 Hacken sent them to the Catskill Mountains to talk to basketball players working there about fixing games, shaving points, and dumping games. There Greene met and talked to Gallagher about shaving points in basketball games for the coming season. In October 1959 Greene came to Gallagher's home in Raleigh and stated he could give him $1,000 to shave points in basketball games for the coming season, and he would contact him later. On 5 December 1959 Wagman and Greene flew to Winston-Salem for the N. C. State College-Wake Forest College basketball game there that night (Indictment 8139). They were met at the airport by Hacken and Lekometros. Hacken introduced Lekometros to them. Greene gave Gallagher $1,000 to shave points in that game. Hacken or Lekometros gave Greene $500 of the $1,000 paid to Gallagher. After the game Lekometros said in the presence of Hacken, Wagman, and Greene: "Gallagher in the second half really did a terrific job and they liked the way he worked * * *. 'This kid is going to be real good. We will make a lot of money with this guy this year'." On 10 December 1959 Lekometros in St. Louis talked with Wagman in Columbia, over long distance telephone, and said his partner wanted Greene and himself to come out to St. Louis, he wanted to meet them. Wagman and Greene went, and Lekometros introduced Dave Louis Goldberg to them as his partner. The conversation they had in St.

Louis is set forth above. That Wagman, Greene, Hacken, Lekometros and Goldberg had entered into a criminal conspiracy to bribe basketball players as early as the summer of 1959, when Wagman and Greene were sent to the Catskill Mountains by Hacken to talk to basketball players about rigging basketball games, and in particular to bribe Gallagher, a player on the varsity team of N. C. State College, with intent to influence his play, action and conduct in basketball games, and that this criminal conspiracy continued and was operative by overt acts in North Carolina during the games alleged in indictments 8139, 8141, 8142, 8143, 8144, and 8145, and actual payment of bribes in furtherance of the common design of the criminal conspiracy to Gallagher as alleged in the third counts of indictments 8139, 8142, 8143, 8144, and 8145, and to Niewierowski in indictment 8145 count six. The trial court correctly overruled appellants' motions for judgment of nonsuit of indictment 8139 counts one and three, of indictment 8141 count one, of indictment 8142 counts one and three, of indictment 8143 counts one and three, of indictment 8144 counts one and three, and of indictment 8145 counts one, three, four, and six.

Appellants' assignments of error in respect to the admission over their objections and exceptions of alleged incompetent and prejudicial evidence, and of questions asked by the trial judge, are set forth in the record in assignments of error beginning with No. 15 and ending with No. 89, and appear in the record on pages 471 through 542. It is manifest that all these assignments of error cannot be discussed *seriatim* without extending this opinion dozens of pages. We shall discuss only the parts of the alleged incompetent and prejudicial evidence set forth with argument in appellants' brief in discussing their assignments of error.

Appellants contend that it was prejudicial error to permit Gallagher to testify that in October 1959 Greene came to his house in Raleigh and said, "he could give $1,000 a game to shave points in basketball games for the coming season, and I said that I had considered that and it sounded like a pretty good deal and he said that he would get in contact with me at a later date," and further prejudicial error to permit Gallagher to testify that after the N. C. State College-Wake Forest College game in Winston-Salem on 5 December 1959 (Indictment 8139) Greene told him "things worked out just fine in the ball game." Just before the last statement, Gallagher testified, "according to Joe Greene everything did go well and he did win on this particular ball game." This evidence was competent and admissible against all the conspirators for the simple reason that they were the acts and declarations of a co-conspirator done and uttered in furtherance of the common, illegal design of the conspiracy between Lekometros, Goldberg, Greene, Wagman, and

Hacken, and during the pendency of the conspiracy, which the State's evidence by independent proof shows was entered into before Greene saw Gallagher in Raleigh in October 1959, and shows that the conspiracy accomplished its illegal purpose of rigging the game and making money for the conspirators.

Appellants further contend that Greene testified that after the State-Duke game in Raleigh on 9 February 1960 (Indictment 8144), and before the State-Maryland game in Raleigh on 13 February 1960 (Indictment 8145), "I had a conversation with the defendant Goldberg with respect to backing games * * *, and Dave said he wouldn't want to back any more games, any more games that we had in the future * * *, if we would go and get another backer, that he, Dave Goldberg, would give us a thousand dollars, would give to Aaron Wagman and myself that amount if we would succeed in getting ourselves another backer to back any games in the future," that this shows Goldberg had withdrawn from the conspiracy, and consequently the testimony of Gallagher and Niewierowski as to the acts and conversations of Greene with them about the State-Maryland game and the testimony of Greene and Wagman about this game (Indictment 8145) were not competent against them and were highly prejudicial. Goldberg's words, as testified to by Greene, are not an unequivocal statement that he was withdrawing from the conspiracy at that time. There is nothing in the evidence to the effect that Lekometros was withdrawing at that time from the conspiracy. Lekometros had introduced Goldberg to Greene and Wagman as his partner, as set forth before in this opinion where evidence is summarized under indictment 8139. There is other evidence in the record that would permit a jury's finding that Goldberg had not withdrawn from the conspiracy at that time, but was still an active participant in it, and the jury accepted that version of the evidence and convicted appellants on indictment 8145, counts one, three, four, and six. Appellants in their brief do not contend Lekometros had withdrawn from the conspiracy before the State-Maryland game (Indictment 8145). Contradictions and inconsistencies in the State's evidence are a matter for the jury. Consequently, in our opinion, this evidence was competent and admissible against appellants, because the evidence in the record would permit a jury to find that they were the acts and declarations of a co-conspirator done and uttered in furtherance of the common, illegal design of the conspiracy between Lekometros, Goldberg, Greene, Wagman, and Hacken, and during the pendency of the conspiracy, which the State's evidence by independent proof shows was entered into by all the conspirators charged in the indictment before the State-Maryland game (Indictment 8145).

Appellants further assign as errors testimony admitted over their objections and exceptions as to the bribery of a number of basketball play-

ers in other states by Greene and Wagman and their rigging of basketball games in other states. All the indictments are based on G.S. 14-373. An essential element of the offense is bribery or offer to bribe with intent to influence the play, action or conduct of a player in any athletic contest. It is necessary for the State to prove this specific intent. Consequently, the evidence of these other briberies is relevant to the purpose and is competent as proof of such intent in the instant cases. Stansbury, N. C. Evidence, sec. 92, Intent.

Appellants also assign as error that the judge over their objections and exceptions admitted in evidence the testimony of A. W. Otwell, an employee of the telephone company, to the effect that certain records were the official records of the telephone company, and admitted these records in evidence showing numbers of long distance telephone calls to St. Louis and various cities; and further admitted in evidence over their objections and exceptions the testimony of E. N. Case, basketball coach at N. C. State College, as to the play in basketball games of Gallagher, Niewierowski, and Muehlbauer and their reputation; and admitted in evidence over their objections and exceptions the testimony of Michael Siegal and Lou Barshak to the effect that they bribed certain players and rigged certain basketball games, which the State did not connect with any of the indictments here or with any of the alleged conspirators here. At the very beginning of the charge to the jury the court instructed the jury that he was striking out the evidence in its entirety of Otwell, Case, Siegal, and Barshak, and the records identified by Otwell and introduced in evidence, and that the jury should not consider this evidence in passing on the guilt or innocence of the defendants on trial. Appellants contend this evidence was incompetent and prejudicial, that its harmful impression on the minds of the jury could not be erased by the court's instruction withdrawing it from their consideration in passing on their guilt or innocence, and that this entitles them to a new trial. They excepted to the judge's withdrawing this evidence from the jury and assign it as error.

Appellants rely on *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926. The facts are clearly distinguishable. Broom was charged with murder in two cases. He was convicted by a jury and appealed. During the cross-examination of Broom, the prosecuting officer for the State asked him if he had not been engaged in committing abortions on women and obtaining money for such unlawful acts. This Broom denied. The prosecuting officer for the State showed him certain instruments and asked him if these were not instruments for producing abortions. This the defendant denied. Broom admitted ownership or possession of some of these instruments, but denied that others were his. The instruments were admitted in evi-

dence in behalf of the State over defendant's objections. The court afterwards withdrew the instruments from evidence. This Court held that the impression made upon the jury's minds by these exhibits, improperly introduced and tending to degrade and discredit defendant, could not be removed, and awarded a new trial.

Appellants rely on *Gattis v. Kilgo,* 131 N.C. 199, 42 S.E. 584. It is distinguishable. This was an action for libel and slander. In this case a mass of incompetent evidence was introduced. The opinion states: "Some of the ablest lawyers in the State had appearances on either side, and the plaintiff's counsel were allowed in the argument to use a mass of evidence against the defendants totally incompetent, and calculated to arouse passion and prejudice against the defendants, and to obscure the real question at issue." After the argument of counsel on both sides, the court withdrew this incompetent evidence from the jury. There was a verdict and judgment for plaintiff. This Court ordered a new trial.

This Court said in *In re Will of Yelverton,* 198 N.C. 746, 153 S.E. 319:

> "It is undoubtedly approved by our decisions that the trial court may correct a slip in the admission of isolated or single points of evidence by withdrawing such evidence at any time before verdict and instructing the jury not to consider it. [Citing authority.] But this may not be done, without ordering a mistrial, where the inadvertence is protracted and injury would result to the appellant by such action. [Citing authority.] 'When we can see that the appellant has been really injured by such action, we will always order a new trial' —Brown, J., in *Parrott v. R. R., supra* [140 N.C. 546, 53 S.E. 432] [Citing authority.].
>
> "On this phase of the case, therefore, the principal question presented resolves itself into an interpretation of the record."

The evidence in this consolidated case is set forth in the record on pages 94 through 376. The testimony of Gallagher, Scott, Greene, and Wagman is set forth on pages 94 through 309. The testimony of Otwell is set forth on pages 310 through 313, of Case on pages 341 through 345, of Barshak on pages 350 through 362, and of Siegal on pages 362 through 365. This evidence was introduced during the last days of the trial.

While the records identified by Otwell show a number of telephone calls from Raleigh to St. Louis and other cities during the basketball games referred to in the indictments, they do not show that any of them were made by appellants. Nor did the State connect them with any indictments. It does not seem that Case's testimony as to the play of the named bribed players was prejudicial in the light of testimony by Greene and Wagman of the bribery of these players, and of the testimony of

Gallagher and Niewierowski and Muehlbauer to the effect that they accepted bribes from Greene and their play was influenced thereby. The testimony of Siegal and Barshak was not connected with defendants in any way. It is hard to see how it was prejudicial to appellants.

Was the admission of this evidence such a slip as could be cured by withdrawing it, or was it a fatal inadvertence? There is nothing in the record to show that the prosecuting officer for the State even referred to this evidence in his argument to the jury. While not altogether free from difficulty, a careful perusal of the entire record leaves us with the opinion that appellants have not been really injured by the introduction of this evidence and that the court's withdrawing it from the consideration of the jury should be sustained. *Cauley v. Insurance Co.,* 220 N.C. 304, 17 S.E. 2d 221.

Appellants have numerous assignments of error in respect to the trial judge asking questions of the witnesses, contending that in doing so he expressed an opinion in violation of G.S. 1-180, and that he cross-examined witnesses. All these assignments of error are overruled. A careful study of all the questions asked witnesses by the trial judge leaves us with the opinion that he did not by word or conduct suggest an opinion as to the credibility of any witness in asking questions, that he did not ask any question reasonably calculated to impeach or discredit a witness, that he did not cross-examine any witness, and that all the questions he asked were competent in order to obtain a better understanding or clarification of what a witness said. Frequently in asking a question the judge said he did not understand what the witness had said. All these assignments of error are overruled. *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774.

Appellants assign as error the following part of the charge:

> "Now, Gentlemen of the Jury, it is not permissible for the Court to give you these bills of indictment or the exhibits so that the jury might have them during its deliberations. Inasmuch as there are eight bills of indictment with a number of counts in some of the cases or bills alleging separate offenses on different dates and at different times it seems to me imperative that you have some way of making an outline of your own, a memorandum of your own, and in the interest of justice in this case and in the furtherance of justice I'm going to hand you these blank tablets or pads for your own use. I'm not requiring any one of you to try to take any notes or make any memoranda whatsoever, but it has occurred to me that you might like at least to make a list of the bills of indictment and the number of counts in each bill as I go through them and read them thus presenting an opportunity for you to do so, and to that

end I'm going to hand you these blank tablets though, as I have said, it is not required of you that you take a single solitary note. The jury must recall all the evidence and must weigh, consider and compare it all. I am not giving you these tablets, this equipment, for the purpose of trying to have you take any notes whatsoever, any memorandum on the instructions of the Court or on the evidence in the case, the evidence that has already been heard by you, but am doing it simply to give you an opportunity to make some memorandum of the bills of indictment themselves so that at least you will have a list of the charges which you must consider in this case. (Whereupon, the presiding Judge handed the blank tablets to the jurors) Now, those of you who will not have these pads may work together in pairs of two, if you wish, and may list these cases, these charges."

In *Cowles v. Hayes,* 71 N.C. 230, the court allowed the jury to copy a memorandum of articles sold and the prices thereof, made out by plaintiff's counsel. This was objected to by defendants. The case states that this memorandum was but the copy of the account proved and admitted in evidence. The Court in affirming said: "It was therefore nothing more than a note of the evidence taken down by a juror, which was not only proper, but often commendable."

Practically all judges and lawyers take notes during a long complicated trial, and it seems that any judge in a complicated trial like this would make a list of the indictments and the counts therein submitted to the jury to aid him in his charge. With eight indictments containing eighteen counts submitted to the jury, it seems that to give them tablets to list these indictments and counts was not improper and not prejudicial to appellants. In our opinion, no prejudice was sustained by appellants in the court's giving the tablets to the jurors pursuant to what he had just before said to them, and this assignment of error is overruled. See *In re Appropriation of Easements for Highway Pur. (Court of Common Pleas of Ohio, Ashtabula County),* 176 N.E. 2d 881; *United States v. Standard Oil Co.,* 316 F. 2d 884. The facts in *Corbin v. City of Cleveland,* 144 Ohio St. 32, 56 N.E. 2d 214, relied on by appellants, are distinguishable.

The charge of the court to the jury is set forth in pages 378 through 465. In respect to this exhaustive charge appellants have brought forward and discussed in their brief only two assignments of error other than the assignment of error to the court's giving tablets to the jury as set forth above.

Appellants assign as error the charge to this effect: The general rule in a conspiracy case is there can be no conviction on the testimony of accomplices alone no matter how many they be if their testimony is not

corroborated apart from the accomplices' testimony. And that immediately thereafter the court instructed the jury: "You may convict on the unsupported testimony of an accomplice or co-conspirator, but that it is dangerous and unsafe to do so." The quoted part of the charge is correct in this State, *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291. The preceding part summarized is not the law in this State. This conflicting statement of the law was not prejudicial to appellants, for if the jury had accepted the summarized statement as correct they would have acquitted appellants. This assignment of error is overruled.

The other assignment of error to the charge is a sentence taken out of context. When the charge is read in its entirety, no error is seen. This assignment of error is overruled.

All assignments of error not brought forward and discussed in appellants' brief are deemed abandoned by them. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

All appellants' assignments of error are overruled, except that their assignments of error to the denial of their motions for judgment of nonsuit as to indictment 8140, count one, are sustained, and Goldberg's assignment of error to the denial of his motion for judgment of nonsuit as to indictment 8149, counts one, three, four, and six, is sustained.

The result is as follows: In the trial of indictment 8139 counts one and three, of indictment 8141 count one, of indictment 8142 counts one and three, of indictment 8143 counts one and three, of indictment 8144 counts one and three, and of indictment 8145 counts one, three, four, and six, we find No error. In the trial of indictment 8140 count one and of indictment 8149 counts one, three, four, and six, Reversed.

LESTER BROTHERS, INC., PLAINTIFF v. J. M. THOMPSON COMPANY, DEFENDANT.

(Filed 31 January 1964.)

1. Contracts § 12—

The contract of the parties must be enforced as written, and where the language is free from ambiguity the court must declare its meaning as a matter of law.

2. Same—

Where a contract calls for the delivery of wood trusses completely assembled at the job site for a specified sum, the term "completely assembled" has a definite meaning, and while the manufacturer may be free to assemble the

trusses at its plant or to assemble them for shipment at its plant and complete the assembly at the job site, the delivery to the purchaser in such condition as to require appreciable labor to complete the assembly fails to meet the specifications of the contract.

3. Customs and Usages—

When properly pleaded, a local custom or one peculiar to a particular trade or business may be shown in evidence for the purpose of clarifying ambiguous words of the contract, but evidence of customs and usages is incompetent to vary or contradict the terms of a written agreement which is free from ambiguity.

4. Same—

Where the categorical terms of the contract require the manufacturer to complete the assembly of the trusses either at its plant or, after shipment, on the job site, the admission of evidence of the manufacturer's contention that the trusses were assembled for shipment in the customary manner is incompetent and irrelevant, since it tends to vary the terms of the writing requiring complete assembly and not merely assembly for shipment.

5. Trial § 42—

The verdict must be interpreted with reference to the pleadings, the evidence and the judge's charge.

6. Trial § 33—

Where the terms of the contract are unambiguous, whether facts established by uncontradicted evidence constitute a breach of such contract is a question of law, and the party asserting such breach is entitled to an explicit instruction to this effect.

7. Same—

Where the court charges the circumstances under which the jury should answer the issue "no" but fails to charge the circumstances, arising upon the evidence, under which the jury should answer the issue in the affirmative, the charge must be held for prejudicial error, since it is the duty of the court to charge the jury on all substantial features of the case arising on the evidence. G.S. 1-180.

8. Appeal and Error § 45—

The admission of incompetent evidence tending to establish the absence of a breach of the contract in one aspect cannot be held cured by an affirmative verdict upon the issue when the adverse party has introduced evidence tending to establish a breach in two separate aspects, so that the issue might have been answered in the affirmative on the other aspect, and the incompetent evidence, in connection with the charge, might have affected the amount of damages awarded.

9. Contracts § 21—

Evidence tending to show that the builder had its crew ready to handle trusses at the time of delivery by the manufacturer, that the trusses were too short, that the defect was not discovered until the crew had installed

some of them, that the trusses installed had to be taken down, so that the crew lost time before it could be put back to work on some other job, *is held* sufficient to be submitted to the jury on the issue of damages from the delivery of trusses failing to meet the specifications, even though the defective trusses were later replaced.

APPEAL by defendant from *Williams, J.*, January 1963 Regular Civil Session of WAKE.

On or about February 11, 1958, plaintiff, a Virginia corporation with principal office in Martinsville, Virginia, and defendant, a North Carolina corporation with principal office in Raleigh, North Carolina, entered into a written contract for the sale by plaintiff and the purchase by defendant of "2598 Typical wood trusses completely assembled per plans and specifications F.O.B. job site for the sum of $32,000.00." The trusses were for use by defendant in roof construction work on the thirty-eight buildings comprising FHA Project "NC 2-5, Walnut Terrace, Raleigh, North Carolina."

Plaintiff, alleging full performance, instituted this action to recover $7,100.00, the unpaid portion of said contract price of $32,000.00. (Note: Through inadvertence, plaintiff alleged the contract price was $32,003.00.)

Answering, defendant admitted that plaintiff, on dates between August 5, 1958, and March 7, 1959, had delivered 2598 trusses to defendant at the Walnut Terrace Housing Project site in Raleigh. It admitted the amount it had paid plaintiff was $24,903.00. It denied that it was indebted to plaintiff in any amount.

Defendant, for further answer and defense, alleged: The 2598 trusses, when delivered by plaintiff to defendant, "were not completely assembled as called for in the proposal submitted by plaintiff and accepted by defendant." It was necessary to unload the trusses from plaintiff's trucks and assemble them before they were ready for installation in the buildings. Plaintiff's men at plaintiff's expense "completely assembled 210 of the trusses on the job site." The remaining 2388 trusses had to be and were "completely assembled" by defendant at a cost to it of $2.29 per truss for a total of $5,468.52. In addition, "some 300 of the trusses delivered by plaintiff to defendant had not been properly put together" in certain respects; and defendant, to correct the deficiencies, incurred costs and expenses in the amount of $479.03. Hence, defendant was entitled to a credit of $5,947.55 "against the difference in the contract price and the amount paid thereon by defendant to plaintiff."

Defendant, for a counterclaim, alleged "the progress of the work was delayed and the labor costs to the defendant were substantially increased, all as a direct result of the failure of the plaintiff to deliver trusses

manufactured in conformity with the plans and specifications and the approved shop drawings and completely assembled as required by the plaintiff's contract with the defendant," and on account thereof defendant sustained damages in the amount of $8,400.00.

Defendant prayed (1) that plaintiff recover nothing, (2) that defendant recover from plaintiff the sum of $7,250.55 and (3) that plaintiff be taxed with the costs. (Note: Defendant arrives at the figure of $7,250.55 by deducting $7,097.00 from $14,347.55, to wit, $5,947.55 plus $8,400.00.)

In its reply to defendant's further answer and defense, plaintiff admitted "that it assisted the defendant by showing the defendant's agents and employees the best method for installing the trusses furnished by the plaintiff fully assembled as required by the plans and specifications." In its reply to defendant's counterclaim, plaintiff admitted "that before the trusses could be erected on the buildings it was necessary that a center bolt be placed therein." Plaintiff *denied* "this was not in complete accordance with the plans and specifications and that the trusses were not fully assembled in accordance with the correct interpretations of that term as the same is universally used in the building trades and an accepted practice and as the said term is universally and legally defined." Plaintiff admitted it sent a representative and a crew of its men to the job site who, plaintiff alleged, "discovered that the trusses had been mishandled and improperly cared for by the defendant after delivery on the job, and that due to deterioration by the elements the defendant had permitted some of the trusses to become defective after delivery." Except as stated, plaintiff denied all allegations on which defendant based its further defense and counterclaim.

Plaintiff prayed (1) that defendant recover nothing on its counterclaim, and (2) that plaintiff recover ($7,100.00 plus interest and costs) in accordance with the prayer in its complaint.

Evidence was offered by plaintiff and by defendant.

At the close of defendant's evidence, the court granted plaintiff's motion for nonsuit of defendant's alleged counterclaim. Defendant excepted.

The court submitted and the jury answered the following issues: "1. Did the plaintiff breach the contract of February 11, 1958, with the defendant? ANSWER: Yes. 2. If so, in what amount, if any, was the defendant damaged by the plaintiff's breach of the contract of February 11, 1958? ANSWER: $847.00. 3. What amount, if any, is the plaintiff entitled to recover of the defendant on the contract of February 11, 1958? ANSWER: $6,253.00."

The judgment, after quoting said issues and answers, recites that "the plaintiff has elected to remit the sum of three (3.00) dollars from the amount awarded by the jury to make the jury's award conform to the

evidence." The court then ordered, adjudged and decreed that plaintiff have and recover of defendant the sum of $6,250.00 with interest thereon from March 7, 1959, and that the costs of the action be taxed against defendant. Defendant excepted and appealed.

Broaddus, Epperly & Broaddus and Bryant, Lipton, Bryant & Battle for plaintiff appellee.

Manning, Fulton, Skinner & Hunter for defendant appellant.

BOBBITT, J. Plaintiff's Exhibit No. 2, a blueprint of the "Trussed Rafter Detail," shows a completely assembled truss. On said blueprint, under the heading, "Notes," the following appears: "2. Trussed Rafters: All lumber for rafters to be No. 1, S4S, southern pine with grade mark on each piece. Timber connectors to be 2½" diameter split rings & trip-L-grip framing anchors to be as manufactured by the Timber Engineering Co. Bolts to be ½" machine bolts with 2" x 2" x ⅛" plate or 2⅛" diameter steel washers each end. Timber connectors to be installed according to the manufacturers instructions. Trussed rafters to be closely fitted and accurately fabricated and erected as shown. Bolts thru connectors to be tight. Check & tighten if necessary at time of erection. Provide additional bracing as required for erection."

It seems that trip-L-grip framing anchors were for use in the process of anchoring the trusses to wall plates when installing the trusses in the roofs of the buildings. The lumber, split rings, bolts and washers are referred to in the following general description of a "split ring type 'W' truss" as depicted in the plans and other evidence.

The lumber portion of a truss consisted of a bottom chord (base), two top chords (rafters) and four braces. All chords were made of 2 x 6's. All braces were made of 2 x 4's. Except in a comparatively few instances when it was otherwise specified, the overall length of the bottom chord was 28 feet and 4 inches. Testimony as to the weight of each truss varied from a minimum of 100 to a maximum of 250 pounds.

The top chords extend upward (diagonally) from the ends of the bottim chord, meet at an elevation above the center of the bottom chord and form a triangle of which the bottom chord is the base and the top chords are the sides. From each side of the bottom chord and at an equal distance from the center thereof, a (primary) brace extends upward to the vertex of said (outer) triangle, converging there with the upper ends of the top chords and forming an inner triangle of which the central portion of the bottom chord is the base and these primary braces are the sides. From where the lower end of each primary brace joins the bottom chord a (secondary) brace extends to and joins the top chord on its side of

the outer triangle, forming an inverted triangle of which a portion of the top chord is the base and a primary brace and a secondary brace are the sides. When viewing a completely assembled truss standing upright on the bottom chord, the appearance of the braces resembled the letter "W."

To make the indicated connections, holes were bored as follows: (1) At each end of the bottom chord; (2) at each end of the top chords; (3) at each end of the primary braces; (4) at the lower end of each secondary brace; and (5) in the bottom chord, on each side of the center, where the lower ends of the secondary braces connect with the bottom chord.

Where said holes are bored, two or more pieces of lumber are connected and bolted together in this manner: Between two connecting pieces of lumber there is placed (in a groove made for that purpose) a metal "split ring," having "a split in them so they can open or close up and fit in the holes." A bolt passes through the holes and split rings and is fastened by a nut. In each instance, a washer is placed between the head of the bolt and the (first) piece of lumber on one side and between the nut and the (first) piece of lumber on the opposite side.

The secondary braces are connected with the chords in a different manner: The upper ends of these secondary braces, to which "scabs" are nailed, are connected by nailing the "scabs" to the top chords. A "scab" is "(a) short piece of timber nailed or bolted to two abutting timbers to splice them together." Webster's New International Dictionary, Second Edition.

It seems the bottom chord was composed of two pieces of lumber of equal length, overlapping and bolted together (split rings and bolts being used in the process) so as to constitute one continuous piece of lumber. However, the evidence is unclear as to details.

The trusses were constructed at plaintiff's factory at Martinsville, Virginia, and transported therefrom to the job site in Raleigh on plaintiff's trucks. While certain trusses were rejected by the architect's inspector and replaced as stated below, 2598 trusses constructed by plaintiff were used by defendant and incorporated in the buildings constituting the Walnut Terrace Housing Project. Defendant alleged plaintiff's men at plaintiff's expense "completely assembled 210 of the trusses on the job site." The main controversy is whether the remaining 2388 used by defendant were "completely assembled" within the meaning of the contract upon arrival by truck at the job site in Raleigh.

There is no controversy as to the facts concerning the extent the trusses were assembled when loaded on plaintiff's trucks in Martinsville and upon arrival at the job site in Raleigh. Each truss was "in a folded position similar to closing up a knife." The lower ends of the top

chords and of the braces were connected with the bottom chord by bolts through split rings. These bolts were loose enough to permit the upper portion of the top chords and of the braces to fold over onto the bottom chord. Metal bands were wrapped around each unit to hold the several parts together during shipment.

After unloading and removal of the metal bands, the following work was required to complete the assembly of a truss. The upper ends of the top chords and of the primary braces had to be brought together and connected at the vertex of the outer triangle. Split rings, bolts, nuts and washers for such use were shipped separately (ordinarily on the same truck) and delivered to defendant in boxes or burlap bags. The bolt for use at this location is referred to as "the king pin." Too, the scab on the upper end of each secondary brace had to be brought into position and nailed (four nails) to the upper chord. In addition, the bolts at said connections, four in the bottom chord as well as "the king pin," had to be tightened.

We deem it unnecessary to discuss the conflicting evidence as to the effort and time required to complete at the job site the assembly of a truss. There was evidence for plaintiff tending to show "three *experienced* men could erect one in five minutes." (Our italics). There was evidence for defendant tending to show it took two carpenters and two laborers "a half hour for each truss—that wouldn't miss it two minutes."

There was evidence that only 15 completely assembled trusses, that is, trusses ready for immediate use, could be transported per truckload, but when in "folded" position as many as 75 trusses could be transported per truckload.

"Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written." *Barham v. Davenport,* 247 N.C. 575, 578, 101 S.E. 2d 367, and cases cited. And, "where the language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and not for the jury." *Young v. Mica Co.,* 237 N.C. 644, 648, 75 S.E. 2d 795, and cases cited; *Bishop v. DuBose,* 252 N.C. 158, 161, 113 S.E. 2d 309; *Robbins v. Trading Post,* 253 N.C. 474, 478, 117 S.E. 2d 438.

The contract, in express terms, obligated plaintiff to deliver the trusses to defendant at the job site "completely assembled per plans and specifications." The presumption is that these words "were deliberately chosen and are to be given their ordinary significance." *Briggs v. Mills, Inc.,* 251 N.C. 642, 644, 111 S.E. 2d 841, and cases cited.

The writing in which the terms of the contract are stated is in the form of a letter dated February 11, 1958, from plaintiff (signed by L. P. Fore, District Representative) to defendant. The proposal or offer set

forth in said letter was accepted in behalf of defendant by J. E. Merritt. It is "a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing. *Wilkie v. Ins. Co.*, 146 N.C. 513, 60 S.E. 427." *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E. 2d 906; *Realty Co. v. Batson*, 256 N.C. 298, 307, 123 S.E. 2d 744; *Trust Co. v. Medford*, 258 N.C. 146, 149, 128 S.E. 2d 141.

In Webster's New International Dictionary, Second Edition, we find this definition of the verb "assemble": "3. To collect and put together the parts of; as, to *assemble* an automobile, airplane, watch, or gun." Too, we find this definition of the verb "complete": "To bring to a state of entirety or perfection; to perfect; to furnish or equip fully; to fulfill; finish, as, to *complete* a task." "Completely" is the adverb of the verb "complete."

When the words used are given their ordinary significance, we think the plain and unambiguous meaning of the quoted contract provision obligated plaintiff to deliver the trusses to defendant at the job site in Raleigh in such condition that they conformed to the plans and specifications and were suitable for immediate use without further action with reference to assembling the parts thereof. The contract provision relates solely to the condition of the trusses when delivered by plaintiff to defendant at the job site. Whether the trusses were to be completely assembled at Martinsville or assembled in part at Martinsville and in part at the job site was for decision according to plaintiff's preference.

"The necessity in pleading of the making of specific averments of usages and customs is ordinarily dependent upon the nature of the particular usage or custom in question, whether it is a general one of which the court takes judicial notice—a matter which in its final analysis is one of evidence and not of pleading—or is one local in character or one which pertains to a particular trade or business." 55 Am. Jur., Usages and Customs § 46; 25 C.J.S., Customs and Usages § 32. There is a serious question as to whether the *negative* averments in plaintiff's reply, quoted in our preliminary statement, constitute a sufficient allegation that the phrase "completely assembled" has a generally known or accepted meaning in the building trades. It is noted that plaintiff did not allege what it contended was such generally known and accepted meaning. Be that as it may, we think the evidence offered by plaintiff was erroneously admitted *and* was insufficient to support plaintiff's contention.

All the evidence is to the effect the 2388 trusses were not completely assembled when they arrived at the job site in Raleigh and that the assembly of these trusses was completed by defendant.

"Perhaps the most fundamental of the rules which limit the introduction of a custom or usage to affect the rights of parties to a written con-

tract is that which denies the admissibility of such evidence where its purpose or effect is to contradict the plain, unambiguous terms, covenants, and agreements expressed in the contract itself, or to vary or qualify terms which are free from ambiguity, even though the provisions of the contract may be unusual. A custom or usage may be proved in explanation and qualification of the terms of a contract which otherwise would be ambiguous, or to show that the words in which the contract is expressed are used in a particular sense different from that which they usually import, and, in some cases, to annex incidents to the contract in matters upon which it is silent; but evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made. It may explain what is ambiguous but it cannot vary or contradict what is manifest and plain, or be received to give to plain and unambiguous words or phrases a meaning different from their natural import." 55 Am. Jur., Usages and Customs § 31; 25 C.J.S., Customs and Usages § 30. In this connection, see *Cooper v. Purvis,* 46 N.C. 141.

The distinction may be illustrated by a comparison of the present case with *Long v. Davidson,* 101 N.C. 170, 7 S.E. 758. In *Long,* the plaintiff testified the defendant agreed to pay $2.40 per thousand for laying brick, the number to be estimated by "wall count, solid measure." Evidence that the quoted words had an established meaning, universally understood among brickmasons and contractors, was held competent as explanatory of (otherwise) ambiguous terms of the contract. In the present case, plaintiff offered no evidence tending to show the words "completely assembled per plans and specifications F.O.B. job site," which are plain and unambiguous, had a meaning in the building trades different from their ordinary significance.

McDearman v. Morris, 183 N.C. 76, 110 S.E. 642, and *R. R. v. Fertilizer Co.,* 188 N.C. 137, 124 S.E. 127, cited by plaintiff, are readily distinguishable. Suffice to say, there was no attempt to show a custom or usage to contradict or to explain any term of an express contract.

Defendant assigns as error the admission over its objection of incompetent evidence. This evidence relates to customary methods in which such trusses are *shipped.* It includes testimony that such trusses are shipped "whole folded," "folded in halves" or "knocked down." It includes testimony that such trusses when "whole folded" are in a position known in the trade as "assembled *for shipment.*" It includes the testimony of one witness that the particular trusses involved in the present case *were shipped* "as called for in the plans and specifications."

A pamphlet entitled "Fabricating Instructions for TECO Roof Trusses (Split Ring Type)," was admitted in evidence over defendant's objec-

tion. We pass, without discussion, defendant's contention that this pamphlet was not sufficiently identified. The pamphlet indicates it was issued by Timber Engineering Company of Washington, D. C., San Francisco and Los Angeles. Defendant objected particularly to that portion of the pamphlet which, under the heading "SHIPPING," provides: "The TECO ring type truss can be shipped a variety of ways for maximum savings in shipping space. The following are three suggested methods of shipment: FOLDED (illustrated) saving in space 36%, IN HALVES (illustrated) saving in space 55%, KNOCKED DOWN (illustrated) saving in space 81%."

The said testimony, similar testimony and the portion of said pamphlet under the heading, "SHIPPING," was incompetent and should have been excluded. It relates solely to methods by which *partially assembled trusses* may be shipped. No matter how shipped, performance of the contract required that plaintiff deliver "completely assembled" trusses at the job site.

Plaintiff contends the admission of such evidence, even if held incompetent, was harmless. This contention is based on the fact the jury answered the first issue, "Yes," and thereby found that plaintiff had breached the contract.

It is well settled that a verdict must be interpreted with reference to the pleadings, the evidence and the judge's charge. *Widenhouse v. Yow*, 258 N.C. 599, 605, 129 S.E. 2d 306, and cases cited.

The court's instructions bearing upon the first issue include the following: "The question for you is what is meant by the words 'completely assembled' and in that connection the plaintiff says and contends that there exists in the building trade a custom, a trade custom, which provides that the trusses should be shipped bundled up and knocked down, that that assembly is recognized by the custom of the building trade, that all of these trusses were assembled in accordance with that custom and that the execution of the contract incorporated within its provisions the recognized custom in force in the trade at the time, and I instruct you, Members of the Jury, that if you find that was the general trade custom in force at the time that the trusses were shipped and assembled in the manner required by that custom and it did enter into and was a part of the contract, and if you find that they were shipped in accordance with that custom your answer to that issue would be 'no'; that would constitute compliance with the contract at the time delivery was made, in other words. Instructions will hereafter be given you touching on the law of breach of contract with reference to existing trade customs unless those trade customs are expressly excluded by the agreement, and there was no exclusion in this agreement, gentlemen. So I instruct you if you

find by the greater weight of the evidence there was the general well established rule of custom and usage in the trade when these trusses were shipped that they were assembled by putting or fastening them together with a band around the center of them for the purpose of shipping and that this custom was known to the parties then that would constitute, as far as the assembly is concerned, a lawful assembly of the trusses; and if you further find by the greater weight of the evidence that the trusses were delivered to the site and that they were made suitable for the purpose for which they were purchased, you would answer that first issue 'no.' The burden of establishing that issue is upon the defendant, the Thompson Company, to establish it by the greater weight of the evidence." Defendant excepted.

All the evidence was to the effect the 2388 trusses were "folded," with two metal bands around each truss, when delivered by plaintiff to defendant at the job site in Raleigh. There being no controversy as to the terms of the contract, whether the said "folded" trusses were "completely assembled" was for decision by the court, not by the jury. They were not "completely assembled" and defendant was entitled to an explicit instruction to that effect. For reasons indicated above, the instructions relating to trade customs were inappropriate and tended to confuse rather than clarify the issue.

Defendant's allegations and evidence are to the effect plaintiff breached its contract in two separate and distinct ways: (1) by plaintiff's failure to deliver the 2388 trusses "completely assembled," and (2) by its delivery of trusses which in other respects did not comply with the plans and specifications. Defendant offered evidence tending to show the expenses it incurred in completing the assembly of the 2388 trusses. Defendant offered other evidence tending to show that it incurred additional expense in making corrections sufficient to put in usable condition trusses that did not (apart from the fact they were not completely assembled) comply with the plans and specifications. The first issue involved whether plaintiff had breached its contract in either of these respects.

Careful examination of the charge discloses no instruction as to the circumstances under which the jury would answer the first issue, "Yes." Indeed, the word, "Yes," does not appear anywhere in the charge.

"Under G.S. 1-180, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. (Citations). He has '. . . the positive duty of instructing the jury as to the law upon all of the substantial features of the case.' (Citations). Moreover, in the absence of request for special instructions, a failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. (Citations)." *Westmoreland v. Gregory,* 255

N.C. 172, 177, 120 S.E. 2d 523; *Pittman v. Swanson,* 255 N.C. 681, 685, 122 S.E. 2d 814.

Under the circumstances, it cannot be determined in what way the jury, by its answer to the first issue, found plaintiff had breached its contract with defendant. The conclusion reached is that the jury's answer to the first issue, when considered in connection with the court's instructions in relation thereto, is insufficient to render harmless the admission of the incompetent and prejudicial evidence.

Moreover, we are of opinion, and so decide, that the court erred in granting plaintiff's motion for nonsuit of defendant's counterclaim. All the evidence tended to show the trusses in the first shipment were too short, were returned to plaintiff's factory and were replaced by other trusses. Evidence offered by defendant tended to show that, with knowledge as to when these trusses were to arrive, it had lined up its crew to handle them; that it was found these trusses were too short when its crew was engaged in putting them on a building; that, because the trusses were short and had to be taken down, it was five hours before defendant could get its crew back to work on some other job; that its crew consisted of nine carpenters, two apprentices, four laborers and a crane operator; and that the "total cost of the men and the crane for five hours was $222.10." In our view, this evidence alone, when considered in the light most favorable to defendant, was sufficient to withstand plaintiff's motion for nonsuit of defendant's counterclaim.

Although not stressed by either party, it seems appropriate to mention the matters narrated below.

Two payments were made by defendant to plaintiff, $1,812.20 on September 11, 1958, and $23,090.00 on January 23, 1959. Defendant's superintendent testified: "By the end of December, 1958, there were 28 buildings complete with trusses. That left 10 buildings for trusses to be put in after that." Defendant offered evidence tending to show: Upon arrival of the first load of trusses, defendant's president (Hal A. Thompson) got in touch with plaintiff's Mr. Fore. Mr. Fore came to the job site in Raleigh. According to Thompson: "I told him and he agreed that the trusses were knocked down, that is to say, not assembled, and said, 'Well, you will just have to put them together, use your carpenters and keep time on us and we will pay you for them,' and that's exactly what we did." Thereafter, defendant by letter dated September 18, 1958, signed by Thompson, referring to the Walnut Terrace Housing Project, advised plaintiff as follows: "We thought it advisable to go on record in the matter of the trusses being delivered to the above mentioned job. As you know, our men are having to assemble these trusses on the job. You will be back charged for the labor involved in this operation since you orig-

inally quoted us F.O.B. job site completely assembled." This letter, addressed to plaintiff, invited particularly the attention of L. P. Fore, the person who had signed in plaintiff's behalf the contract of February 11, 1958. It is noted that Mr. Fore was not a witness and there was no explanation of his failure to testify.

For the reasons indicated, the ruling granting plaintiff's motion for nonsuit of defendant's counterclaim is reversed; and, for the indicated errors, the entire cause is remanded for a new trial not inconsistent with the law as stated in this opinion.

New trial.

CLARK'S CHARLOTTE, INC., A CORPORATION, AND ATLANTIC MILLS OF N. C., INC., A CORPORATION, ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS AND CORPORATIONS AS ARE SIMILARLY AFFECTED BY AN ORDINANCE AMENDING CHAPTER 13, ARTICLE IV, SECTION 13-56 OF THE CODE OF THE CITY OF CHARLOTTE, TO PROVIDE FOR THE DUE OBSERVANCE OF SUNDAY, AS AMENDED v. J. CLYDE HUNTER, SHERIFF OF MECKLENBURG COUNTY, JOHN HORD, CHIEF, CHARLOTTE POLICE DEPARTMENT; AND G. A. STEPHENS, CHIEF, MECKLENBURG COUNTY RURAL POLICE DEPARTMENT.

(Filed 31 January 1964.)

1. Constitutional Law § 14; Municipal Corporations § 27—

The enactment of Sunday regulations comes within the police power, and the General Assembly or a municipal governing board exercising delegated power may enact such regulations provided the classifications of those affected are based upon reasonable distinctions, affect all persons similarly situated, and have some reasonable relation to the public peace, welfare, and safety.

2. Same—Fact that businesses exempt sell types of articles included in types sold by businesses proscribed does not in itself constitute discrimination.

A municipal ordinance prohibiting generally the operation of all businesses within the municipality on Sunday but excepting certain businesses, including hotels, drug stores, magazine stands, etc., does not result in unlawful discrimination in regard to general department stores, even though such stores have departments selling the same types of goods as stores within the classifications excepted from the ordinance, since the classification of general department stores as distinguished from drug stores, bakeries, etc., is based upon a reasonable distinction and the ordinance operates equally upon all within the several classifications. Article I, § 17 of the Constitution of North Carolina; Fourteenth Amendment to the Federal Constitution.

3. Criminal Law § 1—

An ordinance proscribing the operation of certain businesses on Sunday *is held* to define the acts proscribed clearly enough so that a reasonably intelligent person is advised of the acts forbidden and to furnish a standard and method for its enforcement, and therefore the act is not void on the ground that it is unconstitutionally uncertain and vague.

4. Municipal Corporations § 27—

Municipal corporations of this State are clothed with power to enact and enforce ordinances for the observation of Sunday.

5. Statutes § 11—

An unconstitutional statute cannot operate to supersede, affect or modify an existing valid city ordinance.

APPEAL by plaintiffs from *Brock, S. J.*, 3 June 1963 Special "A" Civil Session of MECKLENBURG.

Civil action instituted on 4 October 1962 by plaintiffs as a class action to restrain permanently the defendants from enforcing the provisions of an ordinance of the city of Charlotte, and an amendment thereto, commonly known as the city Blue Law, on the ground that the ordinance, and the amendment thereto, violates the provisions of Article I, section 17, of the North Carolina Constitution, and of the Fourteenth Amendment to the United States Constitution.

On 4 October 1962 Riddle, S. J., issued a temporary injunction restraining defendants from enforcing the provisions of this ordinance, and the amendment thereto. On 23 October 1962 defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. On 25 October 1962 Riddle, S. J., overruled the demurrer and continued the temporary injunction to the final hearing. We denied a petition for a writ of certiorari. Thereafter, on 20 November 1962, defendants filed an answer.

The action came on to be heard on its merits before Brock, S. J., at the 3 June 1963 Special "A" Civil Session. Pursuant to the provisions of G.S. 1-184 *et seq.*, the parties waived a jury trial and agreed that the judge should hear the evidence, make findings of fact and conclusions of law, and render judgment thereon.

FINDINGS OF FACT MADE BY JUDGE BROCK

"1. That the plaintiff, Clark's Charlotte, Inc., is a North Carolina corporation duly organized and existing with an office and place of business located in the City of Charlotte, Mecklenburg County, State of North Carolina, where it engages in, among other things, a general retail merchandising and mercantile business, including a

restaurant, a department in the store which furnishes medical and surgical supplies, but which does not have a pharmacist and does not fill prescriptions or sell so-called ethical drugs, another department or departments which sell cookies, candies, chewing gum, beverages, tobacco products, books, newspapers, magazines, dairy products, bakery products (there being no bakery on the premises), shoe shine parlors, coin-operated vending machines, and sporting goods and games; that although Clark's Charlotte, Inc., does sell the items described above, it is a department store and the sale of soft goods accounts for the major portion of its sales volume.

"2. That the plaintiff, Atlantic Mills of N. C., Inc., is a corporation duly organized and existing with a place of business in the City of Charlotte, Mecklenburg County, State of North Carolina, where it engages in a general retail merchandising and mercantile business, including a department which sells medical and surgical supplies, but which does not have a pharmacist, does not fill prescriptions and does not sell any of the so-called ethical drugs, a restaurant, cookies, candies, tobacco products, books, newspapers, games, and various coin operated vending machines; that although Atlantic Mills of N. C., Inc. does sell some of the above described items, it is a department store and the major portion of its sales volume comes from the sale of soft goods.

"3. That the term 'soft goods' means clothing of all sorts, towels, sheets, pillow cases, fabrics, and other products made from fabrics of various kinds.

"4. That the plaintiff, Clark's, operates its place of business in a leased premises located within a shopping center and that all customers enter and leave Clark's through an exterior doorway, whereby the customers are required to go by cashier counters and pay for all self service purchased located within the store area, except for bakery, restaurant, and vending machines.

"5. The plaintiff, Atlantic Mills, engages in a general retail merchandising and mercantile business in a leased area with an exterior door for the entrance and exit of all customers and with a check-out counter operated by cashiers and that it is designated as a self-service department store, and all items purchased by the customers in the store area are required to be paid for at the check-out counters, except for restaurant and vending machines.

"6. The defendant, J. Clyde Hunter, is the duly elected and acting Sheriff of Mecklenburg County. The defendant, John Hord, is

the duly appointed and acting Chief of Police of the Charlotte Police Department. The defendant, G. A. Stephens, is the duly appointed and acting Chief of Police of the Mecklenburg County Rural Police Department. That each of the officers in his official capacity intends to enforce the Ordinance as set forth in Paragraph 6 of the plaintiffs' Complaint, and, further, that said officers in their official capacity shall proceed against the plaintiffs and others similarly situated if it is made to appear that a violation of the City Ordinance has occurred. The violation of the City Ordinance in question constitutes a general misdemeanor and each act in violation thereof constitutes a separate and distinct criminal violation.

"7. That the Ordinance complained of is Section 13-56, as amended, of the Code of the City of Charlotte, and was enacted pursuant to the authority granted by G.S. 160-52, G.S. 160-200(6), (7) and (10) and Chapter 366 of the Public-Local Laws of 1939, as amended, and provides that:

" 'It shall be unlawful to conduct, operate or engage in or carry on within the City of Charlotte on Sunday any business except hotels; motels; boarding houses; restaurants; drug stores furnishing medical or surgical supplies, food-stuffs, beverages, tobacco products, books, newspapers and magazines only; food stores furnishing food-stuffs, beverages, tobacco products, books, newspapers and magazines only; newspapers and the sale thereof; public utilities; radio and television broadcasting; public and private hauling and the rental of vehicles therefor and the rental of automobiles; taxicabs; gasoline service stations; refrigeration; dairy products; bakeries; magazine stands; ice and the sale thereof; shoeshine parlors; coin-operated laundries and dry-cleaners; coin-operated vending machines; real estate dealers; funeral directors; cemeteries; florists; and amusements, shows, games, sports and sporting events; provided, however, that it shall be unlawful to operate, stage or put on any amusement, show, game, sport or sporting event, where a fee is charged for admission as a spectator, within the City of Charlotte, on Sunday prior to one o'clock p.m., eastern standard time, except that this section shall not apply to any amusement, show, game, sport or sporting event that is or may be in progress at Saturday midnight.'

"8. That the effective date of Section 13-56, as amended, of the Code of the City of Charlotte was October 1, 1962.

"9. That the present action is a class action instituted by the plaintiffs and numerous other persons, firms, and corporations not

named as parties hereto, but in whose behalf the present action has been instituted, do, along with these plaintiffs operate a general retailing merchandising and mercantile store in the City of Charlotte, and, further, that they and the plaintiffs above-named engage on Sundays in the business of selling articles both embraced and not embraced in the various categories referred to in the above said Ordinance and its amendment.

"10. The plaintiff, Clark's does not compel any of its employees as a condition of employment to work on Sunday, and that the employment of employees on Sunday is of a voluntary nature. That Clark's operates its business on Sunday between the hours of 1:00 p.m. and 6:00 p.m. Any employees of Clark's who volunteer to work the five hours on Sunday are then entitled to a full day off during the week and are paid for a full eight hours of work. The Sunday afternoon business operation of Clark's constitutes approximately 15% of the total dollar volume of the corporation for the entire week, and that the Sunday sales constitute a large and substantial dollar volume of business. That Clark's has applied for, paid for, and received various and sundry licenses from the City of Charlotte, State of North Carolina.

"11. That Atlantic Mills does question each prospective employee as to the willingness of the employee to work on Sunday, and if the employee accepts employment, the employee is expected to work on certain Sundays, but only between the hours of 1:00 p.m. and 6:00 p.m., and for which the employee receives a full day's pay and receives a day off during the week. That the Sunday employment is on a rotated basis among the employees of the corporation. In the corporation operation between 1:00 and 6:00 p.m. on Sunday, Atlantic Mills attributes 33% to 34% of its total weekly business to the Sunday afternoon operation during the three weeks prior to Christmas, and at times other than immediately prior to Christmas, the Sunday operation constitutes approximately 15% to 20% of the total volume of the business for the week. During the three weeks before Christmas, 1962, it is estimated that approximately 63% of the customers at Atlantic Mills came to shop from places outside the City of Charlotte. That the Sunday sales constitute a large and substantial dollar volume of business. That Atlantic Mills has applied for, paid for, and received various and sundry licenses from the City of Charlotte, State of North Carolina.

"12. That both Clark's and Atlantic Mills operate from 9:30 a.m. until 10:00 p.m. on Monday through Saturday of each week.

"13. That each of the plaintiffs above-named derive from their Sunday sales a large and substantial dollar volume of business.

"14. That in order to open any individual department or section of the plaintiffs' business, the plaintiffs' entire general business is also open.

"15. That Section 13-56, as amended, of the Code of the City of Charlotte prohibits the operation of all department stores on Sunday and prohibits the operation of all general retail merchandising and mercantile stores in the City of Charlotte on Sunday; that under the provisions of the Ordinance, the plaintiffs would not be permitted to conduct, operate, engage in, or carry on their business on Sunday in the City of Charlotte."

CONCLUSIONS OF LAW MADE BY JUDGE BROCK

"Based upon the foregoing Findings of Fact, the court makes the following Conclusions of Law:

"1. That Section 13-56, as amended, of the Code of the City of Charlotte contains a general prohibition against operation of all businesses in the City of Charlotte on Sunday, but that there are excepted from such prohibition several specified classes of business.

"2. That the operation of department stores or general retail merchandising and mercantile businesses are not among the classes of business excepted from the prohibition of Section 13-56, as amended, of the Code of the City of Charlotte, and that the named plaintiffs and all others similarly situated are required by the Ordinance to close on Sunday.

"3. That Section 13-56, as amended, of the Code of the City of Charlotte affects all persons engaged in the department store or general retail merchandising and mercantile business without discrimination, in that all businesses of this type, including the plaintiffs, are required to close on Sunday.

"4. That Section 13-56, as amended, of the Code of the City of Charlotte is neither arbitrary, capricious, unconstitutionally vague, or violative of any constitutional rights of the plaintiffs."

Based upon his findings of fact and conclusions of law, Judge Brock ordered and decreed that the temporary restraining order theretofore issued be dissolved, and that the action be dismissed and plaintiffs be taxed with the costs.

Thereupon, the court, exercising the discretionary power conferred by G.S. 1-500, ordered that the temporary restraining order remain in effect

pending disposition of plaintiffs' appeal to the Supreme Court, provided that the plaintiffs execute and deposit with the clerk a bond in the sum of $5,000 to indemnify the defendants for any loss they may suffer on account of continuing said restraining order. On 14 June 1963 the required bond was filed.

From the judgment entered, plaintiffs appeal to the Supreme Court.

Warren C. Stack for plaintiff appellant Clark's Charlotte, Inc.

John D. Shaw for plaintiff appellant Atlantic Mills of N. C., Inc.

John T. Morrisey, Sr. and T. LaFontine Odom, Sr., for defendant appellee John Hord.

James O. Cobb for defendant appellees J. Clyde Hunter and G. A. Stephens.

PARKER, J. Plaintiffs have not excepted to any of the findings of fact made by Judge Brock, and they have not excepted to his first conclusion of law. They except to his second, third and fourth conclusions of law and to the judgment and assign them as error.

The challenged ordinance as amended has a general provision stating that it shall be unlawful to operate or carry on any business on Sunday in the city of Charlotte, with a second provision exempting certain specified types of business from the operation of the first provision and permitting them to remain open on Sunday, with a proviso that sporting events, etc., before 1:00 p.m. on Sunday where a fee is charged for admission are not exempt. Judge Brock's first conclusion of law, to which there is no exception in the record, is correct. This is one of the three principal types of Sunday closing legislation or ordinances. *Humphrey Chevrolet v. Evanston,* 7 Ill. 2d 402, 131 N.E. 2d 70, 57 A.L.R. 2d 969.

Plaintiffs here, like the defendant in *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783, and like the defendant in *S. v. Towery,* 239 N.C. 274, 79 S.E. 2d 513, appeal dismissed 347 U.S. 925, 98 L. Ed. 1079, do not contend that the challenged ordinance as amended discriminates against them insofar as it applies to any other person or persons engaged in the operation of a similar department store or stores or similarly situated. One of their principal grounds of attack upon the ordinance as amended is that it is discriminatory, arbitrary and unreasonable, denies them the equal protection of the law, and deprives them of their property without due process of law, all in violation of their rights under the Fourteenth Amendment to the United States Constitution and under Article I, section 17, of the North Carolina Constitution, because it permits drug stores, food stores, restaurants, and other enumerated businesses to stay open and sell on Sunday some of the same goods that they as operators

of large department stores sell, and denies them the privilege of opening their department stores and selling goods on Sunday. They rely upon *Elliott v. State,* 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; *Mt. Vernon v. Julian,* 369 Ill. 447, 17 N.E. 2d 52, 119 A.L.R. 747, and similar cases.

As long ago as A.D. 321 Constantine the Great passed an edict commanding all judges and inhabitants of cities to rest on the venerable day of the sun. At an early date Sunday statutes were enacted in England, and 29 Charles II c. 7 has been made the basis of similar legislation in many of the states. A few such statutes were enacted in what is now the United States during colonial days. The observance of Sunday is recognized by constitutions and legislative enactments, both state and federal, and it is said Sunday prohibitory laws have been enacted in all the states. 83 C.J.S., Sunday, sec. 3.

The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *S. v. McGee, supra; S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198; 83 C.J.S., Sunday, sec. 3, c and d; Anno. 119 A.L.R. p. 752.

"While the statute [a statute prohibiting public selling on Sunday except in enumerated cases] may not be perfectly symmetrical in its pattern of exclusions and inclusions, the equal protection of the laws does not require a Legislature to achieve 'abstract symmetry,' *Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144, 34 S. Ct. 281, 58 L. Ed. 539, or to classify with 'mathematical nicety.'" *People v. Friedman,* 302 N.Y. 75, 96 N.E. 2d 184. This principle of law also is applicable to a municipal ordinance prohibiting public selling on Sunday, except in enumerated cases, when the governing body of the municipality is clothed with the power to enact and enforce ordinances for the observance of Sunday.

In *McGowan v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 393, which was a case concerning the constitutional validity of certain Maryland criminal statutes commonly known as Sunday Closing Laws or Sunday Blue Laws, the Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide

> scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

There are a line of cases, such as *Mt. Vernon v. Julian (Ill.), supra,* which is reported and annotated in 119 A.L.R. 747 and which is cited in the annotation in 57 A.L.R. 2d 987, upon which plaintiffs rely, that take the position because a drug store might sell some of these things that the grocers or these others sell then the Act is discriminatory and unconstitutional. This Court by the present Chief Justice has answered the arguments of the *Mt. Vernon v. Julian (Ill.)* case, and others that hold to the same effect, in *S. v. Towery, supra.*

In this case Towery was tried and convicted in the superior court, on appeal from the municipal court of the city of High Point, on a warrant charging him, the operator of a curb market, with keeping his curb market open on Sunday for the purpose of selling his goods, and with selling on Sunday tomatoes, peaches and toilet paper, in violation of a city ordinance. The city ordinance prohibited the operation of businesses on Sunday and exempted from its operation hotels, restaurants, delicatessen and sandwich shops, and the like "furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business"; ice cream or confectionery stores "furnishing ice cream, cigars, tobacco, nuts and soft drinks *only*"; cigar stands and newstands "furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only*"; drug stores "furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines"; and certain others. (Italics ours.) Defendant operated a curb market and, according to his own testimony, sold "practically everything that is sold in a general grocery store or a super market."

The present Chief Justice writing for the Court the opinion in the *Towery* case said:

> "It would seem that the reasoning of the Illinois Court [*Mt. Vernon v. Julian*] ignores the right of a municipality in adopting a Sunday closing ordinance to discriminate as between classes, *S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198, but instead makes the question of competition or the right generally to conduct a business the determinative factor.
>
> * * *

"The defendant here, like the defendant in *S. v. McGee, supra* [237 N.C. 633, 75 S.E. 2d 783], does not claim that the ordinance discriminates against him in so far as it applies to any other person or persons similarly situated. He simply claims that the business establishments permitted to remain open on Sunday sell certain articles of merchandise similar to those which he sells, therefore, he says they are his competitors. He falls into error in undertaking to make competition as between classes the test rather than discrimination within a class.

* * *

"Moreover, it will be noted that in the ordinance under consideration, the exemption as to cafes, delicatessens and sandwich shops is limited to those furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business. Likewise, the exemption extends to (1) 'ice cream or confectionery stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks *only;*' and (2) 'cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only.*' (Italics ours.)

"The defendant, according to his own testimony, operates a curb market and sells 'practically everything that is sold in a general grocery store or super market.' Therefore, he has shown no arbitrary or unreasonable exercise of the police power in the classification and selection of businesses to be closed on Sunday.

* * *

"After a careful consideration of the question raised on this record, and the authorities bearing thereon, we are of the opinion that the ordinance in so far as it has been challenged on this appeal, is constitutional and, therefore, the verdict below must be upheld."

The Court in the *Towery* case relies upon *S. v. Medlin,* 170 N.C. 682, 86 S.E. 597, in which case the Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power." In the *Towery* case it is stated: "This decision has been followed and cited with approval in *S. v. Davis,* 171 N.C. 809, 89 S.E. 40; *S. v. Burbage,* 172 N.C. 876, 89 S.E. 795; *Lawrence v. Nissen,* 173 N.C. 359, 91 S.E. 1036; *S. v. Kirkpatrick,* 179 N.C. 747, 103 S.E. 65; *S. v. Weddington,* 188 N.C. 643, 125 S.E. 257, 37 A.L.R. 573, and *S. v. McGee, supra* [237 N.C. 633, 75 S.E. 2d 783]."

In *Kirk v. Olgiati,* 203 Tenn. 1, 308 S.W. 2d 471 (6 Dec. 1957), the Court held that an ordinance of the city of Chattanooga requiring Sunday

closing of general merchandise, department, hardware, jewelry, furniture and grocery stores, super markets, meat markets and similar establishments is not discriminatory, arbitrary and an unreasonable exercise of the police power on any theory that drug stores, curb markets, filling stations and similar establishments selling same goods as grocery stores are permitted to stay open. The Supreme Court of Tennessee in this case relies upon our case of *S. v. Towery, supra,* as a principal authority for its decision.

According to the unchallenged findings of fact, this appears as to the business of the plaintiffs here: They operate large department stores, and the sale of "soft goods" accounts for a major portion of their sales volume. The term "soft goods" means clothing of all sorts, towels, sheets, pillowcases, fabrics, and other products made from fabrics of various kinds. One or both have a department which sells medical and surgical supplies, but which does not have a pharmacist and does not fill prescriptions or sell so-called ethical drugs. One or both have a department or departments which sell cookies, candies, chewing gum, beverages, tobacco products, books, newspapers, dairy products, and bakery products. Each operates in its store a restaurant. One or both have in their store coin-operated vending machines. In our opinion, and we so hold, the operation of large department stores by plaintiffs here, the major portion of whose sales volume comes from the sale of "soft goods," although they sell many other goods as specified in the findings of fact, is an entirely different business from "drug stores furnishing medical or surgical supplies, foodstuffs, beverages, tobacco products, books, newspapers and magazines *only*"; and from "food stores furnishing foodstuffs, beverages, tobacco products, books, newspapers and magazines *only*"; (Italics ours.) and from restaurants; and from any of the other businesses enumerated in the challenged ordinance as amended, and may be placed in a different classification, and the business of the plaintiffs as the operators of large department stores reasonably justifies their being placed in a different classification from the businesses permitted to be open and to sell goods on Sunday in the challenged ordinance as amended. In consequence, plaintiffs have shown no discriminatory, arbitrary, or unreasonable exercise of the police power by the governing body of the city of Charlotte in the classification and selection of businesses, in the ordinance as amended here, to be closed or permitted to be open on Sunday, and such classification does not deny them the equal protection of the law, and does not deprive them of their property without due process of law, in violation of their rights under the Fourteenth Amendment to the United States Constitution and under Article I, section 17, of the North Carolina Constitution.

Plaintiffs further contend that the challenged ordinance as amended is void for vagueness in that it furnishes no standards for enforcement and gives no definition so that one can know a crime is being committed. The purpose of the "void for vagueness" doctrine is to warn people of the criminal consequences of certain conduct. The ordinance of the city of Charlotte challenged in the case of *S. v. McGee, supra,* is in many ways strikingly similar to the challenged ordinance as amended here, and we upheld the constitutionality of the ordinance challenged in the *McGee* case. The challenged ordinance in *S. v. Towery, supra,* is in many respects similar to the challenged ordinance as amended here, and we upheld the constitutionality of that ordinance. In our opinion the challenged ordinance as amended expresses the conduct prohibited clearly enough so that a reasonably intelligent person will know what is forbidden and, consequently, is not unconstitutionally void on the ground of uncertainty and vagueness. *S. v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *McGowan v. Maryland, supra;* University of Kansas Law Review, vol. 10, 1961-62, p. 444. It seems from the unchallenged sixth finding of fact by the court that the ordinance as amended here furnishes a standard and method for its enforcement.

Plaintiffs do not challenge the fact that the governing body of the city of Charlotte is clothed with power to enact and enforce ordinances for the observance of Sunday. The city has such power, and that question has been decided in *S. v. McGee, supra.*

The effective date of the challenged ordinance as amended is 1 October 1962. Plaintiffs contend that this ordinance as amended has been superseded and replaced by Ch. 488, Session Laws 1963, which is entitled "AN ACT TO REWRITE G.S. 14-346.2 TO PROHIBIT CERTAIN BUSINESS ACTIVITIES ON SUNDAY." In the recent case of *Treasure City v. Clark, Ante,* 130, 134, S.E. 2d 97, the Court held this Act unconstitutional, because it violates the provisions of Article II, section 29, of the North Carolina Constitution. This contention is untenable because an unconstitutional statute cannot operate to supersede and replace or to affect or modify an existing valid city ordinance. *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; *Chicago, I.L.R. Co. v. Hackett,* 228 U.S. 559, 57 L. Ed. 966; 16 C.J.S., Constitutional Law, sec. 101, p. 473.

We are of opinion, and so hold, that the ordinance as amended is constitutional, insofar as it has been challenged on this appeal, and that the trial court's findings of fact and conclusions of law, and its judgment based thereon are legally correct. All plaintiffs' assignments of error are overruled. The judgment below is

Affirmed.

DAN S. CLARK, SR., EMPLOYEE v. GASTONIA ICE CREAM COMPANY, EMPLOYER, NON-INSURER, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 31 January 1964.)

1. Master and Servant § 53—

Whether an employee's injury is sustained by accident arising out of and in the course of his employment is a mixed question of law and fact.

2. Master and Servant § 93—

Where there is no exception to the findings of the particular facts and the particular findings provide a factual basis for the ultimate finding that the employee's injury arose out of and in the course of his employment, exception to the ultimate finding will not be sustained.

3. Master and Servant § 82—

The Industrial Commission has only such jurisdiction as is conferred upon it by statute, expressly or by necessary implication.

4. Courts § 2—

Want of jurisdiction may be raised at any time.

5. Same; Master and Servant § 78—

Where the injured employee does not assert any claim against insurer and the employer has the insurer brought in as a party and asserts liability of insurer under a policy which on its face was not in force until some six days after the injury in question, the Industrial Commission has no jurisdiction to determine the rights and liabilities of the employer and the insurer *inter se*, since insurer's liability must be based upon reformation of the policy and the Industrial Commission has no jurisdiction of the equitable remedy of reformation upon the facts of the case. G.S. 97-91.

6. Appeal and Error § 59—

The language in an opinion of the Supreme Court must be considered in relation to the facts of the particular case in which it was written.

APPEAL by defendant employer, Gastonia Ice Cream Company, from *Riddle, S. J.*, July 1963 Civil Session of GASTON.

Proceeding under our Workmen's Compensation Act. G.S. 97-1 *et seq.*

Plaintiff (Clark) filed claim against his employer, Gastonia Ice Cream Company (Ice Cream Company), alleging he sustained a compensable injury on May 3, 1960.

On January 31, 1962, Ice Cream Company, asserting "it was not a non-insurer at the time of the accident in question, but instead was covered by Workmens Compensation Policy No. OCL 614 (*sic*) issued by the Lumbermens Mutual Casualty Company," moved that Lumbermens Mutual Casualty Company (Casualty Company) be made a party to the proceeding. No order making Casualty Company a party appears in

the record. However, unchallenged recitals in the opinion of the hearing Commissioner disclose Casualty Company had "received all pleadings and other documents in connection with this case," and that counsel for Casualty Company acted in its behalf in "the trial of this claim" and during the progress of the hearing "advised the Commission that his appearance was no longer special and accepted the jurisdiction of the Commission to make the defendant carrier a party to the action."

It was stipulated that plaintiff and Ice Cream Company were subject to the Workmen's Compensation Act; that Ice Cream Company regularly employed five or more employees; that the employer-employee relationship existed between Ice Cream Company and plaintiff at the time of the alleged accidental injury; and that plaintiff's average weekly wage at the time of the alleged accidental injury was $35.00.

Hearings were conducted by Deputy Commissioner Gene C. Smith on January 31, 1962, and on February 13, 1962. Plaintiff offered evidence bearing exclusively upon the circumstances and extent of his injuries. Ice Cream Company offered evidence bearing upon whether its liability, if any, to plaintiff was covered by Casualty Company's workmen's compensation Policy No. OCL 614 140. This policy states it is for the period "from May 9, 1960, to June 1, 1961." The evidence offered by Ice Cream Company, admitted over objection by Casualty Company, tended to show Casualty Company had agreed to issue such a policy for a period beginning April 20, 1960. Casualty Company did not offer evidence.

The hearing Commissioner, based upon his findings of fact and conclusions of law, held (1) that plaintiff had suffered a compensable injury on May 3, 1960, and (2) that Casualty Company was not on the risk on May 3, 1960. The hearing Commissioner entered an award that Ice Cream Company pay compensation and medical expenses in specified amounts. Ice Cream Company filed exceptions and appealed.

The full Commission adopted the findings of fact and conclusions of law of the hearing Commissioner and affirmed the award. Ice Cream Company filed exceptions and appealed to the superior court.

Judge Riddle, being of opinion the Commission's findings of fact are supported by competent evidence and that its conclusions of law are correct, entered judgment as follows:

"Therefore, it is ordered, adjudged, and decreed that the award of the North Carolina Industrial Commission allowing compensation to the plaintiff as against the defendant, employer, Gastonia Ice Cream Company, Inc., be and the same is hereby in all respects approved and confirmed, and the opinion and award of the North Carolina Industrial Commission denying compensation to the employee as against the de-

fendant, carrier, Lumbermens Mutual Casualty Company, is likewise, in all respect approved and confirmed."

Ice Cream Company excepted and appealed.

Mullen, Holland & Cooke, O. A. Warren and Robert E. Gaines for plaintiff appellee.

Garland & Alala for defendant appellant Gastonia Ice Cream Company.

Hollowell & Stott for defendant appellee Lumbermens Mutual Casualty Company.

BOBBITT, J. Plaintiff (an appellee) contends he sustained a compensable injury on May 3, 1960, for which he is entitled to a compensation award against Ice Cream Company. Plaintiff did not and does not assert any claim against Casualty Company.

Ice Cream Company (the appellant) contends: (1) Plaintiff did not sustain a compensable injury on May 3, 1960. (2) If he did, Casualty Company under its Policy No. OCL 614 140 is obligated to pay the compensation award.

Casualty Company (an appellee) contends its policy does not cover compensable injuries sustained prior to May 9, 1960, and that the Industrial Commission has no jurisdiction to reform the policy.

Finding of Fact No. 8, the only finding of fact bearing upon whether plaintiff sustained a compensable injury to which appellant excepted, states: "8. That the plaintiff suffered an injury by accident arising out of and in the course of his employment with the defendant employer on May 3, 1960." In assigning error, appellant asserts "(t)he evidence introduced was not sufficient to warrant Finding of Fact No. 8 . . ." Appellant also excepted to Conclusion of Law No. 1, essentially the same as Finding of Fact No. 8, and to Conclusion of Law No. 2. The subject of Conclusion of Law No. 2 is the extent of plaintiff's injury and the amount of compensation to which he is entitled.

Whether plaintiff sustained an injury by accident arising out of and in the course of his employment is a mixed question of law and of fact. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 197, 128 S.E. 2d 218, and cases cited; *Horn v. Furniture Co.*, 245 N.C. 173, 176, 95 S.E. 2d 521, and cases cited.

The Commission's ultimate finding that plaintiff was injured by accident arising out of and in the course of his employment is based on specific findings covering crucial questions of fact on which plaintiff's right to compensation depends. There being no exception to any of the Commission's specific findings of fact, "we consider such specific findings of

fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a factual basis for such ultimate finding." *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E. 2d 596; *Hardy v. Small*, 246 N.C. 581, 584, 99 S.E. 2d 862. When so considered, we are of opinion and decide that the Commission's specific findings of fact support its Finding of Fact No. 8 and its Conclusions of Law Nos. 1 and 2. Hence, appellant's said assignments of error are overruled.

As indicated, plaintiff did not and does not assert any claim against Casualty Company. Ice Cream Company (appellant), not plaintiff, caused Casualty Company to be brought into the proceeding. The matters discussed below relate to the rights and liabilities of appellant and Casualty Company *inter se*.

Finding of Fact No. 14, the only finding of fact bearing on this feature of the case to which appellant excepted, states: "14. That the defendant employer was not covered by a policy of workmen's compensation insurance on May 3, 1960, the date of the plaintiff's injury by accident." In assigning error, appellant asserts "(t)he evidence introduced was not sufficient to warrant Finding of Fact No. 14 . . ." Appellant also excepted to Conclusion of Law No. 4, essentially the same as Finding of Fact No. 14.

The Commission, citing G.S. 97-91 and *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488, concluded it was its duty to determine the rights and liabilities of Ice Cream Company and Casualty Company *inter se*.

The policy, according to its express provisions, was for the period from May 9, 1960, to June 1, 1961. It appears the Commission based its ultimate finding that Casualty Company was not on the risk on May 3, 1960, on the ground appellant, notwithstanding its officers had full opportunity to discover the contents of the policy, accepted and retained the policy without protest, citing *Clements v. Insurance Co.*, 155 N.C. 57, 70 S.E. 1076, and *Coppersmith v. Insurance Co.*, 222 N.C. 14, 21 S.E. 2d 838. Appellant contends this basis of decision is untenable in that there is no evidence or specific finding of fact to the effect the policy was received by appellant prior to plaintiff's injury on May 3, 1960. Be that as it may, in view of our conclusion that the Commission had no jurisdiction to determine the rights and liabilities of appellant and Casualty Company *inter se*, the Commission's findings of fact and conclusions of law with reference thereto are without significance and are set aside.

Appellant offered evidence tending to show Casualty Company agreed to issue to it a workmen's compensation insurance policy for a period beginning April 20, 1960. Since the decision(s) below were in favor of the Casualty Company, no question is presented on this appeal as to

the competency of such evidence. Obviously, the Commission would have no jurisdiction of a cause of action by appellant against Casualty Company to recover damages on account of Casualty Company's failure to comply with such agreement. See 44 C.J.S., Insurance § 229; 29 Am. Jur., Insurance § 185.

Under the policy as written and issued, Casualty Company has no liability in connection with the compensable injury sustained by plaintiff on May 3, 1960. Hence, appellant cannot recover from Casualty Company *on the policy* unless and until the policy is reformed on the ground of mutual mistake (or otherwise) so as to provide for a policy period inclusive of May 3, 1960. *Peirson v. Insurance Co.*, 248 N.C. 215, 102 S.E. 2d 800, and cases cited. The question is whether the Commission had jurisdiction of what is essentially an action by appellant against Casualty Company to reform the policy and then recover the amount necessary to reimburse appellant as to all payments it is required to make to plaintiff under the award and judgment. The agreement asserted by appellant against Casualty Company is in the nature of an indemnity agreement and the controversy with reference thereto is not germane to the determination of plaintiff's claim against appellant. Compare *Greene v. Laboratories, Inc.*, 254 N.C. 680, 688, 120 S.E. 2d 82; *Steele v. Hauling Co.*, 260 N.C. 486, 489, 133 S.E. 2d 197.

"The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms." *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E. 2d 215, and cases cited; *Biddix v. Rex Mills*, 237 N.C. 660, 662, 75 S.E. 2d 777; *Tindall v. Furniture Co.*, 216 N.C. 306, 312, 4 S.E. 2d 894. Whether the commission had jurisdiction of the subject matter, to wit, said controversy between appellant and Casualty Company, depends solely upon whether such jurisdiction was conferred by statute. *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673, and cases cited. "An absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment." *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876, and cases cited. Casualty Company has contended throughout this proceeding that the Commission had no jurisdiction of said subject matter.

There is no contention that our Act expressly confers upon the Commission equitable jurisdiction to determine an asserted cause of action to reform a workmen's compensation insurance policy. The question is whether there is any statutory provision which, by necessary implication, confers such jurisdiction. In resolving this question, the nature of such cause of action and traditional requirements in respect of pleadings and burden of proof must be considered.

Well established principles relating to the *equitable* remedy of reformation include the following: "A proper case for the reformation of instruments must be made by the pleadings, and considerable strictness of pleadings as well as of proof is required." 76 C.J.S., Reformation of Instruments § 72; 45 Am. Jur., Reformation of Instruments § 98. "The power to reform an instrument is an extraordinary one whose exercise must be guarded with zealous care, and exercised with great caution. Thus, equity is slow and cautious in the exercise of this power, and will grant reformation only in a clear case of fraud or mistake." 76 C.J.S., Reformation of Instruments § 3; 45 Am. Jur., Reformation of Instruments § 5. To reform, *i.e.*, to *correct*, a written instrument on the ground of mutual mistake of the parties, the evidence must be clear, strong and convincing. *Johnson v. Johnson*, 172 N.C. 530, 90 S.E. 516. "Whether or not the evidence is clear, strong and convincing in a particular case is for the jury to determine." Stansbury, North Carolina Evidence, Second Edition, § 213, and cases cited.

Unless the notice of accident required by G.S. 97-22 and G.S. 97-23 is so considered, our Act (G.S. 97-1 *et seq.*) makes no mention of pleadings. No statutory provision suggests it would have been appropriate for appellant to have alleged a cause of action against Casualty Company for reformation of the policy on the ground of mutual mistake. Indeed, appellant did not attempt to plead or assert such cause of action. Appellant's motion of January 31, 1962, that Casualty Company be made a party to the proceedings, is based on its assertion that its liability, if any, on account of plaintiff's injury on May 3, 1960, was covered by the policy Casualty Company had issued.

"Whether administrative tribunals have equity jurisdiction to reform a policy of insurance to conform to the true intent of the parties depends on the wording of the Constitution and the Statute enacted in pursuance thereto creating the tribunal. Administrative tribunals are of limited jurisdiction. In some states constitutional and statutory provisions confer equity jurisdiction upon them which permits the reformation of a policy. In other states such reformation may be accomplished only through courts of equity, while in still other states the courts, without specific reference to either statutory or constitutional authority have held that the particular administrative tribunal has such equity power." Schneider, Workmen's Compensation Text, Permanent Edition, Volume 12, § 2500; 58 Am. Jur., Workmen's Compensation § 572; 100 C.J.S., Workmen's Compensation § 377; Annotation: 127 A.L.R. 473.

This summary is pertinent: "The general rule appears to be that, when it is ancillary to the determination of the employee's rights, the compensation commission has authority to pass upon a question relating to the

insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, and construction of extent of coverage. This is, of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured. On the other hand, when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack. Or it may occur when the insured and insurer have some dispute entirely between themselves about the validity or coverage of the policy or the sharing of the admitted liability." Larson, Workmen's Compensation Law, Volume 2, § 92.40.

In our opinion, and we so decide, our Act does not confer upon the Commission expressly or by implication jurisdiction to determine, in a proceeding in which plaintiff asserts no claim against Casualty Company, appellant's asserted right to reform the policy and to recover from Casualty Company the amount of plaintiff's award. It was not contemplated that payment of compensation to an injured employee should be delayed by or involved in a determination of such a controversy.

It is unnecessary to determine to what extent, if any, our Act confers equitable jurisdiction upon the Commission. It seems appropriate that such determination(s) be made when specific factual situations are under consideration. It is noted: Under Article IV (Section 3) of the Constitution of North Carolina as amended in 1962 the General Assembly may vest in administrative agencies "such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created."

Unquestionably, the Commission has jurisdiction to set aside on the ground of mutual mistake an agreement and an award theretofore entered in a proceeding for compensation. *Neal v. Clary,* 259 N.C. 163, 130 S.E. 2d 39. Here, the Commission's records disclose appellant's prior policy expired April 20, 1960, and that appellant's compensation liability was not insured between April 20, 1960, and May 9, 1960.

Appellant contends equitable jurisdiction to determine the cause of action it asserts against Casualty Company is conferred by G.S. 97-91, which 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." (Our italics). Questions "arising under this article" would seem to consist primarily, if not exclusively, of questions

for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents.

Appellant quotes and stresses this excerpt from the opinion in *Greene v. Spivey, supra, viz.*: "The Commission is specifically vested by statute with jurisdiction to hear 'all questions arising under' the Compensation Act. G.S. 97-91. This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." While the quoted statement, considered apart from the factual situation under consideration, would seem to support appellant's contention with reference to the jurisdiction of the Commission, we are mindful of this apt expression of Barnhill, J. (later C. J.): "The law discussed in any opinion is set within the framework of the facts of that particular case . . ." *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10.

Reference is made to the preliminary statement and opinion in *Greene v. Spivey, supra,* for a full explanation of the factual situation. Greene, an employee of Spivey, sustained a compensable injury on July 19, 1949, and as a result thereof died on July 26, 1949. The Commission's award in favor of Greene's dependents was against Spivey, Greene's employer, *and* against American Mutual Liability Insurance Company (American Mutual) as *Spivey's* compensation insurance carrier.

Spivey was engaged in the business of "timbering and logging." He purchased and worked standing timber and sold logs in the open market. However, on January 14, 1949, and for some time prior thereto, he had been selling his entire output to Halsey Hardwood Company, Inc. (Halsey Hardwood). He continued to do so until March, 1949. On January 14, 1949, American Mutual issued its compensation insurance policy to Halsey Hardwood on a "quarterly audit basis." Spivey, Halsey Hardwood and American Mutual negotiated with reference to providing compensation coverage for Spivey. It was agreed that Spivey would be covered by the Halsey Hardwood policy upon payment of premiums based on 5.5% of his payroll, to be reported and paid weekly by Spivey to Halsey Hardwood and thereafter transmitted by Halsey Hardwood to American Mutual. Beginning the first week in February, 1949, and thereafter, Spivey reported and paid weekly to Halsey Hardwood. The Commission found as a fact that "premiums were paid by O. R. Spivey to Halsey Hardwood in accordance with the arrangement detailed until after the death of Henry Greene." American Mutual conceded the policy provided coverage for Spivey from "on or about 1 February, 1949." The opinion states: "However, American Mutual takes the position that *its contract with Spivey* furnished coverage of his workers only while and so long as he was selling and delivering logs to Halsey Hardwood." (Our

italics). American Mutual's primary contention was that Spivey was not covered on July 19, 1949, when Greene was fatally injured, because Spivey then was not engaged in selling and delivering logs to Halsey Hardwood but was engaged in selling and delivering logs to another purchaser.

In *Greene v. Spivey, supra,* the policy was in full force and effect on July 19, 1949. Subsequent to the issuance of the policy, the agreement was reached that, for the consideration stated, it would provide coverage for Spivey. No question was presented as to the necessity for reformation of the policy or of the Commission's jurisdiction to reform the policy. Whether the Commission had jurisdiction seems to have been raised and treated as an incidental question. Indeed, in view of American Mutual's admission that the policy provided coverage to Spivey "for a time," it does not appear that a serious question as to jurisdiction was presented. Be that as it may, the conclusion reached is that *Greene v. Spivey, supra,* may not be considered authority for the proposition that the Commission has equitable jurisdiction to determine whether a compensation insurance policy should be reformed. *A fortiori,* this is true when as here the controversy is solely between the employer and the insurance company.

The portion of the judgment of the court below which affirms the award of the Commission "allowing compensation to the plaintiff as against the defendant, employer, Gastonia Ice Cream Company, Inc.," is affirmed.

The portion of said judgment providing, "and the opinion and award of the North Carolina Industrial Commission denying compensation to the employee as against the defendant, carrier, Lumbermens Mutual Casualty Company, is likewise, in all respect approved and confirmed," is stricken therefrom for two reasons, to wit: (1) The Commission's award contains no reference to the Casualty Company. (2) The Commission had *no jurisdiction* to determine the controversy between appellant and Casualty Company. Too, as stated above, all of the Commission's findings of fact and conclusions of law relating to the controversy between appellant and Casualty Company are set aside. Hence, in further litigation, if any, between appellant and Casualty Company neither party will be prejudiced on account of any finding of fact or conclusion of law made herein.

As modified as provided in this opinion, the judgment of the court below is affirmed.

Modified and affirmed.

MELVIN W. STANLEY v. BILLY RAY BROWN AND LONNIE C. JONES, JR.

(Filed 31 January 1964.)

1. Master and Servant § 86—

The Workmen's Compensation Act precludes an action by one employee against another to recover for negligent injury when the employees and the employer are subject to the Compensation Act and the injury arises out of and in the course of the employment.

2. Master and Servant § 91—

The approval by the Industrial Commission of an agreement for compensation upon facts stipulated is as conclusive as an award of the Commission in an adversary proceeding. G.S. 97-82, G.S. 97-83.

3. Same; Master and Servant § 86—

Where the Industrial Commission has entered an award affirming an agreement for compensation for injuries inflicted by a fellow employee, a commissioner may not thereafter, upon agreement of the injured employee, the employer and the insurer that the injured employee was not engaged in the employment at the time, set aside the award without a hearing and without notice to the fellow employee. G.S. 97-6, G.S. 97-17, and an action at common law thereafter instituted by the injured employee against his fellow employee should be nonsuited in the Superior Court.

4. Automobiles § 41f—

Evidence that defendant-driver rammed the rear of another vehicle stopped because of a red traffic light *held* sufficient to take the issue of negligence to the jury.

5. Automobiles §§ 21, 46—

Where defendant introduces evidence that he ran into the rear of a stationary vehicle because of unforeseeable brake failure due to loss of brake fluid, the court should charge the jury as to the law if the jury should find the facts as contended by defendant, and the mere summarization of the evidence and statement of the defendant's contentions with respect to the failure of the brake are insufficient.

MOORE, J., concurring.

PARKER, J., joins in concurring opinion.

APPEALS by plaintiff and defendant Brown from *Carr, J.*, July 29, 1963 Civil Session of ALAMANCE.

Plaintiff seeks by this action damages for injuries to person and property sustained when the vehicle in which he was riding was struck in the rear by a vehicle owned by defendant Jones but driven by defendant Brown. The collision occurred about 6:13 p.m. 1 March 1960 at the intersection of Webb and Lexington Avenues in Burlington.

Plaintiff alleges: Brown, a police officer of Burlington, arrested Jones on the charge of operating a motor vehicle while under the influence of

intoxicants; the Jones car was parked while Brown took Jones to jail; Brown, in the performance of his duty as a policeman, returned to the Jones car for the purpose of parking it off the streets; while moving the Jones car, Brown ran into the rear of plaintiff's vehicle which had stopped because of a red traffic light; the collision was caused by the negligent failure of Brown to keep a proper lookout and control the car he was driving, and driving it at a speed in excess of that permitted by law; Brown was acting as agent for Jones in moving the car.

Brown and Jones filed a joint answer. They denied the alleged negligence, alleged the collision was caused by an unforeseeable brake failure due to loss of brake fluid. They denied the alleged relationship of principal and agent. For an affirmative defense they alleged both plaintiff and Brown were police officers of Burlington. Both in the performance of their duties went to remove the Jones vehicle from the streets. The collision occurred in the performance of that work; and because plaintiff had been injured by a fellow servant in the course and scope of their employment, plaintiff, Burlington, and Burlington's insurance carrier for workmen's compensation had submitted to the Industrial Commission the question of compensation to which plaintiff was entitled. The Commission had made an award which was conclusive and binding on the parties.

Plaintiff filed a reply admitting the Industrial Commission had made an award but alleged this award was thereafter vacated by the Commission because the injury did not arise out of and in the course of plaintiff's employment.

Issues based on (1) the alleged negligence of Brown, (2) agency, and (3) damages (a) to the person and (b) to plaintiff's vehicle were submitted to a jury. The jury answered the first issue in the affirmative, the second, in response to a peremptory instruction, in the negative. It fixed the amount of damages for personal injuries and to the truck.

The court set aside that portion of the verdict fixing the damages for personal injuries. It did so because it was of the opinion it had committed an error of law on that question. It rendered judgment for $100, the amount assessed as damages to the truck.

Plaintiff and Brown appealed.

H. Clay Hemric, Clarence Ross, and B. F. Wood for plaintiff appellee, appellant.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter for defendant appellee, appellant.

RODMAN, J. Plaintiff's appeal is directed to the action of the court in setting aside, because of error of law arising during the trial, that

portion of the verdict fixing damages for personal injuries. The conclusion we reach with respect to the errors assigned by Brown makes it unnecessary to answer the question propounded by plaintiff.

Brown's appeal presents two questions: (1) Is he liable for personal injuries sustained by plaintiff? (2) Did the court commit error in the charge with respect to the asserted negligence of Brown?

Our Workmen's Compensation Act, c. 97 of the General Statutes, was enacted in 1929. Sec. 9 of that chapter relieves an employee from liability for negligence resulting in injury to a fellow employee when the employees and employer are subject to the Compensation Act and the injury arises out of and in the course of the employment. *Warner v. Leder*, 234 N.C. 727, 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.

Municipalities and their employees are bound by the Act, G.S. 97-7. The Act does not purport to deal with an employee's common law right of action against his fellow employee for damage to property.

Brown, as a defense to plaintiff's right to damages for personal injuries, pleaded an award made by the Industrial Commission. In support of his defense he put in evidence I.C. Form 21 entitled *"AGREEMENT FOR COMPENSATION FOR DISABILITY MELVIN WILLARD STANLEY (Employee) v. CITY OF BURLINGTON (Employer) IOWA NATIONAL MUTUAL INS. CO. (Carrier)."* The named parties stipulated the following facts: (1) "(A)ll parties hereto are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act, and that the Iowa National Mutual Insurance Company is the insurance carrier for said employer." (2) Employee sustained an injury by accident arising out of and in the course of his employment on 1 March 1960. (3) The accident resulted in a sprained back and neck. (4) The average weekly wage of the employee at the time of the accident, including overtime, was $323 per month. (5) Disability resulting from the accident began on 2 March 1960. (6) The employer and the insurance carrier were bound to pay to the employee compensation at the rate of $35 per week for 2 and 5/7 weeks. (7) The employee returned to work for the City of Burlington on 28 March 1960 at an average wage of $323 per month. Compensation was paid pursuant to the stipulations on 8 June 1960. The Industrial Commission, based on the facts stipulated and the compensation paid, approved the agreement on 13 June 1960.

The Commission's approval of the stipulated facts and payment was as conclusive as if made upon a determination of facts in an adversary proceeding. G.S. 97-82 and 83; *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559; *Neal v. Clary*, 259 N.C. 163, 130 S.E. 2d 39. Plaintiff, to avoid the bar created by the Commission's approval, alleged the order

of 13 June had been vacated because his injuries were not sustained in the course and scope of his employment.

The order on which plaintiff relies to vacate the award of 13 June 1960 was made by a deputy commissioner on 8 March 1962. It is based on facts stipulated by plaintiff, Burlington, and Iowa Mutual. The stipulation is dated 18 January 1962. Summarized or quoted, these are the facts stipulated: The parties were, on 1 March 1960, bound by the Compensation Act; plaintiff's monthly wage was $323; employer, on 2 March 1960, filed a report of the accident and injury with the Industrial Commission; *"the defendant-insurance carrier thereafter investigated the matter and on the basis of the investigation, the defendant-insurance carrier concluded that the plaintiff-employee was injured by accident within the course and scope of his employment";* defendants then entered into an agreement to pay compensation to plaintiff; the agreement was submitted to and approved by the Commission; pursuant to the agreement the insurance carrier paid plaintiff $95 as compensation and $1,259.15 as medical expenses; that Brown was acting in the course and scope of his employment when he collided with the vehicle occupied by plaintiff; but "because of the mistaken belief that a police officer is always on duty and acting within the course and scope of his employment, and the fact that the plaintiff-employee had gone to the point where there was a cave-in in the street, a captain of the police department filed an employer's report of accident in which he stated that the plaintiff-employee was returning to the police station after assisting a fellow patrolman on an assignment, and the *plaintiff-employee advised the defendant-insurance carrier that he was still on duty at the time of the accident and was assisting Police Officer Brown who had arrested a driver of a vehicle for being under the influence of intoxicants and that the accident occurred as they were on the way back to the police station and that the plaintiff-employee was using his own personal vehicle since there were no other such vehicles available";* compensation and medical payments had been made; "The defendant-insurance carrier was notified by the plaintiff-employee that he was not actually on duty at the time of the accident and that his injury was probably not one covered by the Workmen's Compensation Act; that the *defendant-insurance carrier and the defendant-employer then conducted separate investigations and on the basis of the investigations conducted they concluded that the plaintiff did not sustain an injury by accident arising out of and in the course of the plaintiff's employment.*" (Emphasis supplied). Based on these stipulations the deputy commissioner, on 8 March 1962, found as a fact and concluded as a matter of law that plaintiff did not sustain an injury by accident arising out of and in the course of his employment.

Brown, by motion to nonsuit, challenges the validity of the order of 8

March 1962. That order was made without notice to him. If valid it deprives him of the protection accorded by the statute and does so simply because the employer and its insurance carrier, at the suggestion of the injured employee, have *"concluded that the plaintiff did not sustain an injury by accident arising out of and in the course of the plaintiff's employment,"* a fact theretofore solemnly asserted by plaintiff and admitted after an investigation by the insurance carrier. Plaintiff's right to compensation, under the admissions made in 1960 and not now controverted, depended upon a resolution of this simple question of fact: Did plaintiff go to the Jones car for the purpose of assisting Brown in the performance of his duty? If so, the rights of plaintiff and Brown *inter se* were fixed by the express language of the Compensation Act. The Commission, with plenary power to decide that factual question, answered in the affirmative. Its answer was based upon the admissions made by the injured party, his employer, and by the insurance carrier after it had made its own investigation.

The Industrial Commission has the inherent power, upon application made in due time, to relieve a party from a judicial determination of his rights when the decision is a product of mistake, fraud, or excusable neglect. *Neal v. Clary, supra; Butts v. Montague Brothers,* 208 N.C. 186, 179 S.E. 799; *Ruth v. Carolina Cleaners,* 206 N.C. 540, 174 S.E. 445; *Harris v. Diamond Const. Co. (Va.),* 36 S.E. 2d 573; Annotations 73 A.L.R. 2d 939 *et seq.;* 2 Am. Jur. 2d 336. But this power to prevent injustice by fraud, mistake, or excusable neglect does not extend so far as to permit a nullification of the Act, by an agreement between a party entitled to receive and a party obligated to pay compensation that they will disregard its provisions. G.S. 97-6, 17.

When it has been judicially determined upon solemn admissions made by the party entitled to receive and the party obligated to pay that the employee has sustained a compensable injury, rights accrue to others which cannot be disturbed without notice and an opportunity to be heard. *Neal v. Clary, supra.*

It follows from what we have said that the order of the deputy commissioner, based as it is solely upon the agreement of the employee, employer and insurance carrier, without notice to and an opportunity for Brown to be heard is, as to him, void. *Universal Oil Products Co. v. Root Ref. Co.,* 328 U.S. 575, 90 L. ed. 1447; 30A Am. Jur. 672.

The record does not disclose when the parties sought to have the Commission vacate its original award. It must not be inferred from what is here said with respect to the power of the Commission in a proper case to vacate an award that the Commission can or should act upon the petition which the parties filed with it. Certainly the Commission has no greater authority than courts of general jurisdiction in similar situations.

In re Crawford, (S.C.), 30 S.E. 2d 841. The least that is required of an applicant is that he shall have exercised due diligence. *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227; 30A Am. Jur. 625. Whether G.S. 1-220 is applicable to cases before the Industrial Commission where relief is sought on the ground of fraud, mistake, or excusable neglect, need not now be determined.

The court erred in declining to allow Brown's motion to nonsuit plaintiff's cause of action for personal injuries.

The evidence with respect to Brown's negligence was sufficient to carry the case to the jury; hence the court properly overruled the motion as it relates to plaintiff's claim for property damage.

Plaintiff alleged the collision was caused by the negligence of Brown in that he (a) exceeded the speed limit, (b) failed to keep his vehicle under control, and (c) failed to look out for other traffic. Plaintiff's evidence was sufficient to support a finding of negligence based on any of these allegations.

Brown's evidence was sufficient to repel the asserted negligence. To explain his failure to stop before colliding with plaintiff's vehicle, he offered evidence that there was a sudden and unexplained failure of the brakes on his car caused by loss of brake fluid.

The court in its charge summarized the evidence and stated Brown's contention with respect to the failure of the brakes, but it failed to state what the law would be if the jury concluded the collision was caused by an unforeseeable brake failure. Brown's exception directed to the failure of the court to declare the law entitles him to a new trial on the issue of negligence.

Reversed on the claim for personal injuries.

New trial on the claim for property damage.

MOORE, J., concurring: An agreement for the payment of workmen's compensation, setting out jurisdictional facts and that the employee was injured by accident arising out of and in the course of his employment, when approved by the Industrial 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. *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559. Such agreement may be set aside for fraud, misrepresentation or mutual mistake at the instance of a party or parties thereto. *Neal v. Clary,* 259 N.C. 163, 130 S.E. 2d 39.

I concur with the holding of the majority opinion that such agreement may not be set aside by the Commission upon the *ex parte* factual stipulations of the parties which have the effect of withdrawing the question of compensation from the jurisdiction of the Commission, though such stipulations tend to show a mutual mistake of fact. Jurisdiction may

not be turned on and off at the whim or for the convenience of the parties. "In determining the question of jurisdiction, considerations of hardship, or the merits of the case, can play no part, nor is the concurrence of the litigants or witnesses controlling." 21 C.J.S., Courts, s. 112, pp. 170, 171. "When at any time or in any manner it is represented to the court that it has not jurisdiction, the court should examine the grounds of its jurisdiction before proceeding further, the question of jurisdiction being always open for determination. The court may receive testimony on a preliminary question to determine its jurisdiction and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment." 21 C.J.S., Courts, s. 113, p. 175. There can be no waiver of jurisdiction *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286. An order of the Commission relinquishing jurisdiction, theretofore asserted, should be made only after a plenary hearing instituted, if it need be, by the Commission itself. Such hearing was not had in this case. The majority opinion correctly reversed the court below on the question of nonsuit.

However, in my opinion we should not leave the impression that a full hearing and determination of the question of jurisdiction by the Commission would bind the defendant in the present action—the fellow employee. The sole issue before the Industrial Commission is whether Stanley, plaintiff herein, is entitled to compensation under the Workmen's Compensation Act. Defendant herein, the fellow employee, is neither a necessary nor proper party to the proceeding. He may be a necessary or important witness before the Commission, but the Commission cannot make him a party to the proceeding before that tribunal. Its orders and awards will be binding only upon the claimant-employee, the employer and insurance carrier.

Miller v. Roberts, supra, was an action in Superior Court for wrongful death. Miller and Townsend, a fellow employee, were employed by Roberts. Miller was fatally injured while riding in a motor vehicle operated by Townsend. Both were about the business of Roberts at the time of the injury. The immediate cause of the injury was the negligence of Townsend in the operation of the motor vehicle. Miller's administratrix instituted an action in Superior Court for the wrongful death of Miller, alleging actionable negligence on the part of Townsend and the liability of Roberts under the doctrine of *respondeat superior.* Defendants did not plead the Workmen's Compensation Act in bar, but there was uncontradicted evidence that Roberts had, at the time of the accident, 25 employees in the business establishment at which Miller and Townsend worked. The trial court nonsuited the action for want of jurisdiction in the Superior Court. On appeal, this Court affirmed, holding

that "The Superior Court has the duty and power to find a jurisdictional fact."

"Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." 21 C.J.S., Courts, s. 113, p. 174. It is the first duty of a court to determine its own jurisdiction. *Patrick v. Baker,* 180 N.C. 588, 105 S.E. 271.

In my opinion the Industrial Commission is without authority to bind defendant Brown as to its jurisdiction. If the Industrial Commission, after a full hearing should determine that the agreement for compensation for Stanley was executed by reason of mutual mistake, that Stanley was not injured in the course of his employment, and that Stanley had been diligent in moving to vacate the agreement, Brown would still be entitled to raise and have determined in Superior Court the question of jurisdiction in an action in Superior Court to fix him with liability for Brown's injury.

PARKER, J., joins in the concurring opinion.

LAWRENCE BRITT v. LAURIN PATTERSON MANGUM, JR. AND JAQUELINE MANGUM.

(Filed 31 January 1964.)

1. Automobiles §§ 24.1; 35—

A complaint containing allegations to the effect that defendant wrecked the automobile driven by her as the result of her negligent operation of the vehicle, that defendant's arm was pinned between the vehicle and the ground, that plaintiff, called to the scene as the result of defendant's cries for aid, lifted the vehicle and extricated defendant and took her into his home, and that in lifting the vehicle plaintiff suffered serious injury to his back, *is held* to state a cause of action.

2. Automobiles § 24.1 —

The doctrine of rescue, usually arising in negating contributory negligence on the part of a person rescuing another from peril resulting from the negligence of a third person, is applicable in this State to permit recovery by the rescurer injured in the rescue of a person placed in a position of peril by his own negligence.

HIGGINS, J., dissenting.

RODMAN, J., joins in dissent.

BRITT *v.* MANGUM.

APPEAL by plaintiff from *MacRae, Special Judge,* June 1963 Special Civil Session of COLUMBUS.

This is a civil action in which the plaintiff seeks to recover damages for personal injuries sustained while rescuing the feme defendant from an upset automobile under the circumstances hereinafter set out.

Plaintiff and the defendants live on a rural unpaved road, just off U. S. Highway No. 74, between Evergreen and Chadbourn, in Columbus County. The home of the plaintiff is located between the home of the defendants and Highway No. 74. On the morning of 22 April 1962, plaintiff was in his home when the feme defendant, wife of the male defendant, drove along the unpaved road in a southerly direction toward Highway No. 74. The feme defendant, operating a 1959 Volkswagen, owned and maintained by her husband and furnished by him for the use of the members of his family as a family purpose car, was traveling at a high and unlawful rate of speed, in violation of G.S. 20-140, and, as she reached a point in said road approximately in front of the home of plaintiff, she lost control of said vehicle. The automobile overturned in the roadway. Plaintiff was summoned from his house by other members of his family who had heard or seen the accident. Upon arriving at the automobile, plaintiff observed that gasoline was leaking out of the tank and saturating the ground around the automobile. The feme defendant indicated to plaintiff that her arm was caught between the door and the ground and that she was unable to free herself; that she was suffering "intolerable physical agony." Thereupon, the plaintiff lifted the automobile in order to free the feme defendant's arm, got her out of the automobile and took her into his home. In the process of lifting the automobile, it is alleged plaintiff suffered serious injuries to his back, for which he has been compelled to obtain extended medical care and treatment; that he continues to suffer "excrutiating pain" as the result of the injury to his back.

Plaintiff alleges in his complaint that the injuries sustained by him were solely and proximately caused by the negligence of the feme defendant.

The defendants demurred to the complaint on the ground that it fails to state a cause of action or that it fails to allege the violation of any duty owed by the defendants to the plaintiff, and for that the negligence complained of in the complaint was not the proximate cause of the injuries received by the plaintiff as a matter of law.

The demurrer was sustained and the plaintiff appeals, assigning error.

David M. & W. Earl Britt; John W. Campbell for plaintiff.

Tally, Tally, Taylor & Henley for defendants.

DENNY, C.J. This case involves the application of what is known as the rescue doctrine.

Our cases involving the doctrine seem to differ factually from the present one. In *Norris v. R. R.*, 152 N.C. 505, 67 S.E. 1017, 27 L.R.A. (N.S.) 1069; *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915; s.c., 244 N.C. 132, 92 S.E. 2d 788; and *Bumgarner v. R. R.,* 247 N.C. 374, 100 S.E. 2d 830, the plaintiff in each of these cases had rescued or undertaken to rescue a person or persons who had been subjected to imminent peril through the negligence of a third person.

In *Norris v. R. R., supra,* it is said: "* * * (I)t is well established that when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question. * * * (W)hen one sees his fellow-man in such peril he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promtings of a generous nature and extend help which the occasion requires; and his efforts will not be imputed to him for wrong, * * * unless his conduct is rash to the degree of reckless; and all of them hold that full allowance must be made for the emergency presented."

Likewise, in *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915, this Court quoted with approval the rule laid down in 38 Am. Jur., Negligence, section 228, page 912, as follows: "The rule is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." To like effect is 65 C.J.S., Negligence, section 124, page 736.

The appellees contend that since the feme defendant did not imperil another, but only herself, the plaintiff cannot recover, citing *Saylor v. Parsons,* 122 Iowa 679, 98 N.W. 500, 64 L.R.A. 542, 101 Am. St. Rep. 283.

In the *Saylor* case the Court held the rescuer could not recover on the ground that, "Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself." This view has not met with favor in other jurisdictions, but instead, when it has been pressed, it has been almost invariably rejected.

In the case of *Brugh v. Bigelow,* 310 Mich. 74, 16 N.W. 2d 668, 158 A.L.R. 184, the defendant drove his car into an intersection where a col-

lision occurred. Plaintiff alleged the defendant was negligent in the operation of his automobile, that her attention was attracted to the wreck by the noise and defendant's cries, and that she went to his rescue and was injured. Defendant relied upon *Saylor v. Parsons, supra,* and advanced substantially the same argument that the defendants' counsel do in their brief in support of the ruling of the court below in the instant case. The Michigan Court distinguished the cases thus: "In that case *(Saylor)* plaintiff was proceeding at his own risk on private property where the safety of others would not necessarily be involved. In the instant case defendant Bigelow was bound by the law of Michigan to exercise due care for the safety of others in his driving upon a public highway. * * *

"At this point counsel for defendant makes the distinction that if plaintiff had been injured in the rescue of defendant's passenger, Swan, there would be authority to hold defendant liable but argues that defendant owed no duty to himself not to make himself an object of necessary rescue and hence he is to be absolved of liability.

"We can make no such distinction of duty defining the duties of drivers of automobiles on the highways of this State. This was a roadside where passers-by would be expected to stop and render needful assistance. Defendant's claim that he owed himself and his rescuer no duty is without merit. His cries for help belie his claimed freedom from duty. Defendant further argues that rescue is unusual and that it is an unusual thing and therefore not to be anticipated that passers-by would respond to relieve known dire necessity resulting from an automobile accident. We understand the contrary to be the case.

"Whether the defendant was negligent, and if so, whether such negligence was the proximate cause of the injury, are questions for the jury."

In *Carney v. Buyea,* 65 N.Y.S. 2d 902, the defendant parked her car on an incline leading from her farmhouse to the main highway, without engaging the brakes, while she got out and walked some 20 feet in front of the car to pick up some soft drink bottles in the road. While she was stooped over, the car began to roll and plaintiff, a bystander, ran to her and was injured in rescuing her. On appeal from a verdict for plaintiff, the defendant contended, *inter alia,* that she owed no duty to the plaintiff and that she could be guilty of no negligence to herself, citing *Saylor v. Parsons, supra.* After reviewing the *Saylor* case at length, the Court said: "In parking her car as she did, the defendant endangered the safety not only of the bystanders on her farm but also the safety of herself and the probable safety of the users of the highway who might be passing her farm in case her car should run onto the highway. May not a lack of self-protective care be negligent towards any person in whose vicinity

one exposes oneself to an undue risk of injury? * * *" The Court then quoted Bohlen on Torts, as follows: " 'The rescuer's right of action, therefore, must rest upon the view that one who imperils another, at a place where there may be bystanders, must take into account the chance that some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue.' * * *

"We think the defendant, by parking her car as she did, exposed herself to undue risk of injury. Her act in that respect was wrongful to the plaintiff since it brought about an undue risk of injury to him causing him to undertake her rescue to his injury and damage. *Brugh v. Bigelow,* 310 Mich. 74, 16 N.W. 2d 668, 671, 158 A.L.R. 184; Vol. 43 Michigan Law Review, pages 980-982. We think there was a legal duty owing by the defendant to the plaintiff not to create an undue risk of injury to him and not merely a moral duty as was held in *Saylor v. Parsons,* 122 Iowa 679, 98 N.W. 500, 64 L.R.A. 542, 101 Am. St. Rep. 283., *supra.*"

The Court further said in discussing the case of *Eckert v. Long Island R. R. Co.,* 43 N.Y. 502, 3 Am. Rep. 721: "The rigid rules of an action at law for negligence bend before a situation where the life of a person is imperiled and without penalty to his rights permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances. * * *"

In the case of *Longacre v. Reddick,* C.C.A. of Texas, 215 S.W. 2d 404, a truck loaded with butane gas owned by J. E. Reddick, the appellee, and driven by his employee, J. T. Abbott, collided with another truck. Longacre was walking along the highway a short distance from the point of the collision. Seeing Abbott apparently unconscious in the cab of the truck, Longacre rushed to the truck to rescue him, pulled him out of the truck and started away from the truck with him. When he was only a few feet away, the gas in the truck exploded, causing Longacre to be severely burned. The facts found were to the effect that Abbott was negligent in driving his truck on the wrong side of the highway, and that such negligence was a proximate cause of Longacre's injuries. The trial court, however, denied recovery on the ground that there was "no negligence on Reddick's part as between him and Abbott, the driver of the truck, that Abbott could not have claimed damages as against Reddick, and that Longacre could not recover damages from Reddick unless the person whom he rescued, to wit, Abbott, could have recovered from Reddick."

The Appellate Court said: "Recovery has been allowed in many cases to a plaintiff who had rescued some one from peril where the latter had been placed in the position of peril as a result of the negligence of defendant. Many cases, including several from Texas, are listed in annotations in 19 A.L.R. 4 and 158 A.L.R. 190.

"The gist of the holdings is that the rescue is something that might reasonably be foreseen by the negligent defendant and is a natural and probable consequence of his negligence, and that the rescuer is not guilty of contributory negligence as a matter of law in risking loss of his own life or serious injury to himself, provided the rescue attempt is not recklessly or rashly made, and that contributory negligence is ordinarily a question for the jury to decide. * * *

"The rescued person here was put into the position of peril through the negligence of a servant of the defendant Reddick. The servant's negligence, which under the law is imputed to the master, was a proximate cause of the injuries suffered by the plaintiff. It is not material, from the plaintiff's standpoint, that the negligent servant was the one who was rescued. The case is not basically different from *Brugh v. Bigelow*, 310 Mich. 74, 16 N.W. 2d 668, 671, 158 A.L.R. 184, where liability was imposed on the negligent operator of an automobile, who was rescued by the plaintiff who suffered injury in making the rescue." The judgment of the court below was reversed.

In *Lynch v. Fisher*, Court of Appeal of Louisiana, 2nd Circuit, 34 So. 2d 513, the Court, in considering the question of foreseeability and its application to the doctrine of rescue, said: "We think it is well established that the general doctrine of foreseeability is not applicable to the extent of relieving one who sets in motion, through the agency of a negligent act, a chain of circumstances leading to the final resultant injury. In *Payne v. Georgetown Lumber Co., Ltd.*, 117 La. 983, 42 So. 475, 477, the Court said: 'That the particular injurious consequence was "improbable" or "not to be reasonably expected" is no defense.' "

Also, in the case of *Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1, Justice Cardoza, in speaking for the Court, among other things, said: "The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. * * * The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had. *Ehrgott v. Mayor, etc.*, New *York*, 96 N.Y. 264, 280, 281, 48 Am. Rep. 622." cited with approval in *Brock v. Peabody Cooperative Equity Exchange*, 186 Kan. 657, 352 P. 2d 37.

In the light of the foregoing authorities, it is immaterial from the plaintiff's standpoint whether the feme defendant was imperiled as the result of her own negligence or by the negligence of another, so long as she was imperiled by the negligence of one other than her rescuer. The facts determine who shall be made the defendant or defendants in such an action.

For example, if the peril of the feme defendant had been brought about by the negligence of a third party instead of by her own negligence, as alleged in the complaint, then the third party and not the feme defendant and her husband would be liable for any injury sustained by the plaintiff in making the rescue.

The plaintiff herein is not entitled to recover from the defendants upon the facts as alleged in the complaint, unless he can establish by the greater weight of the evidence that the feme defendant's peril was brought about as the result of her own negligence and that such negligence was the proximate cause of the plaintiff's injuries. *Carney v. Buyea, supra; Longacre v. Reddick, supra;* 158 A.L.R. Anno.—Rescuer—Death or Injury, at page 195, *et seq.*

We hold that the complaint states a cause of action and that the demurrer should have been overruled.

Reversed.

HIGGINS, J., dissenting: The majority opinion, as I read it, eliminates reasonable foreseeability as one of the constituent elements of actionable negligence. For that reason I am unable to agree.

RODMAN, J., joins in this dissent.

HUBERT M. HOWELL, T/A HOWELL OIL COMPANY v. HERBERT SMITH, T/A ATLANTIC BLOCK COMPANY.

(Filed 31 January 1964.)

1. Principal and Agent § 7—

An agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity.

2. Same; Corporations § 12—

An agent acting for a principal in the purchase of materials has the duty to disclose the fact of agency and the name of his principal if he would relieve himself of personal liability, and the use of a trade name or the existence of means by which the seller might discover the fact of agency is not sufficient for this purpose, nor will the discovery of the fact of agency by the seller after the extension of credit relieve the agent of personal liability.

3. Same—

Where over a period of years plaintiff, in selling petroleum products, deals with defendant as an individual, checks in payment of the products being signed individually by defendant or the manager under a printed trade name without disclosing the fact of incorporation, the fact that five statements for

products sold by the corporation to plaintiff over the period of several years had the word "Inc." printed after the trade name, although such word did not appear on the invoices, *held* insufficient to establish actual knowledge by plaintiff that he was dealing with a corporation.

APPEAL by defendant from *Morris, J.*, May 1963 Session of WAYNE.

Plaintiff seeks to recover from the defendant Herbert Smith, trading as Atlantic Block Company, the sum of $2,054.13, alleged to be the balance due for petroleum products which plaintiff sold and delivered to the defendant. As a defense to the action defendant alleged that, as plaintiff well knew, he had purchased the products as an officer of a corporation which was solely liable for the debt.

In brief summary, plaintiff's evidence tended to show these facts: Prior to April 1957 plaintiff had furnished petroleum products to A. J. Marlow, trading as Atlantic Building Block Company. On April 5, 1957, Marlow introduced plaintiff's salesman Combs to defendant and informed Combs that he was selling out to defendant. Combs and defendant agreed that plaintiff would continue to furnish petroleum products to Smith as he had to Marlow. A few days later Combs delivered one hundred and sixty gallons of gasoline to the defendant who signed the ticket which was made out to him in his own name. At that time defendant informed Combs that he was changing the name of the business to Atlantic Block Company, but he did not tell him that the business was incorporated. Its status was not mentioned. Plaintiff's manager checked the credit rating of Herbert Smith, trading as Atlantic Block Company, and then set up the account on his ledger in the name of Atlantic Block Company. Thereafter he observed signs erected throughout Wayne County advertising Atlantic Block Company.

The account in suit covers deliveries made from June 5, 1959 to December 31, 1960. Subsequent to the bringing of this action, on August 20, 1960, defendant made a payment on this account by a check with the name Atlantic Block Company printed above the signature line and signed by defendant Herbert Smith without any official designation.

While plaintiff was furnishing petroleum products under the contract with defendant, he made at least five purchases of blocks from Atlantic Block Co. At least one of the delivery tickets accompanying these purchases bore the name "Atlantic Building Block Company." Bills were rendered on September 30, 1957; October 31, 1957; November 30, 1957; January 1, 1958; and February 1, 1958. These bills came through the mail and were received by plaintiff's manager, Herbert H. Howell, but he did not "examine each of them specifically." At the top of each statement was imprinted the name "Atlantic Building Block Co., Inc." The amount of these bills was credited against the account of Atlantic Block

Company. Plaintiff also received at least one invoice for these blocks which read "bought of Atlantic Building Block Co." On July 5, 1960 plaintiff received an invoice for four stepping stones with the name "Atlantic Block Company" appearing at the top.

Defendant's evidence tended to show: On March 19, 1946 the Secretary of State issued a certificate of incorporation to Atlantic Building Block Company. Defendant, his wife, and brother bought the corporate stock from A. J. Marlow to whom it was pledged to secure the unpaid balance of the purchase price. Defendant became vice-president of the corporation and Glenn Maready, a salaried employee of the defendant, became the president and manager although he owned no stock. Except for the change in management, the business continued to be operated by the new owners at the same location and in the same manner as before the sale. A sign, "Atlantic Building Block Company," remained on the premises. When plaintiff's manager asked defendant how to bill the new account he was told that Mr. Marlow's account at the bank would continue in the name of Atlantic Building Block Company and, to avoid confusion, defendant's account would be in the name of Atlantic Block Company. Whether the business was incorporated was not discussed.

Defendant had some letterheads, billheads, and envelopes imprinted with the name "Atlantic Building Block Co., Inc." These envelopes were used in mailing statements to debtors. He also had some checks printed with the name Atlantic Block Company above the signature line. Maready had invoices imprinted with the name "Atlantic Building Block Company." Both defendant and Maready signed checks and in so doing, neither ever designated his position with the corporation. At the time of the sale of the stock, Marlow retained all the old accounts receivable and agreed to pay all existing debts of the corporation. Until his business forms were exhausted defendant had no others printed.

The jury returned a verdict in favor of the plaintiff for the amount claimed. From judgment on the verdict the defendant appealed assigning errors in the charge.

Sasser and Duke by John E. Duke; Joseph H. Davis for plaintiff appellee.

James N. Smith for defendant appellant.

SHARP, J. This case was heard at the Fall Term 1962 at which time the question of nonsuit was decided adversely to the defendant. *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144.

These rules are well established in the law of agency:

An agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowl-

edge of the agency and of the principal's identity. *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375; *Lumber Co. v. Motor Co.*, 192 N.C. 377, 135 S.E. 115; 3 Am. Jur. 2d, *Agency* § 320; Restatement, *Agency* 2d § 322; 2 Williston on Contracts 3d Ed. § 284. The disclosure of the agency is not complete so as to relieve the agent of personal liability unless it embraces the name of the principal. The duty is on the agent to make this disclosure and not upon the third person with whom he is dealing to discover it. 3 Am. Jur. 2d, Agency § 317. It will not relieve the agent from personal liability that the person with whom he dealt had means of discovering that the agent was acting as such. 2 Williston on Contracts, 3d Ed. § 288. "Actual knowledge brought by the agent, or, what is the same thing, that which to a reasonable man is equivalent to knowledge, is the criterion of the law." *Conant Co. v. Lavin*, 124 Me. 437, 126 A 647. Mere suspicion and means of knowledge do not amount to actual knowledge. *Ell Dee Clothing Co. v. Marsh*, 247 N.Y. 392, 160 N.E. 651. "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable." *Cobb v. Knapp*, 71 N.Y. 348, 27 Am. Rep. 51; *Saco Dairy Co. v. Norton*, 140 Me. 204, 35 A 2d 857, 150 A.L.R. 1299; 1 Mechem on Agency 2d Ed. § 1413. The cases are in substantial accord that the use of a trade name is not as a matter of law a sufficient disclosure of the identity of the principal and the fact of agency. Annot., 150 A.L.R. 1303.

The liability of the agent is not exclusive. When the principal becomes known, the other party to the contract may elect whether he will resort to him or to the agent with whom he dealt unless the contract is under seal, a negotiable instrument, or expressly excludes him. *Hardware Co. v. Banking Co.*, 169 N.C. 744, 86 S.E. 706; Restatement, Agency 2d, §§ 186, 322; 2 Williston on Contracts, 3d Ed. § 286. Ordinarily, however, it is an alternative liability. The principal and agent are not jointly liable unless the agent has, by contract or by his conduct, added his own liability to that of the principal. *Rounsaville v. Insurance Co.*, 138 N.C. 191, 50 S.E. 619. It is competent for an agent, although fully authorized to bind his principal, to pledge his own personal responsibility instead. *De Remer v. Brown*, 165 N.Y. 410, 59 N.E. 129. The aggrieved party seeking damages must elect whether he will hold the principal or the agent liable; he cannot hold both. *Walston v. Whitley & Co., supra; Horton v. R. R.*, 170 N.C. 383, 86 S.E. 1020.

The right of the third party to sue the agent is not impaired by a discovery of the identity of the principal after the contract was made. Tiffany on Agency § 99. The disclosure of the principal comes too late to discharge the agent after the third party has extended credit, performed services, or entered upon the performance of an indivisible contract. To protect himself, the agent must disclose the fact that he is acting for a designated principal in time for the third party to determine beforehand whether he will accept the responsibility of the principal in the transaction. Knowledge of the identity of a principal acquired after the performance of the contract, cannot release the obligated agent to whom credit was extended and substitute a stranger to the transaction. *Whiting v. Saunders,* 51 N.Y.S. 211; *Curtis v. Miller,* 73 W. Va. 481, 80 S.E. 774; *Lull v. Anamosa Nat. Bank,* 110 Iowa 537, 81 N.W. 784; *Hospelhorn v. Poe,* 174 Md. 242, 198 A. 582.

The trial court adequately explained these rules of law as they apply to the instant case. Whether the agent or the principal was the contracting party was a question for the jury. *Howell v. Smith, supra.* Its verdict has established that at the time defendant made arrangements with plaintiff to furnish oil to the Atlantic Block Company he did not disclose that he was acting as the agent of a corporation. Therefore, he was the original contracting party and outside the usual rule that an officer of a corporation will not be individually bound when contracting within the scope of his employment as an agent of the corporation. *Potter v. Chaney,* Ky., 290 S.W. 2d 44.

However, the agreement in this case was not a single indivisible contract. Under it, upon order, plaintiff delivered oil to the Block Company from April 5, 1957 to June 17, 1960. If a third party to a contract involving an undisclosed principal discovers the agency and the identity of the principal while a continuing, divisible contract for the furnishing of goods or supplies is still executory, he then has the option to deal either with the agent or the principal with respect to the future performance of the contract. Ordinarily, the agent who made the original purchase is not liable if the third party continues to deliver goods after acquiring knowledge of the principal's identity unless he has agreed to be personally liable. *Brackenridge v. Claridge,* 91 Tex. 527, 44 S.W. 819.

The appellant's position is this: Conceding *arguendo* that plaintiff originally dealt with the defendant as the agent of an undisclosed principal in April 1957, by June 1959 he had acquired such information that he must have known that the defendant was the agent of a corporation and thereafter the corporation was solely liable. The defendant assigns as error that the judge (1) failed to explain "what constitutes

knowledge by a third person of the identity of the principal," and (2) failed "to instruct the jury that plaintiff must show that the identity of the defendant's principal remained undisclosed by defendant and was unknown to the plaintiff at the time of the last or unpaid items of the alleged account."

There is no evidence whatever that plaintiff knew that Mr. Marlow's business, the Atlantic Building Block Company, was a corporation. After April 1957 the invoices which Maready had printed bore the caption "Atlantic Building Block Company." It is a fair inference that for each of the five purchases for which plaintiff received a statement bearing the abbreviation "Inc.," he received an invoice without it. Payments received by plaintiff on the account in question were made by checks which gave no clue that a corporation was paying the bill. Below the printed name "Atlantic Block Company" appeared the individual signature of either the defendant or the manager, Maready. It is noted that Maready testified that he received his salary from the defendant personally. The sign at the site of the business identified it as "Atlantic Building Block Company," and fifty or sixty highway signs throughout the county proclaimed the name of the enterprise as "Atlantic Block Company."

To establish knowledge of agency on the part of the plaintiff, defendant must rely upon the five statements bearing the imprint, "Atlantic Building Block Co., Inc." which were sent when plaintiff purchased materials from the Block Company. Did the receipt of those statements constitute such evidence of knowledge as to require an instruction that the burden was on the plaintiff to satisfy the jury that the identity of defendant's principal remained undisclosed to him thereafter?

In *Saco Dairy Co. v. Norton, supra,* the defendant was manager of his mother's hotel, Breakwater Court. As a result of interviews with the defendant R. T. Norton in 1941, plaintiff sold a substantial amount of dairy products for use in the hotel. At no time did they discuss who owned the hotel. All bills were charged to the Breakwater Court and the total bill for 1941 was paid by a check signed "Kate F. Norton by R. T. Norton, Atty." The bills for 1942 were not paid and were the subject of the suit. The sole question was whether the agency of the defendant was disclosed to the plaintiff by the check or the trade name, or both. The trial court held that it was not and the Supreme Judicial Court affirmed. With reference to the check, the court said:

> "This was not, as a matter of law, a disclosure of the agency, nor was it evidence of such probative force that the Justice was bound to consider it conclusive of itself or in connection with other facts

> submitted. . . . It might well be that the check was received in such routine manner that it had little or no significance on the question of knowledge of the plaintiff."

In *Phillips v. Hine,* 70 N.Y.S. 593, it was held that payment to plaintiff by the checks of a Savings & Loan Association was not necessarily notice to him that he was employed by the association. He had been given no express notice of that fact, and he had furnished the work and material for which he sought recovery at the request of the individual defendant.

In *McManor Plantation v. Rouse,* La., 55 So. 2d 631, defendant purchased potatoes from the plaintiff on May 4, 5, 6, and 8, 1950. The purchase of May 4th was paid for by a draft drawn on B Company. Similar drafts, subsequently dishonored, were given for the purchases on May 5th and 6th. Defendant's check was given for the sale on May 8th. When sued for the purchase price of the potatoes sold on May 5th and 6th, the defendant contended that the drafts drawn on B Company fixed plaintiff with notice that defendant was acting as its agent. The court said: "The only import, as we see it, of the name of the alleged principal appearing on the drafts, is whether that fact, coupled with other evidence, would amount to a disclosure by the agent of his principal. From the evidence taken as a whole, we do not think that it would."

Likewise, under the circumstances in this case, we do not think that the receipt of the five statements, even conceding they were mailed in envelopes bearing the name "Atlantic Building Block Co., Inc.," were sufficient to establish actual knowledge by plaintiff that he was dealing with a corporation. At the time the contract was made in April 1957, the defendant dealt with plaintiff's salesman and manager as an individual. He announced that he would operate under the name of Atlantic Block Company and not under the name by which Marlow had done business. When the first delivery of oil was made the defendant receipted for it as an individual. Thereafter every check sent as payment on account was signed by the defendant or his employee Maready individually. In view of the direct personal dealing by the defendant with the plaintiff, we do not think it can be inferred that plaintiff acquired actual knowledge that defendant represented a corporation from the incidental receipt of the five statements under all the circumstances detailed herein. Defendant had it in his power to relieve himself of all personal liability by contracting in the corporation's name. This he did not do, and plaintiff relied upon his credit. Therefore the hardship of the loss should not be imposed upon the plaintiff.

Under the evidence in this case, the omissions complained of were not error. The judge's charge sufficiently applied the law to the case.

In the trial below we find
No error.

STATE OF NORTH CAROLINA v. WINSTON PHILLIP.

(Filed 31 January 1964.)

1. Constitutional Law §§ 31, 32—

Every person charged with crime is entitled to be represented by counsel, and this right necessarily includes a reasonable time for counsel to prepare the case.

2. Constitutional Law § 31; Criminal Law § 86—

Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge, but when the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable.

3. Same— Record held to show that no prejudice resulted from denial of motion for continuance.

Where the record discloses that some forty-three days prior to trial defendant's counsel obtained a continuance, that two days prior to the trial, at the beginning of the term, defendant's counsel, present in court, failed to make any motion after announcement by the solicitor that the case would be called during the term, and that when the case was called defendant's counsel made motion for continuance on the ground that defendant wished to employ additional counsel and had been sick and unable to confer with counsel, but no affidavit is filed detailing facts asserted as a basis for the motion, G.S. 1-176, *held* defendant has failed to show prejudice from the denial of his motion for continuance, regardless of whether the motion was addressed to the discretion of the court or was made as a matter of right.

4. Criminal Law § 94—

The record in this case *is held* to disclose that interrogations of witnesses by the court were properly phrased to clarify and screen the testimony so as to prevent the introduction of any incompetent evidence, and did not constitute an expression of opinion by the court. G.S. 1-180.

5. Constitutional Law § 32—

Defendant has the right to be represented by counsel or to appear *in propria persona* but he has no right to appear both by himself and by counsel. G.S. 1-11.

6. Criminal Law § 165½—

Indulgence by the court in permitting defendant, who was represented by counsel, to personally cross-examine a witness, *held* not ground for a new trial, it not appearing that defendant was prejudiced thereby.

7. Criminal Law § 106—

An instruction to the effect that a reasonable doubt means a fair and honest doubt based on common sense and that if the jury, after applying that test was not satisfied to a moral certainty of defendant's guilt, there would be a reasonable doubt, *is held* without prejudicial error.

APPEAL by defendant from *Carr, J.*, June 1963 Criminal Session of DURHAM.

On June 27, 1963 the defendant was convicted of four charges contained in separate bills of indictment. Each charged the commission of a specific offense on April 13, 1963 as follows: No. 4778, administering to a pregnant woman and prescribing for her drugs with the intent of procuring a miscarriage in violation of G.S. 14-45; No. 4779, practicing medicine without a license; No. 4780, unlawful possession of amphetamine and phenobarbital, barbiturate or stimulant drugs; No. 4781, delivering barbiturates not in good faith, and in violation of G.S. 90-113.2(1).

The defendant did not testify or offer evidence in his own behalf. He stipulated that he had no license to practice medicine in North Carolina and has had none. The evidence of the State was amply sufficient to take the case to the jury and to sustain its verdict. On this appeal defendant does not contend that he was entitled to a nonsuit. In brief summary, the State's evidence tended to establish the following facts:

On Saturday, April 13, 1963, the prosecuting witness, Mrs. Ruby P. Woodard, was four and a half months pregnant. At that time Mrs. Woodard was in good health and she had taken no drugs. At about 11:00 a.m. on that day she went to a house at 412 S. Mangum Street in Durham to keep an appointment with a "Dr. Winslow Phillip." A sign in the yard read "Durham Surgical Company." Upon her arrival, the defendant directed her to an "examining room" where he injected a drug into her uterine cavity by means of a machine. She was then given a couple of capsules to take immediately and some pills to take for pain later. While she was at the Durham Surgical Company she saw no one except the man who medicated her. She paid him $120.00 of his $300.00 fee, promised to pay the balance later, and started on the return trip to her home in Wilson.

A short distance east of Raleigh she became unconscious and was taken by ambulance to the Wake Memorial Hospital. There it was determined that Mrs. Woodard was suffering from intravascular amolysis, i.e., a rupture of the blood cells within the veins. In the absence of disease, this condition is commonly caused by drugs. Mrs. Woodard told the attending physician, Dr. Thomas D. Guin, of the events which had occurred in Durham. The defendant was arrested at 412 S. Mangum Street. About 11:30 p.m. detectives brought him to the hospital where Mrs. Woodard identified him as the man who had treated her in Dur-

ham. Dr. Guin informed the defendant privately that Mrs. Woodard was critically ill and urged him, if he had attempted to perform an abortion on her, to reveal the drug he had used so that they might treat her successfully. The defendant denied that he had ever seen her before. However, he later told a detective of the Raleigh Police that Mrs. Woodard had been to his home that morning seeking narcotics and that he had told her he sold neither narcotics nor medicine. At 12:50 a.m. on Sunday Mrs. Woodard had a miscarriage which, in the opinion of Dr. Guin, was induced by a drug injection.

On Sunday officers searched the defendant's premises and found vials of ergonovinemaleate, a drug used to induce miscarriage; an instrument used to examine women and a tube of Orthogynal creme; hypodermic needles; and other surgical supplies. The search also revealed large quantities of phenobarbital tablets, a barbiturate; several bottles containing dextro amhetamine; and Bellophen pills which contain both phenobarbital and belladonna. A chemical analysis revealed that the pills which had been given Mrs. Woodard to take for pain were phenobarbital.

His Honor imposed active prison sentences: In No. 4778, not less than three and a half years or more than five; in No. 4779, one year to begin at the expiration of the sentence imposed in No. 4778; Nos. 4780 and 4781, consolidated for judgment, one year to run concurrently with No. 4779. From the judgment, the defendant appealed to this Court.

Attorney General Bruton, Assistant Attorney General Richard T. Sanders for the State.

Blackwell M. Brogden for defendant appellant.

SHARP, J. When the case was called for trial the defendant, in the absence of the jury, dictated the following motion to the court reporter:

> "This cause coming on to be heard at the June 26, 1963, Term before the Honorable Leo Carr, Presiding, and the defendant, Winston Phillips, desires to employ additional counsel in said case with C. J. Gates to represent him;
>
> "The defendant having been sick and counsel C. J. Gates was unable to confer with the defense and adequately prepare his case; that counsel has stated to the Court that he was not prepared to try his said case and that he had not interviewed a single witness for the defense; therefore, he makes this motion for a continuance of said case until the next Term of Criminal Court of said County. This 26th day of June, 1963."

The court heard the motion and found facts which are summarized as follows:

Bill of indictment No. 4778 was returned by the grand jury at the April Term 1963. It was based on a warrant issued for the defendant on April 13, 1963 at which time the defendant had given bond for his appearance in the Superior Court on April 17, 1963. This case was calendared for trial at the May Term which convened on May 13, 1963. C. J. Gates of the Durham Bar appeared at that term and moved for a continuance upon the ground that he needed more time to prepare defendant's case for trial. This motion was allowed. The case was again calendared for trial on June 26, 1963. At the call of the calendar on Monday, June 24th, the defendant's attorney, C. J. Gates, was present. The solicitor announced that this case would be for trial and called for any motions which were to be made in any case set for trial at the term. Defendant's counsel made no motion. At no time was there presented to the court a doctor's certificate indicating that the defendant had been too ill to confer with counsel or to stand trial.

Upon the foregoing findings the court denied the motion for continuance and directed the trial to proceed. After the solicitor had started interrogating prospective jurors, defendant's counsel, C. J. Gates, stated in open court that there were three other cases on the calendar pending against the defendant, to wit, Nos. 4779, 4780, and 4781; that to save time and to dispose of all the cases at once, he suggested that the additional three cases be consolidated with No. 4778 for trial. With the consent of the solicitor and the defendant, the court then ordered the four cases consolidated for trial.

Defendant now contends that the failure of the court to allow his motion for a continuance in effect denied him the right to counsel and the right to present his defense as guaranteed by Article 1, §§ 11 and 17 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution.

Every person charged with crime is entitled to be represented by an attorney and this right necessarily includes a reasonable time for counsel to prepare the defendant's case. *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195. Ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse. *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348. However, when the motion is based on a right guaranteed by the Federal and State Constitutions the question presented is one of law and the order of the court is reviewable. *State v. Lane,* 258 N.C. 349, 128 S.E. 389; *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322.

Regardless of whether the defendant bases his appeal upon an error of law or an abuse of discretion, it is elementary that to entitle him to a

new trial he must show not only error but prejudicial error. He has shown neither. Defendant was represented by counsel of his own choosing who, forty-three days earlier, had secured a continuance on the ground that more time was needed to prepare for trial. When the solicitor announced two days earlier that this case would be for trial and asked if there were any motions, none were made although defendant's counsel was present in court. The motion for continuance came two days later when the case was called for trial. The statement of counsel that defendant had been sick was uncorroborated by any doctor's certificate or other proof. While counsel stated that he had not interviewed a single witness, he failed to say that defendant had a single witness for him to interview, and the record does not suggest any.

Employment of counsel does not excuse an accused from giving proper attention to his case; he has the duty to be diligent in his own behalf. "When a man has a case in court the best thing he can do is to attend to it." *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906. Had defendant desired to employ additional counsel, it behooved him to make timely arrangements and not to wait until the day of the trial, particularly when he had already been granted one continuance in order to prepare. The expression of a desire to employ additional counsel, postponed until the day of the trial, may not be used as a device for delay. If, because of circumstances beyond his control, defendant could not have a fair trial at that term, it was incumbent upon him to detail those circumstances in an affidavit as specified in G.S. 1-176. Furthermore, defendant is in no position to complain of the judge's failure to continue No. 4778 after he himself suggested and agreed that the three additional cases, which the solicitor had not intended to try then, should be consolidated and tried with it.

We think this case is controlled by *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520, where Ervin, J., said:

> ". . . A continuance ought to be granted if there is an apparent probability that it will further the ends of justice. Consequently, a postponement is proper where there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term. *S. v. Madison,* 49 W. Va. 96, 28 S.E. 492.
>
> "A painstaking consideration of the record engenders a somewhat firm conviction that counsel for the prisoner suffered from lack of any substantial defense rather than from any scarcity of time. Be their zeal for their client's cause ever so great, advocates cannot

> make brick without straw. It all comes to this: the record fails to show that the requested continuance would have enabled the prisoner and his counsel to obtain additional evidence or otherwise present a stronger defense."

Assignment of error No. 2 relates to certain questions asked by his Honor which defendant contends constituted excessive participation by the judge in the trial. We have carefully examined each of the questions of which defendant complains. A number of them were asked by the solicitor and not by the judge; twelve were asked by the judge in the absence of the jury. Of the questions asked by the trial judge, each was painstakingly and properly phrased in an obvious effort to clarify and screen the testimony so as to prevent the introduction of any incompetent evidence. This assignment of error is overruled.

Assignment of error No. 3 is "That his Honor erred in allowing the defendant Winston Phillip to cross-examine the State's witness William S. Best as follows: . . ." Defendant then sets out in question and answer form the entire cross-examination of the witness. This assignment of error is based on no exception. The trial judge neither required nor suggested that defendant himself cross-examine the witness. Apparently the defendant proceeded to do so by prearrangement with his counsel. Had the solicitor objected, no doubt his Honor would have required counsel to conduct the cross-examination. A party has the right to appear *in propria persona* or by counsel, but this right is alternative. G.S. 1-11. One has no right to appear both by himself and by counsel. *New Hanover County v. Sidbury,* 225 N.C. 679, 36 S.E. 2d 242; *McClamroch v. Ice Co.,* 217 N.C. 106, 6 S.E. 2d 850; *Abernethy v. Burns,* 206 N.C. 370, 173 S.E. 899. However, the court did not intervene *ex mero motu* to stop the examination, and the record suggests nothing to indicate that it was incumbent upon him to do so in the interest of a fair trial. The defendant now contends that this judicial liberality, exercised in his favor at the time, entitles him to a new trial. If defendant's performance was indeed prejudicial to him, which does not appear, the mischief did not result from any action by the trial court. *State v. Pritchard,* 227 N.C. 168, 41 S.E. 2d 287.

Finally, the defendant challenges the definition of reasonable doubt in his Honor's charge to the jury:

> "The burden is on the State to satisfy the jury beyond a reasonable doubt of his guilt as to each of the charges in these four Bills of Indictment. A reasonable doubt is a fair and honest doubt based on common sense and reason and one that leaves your mind so that you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt."

We perceive nothing in this charge calculated to affect defendant's rights adversely or, considering the evidence in the case, likely to have misled the jury in any way. *State v. Mostella,* 159 N.C. 459, 74 S.E. 578. The import of the instruction is that, after applying reason and common sense to the whole case, if the jurors are not satisfied to a moral certainty of the defendant's guilt, they have a reasonable doubt. The statement does not contain the error which necessitated a new trial in *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895 where reasonable doubt was defined as "a doubt based upon reason and common sense and *growing out of the evidence in the case.*" The Court held that, considering the nature of the proof in that case, having used the expression "growing out of the evidence in the case" it was error not to add "or the lack of evidence" or some phrase of similar import. *Cf. State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

"The words 'reasonable doubt' in themselves are about as near self-explanatory as any explanation that can be made of them." *State v. Wilcox,* 132 N.C. 1120, 44 S.E. 625. In the absence of a request, trial judges are not required to define the term "beyond a reasonable doubt" in charging the jury in a criminal case. However, it is their custom to do so. Therefore, as *Denny, J.,* (now C. J.) suggested in *State v. Hammonds, supra,* it would eliminate this particular recurring assignment of error if they would use one of the succinct and approved definitions contained in that opinion.

A careful examination of the record leads us to the conclusion that the defendant has had a fair trial. In it we find

No error.

CLARK EQUIPMENT COMPANY, PETITIONER v. W. A. JOHNSON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, RESPONDENT.

(Filed 31 January 1964.)

1. Administrative Law § 4—

An exception to the findings of an administrative agency is alone insufficient to present the question upon further appeal from the judgment of the Superior Court, but appellant must also except to the ruling of the Superior Court sustaining the findings made by the administrative agency.

2. Appeal and Error § 22—

An exception to the judgment does not present for review the facts found by the court or the sufficiency of evidence to support them.

3. Appeal and Error § 19—

An assignment of error must be supported by an exception.

4. Administrative Law § 4; Taxation § 36—

On appeal from the Tax Review Board the Superior Court is without authority to weigh the evidence and make its own findings, G.S. 143-315, but when there is no exception by the State to findings made by the court in favor of the taxpayer, the matter must be determined on appeal if possible on the basis of the facts found by the Board and the additional facts found by the Superior Court.

4. Taxation § 28b—

This State may tax income earned by a nonresident in this State, but may not tax income of such nonresident earned beyond its borders.

5. Same—

The format prescribed by G.S. 105-134(6) (a) for the allocation of that portion of the income of a foreign corporation which is taxable by this State is *prima facie* just, and the burden is upon the complaining taxpayer to establish by clear, cogent and convincing proof that the results are inequitable in order for differing and additional factors to be considered in ascertaining the income taxable by this State. G.S. 105-134(6) (g).

6. Same—

Findings by the Tax Review Board to the effect that plaintiff corporation was a unitary business so that its income taxable by this State should be computed in accordance with G.S. 105-134(6) (a) together with findings by the Superior Court that each division of the corporation operated separately and each was required to attain its operating success independent of the others, (there being evidence that the division which carried on business in North Carolina sustained a loss instead of a profit according to the books of the corporation) *held* contradictory, and the cause must be remanded.

APPEAL by plaintiff from *Phillips, J.*, May Non-Jury Civil Session, week of May 27, 1963, of WAKE.

Plaintiff, (Clark) a corporation organized under the laws of Michigan, does business in that and several other states, including North Carolina. It filed a North Carolina income tax return for the year 1959. This return showed a total net income subject to tax by the states in which it did business of $21,771,176.38. The income earned in North Carolina ascertained in the manner prescribed by G.S. 105-134, (6), (a), was $201,949.43, resulting in a tax liability of $12,116.97.

Asserting the formula used required it to pay a tax on income not earned in North Carolina, it filed with the Tax Review Board as permitted by G.S. 105-134, (6), (g) a petition seeking permission to compute its tax liability on income earned in North Carolina as disclosed by its books kept as required by G.S. 105-134, (6), (g) (1). The Tax Review Board held a hearing. It found facts on which it concluded Clark

had failed to establish the allegations of its petition. It held Clark liable for the tax as shown on its return.

Clark appealed to the Superior Court as permitted by G.S. 143-309. The Superior Court remanded the proceeding to the Review Board because of the insufficiency of its findings. The Board heard additional evidence. Based on the evidence offered at the hearing, it reaffirmed its original findings and order. Clark then filed exceptions to the findings and to the failure to make requested findings, and to the order sustaining the tax. Based on these exceptions, Clark again appealed to the Superior Court. That court, after hearing the parties, overruled some of the exceptions and sustained others. It affirmed the decision of the Tax Review Board. Clark excepted and appealed.

Poyner, Geraghty, Hartsfield & Townsend by N. A. Townsend, Jr., Thomas L. Norris, Jr., for petitioner appellant.

T. W. Bruton, Attorney General, Peyton B. Abbott, Deputy Attorney General for respondent appellee.

RODMAN, J. The findings made by the Tax Review Board (Board) are summarized, or quoted as follows: Clark manufactures and sells industrial equipment and machinery, including truck trailers and bodies. It operates its business through seven divisions, viz: (a) Automotive Division: It makes and sells axles, housings and transmissions for truck trailers and construction machinery. (b) Industrial Trucks: It makes and sells industrial haulage trucks and straddle carriers. (c) Construction Machinery: It produces and sells heavy construction machinery. (d) Central Parts: It provides parts to users of products made by automotive, industrial truck, and construction machinery divisions. (e) Special Products: It manufactures cabs and weldments for the construction machinery and industrial truck divisions. It also produces screw machinery products and operates an aluminum foundry. (f) Hydraulic Products: It makes and sells pumps, hydraulic motors and valves, and hydrostatic transmissions. (g) Brown Trailer: It manufactures and sells aluminum, composite and steel truck trailers, cargo van bodies, and shipping containers.

Clark has no factories in North Carolina. Its Brown Trailer Division maintains a sales office in North Carolina. No other division of Clark has an office in North Carolina. Each division has its own administrative, selling, and production organization. The division officers operate entirely within the division to which they are assigned and are completely independent of every other division, except the general manager of each division is a vice president of Clark and helps control its general

policy. Brown Trailer uses axles produced by the automotive division. Its purchases from Automotive Division amounted to $409,185.00 in 1959; $457,943.00 in 1960; $756,369.00 in 1961. These purchases represented 1.8 per cent, 1.9 per cent, and 3.1 per cent of the cost of goods produced by Brown in those years.

Consolidated accounting records of all of the divisions are maintained by Clark at its home office. There is also an accounting organization in the home office which combines the cost ledger summaries of the various divisions. General and administrative expenses are allocated among the several divisions by formula based primarily on sales.

Clark had a net income for the year 1959 of $21,771,176.38. Use of the basic formula allocated $201,949.43 of this income to North Carolina. But by Clark's "separate accounting" method the Brown Trailer Division showed a loss for 1959 of $2,090,303.00. "Nevertheless, the evidence reveals that the officers of Brown Trailer Division participated in a bonus based upon company-wide profits, indicating that each division was regarded as a part of a whole company-wide unitary activity." The several divisions are interrelated and engaged in the manufacture and sale of related lines, having common officers and management and operating under a common "corporate umbrella." Service parts are generally shipped to the various divisions from the company's central parts warehouse in Chicago.

"The Board specifically finds as a fact that the taxpayer is a single corporate unity and that all of its corporate activities, although carried on upon a divisional basis, are so allied and so interwoven as to constitute the entire business of a corporation unitary and not multiform. The taxpayer, having the burden thereto, has failed to overcome by evidence which is 'clear, cogent and convincing,' the statutory presumption 'that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earnings in the State.' "

On its appeal to the Superior Court, Clark filed exceptions to specific findings made by the Board. It also excepted to the Board's failure to find facts requested by it. The Court overruled each of Clark's exceptions to the facts as found by the Board but held the Board was in error in failing to find additional facts requested by Clark.

Appellant did not except to rulings of the Superior Court sustaining findings made by the Review Board. If one wishes to have this Court review an affirmance by the Superior Court of findings by a referee or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486. This may be done in the time and manner prescribed by G.S. 1-186.

An exception to a judgment does not present for review the facts found by the court or the sufficiency of the evidence to support the findings. *Ins. Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25. An assignment of error is not a substitute for an exception. *Vance v. Hampton*, 256 N.C. 557, 124 S.E. 2d 527; *Cratch v. Taylor*, 256 N.C. 462, 124 S.E. 2d 124.

The question for decision cannot, however, be determined solely on the facts found by the Board and approved by the Superior Court. It, at the instance of appellant, has found additional facts. These additional findings were facts which the Board had, although requested, refused to make. The Court, in making these findings, weighed the evidence and substituted its evaluation of the evidence for that of the Board. In so doing, it exceeded its right of review. G.S. 143-315. But the State has not excepted to the action of the Superior Court in making the additional findings requested by appellant. We must, therefore, decide the case, if we can, on the facts found by the Board and the additional facts found by the Superior Court without objection by the State. Clark requested, and the Board refused, and the Superior Court held that the Review Board was in error in not finding, "It is the policy of the general management of Clark that each division of the company must attain its operating success independent of any other business venture of the company. Consistent with this policy the operations of Clark are conducted in such manner that the separate identity of each division is maintained *and the operating results of each division are separately reflected.*" (emphasis added).

Additionally, Clark requested, and the Board refused to find, that the only items used by Brown and manufactured by the other divisions are axles, but that Brown buys and uses items not made by the plaintiff. This finding in effect made by the Superior Court is seemingly contrary to the finding made by the Board. It is a fair inference from findings made by the Board that Brown Trailer Division buys aluminum and other parts from Special Products Division and also buys from Central Parts Division.

Clark requested, and the Board refused to find, that Brown Trailer had in 1959 sales of $22,988,956.00; that the cost of producing these goods was $22,819,054.00, leaving a gross profit of $707,902.00. The cost of selling these goods was $2,156,719.00. This cost deducted from the gross profit caused a loss of $1,457,817.00 to which should be added Brown's contribution to general and administrative expense in the sum of $665,-142.00, thereby creating a loss from Brown Trailer Division of $2,122,-959.00. Minor book adjustments reduced this loss to $2,090,303.00. Allocating this loss to North Carolina on the basis of the formula contended

for by the State would attribute to North Carolina a loss of $111,540.66 instead of a profit claimed by the State of $201,949.43.

A State may tax income earned there by a nonresident. It may not tax income of the nonresident earned beyond its borders. This rule, easy to state, is not always easy to apply. Corporations frequently engage in business in all States of the Union. Clark, according to its record, earns income subject to tax in 15 States and the District of Columbia. The wide scope of corporate operations makes necessary some formula for use in allocating to the States in which the corporation operates a proper proportion of income earned. North Carolina uses a formula in which the property, sales and payrolls in this State is the enumerator; and all of the properties, payrolls and sales of the corporation are the denominator. The fraction so obtained is the fractional part of the total income attributable to operations in the State. G.S. 105-134, (6), (a). *Prima facie* this formula will for corporations engaged in manufacturing and selling, produce a fair result. Mathematical accuracy is not required. All that is necessary is a fair apportionment. *Power Co. v. Currie,* 254 N.C. 17, 118 S.E. 2d 155. If the formula composed of property, sales and payrolls produces an unjust result, differing and additional factors may be added. G.S. 105-134(6) (g).

The burden is on the complaining taxpayer to establish by evidence, clear, cogent and convincing, the inequitable result. When that is established the Board may, in cases where the corporation keeps its books in such manner as to establish the income earned here, "use the company's separate bookkeeping and accounting system to ascertain that portion of the income earned in North Carolina."

The Board found in effect that the system of accounting kept by Clark and Brown Trailer Division did not furnish a better system of ascertaining the part of Clark's income obtained in North Carolina than the basic formula. It concluded that while each division had certain work to perform it was the unified effort of all of the divisions and not the effort of any single division, or several divisions, which produced the net income in excess of $21,000,000.00.

The finding by the Superior Court that Clark's books did in fact show what portion of the total net income was attributable to each division is in contradiction of the findings made by the Tax Review Board. This conflict in the findings makes it impossible to reach a conclusion with respect to the question presented for decision, namely: Does the assessment require Clark to pay a tax on income not in fact earned in this State? It follows that the judgment affirming the order of the Review Board is erroneous. The cause is remanded to the Superior Court for proceedings not inconsistent with this opinion. It may, if it deems proper to

do so, upon the application of the parties, remand the case to the Tax Review Board for further and more specific findings of fact.

Error and remanded.

IN THE MATTER OF THE WILL OF LEE D. BELVIN, DECEASED.

(Filed 31 January 1964.)

1. Wills § 15—

Beneficiaries under a prior paper writing are persons interested within the purview of G.S. 31-32 and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify.

2. Wills § 8—

Notwithstanding original jurisdiction to probate a will is vested in the clerk, parties who file a caveat to a paper writing probated in common form and also advise the clerk they wish to probate a prior instrument executed by testator, furnish the clerk a copy thereof, and ask that all interested parties be given notice, seek to probate the prior instrument in solemn form, and the Superior Court acquires jurisdiction. G.S. 31-33.

APPEAL by caveators from *Sink, E. J.,* September 9, 1963 Civil Session of DURHAM.

Lee D. Belvin (deceased), a resident of Durham, died 5 February 1963. On 13 February 1963 Mary D. Belvin, widow, offered for probate in common form as deceased's will a paper writing dated 1 August 1962. The clerk adjudged the writing to be the will of deceased. The widow is named as executrix. She is given all the property of the deceased except $500 given his daughter, Katherine.

On 3 July 1963 nephews and nieces of deceased filed a caveat. They alleged: (1) Deceased's signature to the writing dated 1 August 1962 was obtained by undue influence; and (2) deceased was, on 1 August 1962, without sufficient mental capacity to execute a will.

To support their right to caveat the instrument which had been admitted to probate, they alleged deceased had, in May 1939, executed a writing as his will which was entitled to probate as such. Copy of that writing was attached to their caveat. The writing claimed by caveators to be the will of deceased gives designated tangible personal property to the widow and the residue of his estate to Durham Bank & Trust Co. as trustee. The trustee is directed to pay the income to the widow "until such

time as she shall remarry or die." Upon the termination of the widow's right to the income, the trustee is required to pay the income to deceased's daughter "in such amounts and at such times as it shall consider to be for her best interests"; upon the termination of the rights of the widow and daughter, the estate is given "in equal shares in and among my brothers and sisters (naming them); the share of any then deceased to pass to his or her then living issue and issue of deceased issue in equal shares per stirpes."

The widow and daughter denied the allegations of undue influence and lack of mental capacity. Additionally they alleged caveators were not in the class permitted to file a caveat, because if the writing of 1 August 1962 was not in fact deceased's will, the estate would not pass to caveators but to the widow and daughter under the statutes relating to descent.

They challenge by demurrer caveators' right to have the writing of 1939 probated in the Superior Court.

Judge Sink dismissed the proceeding, holding caveators had no right to contest the validity of the writing dated in 1962, and the Superior Court did not have jurisdiction to probate the writing of May 1939.

Charles B. Nye and Winders & Mitchell by R. Roy Mitchell, Jr., for caveator appellants.

Everett, Everett & Everett by Katherine R. Everett, Hofler, Mount & White by L. H. Mount, and McLendon, Brim, Holderness & Brooks by L. P. McLendon, Sr., for respondent appellees.

RODMAN, J. The right to contest the validity of a writing offered for probate or probated in common form is by statute, G.S. 31-32, limited to "any person entitled under such will, or interested in the estate."

Appellees maintain this language excludes all who would benefit by a prior testamentary disposition unless they were (1) heirs of the deceased, or (2) named as beneficiaries in the writing they seek to nullify. The court accepted appellees' interpretation of the statute. This, we think, unduly restricts the phrase "interested in the estate." If caveators can establish their allegations of undue influence and lack of mental capacity, the writing which has been probated in common form is not the will of deceased, but proof of that fact alone does not establish their right to take a part of the estate. To establish their interest in the estate they allege they are beneficiaries under the will of deceased made at a time when he possessed mental capacity. If the facts be as caveators allege, they are interested in the estate of Lee D. Belvin. *In re Thompson*, 178 N.C. 540, 101 S.E. 107; *Parsons v. Leak*, 204 N.C. 86, 167 S.E. 563; *In re*

Arbuckle's Estate (Cal.), 220 P. 2d 950; *Challiner v. Smith*, (Ill.), 71 N.E. 2d 324; *In re Ash's Estate* (Pa.) 41 A. 2d 620; *Werner v. Frederick* (D.C.) 94 F. 2d 627; *Re Plaut*, 164 P. 2d 765, 162 A.L.R. 837; *In re Parker's Estate* (Mich.), 255 N.W. 318; *Kennedy v. Walcott* (Ohio) 161 N.E. 336; *Ruth v. Krone* (Cal.) 103 P. 960; *Smith v. Chaney* (Me.) 44 A. 897; Annotations 88 A.L.R. 1158 *et seq.;* 57 Am. Jur. 552; 95 C.J.S. 176.

The court not only held caveators did not have such interest in the estate as permitted them to test the validity of the writing dated in 1962, but assigned as an additional reason for dismissing the proceeding the fact that the Superior Court did not have original jurisdiction to probate a will.

Caveators do not controvert the court's statement that original jurisdiction of proceedings to probate a will is vested in the clerk. G.S. 28-1. Their position is they complied with the requirement of the statute. They not only informed the clerk they wanted to probate as Mr. Belvin's will a paper writing dated in 1939, but furnished the clerk with a copy of that will. They ask that all interested parties be given notice. They ask that that paper be adjudged a will. Hence what they sought was to have that instrument probated in solemn form.

Prior to the adoption of the present Constitution, the courts of pleas and quarter sessions were given original jurisdiction of probate proceedings. R.C., c. 119, s. 13. When a caveat was filed, that court submitted the necessary issues to a jury. R. C., c. 119, s. 15. Now, when a caveat is filed and bond given, the clerk does not take testimony. He submits no issue to the jury, but immediately transfers the cause to the Superior Court in term. G.S. 31-33. The Superior Court submits to a jury issues necessary to determine the validity of the instrument asserted to be the will of deceased.

The court erred in concluding the Superior Court did not have jurisdiction to determine the question transmitted to that court by the clerk as he was required to do by G.S. 31-33. *In re Will of Wood*, 240 N.C. 134, 81 S.E. 2d 127; *Morris v. Morris*, 245 N.C. 30, 95 S.E. 2d 110; *In re Will of Marks*, 259 N.C. 326, 130 S.E. 2d 673; *Lillard v. Tolliver*, 285 S.W. 576; *Re Kalskop's*, 281 N.W. 646, 119 A.L.R. 1094.

Reversed.

FREDERICK D. SMITH v. RUBIE L. SMITH.

(Filed 31 January 1964.)

1. Fraud § 2; Cancellation and Rescission of Instruments § 2—

Where the stepson executes a deed to his interest in realty inherited from his father to his stepmother, the administratrix of his father's estate, the law presumes fraud even though the administratrix pays a fair consideration, and the son is entitled to have the issue submitted to the jury in his action to rescind his deed.

2. Curtesy; Estates § 6—

The son during the lifetime of his father is not liable for taxes on property inherited from his mother.

3. Cancellation and Rescission of Instruments § 11—

Where the grantor has his deed declared void and set aside for fraud he must return the consideration for the instrument.

APPEAL by defendant from *Braswell, J.*, April Session 1963 of JOHNSTON.

Plaintiff appellee instituted this action to set aside a warranty deed executed to the defendant, Rubie L. Smith, on the ground that its execution was procured by fraud.

Plaintiff is the step-son of defendant, defendant having married plaintiff's father, Almon F. Smith, in 1954. Almon F. Smith died intestate on 11 December 1961, seized and possessed of the land in controversy. The plaintiff and the defendant are the sole heirs at law of Almon F. Smith, deceased. Plaintiff is a college graduate and taught school from 1960 to 1962; he was teaching in Hillsboro, North Carolina, immediately prior to the time he signed the deed in question.

In April 1962 plaintiff had become addicted to whiskey. He gave bad checks, had difficulty with his Superintendent, as well as with the local police, and his creditors. The defendant learned of his trouble and offered to help him. According to plaintiff's evidence, she requested him to get all his bills together and let her know the amount needed and she would let him have the money and that he could pay her back when plaintiff's father's estate was settled. Defendant, who had been a school teacher for some 24 years at the time of the trial, was administratrix of the estate of her deceased husband, plaintiff's father, having qualified as such in December 1961.

Plaintiff's evidence tends to show that the defendant insisted on something in "black and white" before she would lend the plaintiff the money he needed. He thereupon, on 24 April 1962, signed before a Notary Public what purports to be a release of all his rights to his father's estate in consideration of the payment by defendant of his outstanding bad

checks and other obligations amounting to between three and four hundred dollars.

Plaintiff alleges that he was drinking at the time; that he thought he was executing a note and did not read the instrument; that the defendant said she was making him a loan. Thereafter, on 28 April 1962, plaintiff executed the warranty deed involved herein, conveying to the defendant a one-half undivided interest in certain real estate in Selma, North Carolina, which property the plaintiff and defendant inherited from plaintiff's father. Plaintiff alleges he was drinking and was under the influence of intoxicants at the time he signed this deed and was wholly incapable of comprehending what he was doing. That he did not learn until later that he had signed a deed.

From a verdict in favor of the plaintiff and a judgment entered thereon cancelling the deed involved, the defendant appeals, assigning error.

L. Austin Stevens and Wiley Narron for plaintiff.
Samuel S. Mitchell for defendant.

DENNY, C.J. The plaintiff alleges in his complaint that in addition to the fraudulent acts and conduct of the defendant in procuring the execution of the deed in question, she breached the fiduciary relationship that existed between the plaintiff and the defendant at the time. On the other hand, the defendant contends the transaction was a purely personal one, wholly unrelated to the administration of the estate of Almon F. Smith, father of the plaintiff.

In the case of *Cole v. Stokes*, 113 N.C. 270, 18 S.E. 321, Shepherd, C.J., said: "It is well settled that an executor or administrator in dealing with the estate, and with those who are interested therein, is regarded as a trustee, and as such is subject to that principle which raises a presumption of fraud against him when he undertakes to purchase the trust property from his *cestui que trust*. In respect to purchases of trust property, real or personal, directly or indirectly, from himself, whether privately or at auction, the law considers them invalid; and, says Pearson, J., in *Brothers v. Brothers*, 42 N.C. 150, even if the trustee 'gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity' and this 'not because there *is*, but because there *may* be fraud.'" *Hayes v. Pace*, 162 N.C. 288, 78 S.E. 290; *Lockridge v. Smith*, 206 N.C. 174, 173 S.E. 36; *Harris v. Hilliard*, 221 N.C. 329, 20 S.E. 2d 278.

In our opinion, the plaintiff's evidence was sufficient to take the case to the jury, and the defendant's assignment of error to the failure of the court below to allow her motion for judgment as of nonsuit at the close of all the evidence, is not sustained. *Garris v. Scott*, 246 N.C. 568, 99 S.E. 2d 750; *Carland v. Allison*, 221 N.C. 120, 19 S.E. 2d 245.

The defendant assigns as error the exclusion of evidence to the effect that she paid taxes from 1954 through 1961 on four houses plaintiff inherited from his mother, and, further, excluding evidence of the repairs made on the home in controversy prior to the death of her husband.

The excluded evidence is to the effect that the four houses on which the defendant testified she paid taxes from 1954 through 1961 were owned by plaintiff's mother at the time of her death, but that Almon F. Smith, defendant's husband, collected the rents and profits from these houses after the death of plaintiff's mother until his own death in 1961.

There is no evidence that the defendant has made any repairs on the property involved or paid any taxes on the plaintiff's property since the death of her husband, Almon F. Smith.

A life tenant is liable for the taxes on property from which he receives the income. *Miller v. Marriner*, 187 N.C. 449, 121 S.E. 770; *Jeffreys v. Hocutt*, 195 N.C. 339, 142 S.E. 226; G.S. 105-410.

The payment of these taxes for the period involved was the obligation of Almon F. Smith or his estate. There is no evidence on this record tending to show that the plaintiff is obligated to pay for any expenditure made by the defendant in making repairs or improvements on the property of her husband prior to his death.

This assignment of error is overruled.

It is the general rule that where a plaintiff seeks to set aside and cancel a deed on the ground that it was procured by fraud, the plaintiff will be required to refund the consideration paid in connection therewith, pursuant to the application of the maxim: "He who seeks equity must do equity." *York v. Cole*, 254 N.C. 224, 118 S.E. 2d 419; *Costen v. McDowell*, 107 N.C. 546, 12 S.E. 432.

The plaintiff alleges in his complaint that he tendered the return of the consideration paid in connection with the transaction and requested the reconveyance of his one-half interest in the premises involved. Evidence to this effect was offered in the trial below but excluded on objection of the defendant. Plaintiff did not testify as to the amount he received as consideration in connection with the execution of the deed.

It is difficult to understand why counsel for the parties did not insist upon the submission of an issue as to the amount of the consideration involved. The evidence with respect thereto was vague and conflicting in the trial below. Instead, counsel for the parties agreed that only one issue was to be submitted to the jury: "Did the defendant procure the execution by the plaintiff of the deed dated April 28, 1962, by fraud, as alleged in the complaint?" This issue was answered in the affirmative. Consequently, no question is raised on this appeal with respect to the failure of the court to have the amount of consideration ascertained in the trial below.

All the remaining assignments of error are overruled. However, the judgment setting aside the deed dated 28 April 1962 will be upheld without prejudice to the right of the defendant to bring an action for the refund of whatever consideration defendant paid the plaintiff in connection with the execution of the aforesaid deed, unless the plaintiff voluntarily refunds such consideration. *Cf. Carland v. Allison, supra.*

No error.

STATE OF NORTH CAROLINA, ON RELATION OF THE NORTH CAROLINA MILK COMMISSION v. DOSSIE S. DAGENHARDT AND CURLEE L. DAGENHARDT, T/A FOOD LAND GROCERY STORE.

(Filed 31 January 1964.)

1. Appeal and Error § 50—

Upon appeal in a suit for injunction, the Supreme Court is not bound by the findings of fact of the court below and may review and weigh the evidence submitted to the hearing judge and find the facts for itself.

2. Agriculture § 15; Injunctions § 13—

Where all of the evidence is to the effect that defendant retailer's acts in selling milk below cost as defined by G.S. 105-266.21 was not for the purpose of injuring, harassing, or destroying competition with other retail grocers in the vicinity as alleged in the complaint, the *prima facie* case created by the statute is rebutted and it is error for the court to continue to the hearing the temporary order restraining defendant from selling milk below cost.

3. Injunctions § 13; Statutes § 4—

The constitutionality of a statute ordinarily will not be determined upon the hearing of an order to show cause, but the question of constitutionality should be determined upon the final hearing after the filing of answer when all of the facts can be shown.

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

APPEAL by defendants from *Copeland, S. J.*, 24 June 1963 Civil Session of FORSYTH.

Civil action to enjoin defendants, who are in the retail grocery business, from selling milk below cost for the purpose of injuring, harassing or destroying competition with other retail grocers in violation of G.S. 106-266.21, heard upon a show cause order as to why an *ex parte* temporary restraining order should not be continued until the final hearing.

At the show cause hearing plaintiff offered in evidence one affidavit,

that of Carl F. Bottoms, an employee of the North Carolina Milk Commission. His affidavit is in substance as follows: On 13 March 1963, on 21 March 1963, on 3 May 1963, and on 6 June 1963 he visited the retail grocery store operated by defendants in Winston-Salem, and on each occasion found that half gallons of Sealtest milk were advertised for sale at 49c per half gallon plus sales tax. On 3 May 1963 and on 6 June 1963 he purchased a one-half gallon container of Sealtest milk, Grade A, in their store for 49c plus sales tax. He is familiar with the wholesale cost of one-half gallons of milk in Winston-Salem and knows that the actual cost thereof to defendants was 49c per half gallon.

Defendants offered in evidence an affidavit by Curlee L. Dagenhardt, one of the defendants, which is in substance as follows: Retail grocerymen cannot handle milk at any sort of reasonable profit in competition with the wholesalers, whose retail service includes deliveries to refrigerators of consumers at 55c per half gallon. For these defendants to sell milk at 49c per half gallon is not against the public interest.

Defendants further introduced in evidence two affidavits by fourteen people engaged in the retail grocery business in the Winston-Salem area, which are *ipsissimis verbis*, and are in substance as follows: Every person engaged in the retail grocery business in the Winston-Salem area knows that when a retail grocer in that area sells milk at 49c per half gallon plus sales tax, it is not for the purpose of injuring, harassing, or destroying competition among people engaged in the retail grocery business. The only persons adversely affected in any way by a retail grocer selling half gallons of milk for 49c plus sales tax are the wholesalers of milk who are dealing with the retail trade.

The court in its order found facts substantially as follows: Defendants are engaged in the retail grocery business. On 3 May 1963 and 6 June 1963 defendants in their store sold to the public half gallons of milk for the price of 49c per half gallon plus sales tax, which was below cost as that term is defined in G.S. 106-266.21. Defendants' sale of milk at that price was for the purpose of injuring, harassing or destroying competition, to wit, with other retail grocers in Winston-Salem and its vicinity. That unless restrained defendants will continue selling milk below cost as that term is defined in the statute, in violation of G.S. 106-266.21, and it is necessary in order to protect the public interest and to prevent further violations of G.S. 106-266.21 by defendants that the *ex parte* restraining order heretofore issued be continued until the final hearing. Whereupon, the court, based upon its findings of fact, entered an order continuing the restraining order until the final hearing.

Defendants excepted to the order and appeal.

Hayes and Hayes by John M. Hayes, Jr., for defendant appellants.

Holding, Harris, Poe & Cheshire by Charles Aycock Poe and Womble, Carlyle, Sandridge & Rice by William F. Womble for plaintiff appellee.

PARKER, J. Defendants assign as error the court's finding of fact to the effect that defendants' sales of milk on the dates specified in its order below cost was for the purpose of injuring, harassing or destroying competition with other retail grocers in Winston-Salem and its vicinity.

G.S. 106-266.21 provides in relevant part: "The sale of milk by any * * * retailer below cost for the purpose of injuring, harassing or destroying competition is hereby prohibited. At any hearing or trial on a complaint under this section, evidence of sale of milk by a * * * retailer below cost shall constitute *prima facie* evidence of the violation or violations alleged, and the burden of rebutting the *prima facie* case thus made, by showing that the same was justified in that it was not, in fact, made below cost or that it was not for the purpose of injuring, harassing or destroying competition, shall be upon the person charged with a violation of this section." This statute then proceeds to define the "cost" paid for Grade A or Grade I milk. It seems apparent from the evidence that defendants sold Grade A milk below "cost" as defined in G.S. 106-266.21.

G.S. 106-266.16 provides penalties for a violation of G.S. 106-266.21 by fine or imprisonment or both.

G.S. 106-266.15 provides that in the event of a violation of G.S. 106-266.21, the North Carolina Milk Commission may apply to any court of record in the State of North Carolina for relief by injunction, if necessary, to protect the public interest without being compelled to allege or prove that any adequate remedy at law does not exist.

This Court said in *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116: "On an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the judge hearing the application for the writ. It may review and weigh the evidence submitted to the hearing judge and find the facts for itself."

There is no evidence in the record to show or to permit a legitimate inference that defendants sold or offered for sale milk below cost, as the term "cost" is defined in G.S. 106-266.21, in order to lure customers in their store for the purpose of destructive competition with other retail grocers or that by such sales or offers to sell they diverted trade from a competitor in the retail grocery business, or otherwise injured a competitor in such business, other than the *prima facie* evidence created by G.S. 106-266.21.

It is true that defendants' evidence is to the effect that the only person adversely affected by their selling milk below "cost" is the whole-

saler who is dealing with the retail trade. However, the complaint alleges "that defendants' sale of milk at said price was for the purpose of injuring, harassing, or destroying competition, to wit: other retail grocers in Winston-Salem and vicinity." There is no reference at all in the complaint to wholesalers.

It is our opinion that the evidence does not support the lower court's challenged finding of fact. Reviewing and weighing the evidence, we find as a fact that defendants have rebutted the *prima facie* case created by the provisions of G.S. 106-266.21, and have shown that the sales of milk by them below cost were not for the purpose of injuring, harassing or destroying competition with other retail grocers in Winston-Salem and its vicinity, as alleged in the complaint. The order entered by the court below continuing the *ex parte* injunction theretofore issued to the final hearing was improvidently entered and is hereby ordered vacated.

Defendants contend in their brief at length that G.S. 106-266.21 is unconstitutional and that we should so declare it on this appeal. We decline to accede to their request. As a general rule, the constitutionality of a statute should not be decided on an interlocutory injunction and the complaint and affidavits and when no answer has been filed as here, but should be determined at the final hearing when all the facts can be shown. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590; *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792.

The temporary injunction issued below is
Reversed.

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

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1964

NATIONWIDE MUTUAL INSURANCE COMPANY v. MAC RAY ROBERTS AND JOHNNY SCIPPIO.

(Filed 26 February 1964.)

1. Process § 15—

An action for a declaratory judgment to construe a contract of insurance does not arise out of an automobile collision, and therefore insured may not be served with process by service upon the Commissioner of Motor Vehicles. G.S. 1-105, G.S. 1-105.1.

2. Declaratory Judgment Act § 1—

A contract, including a contract of insurance, may be the subject of a proceeding under the Declaratory Judgment Act even before a breach of the contract when there is a controversy between the parties as to their respective legal rights and liabilities under the policy and the resolution of such controversy is presently necessary to enable the parties to elect between conflicting positions in a companion case.

3. Declaratory Judgment Act § 3—

Where the complaint alleges an action justiciable under the Declaratory Judgment Act a demurrer is not apposite even though plaintiff is not entitled to the relief sought by him, but the court, after the filing of answer and the introduction of such evidence as the parties elect to present, should proceed to declare the rights of the parties.

4. Insurance § 53.2—

To the extent of coverage required by statute, a policy of automobile liability insurance must be construed in accordance with the applicable statutory

provisions and in the light of the overall purpose of the statute to provide compensation for innocent victims injured by financially irresponsible motorists. G.S. 20-279.21.

5. Same—

An assigned risk policy of automobile liability insurance imposes liability upon insurer for injuries intentionally inflicted by insured in assaulting his victim with an automobile, notwithstanding the policy expressly excludes liability for injuries for assault and battery committed by or at the direction of insured, since under the provisions of the Safety and Financial Responsibility Act a policy is required to provide insurance for liability imposed by law for damages arising out of the ownership of the vehicle insured, and the exclusionary provision of the policy, being in contravention of the Act, is void.

APPEAL by plaintiff from *Johnston, J.*, July 8, 1963 Session of FORSYTH, docketed in the Supreme Court as Case No. 386 and argued at the Fall Term 1963.

Action by the plaintiff, Nationwide Insurance Company, for a declaratory judgment to establish its obligations with respect to a policy of automobile liability insurance issued to Mac Ray Roberts under the assigned risk plan.

In its complaint plaintiff alleges the following facts:

On January 22, 1962, a violent altercation occurred between the insured Roberts and the defendant Johnny Scippio at the home of one Vera Brown. Scippio fled the scene and Roberts attempted to overtake him on foot. When he was unable to do so, he began a search for Scippio in his automobile which was covered by a policy of liability insurance issued by plaintiff "pursuant to the assigned risk plan of North Carolina." When he sighted him walking along the sidewalk, Roberts deliberately drove his automobile across the sidewalk into Scippio, crushing him against a stone wall. There is now pending in the Superior Court of Forsyth County an action by Scippio in which he seeks to recover $30,000 from Roberts for the personal injuries inflicted by him with the automobile. In his complaint in that action Scippio alleged that fact and also made the allegation "that Mac Ray Roberts was guilty of negligence at the time and place complained of" which proximately caused his injuries. Scippio has demanded that plaintiff pay him, on behalf of Roberts, the face amount of the policy. Plaintiff refused on the ground that an injury intentionally inflicted is not an accident within the meaning of its liability insurance policy wherein it had agreed:

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile."

The policy further provided:

> "Assault and battery shall be deemed an accident unless committed by or at the direction of the insured."

The insured Roberts has fled the State and his whereabouts are unknown. He is not a party to this action. The defendant Scippio demurred to the complaint for that "the plaintiff alleges that it is an insurer under a compulsory insurance policy and that the insured injured another by his own wilful act." The trial court sustained the demurrer and plaintiff appealed.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by W. F. Maready for plaintiff appellant.

White and Crumpler by Harrell Powell, Jr., Leslie G. Frye, and Fred G. Crumpler, Jr., for defendant appellee.

SHARP, J. An attempt was made to make the insured Roberts a party defendant by service upon the Commissioner of Motor Vehicles under G.S. 1-105 and 1-105.1. The attempt was ineffectual. This action is one for a declaratory judgment to construe a contract of insurance. It does not arise out of an automobile collision. *Lindsay v. Short,* 210 N.C. 287, 186 S.E. 239.

The Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. G.S. §§ 1-253 to -267; *Trust Co. v. Barnes,* 257 N.C. 274, 125 S.E. 2d 437; *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404. When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. G.S. § 1-254. The purpose of the Declaratory Judgment Act is, "to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. . . ." *Walker v. Phelps,* 202 N.C. 344, 349, 162 S.E. 727, 729; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689. It is to be liberally construed and administered.

Generally, questions involving the liability of an insurance company under its policy are a proper subject for a declaratory judgment. *Insurance Co. v. Simmons, Inc.,* 258 N.C. 69, 128 S.E. 2d 19; Annot., 142 A.L.R. 8, 67. In this case there exists a genuine controversy between the plaintiff Insurance Company and the defendant Scippio as to whether plaintiff is liable under its insurance contract for injuries intentionally

inflicted by its insured. Until this controversy is resolved there will be a conflict of interest between plaintiff and its insured as to the case of *Scippio v. Roberts*. If the liability insurer is not liable for injuries intentionally inflicted by its insured, it would be in plaintiff's interest in that action to prove a wilful tort which would establish absolute liability on Roberts and exonerate the plaintiff. If, on the other hand, plaintiff is liable within the limits of its policy for Roberts' assault upon Scippio, the interests of the insurer and the insured are the same. The instant case, therefore, presents a problem such as the Declaratory Judgment Act was designed to solve.

This appeal, however, is from an order of the Superior Court sustaining a demurrer to the complaint. When a complaint alleges a *bona fide* controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. The parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them.

> "The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. And where a complaint in a proceeding for a declaratory judgment stated a justiciable controversy, a demurrer should have been overruled, and after the filing of an answer a decree containing a declaration of right should have been entered."

1 Anderson, Declaratory Judgments, (2d ed.) § 318; *Cabell v. Cottage Grove*, 170 Ore. 256, 130 P. 2d 1013, 144 A.L.R. 286.

In the absence of a stipulation, a declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing. For the same reason, a judgment of nonsuit may not be entered. *Board of Managers v. Wilmington*, 237 N.C. 179, 194, 74 S.E. 2d 749. This rule is analogous to that which prohibits a nonsuit in a caveat proceeding. *In re Will of Redding*, 216 N.C. 497, 5 S.E. 2d 544.

In this case it appears that the court and the parties treated the demurrer as a stipulation by the defendant Scippio that the ultimate facts are as alleged in the complaint which presents this single question: Does an assault and battery with an automobile constitute an "accident" within the meaning of that term as used in an automobile liability insurance

policy issued pursuant to the North Carolina Financial Responsibility Act? It further appears that the court, by sustaining the demurrer, in effect undertook to answer this question by declaring the rights of the parties in accordance with the contentions of Scippio and against those of the plaintiff. Therefore, in this instance to the end that another appeal may be eliminated, we have decided to waive the procedural defect and to pass upon the question presented.

When an insured is intentionally injured or killed by another, and the mishap is, as to him, unforeseen and not the result of his own misconduct, the general rule is that the injury or death is accidentally sustained within the meaning of the ordinary accident insurance policy, and the insurer is liable therefor in the absence of a policy provision excluding such liability. Annot., 116 A.L.R. 396. This is likewise the rule under the Workmens Compensation Act. *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668.

A number of cases have considered the question whether an assault is an "accident" within the coverage of automobile liability insurance policies. The answers given have depended upon whether the court looked at the occurrence from the viewpoint of the aggressor or from that of the injured party. *Jernigan v. Allstate Insurance Co.,* 269 F. 2d 353. See annotations in 111 A.L.R. 1043; 173 A.L.R. 503; 33 A.L.R. 2d 1027. From the standpoint of the aggressor, an injury intentionally inflicted upon another is certainly not an accident. However, from the point of view of the victim of an unexpected and unprovoked assault with an automobile, his damages are just as accidental as if he had been negligently struck while crossing the street.

On the ground that public policy will not permit one to profit from his own wrong, some courts exclude all intentional injuries from the policy coverage while some make a distinction between cases where the named insured himself committed the assault and those where it was committed by an agent or employee without his knowledge. Nevertheless, "it is apparently the more widely accepted view that an assault constitutes an 'accident,' and that injuries therefrom are 'accidentally sustained,' within the coverage of liability insurance policies. However, there is substantial authority to the contrary." 33 A.L.R. 2d 1027, 1030; 29A Am. Jur., *Insurance* § 1342.

In North Carolina today all insurance policies covering loss from liability arising out of the ownership, maintenance, or use of a motor vehicle are, to the extent required by G.S. § 20-279.21, mandatory. All which insure in excess of the compulsory coverage are voluntary policies to the extent of the excess. *Swain v. Insurance Co.,* 253 N.C. 120, 116 S.E. 2d 482. The policy under consideration, being an assigned risk, is entirely compulsory, both as to the insurer and the insured.

With respect to voluntary insurance, North Carolina aligned itself with the minority in *Jackson v. Casualty Co.*, 212 N.C. 546, 193 S.E. 703. There, P, driving the automobile of S, defendant's insured, purposely ran over the plaintiff. After execution on plaintiff's judgment against P was returned unsatisfied, plaintiff sued defendant on the judgment. Defendant's motion for nonsuit was sustained. This Court affirmed, saying:

> "The policy of insurance sued on did not cover the liability of the named insured, or that of any other person embraced within its terms, for a willful or intentional injury. The policy provided indemnity 'against loss from liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any person, caused by the ownership or operation of the automobile described'."

The policy in the instant case contains a provision that an assault will be considered an accident "unless committed by or at the direction of the insured." Either this provision or the holding in *Jackson v. Casualty Co., supra,* would clearly eliminate plaintiff's liability in the present case if the policy were an entirely voluntary one. It is, however, an assigned risk policy providing no coverage in excess of the statutory requirement. Therefore, it must be construed in connection with the public policy which the Motor Vehicle Safety and Financial Responsibility Act embodies. 29 Am. Jur., *Insurance* § 274; *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610. If this exclusionary provision of the policy contravenes the act it is void as to the defendant. G.S. § 20-279.21(b)(2) provides that an owner's policy of liability insurance:

> "2. Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages *arising out of the ownership, maintenance or use of such motor vehicle* or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: five thousand dollars ($5,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, ten thousand dollars ($10,000.00) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000.00) because of injury to or destruction of property of others in any one accident;" (Italics ours).

The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially

irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. In order to accomplish the objective of the law, the perspective here must be that of the victim and not that of the aggressor for whom the law provides criminal penalties calculated to minimize any profit he might derive from the insurance. The victim's rights against the insurer are not derived through the insured as in the case of voluntary insurance. They are statutory and become absolute on the occurrence of an injury covered by the policy. G.S. § 20-279.21 (f) (1).

In Massachusetts the rule applicable to ordinary liability insurance is that a policy indemnifying an insured against liability for his wilful wrong is void as against public policy. Therefore, Massachusetts holds with North Carolina that intentional injuries committed by an insured are not within the coverage of voluntary insurance. *Sheehan v. Goriansky*, 321 Mass. 200, 72 N.E. 2d 538, 173 A.L.R. 497. However, in Massachusetts the rule is otherwise as to a policy of compulsory insurance. Its statute requires indemnity to an insured in specified amounts against loss by reason of his liability for bodily injuries and death "arising out of the ownership, operation, maintenance, control or use upon the ways of the commonwealth" of the insured vehicle. The wording of this statute is substantially the same as G.S. § 20-279.21.

In *Wheeler v. O'Connell*, 297 Mass. 549, 9 N.E. 2d 544, 111 A.L.R. 1038, the defendant, insured under a compulsory liability policy, intentionally injured plaintiff with an automobile. In holding that the statute should be construed to include liability for injuries due to a wilful wrong, the court said:

> ". . . (I)f the purpose of the statute is to compensate the injured party rather than to save the operator of the vehicle from loss it is difficult to see why an injured person's rights should be affected by the fact that the operator's conduct was wilful, wanton or reckless as distinguished from negligent. The evil intended to be remedied is as certainly present in the one case as in the other. The cases cannot be taken as laying down the proposition that nothing but injuries caused by negligence are covered by the statute. Unless the rights of the injured party are purely derivative, as they are in the case of ordinary insurance, there is no justifiable basis for making a distinction between conduct of the operator which was wilful, wanton or reckless, and conduct which is in some degree negligent. Despite the fact that the statute declares that the policy shall provide 'in-

demnity for or protection to the insured,' various provisions of the statute demonstrate that it was not the intention of the Legislature that the rights of the injured should depend on the rights of the insured or of the operator of the motor vehicle. . . .

". . . (T)he statute should be construed as including liability for injuries due to a wilful wrong. The statute itself is declaratory of public policy applicable to compulsory insurance and supersedes any rule of public policy which obtains in ordinary insurance law."

In *Hartford Acc. & Indem. Co. v. Wolbarst*, 95 N.H. 40, 57 A. 2d 151, R deliberately caused his motor vehicle to collide with the rear of the automobile of B. In the collision, defendant Wolbarst, a passenger in B's vehicle, was injured. R's liability insurance carrier instituted an action for a declaratory judgment to determine its liability to Wolbarst. Under the New Hampshire Motor Vehicle Financial Responsibility Act a policy was required to indemnify the insured "against loss by reason of the liability to pay damages to others . . . for damages to property accidentally sustained during the term of said policy." In holding that the statutory phrase "accidentally sustained" included intentional injury, the New Hampshire Court said:

"The meaning expressly or impliedly given to the word in private policies or contracts independently of statutory requirements is not controlling. The point of view is different . . .

"The purpose of the New Hampshire Financial Responsibility Act was fundamentally to provide compensation for innocent persons that might be injured through faulty operation of motor vehicles. '. . . The beneficiaries of such an act and of such a policy, when issued, are the members of the general public who may be injured in automobile accidents by such person; and the policies are generally construed with great liberality to accomplish their purpose.' 7 Appleman, Insurance Law and Practice, § 4295. This purpose of the statute is best served by construing the phrase 'accidentally sustained' to include any unfortunate occurrence causing injury or damage. Regardless of the mental state of the insured that precedes the injury or the damage suffered by the traveler, the suffering or the loss is the same. Neither injury nor damage is mitigated by the fact that there was intent at any stage of the occurrence."

The New Hampshire Court noted that its conclusion was the same as that reached by the Supreme Court of Massachusetts in *Wheeler v. O'Connell, supra.* The logic of these two cases is inescapable, and we hold that injuries intentionally inflicted by the use of an automobile are with-

in the coverage of a motor vehicle liability policy as defined by G.S. § 20-279.21. The word *accident* as used in that section with reference to compulsory insurance is used in the popular sense and means any unfortunate occurrence causing injury for which the insured is liable. In this holding we reach the same conclusion as did the judge below.

As pointed out by *Bobbitt, J.,* in *Swain v. Insurance Co., supra,* the Motor Vehicle Safety and Financial Responsibility Act, G.S. § 20-279.21 (h), authorizes a provision in every liability policy that the insured shall reimburse his carrier for any payment it would not have been obligated to make under the terms of the policy except for the provisions of the Act. In the paragraph relating to the financial responsibility law the policy in question contains this provision:

> "The insured agrees to reimburse the Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph."

This case is remanded to the Superior Court to the end that a judgment be entered defining the rights and obligations of the parties as declared in this opinion.

Remanded for judgment.

JUANELL P. HALEY, BY AND THROUGH HER NEXT FRIEND, ROBERT T. GASH, AND BLANCHE PETIT GOOSEN v. CHARLES W. PICKELSIMER, JR., AND JOSEPH E. PICKELSIMER, EXECUTORS OF THE ESTATE OF C. W. PICKELSIMER, DECEASED.

(Filed 26 February 1964.)

1. Declaratory Judgment Act § 2—

In a proceeding under the Declaratory Judgment Act the plaintiff should set forth in his pleading all facts necessary to disclose an existing controversy justiciable under the Act and all facts necessary to a complete adjudication of the controversy.

2. Appeal and Error § 35—

The Supreme Court will take judicial notice of matters disclosed by its records in prior interrelated actions.

3. Wills § 59—

A forfeiture provision of a will that a beneficiary thereunder should receive nothing if he contests the instrument will not be given effect provided

the contest is in good faith and with probable cause, but in order to adjudicate the question the elements of good faith and probable cause must be properly determined.

4. Same—

A forfeiture provision of a will that a beneficiary should receive nothing thereunder if he contests the will or any of its dispositive provisions will be strictly construed.

5. Same—

A suit to recover for breach of contract by the decedent to leave property to a minor in consideration of personal services rendered by the minor's mother does not constitute an objection to or dissent from the terms and provisions of decedent's will, and therefore does not come within the provision of the will that any beneficiary contesting the will should forfeit all benefits thereunder. The minor not being barred, *a fortiori* the mother, not a party to the prior action, would not be barred.

6. Wills § 63—

The doctrine of election applies only when the intent to put the beneficiary to an election clearly appears from the instrument and the beneficiary is confronted with the inconsistent choices of affirming the will by taking property devised or bequeathed to him thereunder or disaffirming the will by denying testator's right to dispose of other property belonging to the beneficiary.

7. Same—

An unsuccessful suit against the estate to recover for breach of contract to devise or convey property in consideration of personal services rendered does not constitute an election precluding the plaintiff from taking benefits under the will, since the doctrine of election applies only when the will confronts a beneficiary with a choice between benefits inconsistent with each other.

8. Wills § 71—

An adjudication of the right of a beneficiary to take under the will should not decree that such beneficiary is entitled to the amounts specified in the instrument, there being no determination of the status of the estate or the sufficiency of its funds to satisfy all claims within the same priority.

APPEAL by defendants from *Martin, J.*, June Session 1963 of TRANSYLVANIA.

Action instituted February 21, 1963, under the Declaratory Judgment Act, G.S. 1-253, *et seq.*, in which the prayer for relief is that the court "declare the rights of these plaintiffs under the Last Will and Testament of Charles W. Pickelsimer, deceased."

Plaintiffs alleged (and defendants admitted) the following:

The last will and testament of Charles W. Pickelsimer, deceased, was probated February 8, 1960. Defendants are the duly appointed, qualified

and acting co-executors of said will. The said will, set forth in full in the complaint, contains *inter alia* the following provisions:

"VII

"(a) I give and bequeath the sum of $1,000.00 to my housekeeper, Blanche Marie Petit.

"(b) I give and bequeath the sum of $1,000.00 to my housekeeper's daughter, Blanche Juanell Petit. I further give and bequeath to said Blanche Juanell Petit the sum of $75.00 per month until she reaches the age of 18 years. And I direct that my Executors shall set aside sufficient funds for this purpose from cash or bank deposits which I may own at my death and shall deposit same in a special bank account for said monthly distribution to Blanche Juanell Petit until she reaches the age of 18 years.

"VIII

"It is my desire that my property shall be distributed and paid as herein provided in this will and to that end it is provided that any beneficiary or devisee who objects or dissents to any of the terms or provisions of this will in any respect whatsoever shall be forever barred and excluded as a beneficiary or devisee under this will. The share that such dissenting person would have taken shall then be distributed among my surviving children, or their respective successors in interest, who do not dissent or object to the terms of said will."

Plaintiff Blanche Petit Goosen is the person named as beneficiary in paragraph VII(a) of said will. Plaintiff Juanell P. Haley, a minor, is the person named as beneficiary in paragraph VII(b) of said will. Robert T. Gash is the duly appointed, qualified and acting next friend of Juanell P. Haley.

Defendants have not paid any amount to plaintiffs.

Defendants deny plaintiffs are entitled to the sums bequeathed to them in paragraph VII of said will.

For a first further defense, defendants asserted plaintiffs are "forever barred and excluded as beneficiaries or devisees" under said will by the provisions of paragraph VIII. In support thereof, defendants *alleged* the following: An action was instituted by Juanell Petit Haley against these defendants in the Superior Court of Transylvania County in which the plaintiff alleged the testator, Charles W. Pickelsimer, had entered into a verbal contract with Blanche Petit Goosen, mother of Juanell P. Haley, by the terms of which he agreed to will and devise a one-fifth part of his estate to Juanell P. Haley. In said action, the plaintiff sought to recover from the defendants on account of the testator's breach of said oral con-

tract the sum of $250,000.00, alleged to be the value of a one-fifth part of the testator's estate. The said action terminated in favor of the defendants. Plaintiff Blanche Petit Goosen aided and abetted her minor daughter in that she employed counsel to institute and prosecute such action and voluntarily appeared for the purpose of giving evidence in behalf of her minor daughter when the cause was called for trial. Plaintiffs, by said conduct, elected to reject the benefits provided for them under the terms of said will.

For a second further defense, defendants alleged: 1. Plaintiffs, if not barred, are general beneficiaries. There are no funds now available for the payment of general bequests. The payment of costs of administration and other costs having priority has exhausted all the funds out of which general bequests could have been paid. 2. Prior to the institution of said action for breach of verbal contract, defendants offered to pay and had funds available to pay the bequests to plaintiffs under the terms of the will. The expenditure of large sums in the defense of said action has exhausted all funds otherwise available for the payment of general bequests.

The cause was heard by consent at June Session 1963 of the Superior Court of Henderson County, North Carolina, before Judge Martin, the Presiding Judge. It was stipulated and agreed that judgment "might be signed out of term and out of county."

The judgment, which is dated September 20, 1963, after recitals, states the court "finds the following facts concerning said action." (The matters set forth as findings of fact relate solely to defendants' first further defense.) The court then set forth conclusions of law to the effect neither plaintiff had made an election or had taken any action barring her right to receive the bequest made to her in Article VII. The court then entered judgment as follows:

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that Blanche Petit Goosen and Juanell Petit Pickelsimer Haley are entitled to receive from the executors of the Will of C. W. Pickelsimer, Sr., all sums devised and bequeathed to them under the terms of said will."

Defendants excepted "(t)o the signing of the judgment" and appealed.

Uzzell & DuMont and Hamlin, Potts, Ramsey & Hudson for plaintiff appellees.

Redden, Redden & Redden for defendant appellants.

BOBBITT, J. ". . . when a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to

disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises." *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; *Insurance Co. v. Roberts, ante,* 285, 134 S.E. 2d 697, and cases cited. Plaintiffs, in their complaint, did not disclose what controversy, if any, existed between them and defendants. Their complaint contains no reference whatever to a prior action. However, defendants did not demur or move to dismiss.

The answer is the first and only *pleading* that purports to identify matters in controversy between plaintiffs and defendants. Plaintiffs filed no reply. In this state of the pleadings, plaintiffs moved "for the relief prayed for in their petition," to wit, for a declaratory judgment "in favor of the plaintiffs as prayed for in their petition."

It appears from Judge Martin's judgment and from the briefs that the question plaintiffs seek to have answered is this: Did the institution and (unsuccessful) prosecution of the prior action referred to in defendants' first further defense forfeit the right of either plaintiff to the bequest made to her under the terms of Article VII?

The prior action referred to in defendants' first further defense is entitled, *"Juanell Petit Pickelsimer, by and through her Next Friend, Robert T. Gash v. Charles W. Pickelsimer, Jr., and Joseph Pickelsimer, Executors of the Estate of C. W. Pickelsimer, Sr., Deceased."* The person (plaintiff) designated therein as Juanell Petit Pickelsimer is the person (plaintiff) designated herein as Juanell P. Haley.

Two appeals in said prior action have been considered and decided by this Court. On first appeal, this Court affirmed an order denying defendants' motion that Blanche Petit Goosen be made a party to said action. *Pickelsimer v. Pickelsimer,* 255 N.C. 408, 121 S.E. 2d 586. Thereafter, when the case was called for trial in superior court, the attorneys for plaintiff announced that they were prepared to offer oral evidence tending to prove the allegations of the complaint. Whereupon the court expressed the opinion the oral contract alleged was void by reason of the statute of frauds and that plaintiff was entitled to no recovery thereon. To this intimation the plaintiff excepted, submitted to a voluntary nonsuit and appealed. On second appeal, this Court affirmed said judgment of nonsuit. *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557.

While defendants' only exception is "(t)o the signing of the judgment," they assert there was no evidential basis for the court to make any findings of fact. Nothing in the record indicates testimony was introduced or proffered. However, it seems clear Judge Martin had before him either the original record in said prior action (on file in the office of the clerk of the Superior Court of Transylvania County) or the records and decisions of this Court in connection with said two appeals. Suffice to

say, we attach no legal significance to what are denominated findings of fact in Judge Martin's judgment. However, we take judicial notice and base decision on what our own records in said prior interrelated action disclose. *S. v. Patton,* 260 N.C. 359, 367, 132 S.E. 2d 891, and cases cited; *Swain v. Creasman,* 260 N.C. 163, 132 S.E. 2d 304; *S. v. McMilliam,* 243 N.C. 775, 92 S.E. 2d 205.

Reference is made to our decision on first appeal in said prior action for a full statement of the allegations on which the plaintiff therein based her action. Repetition is unnecessary. This fact, disclosed by the appeals in said prior action, is noted: No evidence was offered at any time in said prior action. If either of the present plaintiffs is barred by said prior action, the bar or forfeiture arises from *the institution* of said action and *the allegations* of the complaint therein.

For a comprehensive discussion of questions considered and divergent lines of authority with reference to "no contest" provisions in wills, see the following: Browder, "Testamentary conditions against contest," 36 Michigan Law Review 1066-1106; Leavitt, "Scope and effectiveness of no-contest clauses in last wills and testaments," 15 The Hastings Law Journal 45-91.

In *Ryan v. Trust Co.,* 235 N.C. 585, 70 S.E. 853, the plaintiff, a daughter of the testator, instituted the action to recover possession of a store building devised to her by her father. The defendant (executor and trustee) pleaded a no contest provision in the will as a bar to the plaintiff's claim. The plaintiff, as a caveator, had unsuccessfully contested her father's will. Upon waiver of jury trial, the court found as a fact that the plaintiff had joined in filing the caveat in good faith and with probable cause and entered judgment for the plaintiff. In affirming the judgment, this Court adopted the rule that a no contest clause is not binding and a forfeiture will not result "where the contest or other opposition of the beneficiary is made in good faith and with probable cause." The opinion of *Denny, J.* (now *C.J.*), cites and discusses decisions in each of the two lines of authority and refers to the rule adopted by this Court as supported by "the weight of authority in this country."

Plaintiffs contend the prior action (*Pickelsimer v. Pickelsimer, supra*) was instituted in good faith and with probable cause and that, under the rule adopted by this Court in *Ryan,* there has been no forfeiture of their bequests. The difficulty with this contention is that there has been no factual determination that the prior action was instituted in good faith and with probable cause. Admittedly, the prior action was instituted in reliance upon the law as stated in *Redmon v. Roberts,* 198 N.C. 161, 150 S.E. 881, a decision expressly overruled by this Court on said second appeal (257 N.C. 696). Too, in instituting said prior action, the plaintiff,

by reason of our decision in *Redmon,* was justified in assuming the fact the alleged contract was oral rather than written did not constitute *a legal bar.* However, this would not obviate the necessity of a factual determination as to good faith and probable cause in respect of whether such alleged contract was made. There is no finding, evidence or allegation that the prior action was instituted in good faith and with probable cause. Thus, the present record is insufficient to invoke application of the rule adopted by this Court in *Ryan.*

The will contains extensive provisions in which the testator devised and bequeathed specific properties to his two sons and other specific properties to his two daughters. Articles VII and VIII, quoted in our preliminary statement, are the final provisions (except the *testimonium* clause) of the will. Article VIII provides "that any beneficiary or devisee who objects or dissents to any of the terms or provisions of this will in any respect whatsoever shall be forever barred and excluded as a beneficiary or devisee under this will." Article VIII provides further: "The share that such dissenting person would have taken shall then be distributed among my surviving children, or their respective successors in interest, *who do not dissent or object to the terms of said will.*" (Our italics). These provisions of Article VIII suggest the testator had in mind the possibility that one or more of his children might be dissatisfied with the benefits he (she) would receive under the will and attack the will.

It is generally held, particularly in jurisdictions in which the rule adopted by this Court in *Ryan* prevails, that the provisions of a "no contest" clause are to be strictly construed and not extended beyond their express terms. 57 Am. Jur., Wills § 1511; 96 C.J.S., Wills § 994(b); 5 Page on Wills § 44.29.

The plaintiff in the prior action did not seek to destroy the will. Her cause of action was to recover damages on account of the testator's failure to comply with the alleged contract to make a will and therein bequeath to her a one-fifth share of his estate. Her recovery, if any, would have constituted a claim of debt against the estate, not an increase of benefits under the will. Such recovery, while it would have reduced the amount of assets available for distribution to beneficiaries under the will, would not invalidate or modify any of its provisions.

Our research discloses two decisions involving analogous factual situations, (1) *Boettcher v. Busse,* 277 P. 2d 368, decided by the Supreme Court of Washington (Department 2), and (2) *Kolb v. Levy,* 110 So. 2d 25, decided by the District Court of Appeal of Florida, Third District.

In *Boettcher,* the plaintiff's action was based on allegations that the decedent, the plaintiff's uncle, on account of services rendered by plaintiff, had agreed to make a will devising and bequeathing to plaintiff a portion

(one-half) of his estate. The only provision for the plaintiff in the decedent's will was a bequest of $1,000.00. The defendants (executors) denied the plaintiff's allegations; and, as a cross complaint, alleged the bequest to the plaintiff should be reduced from $1,000.00 to $1.00. The cross complaint was based on this provision of the will: ". . . in the event any person who is named as beneficiary under this Will shall attempt to break the terms and conditions of this Will, then and in that event such person so attempting shall forfeit all of his or her interest in said estate and shall be granted the sum of One Dollar ($1.00) and no more." Judgment dismissing (1) the plaintiff's action and (2) the defendants' cross action was affirmed. The portion of the judgment dismissing the plaintiff's action was affirmed on the ground the evidence offered by the plaintiff to establish the alleged oral contract was incompetent and properly excluded. In affirming the portion of the judgment dismissing the defendants' cross complaint "with prejudice," the opinion of Weaver, J., after quoting said no contest provision, concludes as follows:

"This court has recognized the validity of such provisions. *In re Chappell's Estate,* 1923, 127 Wash. 638, 221 P. 336; see 'Provisions in a will forfeiting the share of a contesting beneficiary.' 3 Wash. Law Review 45 (1928).

"However, the instant case is not a will contest. It is an action to enforce the terms of an alleged oral contract to devise property. It is based upon a creditor's claim filed against decedent's estate. Although the allowance or enforcement of such a claim would—as would the allowance or enforcement of any other creditor's claim—change the amount received by the residuary legatees, it would not 'break the terms and conditions of this will,' nor would it establish appellant as a residuary legatee. The filing or enforcement of a creditor's claim, by a legatee or devisee, does not invoke the provision of a will forfeiting the share of a contesting beneficiary. *Wright v. Cummings,* 1921, 108 Kan. 667, 196 P. 246, 14 A.L.R. 604."

In *Kolb,* the plaintiff was a legatee under a will containing a "no contest" clause worded as follows: *"Eleventh:* If any beneficiary of this my Last Will and Testament shall contest or aid in contesting any portion of this my Last Will, any legacy or bequest herein provided for said person shall lapse and become void, and such legacy or bequest shall become part of my residuary estate to be divided equally among the remaining persons mentioned in paragraph 'Ninth' hereof as my residuary legatees, or their issue surviving, per stirpes, who have not contested or aided in contesting this my Last Will and Testament." The plaintiff filed a claim against the estate for $350,000.00 based on the alleged breach by decedent of his contract to make a will in her favor. If established, this claim

would have consumed the major portion of the ($395,000.00) estate. The plaintiff instituted the action for a determination of her rights in respect of her said claim. The defendant (executrix) by counterclaim asserted the plaintiff's action violated the "no-contest" clause of the will. The trial court, in accordance with the defendant's contention, held the plaintiff's attempt to enforce the contract to make a will was in effect a contest thereof and that the plaintiff thereby forfeited her rights as legatee. On appeal, the decision was reversed. The opinion of Horton, J., citing *Boettcher* and quoting from the opinion therein, concludes as follows:

"Although we have been unable to find any cases in Florida dealing directly with the point in question, we conclude that the better rule, supported by the majority view, is that forfeitures occasioned by 'no-contest' clauses of wills should be strictly construed and interpreted according to the plain meaning of the words employed by the testator. In this instance, the prohibition was against any beneficiary contesting or aiding in contesting any portion of the will, and absent any showing or adjudication that the appellant prosecuted or attempted to prosecute any of her alleged claims in bad faith or without reasonable or probable cause, we conclude that her actions did not constitute a contest within the meaning of that provision of decedent's last will and testament. We have confined our conclusion here to an interpretation of the plain and unambiguous wording employed by the testatrix in the 'no-contest' clause of the will."

Applying the rule of strict construction, it is our opinion, and we so decide, that the minor plaintiff's (unsuccessful) prior action in which she asserted legal rights based on alleged breach of contract did not constitute an objection to or dissent from the terms and provisions of the will and did not forfeit her right to the bequest made to her under Article VII. *A fortiori,* the minor plaintiff's prior action did not forfeit the right of Blanche Petit Goosen to the bequest made to her under Article VII. She was not a party to said prior action. Moreover, it did not purport to involve her legal rights or status in relation to the estate of Charles W. Pickelsimer.

The foregoing conclusion obviates the necessity of considering to what extent, if any, a minor, appearing by next friend, is affected by a "no contest" clause. Suffice to say there are divergent lines of authority: Browder, *op. cit.*, IV, p. 1102; Leavitt, *op. cit.*, p. 87; 57 Am. Jur., Wills § 1512, p. 1025; 96 C.J.S., Wills § 983, p. 472; Annotation, 67 A.L.R. 52, *65*, and supplemental decisions; *Farr v. Whitefield* (Mich.), 33 N.W. 2d 791; *Womble v. Gunter* (Va.), 95 S.E. 2d 213. For a discussion as to the status, functions and authority of the next friend of a minor, see *Teele v. Kerr,* 261 N.C. 148, 134 S.E. 2d 126, and cases cited therein.

There remains for consideration defendants' contention that, under the doctrine of equitable election in the law of wills, the minor plaintiff's

prior action forfeited her right to receive the bequest made to her in Article VII. To support their contention, defendants cite *Lipe v. Trust Co.*, 206 N.C. 24, 173 S.E. 316; *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479; *Taylor v. Taylor,* 243 N.C. 726, 92 S.E. 2d 136. In our view, the doctrine of equitable election referred to in the cases cited by defendants has no application to the factual situation now under consideration.

In *Elmore v. Byrd,* 180 N.C. 120, 122, 104 S.E. 162, Walker, J., in a statement often quoted in subsequent decisions, says: "An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property *already his own,* which is attempted to be disposed of in favor of a third party by virtue of the same paper. The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing." (Our italics). In *Lamb v. Lamb,* 226 N.C. 662, 665, 40 S.E. 2d 29, *Seawell, J.,* in accord with prior cited cases, states: "The doctrine of election, as applied to wills, is based on the principle that a person cannot take benefits under the will and at the same time reject its adverse or onerous provisions; cannot, at the same time, hold under the will and against it. (Citations). The intent to put the beneficiary to an election must clearly appear from the will. (Citations). The propriety of this rule especially appears where, in derogation of a property right, *the will purports to dispose of property belonging to the beneficiary* and, inferentially, to bequeath or devise other property in lieu of it." (Our italics). Thus, as stated in *Honeycutt v. Bank,* 242 N.C. 734, 744, 89 S.E. 2d 598: "An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other.*"

In *Lipe v. Trust Co., supra,* the plaintiff's action against the executors of the will of Alice J. Bost was to recover damages on account of the breach by said testatrix of her express agreement to compensate the plaintiff for services he had rendered to her over a period of years by making a will leaving all her property to him. The dispositive provisions of her will included a pecuniary bequest of $3,000.00 "to my nephew, Chas. H. Lipe." This Court held the pecuniary legacy did not constitute payment of the plaintiff's asserted claim. Specifically, a new trial was awarded the plaintiff on the ground the court's instruction to the effect any amount the plaintiff recovered in the action would be deducted from any amount he was entitled to under the will was erroneous. Although not referred to in the case as reported, the record on file in this Court shows the will contained the following provision: "I hereby declare and

direct that if any of the above named legatees, relatives, etc., contest, either directly or indirectly this my will, or try to break same, then their legacy is thereby forfeited, they losing all interest in my estate, inheriting nothing from me, their legacy to be distributed in the residuary."

In *Taylor v. Taylor, supra,* this Court quotes with approval excerpts from the opinions in *Lamb v. Lamb, supra,* and *Honeycutt v. Bank, supra.* In the factual situation considered, it was held the beneficiary was not put to an election.

In *Lovett v. Stone, supra,* a factual situation for application of the doctrine of election was presented. It was held that Hector Alexander Stone, notwithstanding he was the owner in fee of an undivided two-thirds' interest in a portion (20 acres) of the H. J. Stone tract, elected to limit his interest therein to a life estate by his acceptance, occupancy and use of the *entire* H. J. Stone tract devised to him by Alexander Stone, his grandfather, for life, with remainder in equal shares to his children in fee simple. Under these circumstances, he was required to elect whether he would stand on his rights or abide by the terms of his grandfather's will. See *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45.

Notwithstanding the foregoing, the court erred in entering judgment that plaintiffs are entitled to receive from the executors "all sums devised and bequeathed to them under the terms of said will." Nothing in the record indicates the original or present status of the estate. There was no evidence or finding as to any matter germane to defendants' second further defense. Hence, the judgment of the court below is stricken and the cause is remanded for the entry of a *final* declaratory judgment adjudicating in substance that the institution of said prior action in behalf of the minor plaintiff is not a bar to the right of either plaintiff to receive the bequest made to her in Article VII. Thereafter, plaintiffs will be free to take appropriate action to recover their bequests.

It is ordered that the costs *incident to this appeal* be taxed one-half against plaintiffs and one-half against defendants.

Error and remanded.

MARY KATHERINE FLEMING, BY HER NEXT FRIEND, JOHN C. FLEMING, v. NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION.

(Filed 26 February 1964.)

1. Insurance § 45—

Where plaintiff's evidence tends to show that insurer was not given notice of the accident constituting the basis of the claim until some thirteen months after the occurrence of the injury, and plaintiff fails to introduce evidence

explaining or justifying such delay, the evidence justifies nonsuit for violation of the policy provisions requiring notice, unless insurer had waived this provision.

2. Same—

Ordinarily a refusal by insurer to defend suit against insured on the ground that the policy did not cover the claim is a waiver by insurer of the requirement of the policy for notice of claim.

3. Same—

Where the policy provides coverage for accidents not connected with the transaction of business, and notice to insurer of claim against insured recites facts constituting a business connected accident, the denial of coverage by insurer does not waive its right to assert the defense that notice of the accident was not given as soon as practical as required by the policy, the misstatement of facts having lulled insurer into repose until after a consent judgment had been entered against insured.

APPEAL by plaintiff from *Patton, J.*, April 1963 Special Session of HAYWOOD.

Action by plaintiff to recover the proceeds of a "Comprehensive Family Liability" insurance policy issued by defendant to one Ned Carver.

On 18 June 1957 the plaintiff, an 8-year old child, entered upon the premises of a service station located on the south side of U. S. Highway 70 about three miles west of Waynesville, North Carolina. While on the premises she was attracted to a cage which contained a bear. As she neared the cage the bear either bit or grabbed her leg, inflicting serious injury.

The bear was owned by Ned Carver. The lot and service station belonged to Mrs. Ned Carver and were under lease to one Thurman Caldwell who operated the service station.

On 29 July 1958, more than thirteen months after the injury, plaintiff herein commenced an action in the United States District Court for the Western District of North Carolina against Mr. and Mrs. Carver and Thurman Caldwell for damages suffered because of the injury. The Carvers and Caldwell were represented therein by Attorney Roy Francis. In August 1958 Mr. Francis notified the insurance company (defendant herein) of the pending action and called upon it to defend the action. Upon information received, the insurance company denied that the policy covered such injury and declined to defend the action. Thereafter, on 17 September 1959, a consent judgment was entered against Ned Carver, the named insured, awarding $10,000 damages to plaintiff.

Defendant insurance company was given notice of the judgment by letter dated 12 December 1960. Execution against Ned Carver was returned *nulla bona*. The present action was commenced 7 December 1961.

This action came on for trial at the April 1963 Special Session of Haywood County Superior Court. At the close of all the evidence the court granted defendant's motion for nonsuit.

Plaintiff appeals.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for plaintiff.
Williams, Williams & Morris for defendant.

MOORE, J. The principal question on this appeal is whether the court erred in granting defendant's motion for nonsuit.

The insurance policy contains the following "Conditions":

> "3. In the event of an accident, occurrence or loss, written notice containing particulars . . . shall be given by or for the insured to the Company or any of its authorized agents *as soon as is practicable. . . .*" (Emphasis added).
>
> "6. No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy. . . ."

The complaint alleges that defendant was given full and timely notice of the injury and the action in the United States District Court, and insured fully complied with all the terms and conditions of the policy. Defendant, answering, denies these allegations but admits that defendant was given notice of the injury in terms showing that the policy did not cover the occurrence. Further answering, defendant specifically pleads the provisions of the policy (set out above) with respect to notice and the necessity of complying with the terms of the policy. In reply, plaintiff alleges that defendant waived the notice requirement by refusing to defend the prior action on the ground that there was no coverage.

There is no evidence in the record of any notice of any kind to defendant or any of its agents of the injury to plaintiff until August 1958, thirteen months after the occurrence of the injury. The evidence fails to explain or justify the delay. The failure to give notice for such lengthy period of time defeats the present action as a matter of law (*Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474) unless defendant has waived the notice "condition" of the policy.

The *Muncie* case involves an action against an insurer by a third party beneficiary (plaintiff), who was injured while riding as a passenger in insured's automobile. No notice was given insurer until eight months after the injury; there was no explanation justifying the delay in giving notice. Insurer denied liability and declined to defend the action by plaintiff against insured. The notice provisions of the policy were in all

material respects the same as those in the Carver policy in the instant case. Plaintiff recovered judgment against insured and, failing to collect by execution, sued insurer. This Court held that plaintiff was not entitled to recover against insurer. The opinion, delivered by *Rodman, J.*, fully discusses the questions of law involved, and no good purpose would be served by repeating the discussion here. We merely paraphrase the opinion. No part of the insurance contract may be ignored. The giving of notice is a condition precedent to insurer's liability. The burden of proof is upon plaintiff to show that notice was given as soon as practicable. Plaintiff, third party beneficiary, has no greater right against insurer than the insured would have. "Notice without explanation for the delay, given eight months after the happening of the accident, resulting in injuries . . . , cannot be said to be given 'as soon as practicable.' Since plaintiff has failed to establish compliance with the condition or to justify the delay, it follows that she has failed to establish her right to maintain the action."

In the case at bar, plaintiff contends that defendant waived the notice requirement of the policy by denying liability and declining to defend the action in the United States District Court solely on the ground that the policy does not cover the injury. It is true that defendant, by letter of 2 September 1958, advised Carver's attorney, Mr. Francis, "In view of our position that we did not have any coverage in policy to protect Mr. Carver, we must respectfully decline to enter into the case by furnishing Mr. Carver a defense."

It is well settled in this jurisdiction and elsewhere that an insurer, as a general rule, is precluded from defending successfully against an action brought under a liability policy on the ground of a violation by the insured of the provisions as to notice where it had denied liability on some other ground. *Anderson v. Insurance Co.*, 211 N.C. 23, 188 S.E. 642; *Lowe v. Fidelity & Casualty Co.*, 170 N.C. 445, 87 S.E. 250; 18 A.L.R. 2d, Anno.: Liability Insurance—Notice—Papers, § 31, pp. 491-494.

In our opinion the present case does not come within the general rule above stated, and defendant did not waive the violation by the insured of the provision as to notice.

The first notice received by defendant was the letter by Carver's attorney, dated 19 August 1958, which states, *inter alia*, "Mr. Carver was the owner of a large pet bear well confined in a heavily wired cage which was kept on the premises at his place of business." The unverified answer of the Carvers and Caldwell in the Federal Court case stated: ". . . (D)efendants, Alva Jo Carver and her husband, Ned Carver, . . . for a rental of ninety dollars ($90.00) per month . . . leased to Thurman Caldwell . . . the (service station) premises . . . together with the fix-

tures . . . and contemporaneously with the execution of said lease it was agreed by and between the defendant, Mr. Carver, and the said Thurman Caldwell that the bear would be left and would remain in the custody and control of the said Thurman Caldwell. . . ."

It was upon the foregoing information, emanating from the persons insured, that defendant denied coverage and declined to defend. By the terms of the policy there is coverage of injury by an animal owned by an insured; and the coverage insures any person legally responsible for such animal. But the policy does not apply to injury by an animal involved in a business pursuit "of an Insured in connection with a business solely owned by that Insured or owned by a partnership of which that Insured is a partner," and does not apply to any act or omission, in connection with business premises, involving the ownership, maintenance or control of an animal.

From the information furnished it by and on behalf of the named insured and other insured persons, insurer was clearly within its rights to deny coverage in its letter of 2 September 1958. Defendant, however, took the extra precaution of obtaining a statement in writing directly from Ned Carver on 18 September 1958, which is in pertinent part as follows: "My wife . . . is the owner of a service station which bears the name of Carvers Sinclair Service Station. She also owns the property on which the building is built. I own the fixtures . . . I have not run the business itself in about two years, having leased it to Thurman Caldwell. . . . Tommy Caldwell (agent of Thurman Caldwell) . . . was operating the station on 6-19-57 when a bear that was caged there grabbed a little girl's leg and tore it rather badly. The bear is owned by me and the cage the bear stays in is owned by me. . . . I originally got the bear for my own satisfaction and also for a tourist attraction and it was kept on the service station premises. The Caldwells said, when the building was leased, that they would feed and take care of the bear if I would leave it there. There was no charge made by me and no payment made by Caldwell in-so-far as the bears staying there was concerned."

Construing the statements in the letter of Attorney Francis, in the answer, and in the written account of Ned Carver, singly or together, the purport is inescapable that the ownership and maintenance of the bear was a business pursuit designed to attract tourists and customers to the service station, and that the bear was kept in connection with business premises. Defendant had the right to rely on the statements of the insured persons. These statements were, in effect, an invitation to deny liability on the ground that the policy did not furnish coverage.

So far as the record discloses, there was no notice or intimation to insurer that the facts were different from those contained in the above

statements until plaintiff offered evidence at the trial in Superior Court in April 1963. Thurman Caldwell then testified: "There was a cage located east of the gas station and there was a bear in that cage. Ned Carver fed the bear. Ned Carver bought the bear. I did not own and I did not have any interest in the bear. . . . I had my dealings with Mrs. Carver. Mr. Carver did not tell me he owned the fixtures . . . I did not employ Mr. Roy Francis to represent me. . . . (T)hat answer (in Federal Court) is not a correct statement of my arrangement with . . . Mrs. Carver." Attorney Francis testified that he never talked with Caldwell, and stated: "At the time I wrote the letter of August 19, 1958, . . . I was not then aware of the lease arrangement out at that place."

It comes to this: Defendant was furnished statements by and on behalf of the persons insured, clearly showing no insurance coverage. Relying thereon and induced to inactivity thereby, defendant denied liability on that ground and declined to defend the action in the United States District Court. Having obtained a judgment against the named insured, fixing him with liability, plaintiff undertakes in Superior Court to adduce evidence showing the facts to be different from those stated to defendant at the outset so as to bring her injury within the policy coverage. This, Ned Carver could not do were he the plaintiff herein. But plaintiff has no greater rights against defendant than Ned Carver would have. Defendant, relying on statements it had the right to accept as true and to act upon, and having been lulled into repose until the time and opportunity have passed for defending against liability on the merits, will not be adjudged to have waived other available defenses now that plaintiff, standing in the shoes of the named insured, seeks to change positions to the detriment of the insurer and at the same time keep insurer frozen in the position it had taken because of the original statements. Under these circumstances, we hold that defendant has not waived the violation of the notice provision.

State Mutual, Etc., Ins. Co. v. Watkins, 180 S. 78 (Miss. 1938) is apposite. In that case the insurance policy did not cover injury to an employee of insured. Insured sent plaintiff in the former's automobile to a neighboring town on a business mission for insured. There was an accident and plaintiff and a passenger were injured. Insurer settled with the passenger, and in the course of insured's investigation preliminary to such settlement, plaintiff made a statement to insurer's agent that he was an employee of insured at the time of the accident. Plaintiff's attorney later inquired of insurer what it was going to do about plaintiff's injury, and insurer advised that there was no coverage. Plaintiff sued insured, alleging that he was an employee of insured at the time of the accident. Five months elapsed before insurer had notice of the suit. Insurer, noting the

allegation that plaintiff was an employee of insured, denied coverage and declined to defend. At the trial plaintiff was permitted to amend his pleading, allowing him to allege that he was not an employee but was acting gratuitously. Plaintiff recovered judgment for $2000 against insured and, execution having been returned *nulla bona*, sued the insurer. Insurer defended on the ground that no timely notice of the suit was given. Plaintiff pleaded that this defense was waived by reason of insurer's denial of liability on the ground of want of coverage. The Court held that there was no waiver of the notice provision and said:

> "In view of the facts stated, the contention of appellee that the insurance company had waived notice is obviously not tenable. It would seem hardly necessary to say that a party who presents a certain state of material facts to another may not rely upon a waiver by the latter as having any effect in regard to a materially different set of facts later asserted by the party claiming the waiver.
>
> "If the alleged beneficiary, in a situation such as here presented, were allowed to prevail against the insurer, the lawful stipulations in insurance policies for notice and statement of loss or injury could be diverted from their proper purpose and turned into decoys to lead the insurer away from investigation and defense; would permit an alleged beneficiary who had procured the absence of the insurer in reliance upon the represented state of facts to move later and suddenly against it, without warning, upon another and a materially different set of facts, — essentially different so far as any liability of the insurer is concerned. This does not comport with the principles of judicial justice, and is not permissible."

It will be observed, parenthetically, that a change of position by insured will not *per se* violate the cooperation clause of the insurance policy or render ineffective a waiver of policy conditions, otherwise binding, if insurer is not prejudiced by such change of position. *Henderson v. Insurance Co.*, 254 N.C. 329, 118 S.E. 2d 885. In the instant action, the prejudice to defendant is so clear as not to be debatable.

Affirmed.

THOMPSON-McLEAN, INC. v. P. L. CAMPBELL.

(Filed 26 February 1964.)

1. Brokers and Factors § 6—

In order to be entitled to recover his commission, a broker must show that he had procured a purchaser ready, able, and willing to purchase on the terms and conditions prescribed by the seller.

2. Brokers and Factors § 1; Frauds, Statute of § 6a—

A contract between a broker and the owner to negotiate a sale of land is not required to be in writing.

3. Brokers and Factors § 6; Contracts § 3— If there is no agreement in regard to all essential terms, there is no contract.

The seller agreed to sell on condition that payment of a stipulated portion of the purchase price be deferred upon terms to be worked out to afford him the best tax advantage. The broker procured a purchaser willing to pay the entire purchase price in cash or partly in cash with the balance secured by a second mortgage, or a smaller down payment with the balance secured by a first mortgage. The seller refused the offers, stating that he required the stipulated cash payment with the balance payable in ten yearly installments at six per cent interest, secured by a first mortgage. *Held:* Nonsuit was properly entered in the broker's action for commission, since if the terms of the sale were not definitely fixed there was no contract, while if the terms of the sale were fixed the broker did not procure a purchaser willing and able to comply with the terms as set forth by the seller.

APPEAL by defendant from *Mallard, J.*, June 1963 Session of CUMBERLAND, docketed in the Supreme Court as Case No. 600 and argued at the Fall Term 1963.

Plaintiff, a corporation engaged in the business of selling real estate, instituted this action to recover a commission. Defendant is the owner of a one-half interest in property in Fayetteville known as Big Farmers Warehouse and Drive-In Restaurant. On October 18, 1961 he and his cotenants, Blanche P. Barbour and Ann B. Davis, executed an "exclusive sales agency contract" whereby, for four months, plaintiff was granted the right to sell the property at the price of $235,000. In it they agreed to pay plaintiff a five percent commission if it procured a purchaser in accordance with the agreement even though they might be unable or unwilling to complete the sale. In addition, the contract contained this provision: "P. L. Campbell will accept no more than 29% of his half interest as down payment as a requirement of any sale."

On January 29, 1962 Barbour and Davis sold their one-half interest in the property to Sherrill Akins and A. R. Talley, Sr., purchasers procured by the plaintiff, and paid it a five percent commission on the gross purchase price of their interest. Plaintiff brought this action to recover an

identical five percent commission from defendant, alleging in its complaint that after it secured Akins and Talley as purchasers, ready, willing and able to purchase defendant's interest in said property according to the terms specified in the sales contract, defendant refused to sell to them. In his answer, the defendant admitted the execution of the sales agency contract but alleged that it was a condition to any sale of his interest that the remaining seventy-one percent of the purchase price be secured by a first mortgage on the property and paid in ten annual installments with interest at six percent. He denied that plaintiff ever produced a buyer willing to purchase in accordance with those terms and conditions.

Plaintiff offered evidence tending to establish the following facts:

When the sales agency contract was executed on October 18, 1961, defendant was uncertain as to how he wanted the unpaid balance of the purchase price arranged. For that reason, no provision with reference to the manner in which it should be paid or secured was included. Defendant's purpose was to minimize the tax impact of the sale and "he made it a condition prerequisite to the final completion of any sale of this property that it be done in a way that it would be to his best tax advantage . . ." Defendant and Paul H. Thompson, president of the plaintiff corporation, specifically agreed that "the balance would be worked out as an agreement, after defendant consulted with his accountant and attorney."

On November 17, 1961 plaintiff submitted a written offer, signed by Akins and Talley, to pay $117,500 for the Barbour-Davis interest in the property and, "up to 29% of $117,500 to Campbell," his balance to be paid "in installments as directed by Campbell with interest at 6% on such unpaid balance until fully paid." This offer was accompanied by a good faith deposit of $5,000 with plaintiff as escrow agent. They were then in a position to pay the entire purchase price of the property in cash, having obtained a commitment for a loan from the Scottish Bank to be secured by a first mortgage on the property. On November 20, 1961 defendant and his cotenants accepted this offer in writing "subject to: Good faith deposit increased to $35,000.00, (2) Sellers reserve the right to withdraw this acceptance in writing by noon November 23, 1961." On the morning of November 20th Akins and Talley deposited with Thompson checks totaling $35,000 in accordance with the stipulation in the acceptance; however, on the same day they retrieved the checks and destroyed them.

Thereafter, Mr. Thompson and other agents of the plaintiff, as well as Mr. James C. Davis who represented the Barbour-Davis interest in the property, had a number of conversations with defendant with reference

to the mode of paying and securing the seventy-one percent balance of his part of the purchase price. Thompson told defendant that "if the tax situation was such that it was to his advantage to work out an escrow arrangement, secondary financing, second mortgage, or whatever . . . they stood ready to pay in cash, to pay him in the form of his required down payment, or to do whatever his wishes were, within reason to close out this real estate contract." According to Thompson, he explored many areas, "but we could never get any definite approach." In November 1961 defendant told Davis that he would sell his interest in the property if twenty-nine percent of the purchase price were paid in cash and the balance of seventy-one percent secured by a first mortgage on the property and paid in ten annual installments with interest at six percent. Thompson testified that defendant first made this proposition to him in a letter dated January 31, 1962, seventeen days before the expiration of the contract.

In December, Mr. Davis took defendant one offer from Akins and Sherrill which provided that the balance of the purchase price would be secured by a second mortgage, and another which provided that the balance be held in a trust fund at the Scottish Bank. Defendant, after some study, declined both. On January 24, 1962, plaintiff, on behalf of Akins and Talley, submitted another written offer to purchase the property at the stipulated price proposing that $50,000 be paid in cash and the balance of $185,000 be paid in ten annual installments at six percent interest and secured by a first mortgage on the premises. Defendant declined this offer. After Akins and Talley purchased the Barbour-Davis interest in the warehouse, defendant offered to sell them his interest if they wanted it. They told him they were not then interested in buying his half, and felt that the best thing to do "was to join together to work for the good of the business."

Defendant's evidence tended to show the following:

He informed Mr. Thompson on November 20th, at the time he signed his acceptance on the first offer to purchase, that he would accept the balance above the initial cash payment in ten equal payments at six percent interest. At that time he did not mention the security. On November 22nd defendant called Mr. Davis and told him to have the papers prepared for he was going to sell. On November 27th, Mr. Davis tendered him another contract of sale whereby Akins and Talley proposed to purchase the entire property by paying $151,575 in cash with the balance to be secured by a second mortgage on the premises and payable in ten equal annual installments with six percent interest. Defendant declined to consider a second mortgage. Thereafter, Davis brought him another proposed contract of sale whereby Akins and Talley agreed to pay the

sum of $117,500 to Barbour-Davis and $34,075 to defendant, his balance to be paid in ten equal annual installments at six percent interest and secured by a certificate of deposit in the Scottish Bank with John Steadman, Jr., as trustee. Defendant also declined to accept this "escrow" arrangement. After receiving these last two proposals, defendant talked to Mr. Thompson and told him that he was ready to sell when they would give him a deed of trust to secure the balance which was to be paid in ten annual installments with interest at six percent. Up to that time no paper had been presented to him which provided for a sale upon his terms and Mr. Thompson never did say that he could provide "an agreement of that kind." Defendant was willing to sell at any time that they offered him a first deed of trust but no such offer was ever made. On January 31, 1962 defendant wrote plaintiff that until February 16, 1962 he would sell for $117,500, to be paid twenty-nine percent in cash upon delivery of the deed with the balance in ten annual installments at six percent interest and secured by a first mortgage.

The defendant's motions for nonsuit at the close of plaintiff's evidence and at the close of all the evidence were overruled.

By its verdict, the jury determined that defendant had breached the sales agency contract of October 18, 1961 and was indebted to the plaintiff in the sum of $5,875. From judgment entered on the verdict the defendant appealed.

McCoy, Weaver, Wiggins & Cleveland by John E. Raper, Jr., for plaintiff appellee.

Williford, Person & Canady by Donald R. Canady for defendant appellant.

SHARP, J. "It is established law in this jurisdiction that a real estate broker is not entitled to commissions or compensation unless he has found a prospect, ready, able and willing to purchase in accordance with conditions imposed in the broker's contract." *Sparks v. Purser,* 258 N.C. 55, 127 S.E. 2d 765. Therefore, for a broker to recover he must establish (1) a binding contract and (2) performance on his part. The plaintiff bases this action upon the agreement which the parties made on October 18, 1961. That agreement was not entirely in writing. The portion which related to the mode of paying the seventy-one percent of the purchase price was oral. However, a contract between a broker and a landowner to negotiate a sale of the latter's land is not required to be in writing. *Carver v. Britt,* 241 N.C. 538, 85 S.E. 2d 888.

Plaintiff concedes that no method for paying the balance of the purchase price above the cash down payment was fixed on October 18, 1961.

At that time the parties merely agreed that they would subsequently work out such terms, but it was expressly stipulated by defendant that, as "a condition prerequisite" to any sale, the manner of payment must be to his "best tax advantage." The defendant contends that he later fixed the terms for the payment of the seventy-one percent balance by requiring that it be secured by a first mortgage and paid in ten annual installments at six percent interest. If he did, it is clear from the evidence that plaintiff never secured a purchaser willing and able to purchase upon those terms. If he did not specify definite terms, the condition precedent to the formation of a binding contract was never fulfilled.

The condition that the method and manner of payment be subsequently worked out was not, as in *Carver v. Britt, supra,* a mere detail relating to the ultimate performance of an existing contract. Until such terms were specified by the defendant, after consultation with his attorney and his accountant, and accepted by the plaintiff, there was no valid and enforcible brokerage contract. "To constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms are not settled, there is no agreement." *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618. "Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation." 1 Elliott on Contracts, § 175; *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735.

This case is analogous to that of *McCoy v. Trust Co.,* 204 N.C. 721, 169 S.E. 644 in which a real estate broker sued for a commission. She had procured a purchaser willing to purchase the land at defendant's price of $12,000. Plaintiff testified that defendant's agent told her "they were willing to accept $4,300 down, but would not state any terms; that they would be willing to give liberal terms, but would not state what the liberal terms were. He didn't know exactly what they would do, but would give terms. He didn't state exactly what they would do then." This Court said: "It is evident that, according to the plaintiff's testimony, she had no definite terms upon which to offer the farm for sale." The judgment of nonsuit was sustained.

Where one agrees to sell land for a certain price, "Terms: cash or contract," the broker has authority to sell only upon terms and conditions to be agreed upon and which are satisfactory and acceptable to the landowner. *White v. Turner,* 164 Kan. 659, 192 P. 2d 200. If the details of the terms are never given to the broker by the owner, he is precluded from producing a buyer, ready, able and willing to buy on the terms fixed by the principal. *Pugh v. Dollahan,* 49 N.M. 228, 160 P. 2d 951.

It cannot be seriously contended that a binding contract of sale was created by the defendant's conditional acceptance of the offer to purchase

dated November 17, 1961. The short answer to such a contention is that the checks totaling $35,000, deposited as earnest money by Akins and Talley with the plaintiff on November 20, 1961 in accordance with the requirement in defendant's acceptance, were withdrawn and destroyed on the same day. At that time, according to plaintiff, defendant still had not indicated how he wanted the balance paid. Whether Akins and Talley would have met these requirements when they became known, is a matter of conjecture.

After they took up their checks on November 20th, Akins and Talley did not pursue their offer of November 17th further. Two other offers to purchase were made in December. One proposed to secure the balance of the purchase price by a second mortgage; the other, by a trust fund or escrow account which apparently offered defendant no tax saving. It seems that Akins and Talley were at all times able and willing to pay the entire purchase price in cash, but an offer to purchase property for cash does not entitle the broker to his commission if the landowner has specified deferred payments. Annot., 18 A.L.R. 2d 376, 380. The final offer in January 1962 provided that the balance be secured by a first mortgage but called for a cash payment of only $50,000 which was to be divided between all the co-owners of the property. Defendant accepted none of these propositions.

In 12 Am. Jur. 2d, *Brokers* § 187, we find the following:

> "Where the listing agreement fails to fix the terms for the sale or exchange of property, or specifies only part of the terms with the understanding that further details are subject to negotiation between the principal and the customer, the principal has been held free to terminate the negotiations without liability to the broker. Moreover, in such a case the broker may be denied compensation unless he produced a customer ready, able, and willing to buy on such terms as the principal may require, or as he accepts, or unless the principal and the customer reach a definitive oral or written agreement."

See also Restatement, Agency, 2d § 445, comment *d*.

In this case the plaintiff finds itself in this dilemma: If the terms of the sale were not finally fixed it had no binding contract; if they were, it never produced a purchaser willing and able to comply with those terms. It matters not whether the defendant changed his mind about selling the property, as plaintiff contends, or whether the impasse resulted because the lending institution would furnish Akins and Talley the money with which to purchase the property only if its loan were secured by a first mortgage on the warehouse while defendant would sell only if he could obtain a first mortgage on the same property securing the balance due

him on the purchase price. In either situation, under the evidence in this case, the defendant was entitled to his motion for nonsuit.

Reversed.

JOSEPH E. MOSES AND WIFE, JOSEPHINE MOSES v. STATE HIGHWAY COMMISSION.

(Filed 26 February 1964.)

1. Appeal and Error § 2—

Where the question sought to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the Supreme Court may determine the appeal on the merits even though the appeal is from an interlocutory order and premature. G.S. 1-277, G.S. 1-278.

2. Eminent Domain § 2—

When plaintiffs are given access to the main highway by means of a service road abutting their property, the fact that the main highway is changed into a nonaccess highway does not constitute a "taking" of plaintiffs' property, either in depriving plaintiffs of direct access to the highway or in diminishing the flow of traffic having direct access to plaintiffs' property, the inconvenience resulting from the necessity of using a more circuitous route and any diminution in value to plaintiffs' property being incident to the exercise of the police power and *damnum absque injuria*. Constitution of North Carolina, Article I, § 17.

APPEAL by respondent from *Braswell, J.*, September 9, 1963, Civil Session of CUMBERLAND. This appeal was docketed in the Supreme Court as Case No. 605 and argued at the Fall Term 1963.

This is a condemnation proceeding. Petitioners seek damages because they have been denied immediate access from their property to Interstate Highway I-95, a controlled access road. Petitioners have access to the Interstate Highway by a service road connecting points fixed for entrance and departure from the Interstate Highway. This service road abuts the property of petitioners.

The court, based on stipulations of the parties and admissions in the pleadings, concluded petitioners were entitled to compensation. He remanded the proceeding to the clerk for the appointment of commissioners. Respondent appealed.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney McDaniel, Quillan, Russ & Worth for respondent appellants.

Charles R. Williams, Robert B. Morgan, Morgan & Williams, A. R. Taylor for appellee.

RODMAN, J. An order directing the appointment of commissioners in a condemnation proceeding is interlocutory. It is not such a determination of the rights of the parties as permits a dissatisfied party to appeal. G.S. 1-277, *Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 375. Nonetheless when, as here, the parties desire an answer to a question which is fundamental in determining their rights, is also of public importance, and when decided will aid State agencies in the performance of their duties, we will in the exercise of the supervisory jurisdiction given us, answer the question, G.S. 1-278; *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82; *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273.

The question now for decision arises on this factual situation: Prior to 1954, U. S. 301 was a North-South link in the primary system of federal highways. It was one hundred feet in width, with a paved area in the center for vehicular traffic. This paved area provided one lane for northbound traffic and another for south-bound.

The Highway Commission, in order to convert 301 into an Interstate Highway, proposed to enlarge its right-of-way. It had, prior to 15 June 1954, surveyed and marked the proposed boundary of the enlarged highway.

On 15 June 1954, Joseph Moses purchased from D. A. Calhoun 1.7 acres. This tract is situate east of 301. Its western boundary is the line respondent had marked for the boundary of 301 when enlarged. In December, 1954, petitioners purchased an additional 2 acres from Calhoun. The description in the deed then made covers 3.7 acres. It includes the 1.7 acres purchased in June, 1954. Petitioners purchased the 3.7 acres for the erection and operation of a motel and restaurant. The western boundary of the 3.7 acres is more, than 100 feet east of the eastern line of 301 as it existed in 1954. The 3.7 acres is part of a larger tract owned by Calhoun. The western line of his property was the eastern line of 301. On 10 July 1957, Calhoun granted petitioners an easement to cross his land lying between the 3.7 acres and the highway.

In August, 1959, respondent purchased from Calhoun the land lying between petitioners' 3.7 acres and the boundary of 301 as it existed in 1954. This purchase was made to enlarge 301 and make it a "controlled access," Interstate Highway, with four lanes for through traffic. These lanes are near the center of the right-of-way. Beyond the through traffic lanes are "service roads." These service roads are separated from the inner lanes by a fence. Abutting property owners gain access to the inner

lanes by use of the service roads. Interstate, controlled access highways are constructed under congressional and legislative authorization. Federal Aid Highway Act of 1956, (70 Stat. 374); 23 U.S.C.A. 111, c. 993, S.L. 1957, codified as G.S. 136-89.48 *et seq.*

A motorist traveling south on the inner lane must, in order to reach petitioners' motel and restaurant, travel 1.65 miles further than he would if allowed direct access to their property. A motorist traveling in the northbound lane to get to petitioners' property must travel .65 miles further than he would if given direct access.

If the denial of immediate access to the inner traffic lane is a taking of property compensation must be paid. N.C. Constitution, Art. I, Sec. 17; *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263; *Braswell v. Highway Commission,* 250 N.C. 508, 108 S.E. 2d 912; but if the substitution of a service road for the direct access theretofore enjoyed is an exercise of the police power, any diminution in the value of petitioners' property is *damnum absque injuria. State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; *Morris v. Holshouser,* 220 N.C. 293, 17 S.E. 2d 115; *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149.

Abutting property owners having a private access to a highway cannot be denied the right to enter and use a road constructed for public benefit.

Petitioners do not claim a denial of access; they merely assert access to a portion of the highway is less convenient now than in 1957 when they acquired a right-of-way across land subsequently acquired by respondent. In fixing the line marking the boundary between public and private rights, we are reminded of what Seawell, J., said in *Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133:

> "Ancient doctrines pertaining to roads of the horse and buggy days, when those roads were for the most part trails through the woods and fields, must be applied to modern conditions with caution and sound discrimination. Once, 'ingress and egress' were practically all such a road afforded, and there is logic in the thought that it is all of such a doctrine which should survive. Today roads have been multiplied and expanded into such luxurious proportions that the expression, 'once a road, always a road'—if we attach to it the significance given it by plaintiffs—will give to the abutting owner in a vacated road, if he takes all of it, an easement wholly beyond his necessities and not within the reasonable application of the doctrine.
>
> "The trend of judicial decision where this doctrine is recognized is decidedly toward confining such a right to the necessity of egress and ingress."

Our statutes, G.S. 20-156 (a), (requiring one entering a highway from a private way to yield the right of way) and G.S. 20-165.1, (authorizing the establishment of one way streets and roads) illustrate the power of the State to regulate the time and manner of entering a public highway. Although the State may change the grade of a road making immediate access more difficult, such a change and the resulting inconveniences caused the property owner is not a compensable injury. *Smith v. Highway Commission*, 257 N.C. 410, 126 S.E. 2d 87; *Thompson v. R. R.*, 248 N.C. 577, 104 S.E. 2d 181; *Calhoun v. Highway Commission*, 208 N.C. 424, 181 S.E. 271.

All of these things may require an abutting owner to travel a greater distance to get to his destination. The law applicable to such changes and regulations was stated in *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630. It is there said:

> "It is generally held that the owner of abutting property has a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property is a necessity peculiar to himself . . .
>
> "Where there is no actual encroachment on the property, but only the question of interference with the appurtenant easement, since the right itself springs out of and attaches to the use of a public facility, conservative opinion tends strongly to limit it to such reasonable recognition as will meet the exigencies involved in the owner's use of his property, and yet will not unduly restrict the government in functioning for the public convenience and necessity.
>
> "It is understood that absolute equality of convenience cannot be achieved, and those who take up their residence or purchase and occupy property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest. To justify recovery in such case, the damages must be direct, substantial and proximate, and not such as are attributable to mere inconvenience—such as being compelled to use a longer and more circuitous route in reaching the premises. McQuillan, *op. cit., supra*, § 1527 (1410). It is not enough that the vacation results in some inconvenience to his access, or compels a more circuitous route of access, or a diversion of traffic from the premises, or a consequent diminution in value. 18 Am. Jur., Eminent Domain, sec. 225. An inconvenience of that nature is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria.*"

The basic principle that an abutting property owner is not entitled to compensation because of circuity of travel resulting from a limitation on the direction in which traffic may move, was reiterated in the thoughtful opinion of *Bobbitt, J.* in *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732. Reference is made to the opinion for the numerous cases cited to support the conclusion there reached.

Petitioners' contention that they are entitled to compensation because of the decreased number of travelers who use that portion of the highway affording direct access to their property is likewise without merit. If petitioners could collect because of such diminution in travel by their property, so could every merchant in a town when the Highway Commission constructed a by-pass to expedite the flow of traffic. The true rule with respect to such relocation or change in construction was, we think, aptly stated by the Supreme Court of Vermont in *Nelson v. State Highway Board,* 1 A 2d 689, 118 A.L.R. 915. The Court there said:

> "[T]he State owes no duty to the Nelsons (property owners) in regard to sending public travel past their door. Our truck line highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property of occasional landowners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain these highways."

The revamping of our highway system, making it useful if needed for both national defense and as a safe and economical means of rapid interstate travel, has created many problems for the property owner as well as the agencies charged with the responsibility of constructing and maintaining that system. Naturally these problems have produced much litigation.

An examination of these cases and of treatises by members of the Bar who have made a particular study of the problem will, we think, show the decided weight of opinion supports the conclusion we reach; i.e., an abutting property owner is not entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points designated for access to through traffic. See *Abdalla v. Highway Commission, Ante,* 114, 134 S.E. 2d 81; *State v. Danfelser,* 384 P, 2d 241; *Stefan Auto Body v. State Highway Commission,* 124 N.W. 2d 319; *Nick v. State Highway Commission,* 109 N.W. 2d 71; *Arkansas State Highway Commission v. Bingham,* 333 S.W. 2d 728; Covey: *Control of Highway Access,* 38 Neb. L. Rev., 407; Anderson: *Control of Access by*

Frontage Roads—Police Power or Eminent Domain?, 11 Kan. L. Rev., 388; Covey: *Frontage Roads: to Compensate or not to Compensate,* 56 N.W.U.L. Rev. 587; Levin: *Federal Aspects of the Interstate Highway Program,* 38 Neb. L. Rev. 377.

Because of the public importance of the question presented, we have treated the subject without regard to the provisions contained in the deed granting petitioners an easement. This deed was executed subsequent to the enactment of Chapter 993, S.L. 1957, (Art. 6D c. 136 of the General Statutes). In examining it we are led to the conclusion that both petitioners and their grantors understood the law to be as we have here declared. The easement then granted was to continue only "until such time as the said land shall be conveyed to or taken by the State Highway and Public Works Commission for highway purposes with adequate access allowed to second parties for the operation of their motel and restaurant business." It is further provided in the deed, "In case said land is taken by condemnation, first parties shall be entitled to and hereby reserve for themselves, their heirs and assigns, the right to the entire award for damages resulting from such condemnation, except damages, if any, for severence from said 3.7 acres of land in case adequate access is not available to the second parties, their heirs and assigns, and in such event, the said second parties shall be entitled to severence damages for loss of adequate access to *said highway.*" What highway were the parties talking about? Certainly they were not talking about 301 as it existed at the time of conveyance. The recitals in the deed show that they anticipated the enlargement of the highway in the immediate future. Petitioners do not contend that they do not have direct and immediate access to the new highway. That access is provided by the service roads. These service roads are part of the highway system. They serve not only the petitioners but any member of the public who desires to use the same. These service roads connect with fixed points by which the traveler may enter the north or southbound through stream of traffic.

Since petitioners have not suffered a compensable injury, the order appointing commissioners to ascertain the amount of compensation owing petitioners must be and is

Reversed.

STATE v. LAWRENCE GUFFEY AND GENE CLONTZ.

(Filed 26 February 1964.)

1. Criminal Law § 48—

In order for silence of defendant in the face of an incriminating statement to be competent as an implied admission of guilt, it must appear that the statement was made in the presence and hearing of the defendant, that defendant understood the statement, that the statement was made under circumstances naturally and properly calling for a reply, that the declarant or some person present had the right to the information, and that defendant had an opportunity to reply.

2. Same—

It is better practice for the court in the absence of the jury to hear evidence *pro* and *con* before determining the competency of admissions or confessions by reason of silent acquiescence.

3. Same— Silence held not an implied admission of guilt under the circumstances disclosed by the evidence in this case.

The fact that defendants, charged with robbery, are silent in the face of a statement, made to officers in their presence, that one of defendants paid for a car with twenty dollar bills and had a roll of twenty dollar bills left, and that the other defendant offered to sell a car having bullet holes in its right-hand side, even though the facts recited, in connection with other facts adduced, are incriminating in nature, *held* not competent as an implied admission of guilt, the statement not having been addressed to defendants and not in itself containing a charge of crime, and there being no showing that defendants had an opportunity to reply.

4. Criminal Law § 70—

Testimony of statements of a person not a witness that one defendant had paid for a car with twenty dollar bills and that the other had tried to sell another car having bullet holes in its side, is hearsay and incompetent to prove the facts recited in the statements.

APPEAL by defendants from *McLaughlin, J.*, August 1963 Special Session of RUTHERFORD.

Criminal action. The jury convicted defendants on an indictment for common law robbery. From judgment imposing active prison sentences defendants appeal.

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

Hamrick & Hamrick for defendants.

MOORE, J. The evidence for the State is summarized in part as follows: The defendants, Clontz and Guffey, went to the home of Ben Hudson on the night of 8 May 1963 and knocked at the door. Hudson, who

had gone to bed, got up and opened the door. Guffey blew out the lamp and Clontz grabbed Hudson and held him. Guffey took Hudson's overalls and went outside. There were two billfolds in the overalls, one contained $960 in $20 bills, the other contained $11. Clontz released Hudson and went outside; Hudson followed yelling, and Clontz struck him and threatened to kill him. Defendants got in a white Chevrolet and drove off. Hudson called to his son, Clyde, who lived nearby, told him that he had been robbed and asked him to stop the car. Clyde shot at the car with a rifle; several bullets struck the right-hand side of the car but it did not stop. Officers were called. Hudson described the man who had blown out the lamp and stated that he would recognize him if he saw him again but did not know his name; he also said that he would be able to identify the other man by his voice. The overalls were found some distance away but the money was missing. The defendants were arrested the following day and placed in jail. Hudson picked Guffey from a "line up" and identified him as the man who blew out the lamp. Clontz was not identified by Hudson at the jail. At the trial Hudson positively identified both defendants as the robbers and stated that he had known them 15 to 20 years. There was other evidence of a circumstantial nature tending to implicate the defendants.

Defendants offered no evidence.

Over the insistent objection of defendants the court permitted Wilbur Kizer, a deputy sheriff of Rutherford County, and John Vanderford, a member of the State Bureau of Investigation, to testify to statements made by one Johnny Walker in the presence and hearing of defendants. According to the witnesses, Walker made the statements in the jail after defendants were arrested and in custody, and the witnesses, Kizer and Vanderford, and Walker, Melvin Sisk and the defendants were present. Defendants made no response and did not deny the truth of the statements.

Kizer and Vanderford testified in substance that Walker, in the presence and hearing of defendants, stated to Vanderford that on the morning of 9 May 1963 the defendants came to the home of Melvin Sisk in Forest City and Clontz bought from Walker a Dodge automobile for $200, paid for it in $20 bills and had a roll of $20 bills left, that Guffey offered to sell Walker a 1960 Chevrolet automobile, that Walker, Sisk and the defendants went in the Dodge to a location where they found a white Chevrolet in a field near the edge of a wooded area, that Walker bought the Chevrolet from Guffey and paid $25 for it, that it had several bullet holes in the right-hand side and Guffey told Walker he should make the holes larger with a knife and he could tap the car with an ax where the bullet holes were and it would be easier to fix.

Neither Walker nor Sisk testified at the trial.

The challenged evidence is not admissible unless it is competent as an admission by adoption or acquiescence. When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime, to which he makes no reply, it may be inferred under certain circumstances that the statement is true else he would have denied it. It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used and that he failed to deny it; It is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it. Silence alone is not what gives the incident probative value. Where the occasion is such that the person is not called upon or expected to speak, no statement made in his presence can be used against him because of his silence. The mere silence of the party creates no evidence, one way or the other. The temperaments of people and their conception of the fitness of things are so variant, and the silence of an accused may spring from such a variety of motives (some of which may be consistent with innocence), that failure to reply to or deny a statement is liable to misinterpretation and abuse and evidence thereof should be received with great caution and, except under well recognized conditions, should be held inadmissible altogether. It is not the silence of defendant, but his conduct or some circumstance in connection with the statement made in his presence that gives the statement evidentiary weight. *State v. Wilson,* 205 N.C. 376, 171 S.E. 338; Stansbury: North Carolina Evidence (1946), § 179, pp. 389-392; 31A C.J.S., Evidence, §§ 295, 296, pp. 755-760. See also: *State v. Temple,* 240 N.C. 738, 83 S.E. 2d 792; *State v. Rich,* 231 N.C. 696, 58 S.E. 2d 717; *State v. Evans,* 189 N.C. 233, 126 S.E. 607.

Furthermore, an admission or confession, even where it may be implied by silence, must be voluntary. Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent. *State v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *State v. Dills,* 208 N.C. 313, 180 S.E. 571. No one can be forced to incriminate himself, or to make a false statement to avoid doing so. *State v. Dills, supra.* A person has the right to be silent unless there is good, natural and proper occasion for speaking. *State v. Wilson, supra.* The statement and the circumstances under which it is made must call for a reply, and defendant must exhibit some act of the mind amounting to voluntary demeanor or conduct. *State v. Burton,* 94 N.C. 947. However, if the evidence is otherwise competent, the mere fact that defendant is under arrest or in jail does not necessarily render the admission inadmissible. *State v. Hawkins, supra; State v. Riley,* 188 N.C. 72, 123 S.E. 303. Incarceration is only a circumstance to be considered in determining the competency of the purported admission by adoption.

To render evidence of an admission by silent acquiescence competent, the statement must have been made in the presence and hearing of the defendant, he must have understood it, he must have understood that it contained an accusation against him, it must be of such content or made under such circumstances as to call for a reply, that is, it must be such as to render a reply natural and proper, the declarant or some person present must have the right to the information, and there must have been an opportunity for reply. *State v. Burton, supra;* 31A C.J.S., Evidence, § 295, pp. 755-759. For an exhaustive list of cases from this jurisdiction illustrating the rules herein stated and showing circumstances under which such evidence is admissible and circumstances where inadmissible, see footnotes under § 179 of Stansbury.

In determining the admissibility of admissions or confessions by reason of silent acquiescence, it is the better procedure for the court, in the absence of the jury, to hear evidence *pro* and *con* bearing upon their competency. *State v. Dills, supra.* If it is determined that the admission is otherwise competent, a conflict of evidence as to whether defendant heard the statement is for the jury. *State v. Walton,* 172 N.C. 931, 90 S.E. 518.

It is our opinion that the evidence challenged by defendants' exception in the instant case should have been excluded. Defendants had been arrested and were in jail; they were denying guilt. There is no evidence that they had sent for Walker and Sisk. The statement made in their presence did not, standing alone, involve them in any criminal act. Walker did not accuse them of robbing Hudson or taking the money. It is true that the statement attributed to them acts which, when considered in connection with other circumstances disclosed at the trial, would tend to incriminate them and identify them as the robbers. But the statement, of itself, was not necessarily inconsistent with innocence. The record does not disclose that the officers at the time the statement was made knew that there would be evidence to link the acts stated with the robbery, or if they did know that they so advised defendants. The statement made by Walker was addressed to Officer Vanderford, not to defendants. The record does not show that defendants were asked any questions or even given an opportunity to reply to Walker's statement. The only evidence of their reaction to the statement, if any, is that they did not deny it. There is nothing to indicate that they were expected to speak. The officers probably preferred that they make no reply. If they had unequivocably denied the statement, the evidence would at all events have been inadmissible. *State v. Dills, supra.* It would appear that the officers were providing a means of dispensing with the necessity of using Walker and Sisk as witnesses at the trial. The record simply shows that defendants were in

jail, a statement was made in their presence, and they did not deny it. Mere silence is not enough.

The evidence was not competent as an implied admission, and it was therefore incompetent under the hearsay rule. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." Stansbury, § 138, p. 274; *State v. Frizzelle,* 254 N.C. 457, 119 S.E. 2d 176. Walker did not testify at the trial. There was no opportunity to determine his competency or credibility as a witness by cross-examination or otherwise.

New trial.

HELLEN G. PRESSLEY v. THOMAS D. PRESSLEY.

(Filed 26 February 1964.)

1. Divorce and Alimony § 16—

A wife is entitled to reasonable subsistence and counsel fees from the estate or earnings of her husband if he is guilty of misconduct which would entitle her to divorce, either absolute or from bed and board. G.S. 50-16.

2. Divorce and Alimony § 8—

One spouse is not justified in leaving the other unless the conduct of the other is such as to render it impossible for the first to continue the marital relation with safety, health and self-respect, and is sufficient to constitute ground for divorce, at least from bed and board.

3. Divorce and Alimony § 16— Evidence held insufficient predicate for instruction on principle that separation induced by misconduct of wife would not constitute abandonment.

In this action by the wife for alimony without divorce the defendant offered no evidence and the wife's testimony on cross-examination tended to show, at most, that the person asserted by the husband to be the wife's paramour was a friend of the husband and visited in the home on one occasion for a short time early in the evening, that on this occasion all the lights were on and all the doors and windows open and the child of the marriage was awake and in their presence, that she had not committed adultery, and that she had fussed with her husband only over his affair with a woman he had taken on a trip to Florida with him and in regard to his staying out at night. *Held:* The evidence of plaintiff's conduct elicited on cross-examination is insufficient predicate for an instruction on the principle of law that if the conduct of the wife was such as to induce the conduct of the husband relied on as an abandonment, plaintiff would not be entitled to the relief sought, and the giving of such instruction constitutes prejudicial error.

4. Trial § 33—

It is error for the court to charge on a principle of law not presented by any view of the evidence.

APPEAL by plaintiff from *Patton, J.*, April 1963 Special Session of HAYWOOD.

Civil action by wife for alimony without divorce, in which she prays for maintenance and support of herself and a seven-year-old son born of the marriage, for the custody of the child, and for counsel fees pursuant to the provisions of G.S. 50-16.

The complaint alleges in substance: (1) marriage of the parties on 5 July 1944; (2) that on 11 November 1961 the defendant without just cause abandoned plaintiff and their minor child, left the State of North Carolina, and has failed to provide them with necessary subsistence according to his means and condition in life; (3) that defendant by cruel and barbarous treatment endangered plaintiff's life and offered such indignities to her person as to render her condition intolerable and life burdensome (we omit the nine specific allegations of such treatment); (4) that plaintiff has at all times been a good and faithful wife; (5) that a son was born of the marriage on 18 February 1955 and resides with plaintiff; (6) that plaintiff is a fit and suitable person to have the custody of their son, and that defendant is not; (7) that defendant is an able-bodied and experienced paint and body mechanic and businessman capable of earning $200 per week and owns considerable property in Haywood County; and (8) that plaintiff is without money for the support of herself and their minor child, and is ill and unable to work.

Defendant in his answer, while admitting the marriage and the birth of a child of the marriage, denies the material allegations of the complaint. By way of defense he alleges in substance that throughout their married life plaintiff nagged and fussed with him, refused to prepare meals for him, threatened his life, and by reason of such threats and fears for his health and safety he was forced to leave his home and live apart from her and his son. That in the summer of 1962 and on other occasions plaintiff committed adultery with Tom Hyatt. When he left North Carolina in April 1962 to obtain work, he left a bank account in the amount of about $800, and since then he has caused money to be paid to her.

Plaintiff's evidence tends to show the following facts: The marriage between the parties and the birth of the child as alleged in the complaint; frequent absences of defendant from his home in 1961; defendant's telling plaintiff he took one Mary Rose Poteat with him to Atlanta; his cursing of plaintiff and assaulting her on 14 July 1961; his

leaving North Carolina on 15 April 1962 and going to Wyoming leaving his wife in possession of a mortgaged house owned by them by the entireties, valued at $15,000, and a Ford automobile valued at $1,500. There was in Canton a joint bank account with a balance of $732. Defendant's brother gave plaintiff $200 in April 1962; Bud Pressley gave her $80 on 12 May 1962, and defendant sent her a money order from Colorado or Wyoming for $100 on 15 June 1962, and another $100 on 14 July 1962. When defendant left North Carolina his income was in excess of $200 a week, and he owned a 40% interest in Pressley Paint and Body Works on the Asheville Highway, which had a gross income in 1961 of $56,000. She never threatened to kill defendant or herself or their child. She did not nag and harass defendant, though she occasionally fussed with him when he came home late. She cooked his meals. She instituted this action 24 July 1962.

Defendant offered no evidence.

The court submitted the following issues to the jury which were answered as appears:

"1. Were the plaintiff and defendant married as alleged in the complaint?

"Answer: Yes.

"2. Has the plaintiff been a resident of the State of North Carolina for more than six months prior to the institution of this action?

"Answer: Yes.

"3. Did the defendant wilfully abandon the plaintiff and their minor child, as alleged in the complaint?

"Answer: No.

"4. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome, as alleged in the complaint?

"Answer: No."

From a judgment that plaintiff recover nothing by reason of her action and taxing her with the costs, she appeals.

Wade Hall for plaintiff appellant.

Ferguson & McDarris by Frank D. Ferguson, Jr., and Lee, Lee & Cogburn by Max O. Cogburn for defendant appellee.

PARKER, J. Plaintiff is suing for alimony without divorce under G.S. 50-16. By the terms of this statute, a wife may institute an action in the

superior court to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, if he "be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board." G.S. 50-7 provides, "The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases: 1. If either party abandons his or her family; * * * 3. By cruel or barbarous treatment endangers the life of the other; 4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

The third issue submitted to the jury reads as follows: "Did the defendant wilfully abandon the plaintiff and their minor child, as alleged in the complaint?" The jury answered this issue, "No." When the trial judge in his charge reached the third issue, he read it to them, instructed them that the burden of proof of this issue was upon plaintiff, that this issue is based on G.S. 50-7, 1, which provides that the superior court may grant divorces from bed and board on application of the party injured, if either party abandons his or her family, and then charged in substance that abandonment consists of the voluntary separation of one spouse from the other without the latter's consent, without justification and without the intention of returning, that it must be wilful, intentionally done, without just cause or justification. Then he immediately thereafter instructed the jury as follows, which is assigned as error:

> "The court further instructs you that when the misconduct of the plaintiff, that is, the person who brings the action in an action of this nature, is calculated to and does reasonably induce the conduct of the defendant relied upon in this case, then the plaintiff could not be permitted to take advantage of the plaintiff's own wrong. You will note from the reading of that particular statute that remedy is available in cases to the husband for that matter as well as the wife. But in this case it is the wife bringing the action against the husband."

In support of this challenged part of the charge, defendant relies upon what this Court said in *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466: "We have also held that when the misconduct of the complaining party in an action for divorce *a mensa et thoro* is calculated to and does reasonably induce the conduct of the defendant, relied upon in the action, he or she, as the case may be, will not be permitted to take advantage of his or her own wrong, and the decree of divorcement will be denied. *Page v. Page*, 161 N.C. 170, 76 S.E. 619."

In *Page v. Page*, 161 N.C. 170, 76 S.E. 619, it is said:

"If the cruelty set up as a ground of divorce was provoked by the misconduct of the complainant, a divorce will not be granted. 14 Cyc., 631. If his conduct had been such as to entitle her to a divorce, but was induced by the continued exasperation and violence of the wife, or other misconduct on her part, the same result would follow. There was no retaliation by the husband in this case, and certainly no excessive retaliation. Their domestic infelicity is apparently all due to the wife's misconduct. It is settled by our decisions that, where the wife is the aggressor and by her conduct provoked that of her husband, of which she complains, and it was calculated to do so, it is a bar to her application for a divorce and for alimony. [Citing authority.] No one will be allowed to take advantage of his or her own wrong."

Plaintiff contends in reply that defendant offered no evidence, and that there is nothing in plaintiff's evidence tending to show any misconduct on her part calculated to and reasonably inducing her husband to abandon her and their son. Defendant contends that "the cross-examination of plaintiff yielded evidence bearing upon the conditions in the home of the parties and upon the conduct of the plaintiff as alleged in the answer" sufficient to support the challenged instruction, but none of this alleged evidence is set forth in his brief.

Plaintiff's testimony on cross-examination is in substance: She met Tom Hyatt in 1949 through her husband. She has seen him on the street in Canton and waved to him. He lives six or eight blocks from their home, and between 7 and 9 p.m. in August 1962 he was in their home and stayed about an hour. During that time all the doors and windows were open, and the lights were on. He had telephoned her and asked if he could come over. When Tom Hyatt's wife arrived at her house, she did not black her eye. Mrs. Hyatt did not touch her and said nothing to her. Mrs. Hyatt's eye did not get blackened. Mrs. Hyatt was alone and stayed 15 or 20 minutes. She has not cursed her husband. She has nagged him and accused him of going out with other women. When her husband came in late she would occasionally fuss with him. She never went to bed until he came in. She didn't always object to his going out at night.

Immediately thereafter on redirect examination plaintiff testified: "When Tom Hyatt was at the house David [their son] was there. He was awake and sitting at the table with us."

On direct examination plaintiff testified in substance: She had never committed adultery with Tom Hyatt. He came to her house in the fall, and they talked about the separation between herself and her husband, and Hyatt's wife and her ailments. Tom Hyatt and her husband have

been friends since 1949. She talked to him about her domestic problems, and he said he was going to talk to defendant and see if he would not come home. This was during the summer and the doors and blinds were open and the lights on, and they were sitting at the kitchen table.

Plaintiff's testimony is to the effect that before defendant left her and their son he told her he had carried one Mary Rose Poteat with him to Atlanta. June Johnson, a witness for plaintiff, testified in effect that in the summer of 1961 she saw defendant and Mary Rose Poteat meet at Balsam Gap, he put her suitcase in his automobile, and they left together. Plaintiff offered evidence that she bears the general reputation of being a woman of good character.

The presence of Tom Hyatt at plaintiff's home in August 1962 did not induce defendant to leave her, because he had gone to Wyoming or some far western state in April 1962. Surely, it cannot be seriously argued that plaintiff's fussing with defendant over his affair with Mary Rose Poteat and his staying out at night made her the aggressor, and justified him in leaving her. "Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect, and constitute ground in itself for divorce at least from bed and board." *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923.

In our opinion, and we so hold, there is nothing in plaintiff's evidence tending to show that she was the aggressor and was guilty of misconduct calculated to and which did reasonably induce the conduct of defendant in leaving her and their son so as to bar her application for alimony without divorce. Defendant it is true has *allegata* of his wife's misconduct, but such *allegata* finds no support in plaintiff's evidence, as he contends.

"It is error to charge on an abstract principle of law not supported by any view of the evidence." *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560. The challenged instruction to the jury was upon an abstract principle of law finding no support in the evidence and was highly prejudicial to plaintiff, if not disastrous, and for such error plaintiff is entitled to a

New trial.

STATE v. BILLY R. PAINTER.

(Filed 26 February 1964.)

1. Criminal Law § 31; Evidence § 1—

The courts will take judicial notice of the county in which a municipality of the State is situate.

2. Disorderly Conduct and Public Drunkenness—

"Drunk" within the meaning of G.S. 14-335 is not synonymous with "under the influence of intoxicating liquor" within the intent of G.S. 20-138 and G.S. 20-139, and in a prosecution for public drunkenness an instruction applying the definition of "under the influence of intoxicating liquor" must be held for prejudicial error.

3. Same—

"Drunk" within the meaning of G.S. 14-335 is synonymous with "intoxicated", and a person is drunk within the meaning of the statute when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment materially impaired, or when his brain is so far affected by potations of intoxicating liquor that his intelligence, sense-preceptions, judgment, continuity of thought or of ideas, speech and coordination of volition with muscular action, or some of these faculties or processes, are materially impaired.

4. Criminal Law § 131—

In order to support judgment for a repeated offense the warrant or indictment should set forth that the prosecution is for a repeated offense and the time and place of the prior convictions of defendant. G.S. 15-147.

APPEAL by defendant from *Huskins, J.*, December 1963 Criminal Session of BUNCOMBE.

Criminal prosecution upon a warrant issued by the police court of the city of Asheville charging defendant on 2 November 1963 with being drunk in a public place in the city of Asheville, and that he had been convicted of the same offense more than two times within a period of twelve months next preceeding 2 November 1963. G.S. 14-335.19. From a conviction and judgment in the police court, defendant appealed to the superior court.

In the superior court he was tried on the warrant and pleaded not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment of not less than 12 months nor more than 24 months, he appeals.

Attorney General T. W. Bruton and Assistant Attorney General Richard T. Sanders for the State.

Walter Clark, Jr., for defendant appellant.

PARKER, J. The warrant was based on G.S. 14-335, which reads in relevant part: "If any person shall be found drunk or intoxicated on the public highway, or at any public place * * *, in any county, township, city, town * * *, he shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in this section." Subsection 19 reads:

> "In Buncombe County, by a fine, on the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty (30) days; for the second offense within a period of twelve (12) months by a fine of not more than one hundred dollars ($100.00) or imprisonment for not more than sixty (60) days; and for a third or subsequent conviction of the same offense within any twelve (12) months period, such is to be declared a misdemeanor, punishable as a misdemeanor, within the discretion of the court."

We take judicial notice of the fact that the city of Asheville is the county seat of Buncombe County. *Chappell v. Stallings,* 237 N.C. 213, 216, 74 S.E. 2d 624, 627.

The State's evidence shows these facts: About 8:25 p.m. on 2 November 1963 defendant was drunk in an automobile on 120 Clayton Street in the city of Asheville. He had the smell of alcohol upon him. He was arrested by police officers of the city for drunkenness and carried to police headquarters. Two other persons who had been drinking were with defendant. On 12 August 1963 defendant pleaded guilty to a charge of being drunk; on 21 August 1963 he pleaded guilty of the same offense; and on 17 September 1963 he pleaded guilty of the same offense.

Defendant testified in his own behalf in substance: He had drunk some alcoholic beverage that morning. He has had a silver plate in his head since he was eight years old. This plate causes him to have black out spells always when he gets hot. He has these spells walking, when he gets hot. Sitting in the automobile he got hot and had a black out spell. He does not know when he was arrested that night by reason of his black out spell. He had been in jail several times this year for public drunkenness.

The warrant charges defendant with being drunk in a public place in the city of Asheville. Defendant assigns as error this part of the charge:

> "The word drunkenness or being drunk or being under the influence of intoxicating beverages are synonymous, and to be drunk or under the influence of intoxicants means that a person has drunk a sufficient quantity of some intoxicating beverage as to cause him to lose the normal control of his mental or physical faculties to such an extent that there is an appreciable impairment of either or both

of those faculties. If a man has drunk that much of an alcoholic beverage to have that effect upon him, then the law says he is drunk or he's under the influence. If he hasn't consumed enough to have that effect upon him, then the law says he is sober. It just draws the line at that point and there is no such thing as being just a little bit drunk or a little bit sober, you're either drunk or you're sober and if he has taken enough to cause him to lose the normal control of his mental faculties or his physical faculties to such an extent that either or both of those faculties are appreciably impaired, then he's drunk. If he hasn't had that much, he's sober."

The vice of this instruction is that the trial judge charged the jury to the effect that there is no distinction between being "drunk" within the intent and meaning of G.S. 14-335 and being "under the influence of intoxicating liquor" within the intent and meaning of G.S. 20-138 and G.S. 20-139. He charged the jury in effect that the word "drunk" within the intent and meaning of G.S. 14-335 is synonymous with the words "under the influence of intoxicating beverages," and that a man is drunk if he has "drunk a sufficient quantity of some intoxicating beverage as to cause him to lose the normal control of his mental or physical faculties to such an extent that there is an appreciable impairment of either or both of those faculties," which is a practically verbatim quotation of the language of the present Chief Justice in the case of *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, in defining the words "under the influence of intoxicating liquor" within the intent and meaning of G.S. 20-138 in respect to persons driving an automobile upon the public highway while under the influence of intoxicating liquor. In other words, the trial judge instructed the jury in effect that there is no distinction between being "drunk" and being "under the influence of intoxicating liquor" as defined in the *Carroll* case, and that it was only necessary to prove that a man was "under the influence of intoxicating liquor" as defined in the *Carroll* case to secure a conviction under G.S. 14-335.

The following cases hold that there is a distinction between being drunk and being under the influence of intoxicating liquor, and that a driver of an automobile can be under the influence of intoxicating liquor within the intent and meaning of a statute prohibiting the operation of a motor vehicle "while under the influence of intoxicating liquor" without being drunk in the accepted meaning of that word. *Ballard v. State,* 25 Ala. App. 457, 148 So. 752; *People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8, cert. den. 347 U.S. 931, 98 L. Ed. 1082, overruled on other grounds in *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, 50 A.L.R. 2d 513, disapproving to the extent they indicate a contrary holding, *Taylor v. Joyce,*

4 Cal. App. 2d 612, 41 P. 2d 967, and *People v. Lewis,* 4 Cal. App. 2d Supp. 775, 37 P. 2d 752; *Cannon v. State,* 91 Fla. 214, 107 So. 360; *Hart v. State,* 26 Ga. App. 64, 105 S.E. 383; *Wallace v. State,* 44 Ga. App. 571, 162 S.E. 162; *Shorter v. State,* 234 Ind. 1, 122 N.E. 2d 847, 52 A.L.R. 2d 1329; *Klaser v. State,* 89 Ind. App. 561, 166 N.E. 21; *Com. v. Lyseth,* 250 Mass. 555, 146 N.E. 18; *State v. Noble,* 119 Ore. 674, 250 P. 833; *Com. v. Buoy,* 128 Pa. Super. Ct. 264, 193 A. 144; *Com. v. Long,* 131 Pa. Super. Ct. 28, 198 A. 474; Wharton's Criminal Law, Ed. Anderson (1957), Vol. III, sec. 991, p. 165; Annotation 142 A.L.R. 561; 7 Am. Jur. 2d, Automobiles and Highway Traffic, sec. 257.

In *Shorter v. State, supra,* the Court quoted with approval from *Klaser v. State,* 89 Ind. App. 561, 562, 166 N.E. 21, as follows:

> "The offense defined by the statute is not the operation of a motor vehicle by one who is drunk or intoxicated, but 'while under the influence of intoxicating liquor.' It is evident that in the enactment of the statute the lawmakers intended to relieve the state from making proof that the offender was drunk, in the meaning of that word as commonly used."

In *Cannon v. State, supra,* the Supreme Court of Florida said:

> "Though all persons intoxicated by the use of alcoholic liquors are 'under the influence of intoxicating liquors,' the reverse of the proposition is not true; for a person may be under the influence of intoxicating liquors without being *intoxicated.*"

In *State v. Noble, supra,* defendant was convicted of driving an automobile on a public street while under the influence of intoxicating liquor. The Court said:

> "A person, when drunk, is in an intoxicated condition, and of necessity is under the influence of intoxicating liquor; but a person may be under the influence of intoxicating liquor, within the meaning of this statute, and not be drunk."

In *Com. v. Lyseth, supra,* defendant was convicted of operating an automobile while under the influence of intoxicating liquor. The Court said:

> "The Commonwealth was not required to prove that the defendant was drunk. 'Whatever difficulties there may be in framing * * * a definition of the extent of inebrity which falls short of and which constitutes drunkenness, there is a distinction between that crime on the one hand and merely being under the influence of

liquor on the other hand, which is recognized in common speech, in ordinary experience, and, in judicial decisions'."

In *S. v. Carroll, supra,* this Court said: "It will be noted that in the case of *Wilson v. Casualty Co., supra* [210 N.C. 585, 188 S.E. 102], the Court made a distinction between a person who is drunk and one under the influence of or affected by liquor." The *Wilson* case was an action to recover on an accident policy. The company admitted issuance of the policy and that it was in force at the time, but denied liability under a proviso in the policy that the policy does not cover any loss sustained while intoxicated, or under the influence of or affected by intoxicants. The Court used this language:

> "The words 'intoxicated' and 'drunk' are commonly regarded as synonymous. *Bragg v. Commonwealth,* 133 Va. 645; *Mutual Life Ins. Co. v. Johnson,* 64 Okla. 222; Black's Law Dictionary (3d Ed.), p. 624, citing a wealth of authorities, defines 'drunk' as follows: 'A person is "drunk" when he is so far under the influence of liquor that his passions are visibly excited or his judgment impaired, or when his brain is so far affected by potations of liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech, and coordination of volition with muscular action (or some of these faculties or processes) are impaired or not under normal control'."

Black's Law Dictionary, 4th Ed., defines the word "drunk" as its 3rd Ed. defined it, as set forth in the *Wilson* case, and cites the *Wilson* case. The 4th Ed. of Black further states, "It [drunk] is a synonym of intoxicated."

Webster's New International Dictionary, 2d Ed., defines the word "drunk" as follows: "1. Intoxicated with or as with strong drink; under the influence of an intoxicant, esp. an alcoholic liquor, so that the use of the faculties is materially impaired; inebriated;—used predicatively." This definition from Webster is quoted in *Gault v. State,* 42 Okla. Cr. 89, 274 P. 687.

In *State v. Mann,* 143 Me. 305, 61 A. 2d 786, the Court said: "The word 'intoxicated' is a synonym for 'drunk.' 'Intoxicated' commonly and usually means inebriated to such an extent that the mental or physical faculties are materially impaired."

Before the State is entitled to a conviction within the intent and meaning of G.S. 14-335, upon which the warrant here is based, it must satisfy the jury beyond a reasonable doubt from the evidence that defendant was drunk or intoxicated in a public place. The word "drunk" is a syn-

onym for the word "intoxicated." And a person is "drunk" or "intoxicated" within the intent and meaning of G.S. 14-335, when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment materially impaired, or when his brain is so far affected by potations of intoxicating liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech and co-ordination of volition with muscular action, or some of these faculties or processes are materially impaired. In our opinion, this is the definition of "drunk" or "intoxicated" recognized "in common speech, in ordinary experience, and, in judicial decisions."

In *Wilson v. Casualty Co., supra,* the trial judge instructed the jury in part: "And that means, intoxicated means, in law, that the subject must have drunk of alcoholics to such an extent as to appreciably affect and impair his mental or bodily faculties, or both." This Court in discussing an assignment of error to the charge, of which this quoted sentence was a part, said, "Under the terms of the policy the charge is favorable to defendant." The trial judge's definition of "intoxicated" is disapproved.

The warrant here does not set forth that the offense charged on 2 November 1963 was a fourth offense, and further does not set forth the time and place of the alleged convictions of defendant of being drunk or intoxicated in a public place within a period of twelve months next preceding 2 November 1963. While the particularity required in an indictment is not essential in a warrant *(Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729; *S. v. Jones,* 88 N.C. 671), and while defendant makes no point of it on this appeal, it would seem desirable, if not necessary, that the warrant should be amended in the superior court below to allege such facts. G.S. 15-147; *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772; *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77; *S. v. Walker,* 179 N.C. 730, 102 S.E. 404; 42 C.J.S., Indictments and Informations, sec. 145.

The assignment of error to the charge is good; it was prejudicial to defendant and entitles him to a

New trial.

NANCY P. MANN, ADMINISTRATRIX OF THE ESTATE OF ALBERT MURRY MANN, DECEASED v. WILLIAM M. HENDERSON, D/B/A MANTEO AIRPORT, MANTEO, NORTH CAROLINA, AND THE WEST VIRGINIA PULP AND PAPER COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE AND DOMESTICATED TO DO BUSINESS IN THE STATE OF NORTH CAROLINA.

(Filed 26 February 1964.)

1. Aviation § 5—

Under Federal regulations, a pilot is in command of the aircraft flown by him and nothing short of physical interference by a passenger will remove the pilot from control, notwithstanding the passenger has contracted with the pilot's employer for the service.

2. Same; Evidence § 2—

Federal regulations are made applicable to intrastate flying by G.S. 63-20, and such Federal regulations as are applicable are binding on the State courts and will be given judicial notice by them.

3. Death § 3—

Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability.

4. Aviation § 5; Negligence § 5—

It being common knowledge that airplanes do fall without fault of the pilot, the doctrine of *res ispa loquitur* does not apply to an airplane crash, but in order to support recovery there must be evidence of negligence constituting a proximate cause of the accident.

5. Aviation § 5— Allegations held to leave in conjecture the cause of airplane crash, and demurrer was proper in action for wrongful death.

Allegations to the effect that a flying service was employed to aid in fighting a forest fire, that after two days of flight a pilot was requested by an official of the lumber company to fly him around the fire for a last look, that the pilot was warned by his superior by radio of a weather front moving in, and that shortly thereafter the plane crashed, fatally injuring the pilot, *held* insufficient to state a cause of action for the wrongful death of the pilot, since the facts alleged leave in conjecture whether the crash resulted from want of proper instructions to the pilot, pilot error, adverse flying conditions, mechanical defect, an improperly maintained airfield, or otherwise.

APPEAL by plaintiff from *Peel, J.*, October, 1963 Session, HYDE Superior Court.

The plaintiff, as administratrix, instituted this civil action against the defendants to recover damages for the wrongful death of her husband, Albert Murry Mann. The complaint covers eight pages of the record. Much of it is devoted to a recital of evidence and to a statement of conclusions. The ultimate facts alleged, in so far as they control decision, are discussed in the opinion.

The defendants filed separate demurrers, each upon the same grounds: (1) The complaint fails to allege facts sufficient to constitute a cause of action; (2) the facts alleged show contributory negligence of the plaintiff's intestate as a matter of law; (3) there is a misjoinder of parties and causes.

The court entered judgment sustaining the demurrers, subject to the right of the plaintiff to amend. She excepted and appealed.

Bryan Grimes, John A. Wilkinson for plaintiff appellant.

Rodman & Rodman by Edward N. Rodman for defendant West Virginia Pulp and Paper Company, appellee.

McCown & McCown by Wallace H. McCown for defendant Henderson, appellee.

HIGGINS, J. The plaintiff's intestate was a licensed pilot with 90 hours of flying time. On and prior to April 25, 1961, he was employed as a service attendant, mechanic's helper, and pilot by the defendant Henderson who at the time was operating a taxi or charter flying service under the trade name, "Manteo Airport." The defendant West Virginia Pulp and Paper Company owned a large tract of timber lands in Dare and Tyrrell Counties. Near these lands it maintained a landing strip for the use of planes on fire patrol.

On April 25, 1961, Pulp and Paper employed Henderson to assist in fighting a fire out of control on its lands. Early on that day Henderson and Mann flew from Manteo to the company's landing strip. Thereafter, throughout the day, Henderson flew the company's heavy fire fighter plane, dumping water on the flames. At the same time, Mann in one of Henderson's light planes, usually carrying J. D. Earle, a high official of Pulp and Paper, made numerous reconnaisance flights for Earle's benefit. These operations continued throughout the day.

The following day the same procedures were followed until about 4:30 in the afternoon. At this time Henderson and Mann were preparing to fly back to Manteo. However, Earle requested Mann to fly him around the fire for a last look. Henderson consented. Immediately thereafter, Mann's plane left for the area of the fire with Earle as a passenger. At the same time, Henderson, in another plane, left for Manteo. At this time the fire covered a front of three or four miles. Smoke extended to the northeast for at least 50 miles. The landing field was south of the fire.

Apparently, after the planes became airborne, Henderson observed a weather front or thunderstorm to the northwest. He called Mann over the two-way radio and gave this instruction: "Don't fly that direction too

far—it don't look so good." Earle responded over the radio, "We won't fly very far that way, we won't fly too far." About 60 seconds later Henderson, observing that Mann's plane had not changed course, called again and talked to Earle, directed that the plane "head toward the south and come out of that mess—it looks very black over that way." Earle replied, "We are under it." After the foregoing conversation Henderson flew on to Manteo, having failed to establish further communication with Mann's plane, though he made an unsuccessful effort to do so after landing in Manteo. Not having been able to communicate with the plane, he again left Manteo and flew back in search without alerting the ground crew that he had lost contact with Mann. A short time thereafter the wrecked plane was discovered near a landing strip south of Columbia in an area obscured by smoke. The passenger Earle was killed and the pilot Mann was fatally injured.

The plaintiff alleged that Henderson was negligent in that (1) he should have refused permission for this last flight because of the pilot's lack of experience and of the increased hazards created by the spread of the smoke and the approaching weather front; (2) after Mann's plane took off, Henderson did not give his pilot explicit orders to change direction and fly to Manteo instead of merely cautioning him not to fly too far in the direction of the fire; (3) after observing the plane had not changed course after the first conversation, Henderson delayed 60 seconds or more before reestablishing communication and giving explicit orders to leave the scene of the fire and storm; (4) he failed to give the agents of the Pulp and Paper Company notice Mann's plane was missing rather than confining his rescue efforts to an air search. Upon these allegations the plaintiff seeks to hold the defendant Henderson responsible for the crash of the plane and the pilot's death.

The plaintiff alleged that the Pulp and Paper Company was negligent in that its official and agent, Earle, assumed direction of the plane and caused the pilot, Mann, to fly into the smoke and storm when it was extremely dangerous to do so; and that Earle's reply to Henderson's admonition, "Don't fly that direction too far," and Earle's response, "We won't fly very far that way," disclosed that Earle thereby had assumed responsibility for the flight which resulted in the death both of himself and Mann. Upon these allegations the plaintiff seeks to hold the defendant West Virginia Pulp and Paper Company responsible for Mann's death.

The case is unusual in that the pilot's administratrix seeks to hold both his employer and his passenger's employer responsible for the fatal crash. Mann was a licensed pilot. He had flown around the fire for two days. As pilot, he was in charge of, and responsible for, the operation of

his plane. The plaintiff's conclusion that Earle assumed responsibility for the flight is not supported by the facts alleged. It would seem that nothing short of physical interference with Mann's operation of the plane would remove the pilot from actual control. "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft." Code of Federal Regulations, No. 14, § 60.2. These rules are specifically made applicable to intrastate flying in North Carolina by G.S. 63-20. In this connection courts hold: "Federal laws and regulations where applicable, are, of course, binding on state courts and subject to judicial notice by state courts." *Lange v. Nelson-Ryan Flying Service,* 259 Minn. 460, 108 N.W. 2d 428; *Martin v. Norris,* 188 Md. 330, 52 A. 470; *Morrison v. Hutchins,* 158 Kan. 123, 144 P. 2d 922; *Hough v. Rapidair* (Mo. 1957) 298 S.W. 2d 378.

Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability. "In a case involving an airplane crash the doctrine of *res ipsa loquitur* does not apply, 'it being common knowledge that airplanes do fall without fault of the pilot.' Furthermore, there must be a causal connection between the negligence complained of and the injury inflicted." *Jackson v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817; *Bruce v. Flying Service,* 231 N.C. 181, 56 S.E. 2d 560; *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442; G.S. 63-15, G.S. 63-16.

When tested by the foregoing rules, the complaint is fatally defective in that it fails to allege any fact from which negligence on the part of either defendant may be inferred as a proximate cause of the crash. Whether it resulted from pilot error, adverse flying conditions, mechanical defects, improperly maintained airfields, or otherwise, is left to conjecture. In order to hold either defendant, the complaint should charge such defendant with some act of negligence which proximately caused, or contributed to, the fatal result. Hence the complaint fails to allege a cause of action. Questions whether the second and third grounds for the demurrers are valid do not arise on this record. The judgment sustaining the demurrers is

Affirmed.

LILA A. ADAMS, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF THOMAS E. ADAMS v. WALTER T. ADAMS, INDIVIDUALLY AND AS TRUSTEE UNDER THE WILL OF THOMAS E. ADAMS, BEULAH ADAMS STARMONT, MONNIE ADAMS, JR., MARION ELIZABETH ADAMS MORRISETTE, AND HAZEL GRANT ADAMS.

(Filed 26 February 1964.)

1. Wills § 34—

Where the will leaves property in trust for the benefit of the widow for life, to be divided after her death among named beneficiaries, the interest of a beneficiary dying during the trust descends to his distributees and heirs at law.

2. Wills § 70—

Where a will leaves one-half of an estate to testator's widow absolutely, and the remaining one-half in trust for her benefit for life with remainder over to designated beneficiaries, there is no residuary estate, and the widow's share is chargeable with one-half of the cost of administration and Federal estate taxes, G.S. 30-3(a) being applicable only in the event of a dissent from the will.

APPEAL by plaintiff, individually and as executrix, from *Peel, J.*, in Chambers at BEAUFORT, North Carolina, 31 December 1963. From Beaufort.

Thomas E. Adams, late of Beaufort County, North Carolina, died on 3 April 1961, leaving a last will and testament which has been duly probated and recorded in the office of the Clerk of the aforesaid county.

On 18 April 1961, letters testamentary were issued by the court to plaintiff as executrix of said will.

The sole devisees and legatees under the provisions of said will were as follows: Lila A. Adams, Walter T. Adams, individually and as trustee, Beulah Adams Starmont, Monnie Adams, Monnie Adams, Jr. and Marion Elizabeth Adams Morrisette.

On 15 May 1962, Monnie Adams, one of the legatees in said will, died intestate, leaving as his sole distributees and heirs at law his widow, Hazel Grant Adams, and children, Monnie Adams, Jr. and Marion Elizabeth Adams Morrisette, all of whom are parties to this action.

The plaintiff, pursuant to the provisions of our Declaratory Judgment Act, codified as G.S. 1-253, *et seq.*, presented two questions for decision of the court below:

(1) Did the devise and bequest to Monnie Adams, in Item III of the will, lapse by reason of his death, or did his interest as a beneficiary of the trust descend to his distributees and heirs at law?

(2) Are the costs and expenses of administration and Federal estate taxes payable from the residuary devise and bequest to Walter T.

Adams, as trustee, or is the devise and bequest to the widow in Item II chargeable with one half thereof?

The items of the will to be considered in connection with the determination of the questions posed are as follows:

"ITEM I. My executrix, hereinafter named, shall give my body a decent burial suitable to the wishes of my friends and relatives and pay all funeral expenses, together with *all my just debts,* out of the first funds which may come into her hands belonging to my Estate. (Emphasis ours)

"ITEM II. I give, devise and bequeath to my wife, Lila A. Adams, one-half of my property, real and personal, to be hers absolutely.

"ITEM III. The remaining one-half of my property, real and personal, I give, devise and bequeath to my son, Walter T. Adams, in trust for the following purposes:

"(1) To hold, manage, exchange, convert, sell, convey, lease, improve, invest, reinvest and keep invested in such stock, bonds or other securities and properties as shall from time to time be deemed by the said Trustee to be to the best interest of my estate.

"(2) To pay over the net income monthly or quarterly, or as often as in the judgment of my Trustee her needs shall require, to my wife during her lifetime.

"(3) After the death of my wife, to divide and distribute the trust property, discharged of the trust, in such manner as may be agreed upon between the parties as follows: One-fourth to himself; one-fourth to my daughter, Beulah Adams Starmont; one-fourth to my son, Monnie Adams, one-eighth to my grandson, Monnie Adams, Jr., and one-eighth to my granddaughter, Marion Elizabeth Adams Morrisette."

The court below entered judgment to the effect that, the devise and bequest to Monnie Adams in Item III of the will did not lapse by reason of his death and that his interest as a beneficiary of the trust descended to his distributees and heirs at law; and that the devise and bequest to the widow in Item II be charged with one half of the costs and expenses of administration and Federal estate taxes, and the executrix shall be governed accordingly.

The plaintiff, individually and as executrix, appeals, assigning error.

Rodman & Rodman for plaintiff appellant.

Mayo & Mayo for defendants Walter T. Adams, Beulah Adams Starmont, Monnie Adams, Jr., and Marion Elizabeth Adams Morrisette, appellees.

Gordon E. Campbell and Bryan Grimes for defendant Hazel Grant Adams, appellee.

DENNY, C.J. The appellant does not appeal from or assign as error that portion of the judgment entered below to the effect that the devise and bequest to Monnie Adams in Item III of the will of Thomas E. Adams did not lapse by reason of his death and that his interest as a beneficiary of the trust descended to his distributees and heirs at law. The judgment entered in this respect is in accord with our decisions. *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420; *Severt v. Lyall,* 222 N.C. 533, 23 S.E. 2d 829; *Jackson v. Langley,* 234 N.C. 243, 66 S.E. 2d 899; *Trust Co. v. McEwen,* 241 N.C. 166, 84 S.E. 2d 642.

The plaintiff, individually and as executrix, assigns as error the conclusion and holding of the court below that, under the terms and provisions of the will of Thomas E. Adams, the devise and bequest to his widow in Item II thereof should be charged with the payment of one half of the costs and expenses of administration and the Federal estate taxes.

In *Trust Co. v. Green,* 236 N.C. 654, 73 S.E. 2d 879, Devin, C.J., speaking for the Court, said: "The word 'debts' as used in the statute G.S. 28-105 prescribing the order of their payment would seem to include the federal estate tax. The statute specifically names 'Dues to the United States' as debts of the decedent which must be paid, and concludes with the all-embracing clause 'all other debts and demands.' * * * The obligation to pay taxes is regarded as a personal debt due the United States. * * *"

The law with respect to liability for payment of Federal estate taxes as held in *Trust Co. v. Green, supra,* remains unchanged except as modified by G.S. 30-3 (a), which reads as follows: "Upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2 (3), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax."

However, since no dissent is involved in this appeal, and the testator left lineal descendants, the above statute has no bearing whatever on the question presented for determination. Furthermore, as pointed out in *Tolson v. Young,* 260 N.C. 506, 133 S.E. 2d 135, legislation which would have completely nullified the effect of the *Green* case failed. Senate Journal, Session 1953, 305 and 436; 31 N.C.L. Rev., 491, 494. Therefore, *Sharp, J.,* speaking for the Court in the *Tolson* case, said: "Under the

law, as it is now written, the only instance where a surviving wife is allowed to take her distributive share free and clear of the federal estate tax occurs when her husband dies testate, leaves no lineal descendants or parents surviving him, and she dissents from his will. This was the state of facts in *Bank v. Melvin,* 259 N.C. 255, 130 S.E. 2d 387."

In *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, it is said: "The general rule, in the absence of contrary testamentary provision, is that the ultimate burden of an estate tax falls on the residuary estate. 142 A.L.R. 1137, and cited cases." Even so, we hold that the will under consideration creates no residuary estate. The devises and bequests in Items II and III of the will dispose of all the estate and are all equally specific. In *Trust Co. v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719, it is 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."

The judgment of the court below is

Affirmed.

MACK BENNETT, PLAINTIFF v. NATIONAL SURETY CORPORATION, DEFENDANT.

(Filed 26 February 1964.)

1. Pleadings § 12—

A demurrer admits the facts properly pleaded but not the pleader's legal conclusions, and the sufficiency of the pleading must be determined on the basis of the facts alleged, liberally construed in favor of the pleader.

2. Principal and Surety § 7— Surety is not liable for losses incident to employee's suit against employer for malicious prosecution.

Allegations to the effect that an employer, pursuant to the provisions of the cooperation clause of the surety bond of his employees, signed at the instruction and direction of the surety a criminal warrant charging an employee with embezzlement, that the employer signed the warrant as a condition precedent to payment of his claim against the surety for shortage in the employee's funds and signed same as an agent of the surety, that the employee thereafter sued the employer for malicious prosecution and recovered settlement, and that the surety refused to aid in defending the suit for malicious prosecution, *held* insufficient to state a cause of action against the surety, there being no facts alleged disclosing that the signing of the criminal warrant was a condition precedent to the employer's right to recover on the bond

as a matter of law, and the allegation that the employer was acting as an agent of the surety being a mere conclusion.

APPEAL by plaintiff from *Bundy, J.*, October 1963 Session of CRAVEN.

The hearing below was on demurrer to complaint.

Plaintiff's allegations are summarized or quoted in the following (our numbering) paragraphs.

1. Plaintiff owned and operated a laundry business. In March, 1952, defendant, a corporation, executed "a surety bond to indemnify the plaintiff against losses or shortages of funds belonging to the plaintiff and handled by the plaintiff's employees in the course of business." In August, 1952, plaintiff reported "certain losses or shortages of funds" covered under the terms of said bond. One loss or shortage reported by plaintiff and investigated by defendant "involved one James MacGray." MacGray "had terminated his employment relationship with the plaintiff during August of 1952 and left the State."

2. Defendant stated that plaintiff "would have to get a warrant" for MacGray and "get him back here." An attorney "was contacted" and defendant "instructed said attorney to draw a warrant" charging MacGray with "embezzlement." As a condition precedent to the payment of plaintiff's claim, defendant "instructed and directed" plaintiff to sign a criminal warrant charging MacGray with embezzlement; and, "as instructed and directed by the defendant," plaintiff, on or about October 14, 1952, signed such warrant. About six weeks later defendant located MacGray in Columbus, Ohio.

3. Defendant "caused extradition papers to be prepared for the sole purpose" of bringing MacGray to North Carolina to stand trial on the charge of embezzlement. When it was "determined" the first warrant "had been lost or misplaced," defendant called "the attorney" and requested him to come to the clerk's office and "draw another warrant." A second warrant charging MacGray with embezzlement "was prepared at the request of and in the presence of the defendant's agent on January 14, 1953," and plaintiff "was again instructed and directed by the defendant to sign the criminal warrant."

4. The bond provided that plaintiff "shall cooperate with the company in all matters pertaining to the loss or claim."

5. In March, 1953, "after warrants had been signed by the plaintiff at the direction of the defendant and extradition proceedings had been instituted, the defendant paid the plaintiff's claim in the amount of $840.39 to cover shortages in the account of James MacGray."

6. MacGray was extradited. The criminal case in which he was charged with embezzlement was calendared for trial in April of 1954. Defen-

dant "engaged attorneys to assist in the trial of the case" and requested plaintiff "to contact the attorneys for the purpose of providing them with any information they might need for the trial." When contacted by plaintiff, "the attorneys" told plaintiff "the defendant would not assist or take any part in the criminal action."

7. Upon trial of said criminal case, the court directed a verdict of not guilty. Thereafter, MacGray instituted a civil action against plaintiff to recover damages in the amount of $64,000.00 on account of alleged malicious prosecution. Plaintiff "requested assistance from the defendant on two occasions and each time the defendant refused to help the plaintiff . . ." At the first trial, the plaintiff (MacGray) was nonsuited. On appeal, the nonsuit was reversed. (See *Gray v. Bennett,* 250 N.C. 707, 110 S.E. 2d 324.) At the second trial, there was a verdict in favor of MacGray in the amount of $20,000.00. This was set aside by the trial judge. The case was calendared for (third) trial in October, 1962, at which time the case was settled by plaintiff's payment to MacGray of $3,500.00.

8. Plaintiff "would not have signed the criminal warrants charging . . . MacGray with embezzlement except at the specific request, direction and instruction by the defendant as a condition precedent to the payment of the plaintiff's claim under the surety (bond)."

9. As a direct and proximate result "of the defendant instructing and directing the plaintiff for and in behalf of the defendant to sign criminal warrants charging James MacGray with embezzlement, and by reason of the defendant thereafter abandoning and deserting the plaintiff in the criminal action for embezzlement and the civil action for malicious prosecution, the plaintiff was forced to employ counsel to defend the malicious prosecution suit instituted by the said James MacGray . . ."

10. Plaintiff has been damaged in the amount of $58,920.00, which includes (1) the $3,500.00 paid to him in settlement of the malicious prosecution suit, (2) $5,420.00 on account of "out of pocket expenses," and unspecified amounts for (a) mental anguish, (b) adverse publicity, (c) embarrassment, (d) loss of time, (e) impairment of health, etc.

11. ". . . at the time of the signing of the criminal warrants herein mentioned, the plaintiff was acting solely at the specific request, direction and instruction of the defendant *and as the agent of the defendant.*" (Our italics).

Defendant (for reasons specified therein) demurred on the ground the complaint did not allege facts sufficient to constitute a cause of action.

The court entered judgment sustaining the demurrer. Plaintiff excepted and appealed.

Dunn & Dunn for plaintiff appellant.
Barden, Stith & McCotter for defendant appellee.

BOBBITT, J. The facts alleged, but not the pleader's legal conclusions, are deemed admitted when the sufficiency of a complaint is tested by a demurrer. Strong, N. C. Index, Pleadings § 12. The question is whether the *facts* alleged by plaintiff, liberally construed in his favor, are sufficient to constitute a cause of action.

Plaintiff's action is in tort. Even so, the rights and obligations of plaintiff and defendant *inter se* arise from and are determined by the contractual relationship subsisting between them. *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893.

Plaintiff did not attach to his complaint and incorporate therein by reference a copy of the bond. The only portion of the bond quoted in the complaint is a provision that plaintiff "shall cooperate with the company in all matters pertaining to the loss or claim." The only reasonable inference to be drawn from plaintiff's allegations is that defendant, under the terms of the bond, agreed to indemnify plaintiff, an employer, against financial loss caused by the dishonesty of an employee.

There is no allegation the criminal warrants signed by plaintiff on October 14, 1952, and on January 14, 1953, contained any false accusation. Plaintiff alleged defendant in March, 1953, paid plaintiff's claim "in the amount of $840.39 to cover shortages in the account of James MacGray." Presumably, the criminal warrants were based on the facts plaintiff asserted as the basis of his claim against defendant.

Plaintiff does not allege he was obligated by the terms of the bond to sign such criminal warrants as a condition precedent *to his right to recover* on the claim he was asserting against defendant. The provision with reference to plaintiff's cooperation "in all matters pertaining to the loss or claim," standing alone, falls far short of imposing an obligation that plaintiff sign criminal warrants. No reason appears why plaintiff could not have ignored defendant's alleged "specific request, direction and instruction" and brought suit against defendant to recover on account of the alleged MacGray shortage. Hence, we need not consider whether plaintiff would be in better position if, under the terms of the bond, he were obligated to sign such criminal warrants as a condition precedent to his right to recover on the claim he was asserting against defendant.

Allegations as to the failure of attorneys engaged by defendant to assist or take part in the criminal prosecution, and allegations as to the refusal of defendant to assist plaintiff in the defense of the malicious prosecution action, afford no basis for recovery. No facts are alleged from which it may be inferred that defendant was obligated to provide attor-

neys to assist in the prosecution of the criminal action or in the defense of the malicious prosecution action.

In one allegation (quoted in our preliminary statement) plaintiff asserted he signed the criminal warrants "as the agent of the defendant." The theory of recovery stressed in plaintiff's brief is predicated on the proposition that plaintiff was acting as agent for defendant. However, in view of plaintiff's allegations as to the actual relationship subsisting between him and defendant, the quoted allegation as to agency must be considered a legal conclusion rather than a factual allegation.

Typical of decisions cited and stressed by plaintiff are *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446; *Parrish v. Manufacturing Co.*, 211 N.C. 7, 188 S.E. 817; *D'Armour v. Hardware Co.*, 217 N.C. 568, 9 S.E. 2d 12. The gist of these decisions is stated in *Parrish* as follows: "It is elementary that the master is responsible for the tort of his servant which results in injury to another when the servant is acting by authority or within the scope of his employment and about the master's business. (Citation). Thus, where a servant, acting with authority or within the scope of his employment, wrongfully procures the arrest of a person, the master is liable in damages for such arrest and imprisonment."

The decisions cited by plaintiff are not in point. In the first place, no facts are alleged sufficient to support the legal conclusion that plaintiff was the agent of defendant. Apart from this, the cited decisions involve actions by the injured party against the alleged principal (or against both the alleged agent *and* the alleged principal) in which the plaintiff seeks to hold the principal liable for the alleged tortious acts of the agent. Plaintiff's allegations disclose that he was sole defendant in MacGray's action for malicious prosecution. No question is presented as to whether MacGray had a cause of action against the defendant herein.

Our conclusion is that the complaint does not allege facts sufficient to constitute a cause of action. Hence, the judgment sustaining the demurrer is affirmed.

Affirmed.

JIMMY PITTMAN v. R. T. FROST, WILLIAM T. FROST, R. T. FROST, JR., HENRY FROST AND WILLIAM O. FROST, T/A R. T. FROST & SONS.

(Filed 26 February 1964.)

1. Negligence § 24—

In order to make out a case plaintiff must not only show negligence on the part of defendant and an injury to himself, but also that the injury was

proximately caused by the negligence, including, as an essential element of proximate cause, that the injury was reasonably forseeable.

2. Automobiles § 47—

Evidence tending to show that plaintiff passenger elected to sit on the top of a rear fender enclosed within the body of the truck instead of on the floor or on the flat tool box, and that when defendant slammed on his brakes to avoid an accident plaintiff was thrown from his position to his injury, *held* insufficient to overrule nonsuit, since the act of applying the brakes under the conditions cannot be held for negligence and, further, defendant could not have reasonably foreseen that plaintiff would take this position of peril when safe places were available.

APPEAL by plaintiff from *Clark, S. J.*, August-September, 1963 Session, CARTERET Superior Court.

Civil action to recover damages for personal injury. The plaintiff alleged his injuries were proximately caused by the negligent operation of the defendants' partnership truck, driven by William T. Frost, one of the partners, in that the driver applied the brakes, stopping the truck suddenly, causing the plaintiff to fall from his seat on the top of the rear fender which was enclosed in the plywood body built on the back of the truck.

The defendants denied negligence and conditionally pleaded plaintiff's contributory negligence in that he had voluntarily and without the driver's knowledge placed himself on the oval top of a rear fender which was enclosed within the body of the vehicle when it would have been perfectly safe for him to sit on the floor, or on the flat top of a tool box.

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

Harvey Hamilton, Jr., for plaintiff appellant.
Wheatley & Bennett by Thomas S. Bennett for defendant appellees.

HIGGINS, J. The plaintiff's evidence tended to show the following: On Sunday afternoon, September 3, 1961, the defendant, William T. (Ty) Frost, driving a one and one-half ton Ford truck, left Salter Path to go to a ball game at Smyrna. George Smith rode in the cab with the driver. Bernice Smith and a small boy, Micky Smith, were in the enclosed body of the truck. This body was constructed of plywood. It was approximately eight feet long and five feet high, built on the chassis of the truck with the rear fenders enclosed within the body. The top of the fenders over the rear wheels were 10 or 12 inches higher than the bed of the truck, leaving each fender exposed in the shape of a crescent.

When the driver in the cab gave the plaintiff permission to go with his party to the ball game, the plaintiff entered the enclosed body. "I crawled in the truck . . . Mr. Bernice Smith was in the back of the truck, . . .

sitting on the right-hand fender. The young boy was sitting on the tool box. At the time I fell off the fender Bernice Smith was sitting on the floor. . . . I think he got off the fender about the time we were crossing the Morehead-Beaufort Bridge. I was sitting on the fender with my hands on my knees. I recall when we went over the Beaufort Bridge . . . As the truck went off the bridge it felt to me like it gained speed, and in two or three seconds . . . Ty Frost slammed on brakes. . . . The truck stopped dead still, I imagine. I want up against the tool box. . . . The back part of my ribs hit the tool box." Although the plaintiff went on to the game, he offered medical testimony sufficient to indicate he had suffered injury.

The plaintiff's witness, Captain George W. Smith, gave this account of the accident: "As the truck went off the bridge the speed . . . was increasing . . . there were some cars ahead of us . . . about three . . . going east. Ty . . . speeded up . . . behind the car and in my observation he was going to pass. He run up to the back of it, close to it and all at once he slammed on brakes . . . I went into the dashboard. . . . I raised up and the car was pulling out . . . the car (in front) was still pulling out. . . . I told Ty, 'You certainly got good brakes; one thing I do know.' He said, 'Yes, if I hadn't had I would have been in trouble, wouldn't I,' and I said, 'You certainly would.' . . . When Ty put on the brakes that was the stop, right there. We continued to the ball game. The fender . . . comes up on a round circle and goes down to the floor and there it stops."

The purport of the plaintiff's evidence seems to be this: The driver of the truck increased speed after crossing the bridge, intending to pass three cars going in the same direction. The car immediately in front apparently made some movement which caused the driver to apply brakes rather than to attempt to pass. This caused the plaintiff to slide from the oval top of the fender. The conversation between the driver and the witness at the time of the accident is revealing in that it discloses the sudden application of the brakes kept the truck from striking the car in front. This evidence came from the plaintiff's witness.

Fairly interpreted, the evidence does not permit an inference of negligence. There is an utter lack of evidence indicating knowledge on the part of the driver that the plaintiff, a mature man, would attempt to ride while perched on the top of an oval fender with his hands on his knees. With safety he could have taken a seat on the floor of the bed, or on the flattop tool box. Abrupt application of brakes is known to be a common necessity of present day motor travel. Sudden or abrupt stops may be expected and the driver is not permitted always to take time to notify his passengers that he is about to apply his brakes. They have no right to expect such notice. According to the laws of motion, one perched on the top

of an oval fender should expect to be thrown forward or backward as the vehicle decreases or increases speed.

Plaintiff does not make out a case by showing a negligent act and an injury. He must show the injury was proximately caused by the negligent act. Reasonable foreseeability is one of the necessary elements of proximate cause. "Foreseeability of injury is an essential element of proximate cause." Strong's N. C. Index, Vol. 3, "Negligence," § 7, p. 449, citing *Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451; *Hagar v. Red Band Co.,* 204 N.C. 568, 169 S.E. 142; and 20 cases intervening between the two cited. See also, *Jones v. Hodge,* 250 N.C. 227, 108 S.E. 2d 436. Actually, the facts do not show the application of the brakes was a negligent act. The plaintiff's own witness indicates the application of the brakes may have prevented an accident.

The evidence does not fix the driver with notice the plaintiff had placed himself in a position from which he would be thrown by the application of the brakes. The evidence does not show the defendant, from his position in the cab, could see inside the enclosed plywood body and discover the dangerous position of the plaintiff.

The doctrine applicable to the facts here is discussed by the Supreme Court of Appeals of Virginia in *Worrell v. Winstead,* 194 Va. 597, 74 S.E. 2d 62: "It is, of course, elementary that negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff to prove that an accident was proximately caused by the negligence of the defendant. Unless the plaintiff makes out a *prima facie* case of the defendant's negligence as a proximate cause, there is no duty on the defendant to bring forward any evidence or introduce any testimony to explain the accident or show how or why it occurred. . . . Again, we are not told why the brakes were suddenly applied. This may have been necessary because the car ahead suddenly stopped or slowed down. The presumption is that the defendant was free of negligence in the operation of the car."

"In order to make out a case of actionable negligence the plaintiff must show (1) the defendant has failed to exercise proper care in the performance of a duty owed to the plaintiff; (2) that the negligent breach of that duty was the proximate cause of plaintiff's injury; (3) that a person of ordinary prudence should have foreseen such result was probable under the circumstances as they existed. 'If the evidence fails to establish either one of the essentials, the judgment of nonsuit is proper'." *Burr v. Everhart,* 246 N.C. 327, 98 S.E. 2d 327, citing authorities.

When tested by the applicable standards, the plaintiff's evidence is insufficient to make out a case of liability. Nonsuit was required. The judgment is

Affirmed.

KATHLEEN P. WHITFORD v. JOHN WHITFORD, JR.

(Filed 26 February 1964.)

1. Evidence § 24—

A decree of a court of another State should be authenticated as prescribed by 28 U.S.C.A. 1738, and a decree authenticated only by certification of a person designating himself as an attorney at law is insufficient.

2. Evidence § 2—

Our courts are not required to take judicial notice of a decree of a court of another state.

3. Divorce and Alimony § 22—

Where the children of the marriage are residents of this State and the parents are personally before the court, our courts have jurisdiction in the wife's action for subsistence under G.S. 50-16 to award the custody of the children to the wife and decree the amount defendant should contribute for their support, and to punish him as for contempt for wilfull failure to comply with its order, notwithstanding that the husband may have obtained a decree of divorce in another State after the entry of the order for support.

APPEAL by defendant from *Bundy, J.*, October, 1963, Session of CRAVEN.

This is an appeal from an order adjudging defendant in contempt because of his willful failure to comply with orders of the Superior Court of Craven County.

The record does not contain a case on appeal agreed to by the parties or settled by the court. The clerk has certified certain records of his office. These records are adverted to in the opinion.

R. E. Sumrell, Lee and Hancock for plaintiff appellee.
Charles L. Abernethy, Jr., for defendant appellant.

RODMAN, J. This action was begun in the Superior Court of Craven County in May, 1960. Plaintiff in her complaint alleged: The parties, residents of Craven County, were married in 1951. Two children were born to the marriage—Terry in 1956, and John in November, 1957. Defendant had on numerous occasions committed adultery and on 14 March 1960 abandoned plaintiff and their minor children. She asked for support for herself and the children as authorized by G.S. 50-16.

Defendant answered. He admitted the residence of the parties, the marriage and birth of the children. He denied the wrongful conduct charged by plaintiff.

The court on 20 June 1960, after a hearing at which plaintiff and defendant were represented, made an order awarding custody of the children to plaintiff; granted plaintiff the right to occupy the home and required

defendant to pay $400.00 a month for the support of plaintiff and the children of the marriage, pending trial on the merits. Counsel fees for the plaintiff were also awarded. So far as the record discloses, no exception was taken to this order.

On 2 September 1960, the court cited defendant to appear and show cause why he should not be held in contempt because of his wilfull failure to make the payments directed by the court. Similar orders requiring defendant to appear and show cause why he should not be held in contempt were issued by judges of the Superior Court on 9 January 1961, 4 February 1961, 24 July 1961, and 4 November 1961.

The monthly payments were in January, 1961, reduced to $300.00 per month.

On 18 November 1961, a hearing was held on motion by plaintiff to cite defendant for contempt and on defendant's motion to award custody to someone other than the parents. Judge Bundy found defendant in contempt.

Notwithstanding defendant's charge then made, that plaintiff had on numerous occasions committed adultery, Judge Bundy found that she was a fit and proper person to have the custody of the children. He reaffirmed previous order awarding custody to her. Reciting in his order that plaintiff had stated in open court "that she does not now ask for support for herself but only for the children," he reduced the amount defendant should pay from $300.00 to $250.00 per month. He modified the order previously entered, which had prohibited either of the parties from taking the children beyond the jurisdiction of the court, so as to permit the plaintiff to take the children to Newport News, Virginia, where her mother lived and where plaintiff could find employment.

In September, 1963, plaintiff again sought an order holding defendant in contempt for failure to make the monthly payments theretofore ordered. She alleged defendant had paid part of the amount due in 1962, and nothing for the months of January, February, March, April, June, July, August and September, 1963. Based on her verified petition, the court directed defendant to appear on 10 October 1963, to show cause why he should not be held in contempt. So far as the record discloses, defendant did not file an answer to the petition. He was, however, present and testified at the hearing. He was represented by counsel. To excuse his failure to make the payments theretofore ordered, he relied on a writing which he asserted was a copy of a decree of divorce rendered by the Circuit Court of Duval County, Florida. This paper was neither certified nor exemplified. It was marked as exhibit A. The record does not contain a copy of exhibit A. It does, however, contain a copy of what defendant asserts to be the decree of divorce rendered by the Florida court. The

only authentication appearing on that paper is the following: "I hereby certify this is a true copy of final decree of divorce. CARL G. SWANSON, Attorney at Law." The paper purports to award plaintiff in that action an absolute divorce, custody of the children to the mother with a provision that the father should pay $150.00 per month for their support.

Apparently, for the purpose of challenging defendant's good faith in asserting that he had ever resided in Florida, counsel for plaintiff presented him with affidavits he had made in November 1962, March 1963, and May 1963, stating that he was a resident of Craven County, North Carolina.

In his judgment, finding defendant guilty of wilfull contempt in failing to comply with the orders of this State, the court made no reference to the purported decree of divorce by the Florida court. There was no evidence requiring him to render a decision with respect to the jurisdiction of the courts of Florida to decree a divorce or to award custody or fix the amount to be paid for the support of the children. If defendant wished to rely on a decree of the Florida courts to justify his refusal to provide support for his children as ordered by the courts of this State, he should have offered competent evidence to establish action by the Florida court. The manner of authenticating such records is prescribed by Federal Statute 28 U.S.C.A. 1738. *Dansby v. Insurance Company,* 209 N.C. 127, 183 S.E. 521.

Defendant in his brief filed here attaches as an exhibit an exemplified transcript of a record of an action in the Circuit Court of Duval County, Florida, entitled *JOHN WHITFORD, JR. v. KATHLEEN P. WHITFORD.* The certification on that record is dated January 18, 1964—more than three months after Judge Bundy heard the parties and made his decision.

Defendant argues the trial court should have taken judicial notice of the Florida records. The contention is lacking in merit. *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846; *Wolfe v. North Carolina,* 364 U.S. 177, 4 L. Ed. 2d 1650, 80 S. Ct. 1482.

Defendant does not contend the children have ever been to Florida. They are residents of and subject to the jurisdiction of the courts of this State, although with the court's permission temporarily in Virginia. Even if defendant became a resident of Florida for the purpose of obtaining a divorce, the courts of this State have the right to determine what amount defendant should contribute for the support of his children and, for wilfull failure to comply with its orders in that respect, to punish for contempt. *In re Hughes,* 254 N.C. 434, 119 S.E. 2d 189; *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744; *Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313.

This opinion ought not to close without noting, as we do, that there is nothing in the transcript attached to defendant's brief to indicate the Florida court was informed that the courts of this State had theretofore awarded custody to the mother and fixed the sum the father should pay, which order was made at the time the courts of this State had jurisdiction of both the parents and the children.

The judgment holding defendant in contempt does not deprive him of his right, because of changed conditions, to hereafter move for modification of the order relating either to custody or the amount he must contribute for the support of his children.

Affirmed.

STATE v. LARRY S. WRIGHT.

(Filed 26 February 1964.)

Criminal Law § 131—

Where the sentence imposed does not exceed the statutory limit, the Supreme Court will not hold that it violates the constitutional provision against cruel and unusual punishment except when there is no doubt, the authority to make adjustment if the sentence is disproportionately long being vested in the Governor and the Board of Paroles.

APPEAL by defendant from *McLean, J.*, October, 1963 Criminal Session, BUNCOMBE Superior Court.

Criminal prosecution upon a bill of indictment which contained two counts: The first count charged that the defendant forged a check for $49.57, payable to Larry S. Wright, purported to have been drawn by Hendersonville Apple Packers, Inc., on the Northwestern Bank. The second count charged that the defendant uttered the forged check knowing it to have been forged. The forged instrument was written on a payroll checkbook "taken from the (Apple Packers, Inc.) place of business."

At the time the case was called for trial, and upon ascertaining the defendant was not represented by counsel, the court appointed the attorney of record here to represent the defendant. After investigation and conferences, the attorney, with the defendant's approval, pled not guilty to the charge of forgery but guilty to the charge of uttering the forged instrument knowing it to have been forged.

The evidence disclosed the defendant endorsed the check to the Town Tavern in Asheville which deducted the amount he was due the tavern

($25.00) and paid him $24.57 in cash. The police officer testified the defendant told him that another, giving the name, forged the check, but he cashed it knowing it had been forged, and that he and the named person divided the money. "It appeared from the record that the defendant had pled guilty to or been convicted of public drunkenness eleven times."

The court imposed a sentence of not less than seven nor more than ten years in the State's prison at hard labor. Counsel, at the defendant's insistence, gave notice of appeal to the Supreme Court. The defendant filed an affidavit that he was unable to pay the expenses of the appeal and asked that he be allowed to appeal *in forma pauperis.* Counsel filed a certificate stating "that he has not been able to advise the defendant that he has a reasonable cause for appeal of this case." However, in view of the decision of the United States Supreme Court in *Douglas v. California,* 9 L. Ed. 2d 811, counsel perfected the appeal and filed a brief in which he presents the question whether the sentence is in violation of the constitutional prohibition against cruel and unusual punishment. The court fixed the appearance bond at $5,000.00.

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

Walter Clark, Jr., for defendant appellant.

HIGGINS, J. G.S. 14-120 authorizes the court to punish for the offense of uttering a forged instrument (as defined) "by imprisonment in the county jail or State's prison not less than four months nor more than ten years." The punishment imposed, while near the maximum, nevertheless is within the limits fixed by the statute; hence the trial court did not impose a sentence in violation of the statutory limit. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654; *State v. Woodlief,* 172 N.C. 885, 90 S.E. 137.

The prosecuting witness actually lost $24.57. Her account of $25.00 is still unpaid. Any disparity between the offense and the punishment is not a matter of law or legal inference; hence, not subject to review here. But as this Court said in *State v. Woodlief, supra,* "We are not prepared to say that the court cannot review the judge, as to the quantum of punishment, even where there is a limit set to the exercise of his discretion; but if the right exists, we will not do so except in a plain case, where the violation of the constitutional provision is palpable, and not involved in any doubt—a case not likely to occur."

Although reaching the conclusion that we must affirm the judgment, we take note of the purpose of the Legislature to give the trial judge wide discretion to the end he may fit the punishment to the crime. A charge

of uttering a forged check, even if enough to break a bank, cannot support a judgment of imprisonment exceeding ten years. In this case the defendant obtained $24.57. He was ordered to serve seven to ten years in the State's prison. If the sentence is disproportionately long, the Governor and the Board of Paroles have ample authority to make adjustment. This Court, lacking such authority, must affirm the judgment.

Affirmed.

STATE OF NORTH CAROLINA *v.* NORRIS EARL FRANCIS, JR., A. O. DAVIS, VIOLA GARRIS, JOSEPH SAMUEL BROWN, MATTHEW LEWIS, JR., WILLIE M. FRANCIS, PHYLLIS MARIE BALLANCE, LAURA FRANCES WALTON, WILLIE FRANCIS, COLIN MINGA, COLBERT MINGA, CHARLES ODEN, VIVIAN THORNTON, CLARENCE OWENS, ETHEL GREGORY, JOSEPH S. BROWN, BARBARA JORDAN, VERNELLE BAILEY, BARBARA FEARING, DOROTHY LASHLEY, ERVIN FRANCIS, GILBERT CLARK, BRENDA ANDERSON, FREDERICK TAYLOR, EDWARD BRACEY, JR., VIRGINIA WHITEHURST, LUBERTHA SMITH, DORIS BELL AND MAUDE L. SYKES.

(Filed 26 February 1964.)

Criminal Law § 17—

The filing in the U. S. District Court and in the State court, with notice to the solicitor, of a petition to remove a prosecution from the Superior Court to the United States District Court, effects the removal, and the State court is thereafter without jurisdiction to proceed further in the case unless and until it is remanded by the United States District Court. 28 U.S.C. 1441-1450.

APPEALS by Norris Earl Francis, Jr., Colin Minga and Colbert Minga from *Morris, J.*, November, 1963 Session of PASQUOTANK.

A Criminal Session of the Superior Court of Pasquotank County convened on the 11th of November, 1963. The Grand Jury returned a true bill charging Willie Francis with trespassing on the property of O. B. Wilkinson after being forbidden, a misdemeanor punishable by fine or imprisonment in the discretion of the Court, G.S. 14-134 as amended in 1963. Identical bills were returned charging defendants Minga with identical crimes. (The names of appellants stated in the opening paragraph are as listed by counsel for appellants. The record does not disclose that Norris Earl Francis, Jr. has been charged with commission of a crime, or that he has been tried, or that any judgment has been rendered from which he could appeal.) The record does not disclose the date the bills were found. The record does not show criminal charges against any of

those named in the caption except Willie Francis, Colin Minga and Colbert Minga. The cases were consolidated. Defendants were put on trial on 13 November 1963. The jury found each guilty. Prison sentences were imposed.

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

W. G. Pearson, II, and C. C. Malone, Jr., for defendants.

RODMAN, J. The case on appeal agreed to by solicitor has this statement:

> "Prior to the calling of these cases for trial on the 13th day of November, 1963, at 8:40 A.M., Attorneys for the defendants herein, filed with the Clerk of the Elizabeth City Division of the United States District Court for the Eastern District of North Carolina a petition for the removal of these prosecutions from the Superior Court of Pasquotank County to the United States District Court for the Eastern District of North Carolina, as provided in 28 U.S. Code 1441-1450, a copy of which Petition is hereto attached and incorporated by reference as though fully set out in this paragraph. At 8:55 A.M., the same day, a copy of said petition was served upon the Clerk of the Superior Court of Pasquotank County, and a copy of same delivered to the Solicitor of the Superior Court of Pasquotank County, the Honorable Walter W. Cohoon, in compliance with 28 U.S. Code 1446. A copy of the petition was given to the Court, who, after reading the petition, stated 'MOTION DENIED'."

The petition to which reference is made in the preceding paragraph is entitled "PETITION TO REMOVE STATE PROSECUTION TO FEDERAL DISTRICT COURT, 28 U.S. Code 1441-1450." The petition to remove alleges: Defendants are Negroes; the interpretation which this Court has placed on G.S. 14-134 renders the statute unconstitutional when applied to a Negro.

Prior to 1 September 1948, a defendant, seeking to remove a case from a state court to a federal court, filed his petition for removal in the state court unless he based his right to remove on prejudice or local influence, 36 Stat. 1095 (formerly 28 U.S.C.A. 72.) The court, in which the petition was filed, had jurisdiction to decide whether a removable cause was stated. An erroneous conclusion could be corrected by appeal.

Congress, by statute effective 1 September 1948, 62 U.S. Statutes at Large 992, made many changes in the Judicial Code. Since 1 September 1948, a defendant seeking to move a criminal prosecution from a state

court to the federal court must file, in the Division of the U. S. District Court in which the action is pending, a verified statement of the facts which entitle him to have the case tried in the federal court. This he may do "at any time before trial." 28 U.S.C.A. § 1446 (c). Promptly after the filing of the petition, defendant must give notice to all adverse parties "and shall file a copy of the petition with the clerk of such state court which shall effect the removal and the state court shall proceed no further unless and until the case is remanded." 28 U.S.C.A. § 1446 (e).

The language of the statute is too plain to require interpretation. Removal is accomplished by filing a petition in the district court, giving notice to the adverse party, and filing of a copy of the petition in the state court. *Levine v. Lacy,* 130 S.E. 2d 443 (Va.); *Hopson v. North American Insurance Company,* 233 P. 2d 799, 25 A.L.R. 2d 1040 (Idaho); *State of Louisiana v. National Association for the Advancement of Colored People,* 90 So. 2d 884 (La.); *Bean v. Clark,* 85 So. 2d 588 (Miss.); *Consolidated Underwriters v. McCauley,* 320 S.W. 2d 60 (Texas); *Lowe v. Jacobs,* 243 Fed. 432; *Adair Pipeline Company v. Pipeliners Local Union No. 798,* 203 F. Supp. 434.

The record shows defendants did those things enumerated in the statute as necessary for removal to the District Court. The Superior Court's jurisdiction terminated before appellants were tried. If the cases have been improperly removed, the error may be corrected by motion in the U. S. District Court. If and when the District Court remands, the Superior Court may try defendants on the charges in the bills of indictment.

The motion of defendants to arrest the judgments for want of jurisdiction should have been allowed.

Reversed.

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 26 February 1964.)

Estates § 5—

The sale of timber under agreement between the life tenants and the then surviving contingent remaindermen and the distribution of the proceeds of sale pursuant to the agreement cannot constitute waste and therefore cannot terminate the life tenancies or work a forfeiture thereof.

APPEAL by plaintiffs from *Bundy, J.*, November Mixed Session 1963 of PITT.

This case was argued before this Court at the Spring Term 1963, and our opinion disposing of the appeal appears in 259 N.C. 81, 130 S.E. 2d 22; substantially all the pertinent facts are stated therein and need not be repeated here.

In the present action the plaintiffs allege that M. H. Jackson and wife, Maggie L. Jackson, the life tenants, in 1955, after negotiating with their five children living at the time, whose remainder interest in the lands involved was contingent upon their surviving their parents, the life tenants, sold a large quantity of timber on the lands in which they held the life interest, and divided the proceeds with their five children in accord with the negotiated agreement. Thelma Jackson Vester, one of the five children of the life tenants and mother of the plaintiffs Hannah Vester Strickland, John Milton Vester and Frank Lane Vester, died before the death of her parents, the life tenants, but after she had received her share of the proceeds from the sale of the timber.

The plaintiffs allege that the sale of the timber on the lands involved terminated the life estates and thus accelerated the vesting of the remainder in said lands, which the defendants are estopped to deny.

The defendants demurred to the complaint for that (1) this action has been determined in the Superior Court of Pitt County and affirmed by the Supreme Court and is *res judicata*, (2) misjoinder of causes of action, (3) failure to state a cause of action, and (4) want of jurisdiction of the Superior Court of Pitt County to determine and try out questions relating to matters in dispute in an original proceeding in Washington County and probate matters before the probate authorities in Nash County. The demurrer was sustained and the action dismissed.

The plaintiffs appeal, assigning error.

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

PER CURIAM. In 56 Am. Jur., Waste, section 13, page 459, it is said: "It is well settled that one entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost."

Here, Thelma Jackson Vester was paid for that which she had not lost, since the contingent remainder never became vested in her. *Strickland v. Jackson, supra.*

This Court held in the case of *Lumber Co. v. Lumber Co.*, 153 N.C. 49, 68 S.E. 929, that the life tenant and the remaindermen could by agree-

ment sell the timber on the lands occupied by the life tenant; but it is clear from the opinion that neither the life tenant nor the remaindermen could sell without the concurrence of the other.

In the instant case, the timber was sold pursuant to an agreement entered into between the life tenants and all the then surviving contingent remaindermen. Furthermore, there is no contention that the proceeds from the sale were not distributed pursuant to the terms of the agreement entered into by the interested parties. Such a sale would not constitute waste nor an irreparable injury to the inheritance within the accepted meaning of that term. Therefore, we hold that such a sale would not terminate the life tenancies or work a forfeiture thereof.

The order sustaining the demurrer is

Affirmed.

JAMES HENRY WHITE AND WIFE, WEALTHY WHITE v. HATTIE MCCARTER, REGINALD L. FRAZIER, INDIVIDUALLY, AND REGINALD FRAZIER, TRUSTEE.

(Filed 26 February 1964.)

Payment § 4—

Where, in the principal's cross-action against the agent to recover funds collected by the agent in her behalf, the agent admits collecting the funds as agent but asserts that he paid the full amount of the funds to the principal, the burden is upon the agent to prove his affirmative plea of payment, and he may not complain of an instruction placing the burden upon the principal to satisfy the jury by the greater weight of the evidence of the indebtedness and the amount thereof.

APPEAL by defendant, Reginald L. Frazier, from *Bundy, J.*, September-October 1963 Session of CRAVEN.

Civil action for accounting and cancellation of a deed of trust.

Plaintiffs purchased two lots from defendant McCarter at the price of $1250. The terms of sale were: $250 cash, the balance payable in 23 monthly installments of $30 each and a final installment of $310. A deed, promissory note and deed of trust were executed. Defendant Frazier, a lawyer, prepared these instruments. He was named trustee in the deed of trust; and McCarter and Frazier were the payees in the note. McCarter, a woman 86 years old, authorized Frazier to act as her agent in closing the transaction and collecting the payments from plaintiffs. The deed was delivered to plaintiffs; Frazier retained the note and deed of trust. Plaintiffs delivered to Frazier the $250 down payment and thir-

teen installments in the amount of $50 each, a total of $900, and took Frazier's receipts therefor. A further payment to Frazier was returned to plaintiffs with the information that McCarter had refused to accept it and had demanded foreclosure of the deed of trust. Plaintiffs tendered $350 and when it was refused they instituted this action offering to pay $350 and asking for a cancellation of the deed of trust. McCarter, answering, pleaded a cross-action against Frazier for an accounting, alleging that he had not paid to her the money he had collected. Frazier admitted collecting the $900 and denied that he owed McCarter any amount. McCarter testified that Frazier had loaned her $21 and had paid to her on account of the collections from plaintiffs three or four payments of $23 each and three or four payments of $50 each, and no more. Frazier testified that he collected $900 from plaintiffs, delivered the payments to McCarter at the time he made the collections, and he required of her no receipts because of the close friendship between them.

The jury found that Frazier was agent for McCarter in making the sale and collections, that plaintiffs owe McCarter $350, and that McCarter is "entitled to recover" of Frazier $428. Judgment was entered providing for the cancellation of the deed of trust upon payment of $350 by the plaintiffs to McCarter, and adjudging that McCarter recover of Frazier $428.

Frazier appeals.

Earl Whitted, Jr., for defendant appellant.
Ward & Ward for defendant appellee.

PER CURIAM. McCarter's cross-action against Frazier raises the simple question whether Frazier had fully accounted for the $900 collected by him and, if not, the amount of his default. The court placed the burden upon McCarter to satisfy the jury by the greater weight of the evidence that Frazier is indebted to her and the amount of the indebtedness. Of this, Frazier is in no position to complain. The purport of his pleadings is that he collected $900 for McCarter and paid it to her in full. Payment is an affirmative plea and the burden of showing payment is on the one who relies on payment as a defense. *Davis v. Dockery,* 209 N.C. 272, 183 S.E. 396; *Furst v. Taylor,* 204 N.C. 603, 169 S.E. 185; *Thomas v. Gwyn,* 131 N.C. 460, 42 S.E. 904. Frazier's contention that the burden of the issue was upon McCarter to satisfy the jury of the indebtedness and the amount thereof by clear, cogent and convincing evidence is without foundation. *Henley v. Holt,* 221 N.C. 274, 20 S.E. 2d 62, relied on by Frazier, is not in point.

In the trial below we find

No error.

HAYES CRARY, SR. v. HOYT W. CIVILS AND WIFE, LULA B. CIVILS.

(Filed 26 February 1964.)

Betterments § 1—

During the term of the lease the lessee may not recover for betterments, notwithstanding his contention that the betterments were placed upon the property in reliance upon the landlord's verbal agreement to include in the lease a provision for renewal for an additional ten-year term.

APPEAL by plaintiff from *Bundy, J.*, October, 1963 Session, CRAVEN Superior Court.

Plaintiff instituted this civil action to recover $35,000.00 actual, and $10,000.00 punitive damages "for betterments and improvements placed upon and added to the property solely because of a verbal contract and agreement . . . which the said Hoyt W. Civils has wrongfully and fraudulently failed to carry out on behalf of himself and his wife."

The plaintiff further alleges an agreement by defendants to lease to the plaintiff a described store building in New Bern for 10 years, beginning September, 1959, at $165.00 monthly rental with an option to renew for another ten years at a rental to be determined by business conditions at the beginning of the renewal period. The defendants executed a written lease for 10 years but the option to renew was inadvertently omitted. The plaintiff has requested the defendants to execute a written agreement for the additional term, but this they refuse to do. The plaintiff has made improvements of the value of $35,000.00 to the leased premises.

The defendants filed a demurrer upon the ground the complaint fails to state a cause of action. From the judgment sustaining the demurrer, the plaintiff appealed.

Charles L. Abernethy, Jr., for plaintiff appellant.
Ward and Tucker for defendant appellees.

PER CURIAM. The plaintiff is in possession under a lease which does not expire for more than five years. He is using the fixtures and improvements for his own benefit. He fails to allege either that the improvements were necessary or that the defendants authorized them or agreed to pay for their installation. Whether his additions to the building are such business fixtures as will permit him to remove them when his lease expires, does not appear. If the defendants are in anywise liable, which is not conceded, the extent of the liability cannot be determined until the time the plaintiff surrenders the leased premises.

The complaint fails to state a cause of action. The demurrer was properly sustained.

Affirmed.

MRS. ISA W. PITTMAN v. LT. MUNSON RAY SNEDEKER.

(Filed 26 February 1964.)

Judgments § 29—

In an action by a passenger against one of the drivers involved in a collision in which the other driver is joined for contribution, judgment upon the affirmative findings to the issues of negligence that plaintiff recover of the original defendant and that the original defendant recover from the additional defendant for contribution, bars a subsequent action by one driver against the other.

APPEAL by plaintiff from *Bundy, J.*, September-October 1963 Session of CRAVEN.

Plaintiff appeals from a judgment dismissing her action on the pleadings.

This case arose out of a collision on May 28, 1961 between automobiles operated by the plaintiff and defendant in which both plaintiff and Lynda Joyce Pittman, a passenger in plaintiff's car, received personal injuries. On July 25, 1962 Lynda Joyce Pittman (designated Passenger for convenience) instituted an action against the defendant for her damages. On September 1, 1962 plaintiff brought this suit. In the action brought by Passenger, defendant set up a cross action for contribution against the plaintiff herein alleging in his answer that if he were negligent as alleged in the complaint, negligence on the part of plaintiff concurred with his in proximately causing Passenger's injuries. His motion, made under G.S. 1-240, that plaintiff herein be made an additional party defendant was allowed on September 28, 1962. In her reply to the cross action plaintiff denied any negligence on her part, alleged that the collision was caused solely by the negligence of the defendant as specified therein, and averred that she had instituted the present action against defendant to recover those damages which his negligence had proximately caused her. However, she did not plead her alleged cause of action as a counterclaim against the defendant in his cross action filed in Passenger's suit.

Both this action and Passenger's were calendared for trial at the May 1963 Civil Session. In his discretion, the judge denied plaintiff's motion that her case be tried first. Passenger's case then proceeded to trial and the verdict therein established negligence on the part of both drivers, the plaintiff and defendant herein, as the proximate cause of Passenger's injuries. Defendant recovered judgment against the plaintiff in his cross action for contribution for one-half of the amount which Passenger had recovered against him. Thereafter, on August 16, 1963, the defendant moved for permission to amend his answer in this case to allege the ver-

dict and judgment in Passenger's action as an estoppel and as a bar to any recovery by the plaintiff herein. The motion was allowed and the amendment filed. Plaintiff thereupon demurred to the amendment and moved to strike it. Judge Bundy held that the judgment in Passenger's case barred plaintiff's right to maintain this action. From his order dismissing the suit, plaintiff appealed.

Kennedy W. Ward for plaintiff appellant.
Barden, Stith & McCotter for defendant appellee.

PER CURIAM. Plaintiff concedes that the facts are as stated above. We are unable to accept her contention "that the rights and liabilities of the drivers, Mrs. Pittman and defendant, Snedeker, were not *inter se* put in issue and resolved by the judgment and pleadings" in Passenger's action. Clearly the two drivers, the original defendant in that action and the additional defendant for the purpose of contribution, were adverse parties who litigated their differences *inter sese* therein. The verdict established that the negligence of both proximately caused the collision in question. This case is controlled by *Hill v. Edwards*, 255 N.C. 615, 122 S.E. 2d 383, in which, on identical facts, the question presented was decided adversely to the plaintiff.

There appears no reason to assume that the result in Passenger's case would have been different had plaintiff taken a nonsuit in this action and replead it as a counterclaim therein as she could have done. *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773.

The judgment below is

Affirmed.

STATE v. DOROTHY N. DOVE, GEORGIA GAYLOR, CLARENCE STEWART, JR., ROBERT E. SPRUILL, WILLIE O. DOVE, WILLIE A. DRAKE, VANCE E. GREEN, WILLIAM E. TOON, DAVID R. MILLER, GEORGE LEE BRIMAGE, GEORGE T. JENNINGS, JENNIE S. BOONE, CATHERINE GAYLOR, JUANITA JOHNSON, FARRIES C. SLADE.

(Filed 26 February 1964.)

Criminal Law § 16—

The Superior Court of Craven County does not have original jurisdiction of misdemeanors, G.S. 7-64, and therefore defendants may not be tried in the Superior Court upon indictment upon appeals from convictions in the recorder's court of trespassing, G.S. 14-126; G.S. 14-134.

STATE *v.* DOVE.

APPEAL by defendants from *Bundy, J.*, September 1963 Criminal Session of CRAVEN.

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

Lisbon C. Berry, Jr. and Reginald L. Frazier for defendant appellants.

PER CURIAM. On 16 July 1963 Russell Dunn signed, before the Clerk of the Recorder's Court of the City of New Bern, an affidavit charging Dorothy Narvell Dove violated "Sec. 14-134 of the General Statutes of North Carolina, by entering upon the premises of the A & W Drive-Inn, New Bern, N. C. managed by and in the possession of Russell Dunn, and she, Dorothy Narvell Dove, the said defendant, having been forbidden to enter or remain on the said premises." Based on this affidavit, an order was issued for the arrest of defendant Dove. On the 29th of July 1963, the Recorder imposed a prison sentence, suspended on condition of good behavior and the payment of a fine of $25.00 (The record does not disclose that any trial was had or verdict rendered.) Notice of appeal and bond for the appearance of the defendant at the September 1963 Criminal Session of Craven was given. Similar proceedings against the remaining defendants were had in the Recorder's Court of New Bern.

At the September Session, 1963, the Grand Jury returned a true bill charging the defendants:

> "after being forbidden to do so and without a license therefor did enter upon the land and tenement of Root Beer Drive Ins, Inc., a Corporation, at its place of business on Broad Street, City of New Bern, denominated as 'A & W Drive-In,' consisting of a restaurant located inside the building on the premises and covered walkway and parking areas for automobiles adjoining for the service of food and drink to the occupants of automobiles as drive-in customers, said Root Beer Drive Ins, Inc., being then and there in actual peaceable and legal possession of said premises which at the time was under the control of its agent and manager, Russell W. Dunn, and they did each severally and in concert and each with a multitude of people and each aiding and abetting the others proceed on foot to the front door of the restaurant on the premises where they were met and informed and told by the said Russell W. Dunn, acting as manager and in the scope of his employment, that they could not enter the said restaurant and would not be served and to leave the premises; and they did each individually and in concert and as a part of a multitude of people and each aiding and abetting the others sit

down on the premises on the covered walkway in such positions so as to block said walkway and the front entrance to said restaurant and commenced loud singing, vocalization and clapping of their respective hands; and the said Russell W. Dunn, acting as aforesaid, then told each one individually as well as collectively to immediately quit and leave the said premises, but they each unlawfully, wilfully and intentionally failed and refused to do so."

The bill is sufficient to support a conviction under G.S. 14-126, entitled "Forcible entry and detainer," or under G.S. 14-134 entitled "Trespass on land after being forbidden."

The bill and warrants charge different trespasses, *State v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885.

Defendants were not tried in the Superior Court on their appeals from the judgments rendered by the Recorder's Court. They were there tried on the bill of indictment.

The Recorder's Court of the City of New Bern was created in 1947, as authorized by G.S. 7-190. *State v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312.

The crimes defined in G.S. 14-126 and G.S. 14-134 are misdemeanors. The Superior Court of Craven County does not have original jurisdiction of the crimes charged in the bill of indictment, G.S. 7-64, *State v. Morgan,* 246 N.C. 596, 99 S.E. 2d 764—that jurisdiction is given the New Bern Recorder's Court, G.S. 7-190. Since the Superior Court was without original jurisdiction to determine the guilt or innocence of defendants, it follows that defendants' motion for arrest of judgment should have been allowed.

Defendants are entitled to a trial on the charges heard by the Recorder's Court, now pending on appeal in the Superior Court. Warrants may be issued from Recorder's Court of New Bern charging defendants with commission of the crimes stated in the bill of indictment. If there convicted, they may appeal to the Superior Court. The Superior Court may hear the appeal.

Reversed.

STATE v. OLIVER LANCE.

(Filed 26 February 1964.)

APPEAL by defendant from a judgment entered October 9, 1963, by *McLean, J.,* Resident and Presiding Judge of the Twenty-eighth Judicial District, then presiding at the October 7, 1963, Regular Civil Session, BUNCOMBE Superior Court.

The judgment entered by Judge McLean on October 9, 1963, provides:

"THIS CAUSE coming on to be heard and being heard upon an appeal from the General County Court of Buncombe County, North Carolina, from the ordering into effect of a suspended sentence pronounced in the General County Court of Buncombe County, North Carolina, on October 12, 1963 *(sic)*;

"And upon motion of the Solicitor for the State to place the suspended sentence into effect;

"And it appearing to the Court that on October 12, 1962, Judgment was entered in the General County Court of Buncombe County, North Carolina in this cause, providing among other things, that the defendant be confined in the common jail of Buncombe County for a period of twelve months to be assigned to work under the supervision of the State Prison Department, as provided by law;

"That said prison sentence was suspended on condition:

"1. That defendant violate none of the criminal laws of the State and particularly the prohibition laws.

"And it appearing to the Court that said suspended sentence was placed into effect on the 21st day of June 1963, for violation of condition, in that the defendant was convicted of the unlawful possession of non-tax-paid liquor;

"And the defendant having appealed, both the conviction for the unlawful possession of non-tax-paid liquor and from the activation of the suspended sentence;

"And it appearing to the Court on Monday, July 8, 1963, the defendant tendered a plea of guilty of the unlawful possession of non-tax-paid liquor in Case No. 63-555, in this Court, as appears in Judgment Docket 31, Minutes of the Criminal Trials of the Superior Court of Buncombe County, North Carolina, on Page 330;

"And the Court, after hearing the evidence, adduced in Case # 63-555, and also heard other evidence on the 9th day of October 1963, finds as a fact that the defendant has had in his possession unlawful non-tax-paid liquor, after the rendition of the Judgment in the General County Court on the 12th day of October 1962, and has breached Condition 1 upon which the sentence was suspended on October 12, 1962;

"IT IS, THEREFORE, ORDERED that commitment issue to place the twelve months prison sentence into effect, as pronounced in the General County Court of Buncombe County, North Carolina, on October 12, 1962."

Defendant excepted and appealed.

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

Wade Hall and Lamar Gudger for defendant appellant.

PER CURIAM. The record discloses the following:

On October 12, 1962, in Case No. 62-4887, the general county court, upon defendant's conviction of the unlawful manufacture of intoxicating liquor on September 13, 1962, pronounced judgment imposing a sentence of twelve months suspended for two years upon condition that defendant violate none of the criminal laws of the State, particularly the prohibition laws.

On June 21, 1963, in Case No. 63-2152, the general county court, upon defendant's conviction of unlawful possession of two pints of nontaxpaid whiskey on May 31, 1963, pronounced judgment imposing a sentence of six months; and, based on said conviction, the general county court then entered judgment in Case No. 62-4887 activating the twelve months' suspended sentence it had pronounced therein on October 12, 1962. Defendant appealed from both judgments.

The hearing before Judge McLean on October 9, 1963, was on defendant's appeal from the judgment entered by the general county court on June 21, 1963, in its Case No. 62-4887. See G.S. 15-200.1 as amended by Session Laws 1963, Chapter 632, Section 3.

Defendant's assignments of error relate to asserted irregularities in respect of notice and procedure in connection with the hearing in the general county court on June 21, 1963, and the hearing before Judge McLean on October 9, 1963. We deem it unnecessary to set forth and discuss these assignments in detail. Nothing indicates defendant requested a postponement of either hearing or that he was not given a fair hearing. While defendant did not testify at the hearing before Judge McLean on October 9, 1963, he offered evidence tending to show his (good) general reputation.

Defendant, in his statement on appeal, says: "On the 8th day of July 1963, the defendant entered a plea of guilty in the Superior Court of Buncombe County, North Carolina, to the unlawful possession of non-tax-paid liquor and on said occasion was released upon payment of a fine of $500.00." The case heard *de novo* in superior court on July 8, 1963, was the criminal prosecution of defendant for his alleged unlawful possession of two pints of nontaxpaid whiskey on May 31, 1963, to wit, the criminal offense for which he had been tried and convicted in the general county court on June 21, 1963.

Defendant's said plea of guilty on July 8, 1963, in superior court Case No. 63-555 (general county court Case No. 63-2152) was sufficient in itself to establish his violation of the condition on which the twelve months' sentence of October 12, 1962, was suspended. Hence, Judge McLean's judgment of October 9, 1963, is affirmed.

Defendant's contention that Judge McLean when presiding at said civil session lacked jurisdiction is without merit. See G.S. 15-200.1 as amended by Session Laws 1963, Chapter 632, Section 3.

Affirmed.

VIOLA BRIGHT WHITE v. ALICE ROACH AND DONALD REEL.

(Filed 26 February 1964.)

APPEAL by defendants from *Bundy, J.*, October Session 1963 of CRAVEN.

This is an action instituted by the plaintiff in a claim and delivery proceeding to recover a house trailer, upon the ground that the defendants had acquired possession thereof and title thereto by fraud.

Among other things, the plaintiff in summary alleged in her complaint that she was the owner of one 1960 Buddy House Trailer of the value of $3,500.00; that defendants by threats, assaults, and other means of intimidation, attempted to get the plaintiff to transfer the title of said trailer to them and attempted to give her an older and smaller trailer in exchange therefor; that plaintiff refused to accede to their threats and intimidations; that defendants are unlawfully and wrongfully in possession of said trailer, living in the same and have refused to surrender possession thereof to the plaintiff; that the defendants induced the plaintiff to sign a document on the pretext that the same was necessary in order for her (the plaintiff) to legally own the trailer; that thereafter the plaintiff is informed, believes and alleges the instrument the defendants got her to sign was in truth a transfer of the title to said trailer, which defendants then filled in and had said trailer transferred on the records of the Department of Motor Vehicles to them (the defendants), knowing at the time that they misrepresented the instrument to plaintiff and that she did not understand the true nature of the instrument.

Plaintiff's evidence tends to show that she can only write her name; that she "cannot read or understand the average piece of paper." She testified that when she signed the paper which was used to transfer the title to the trailer to the defendants, the defendants told her "it was to put ownership of the trailer in my name, so I signed the paper, relying on what they told me."

Plaintiff's evidence further tends to show that she and her husband purchased the trailer involved in 1960; that they later separated and

plaintiff purchased her husband's interest in the trailer for $1,000.00; that she borrowed the $1,000.00 from defendant Alice Roach, her sister, who, after the institution of this action married her codefendant Donald Reel. Plaintiff, after separating from her husband, moved the trailer involved from Carteret County to the premises where the defendants operated the Two Rivers Fruit Stand on Highway 70 across the Trent River Bridge from New Bern, North Carolina.

The jury answered the following issues as indicated.

"1. Was the transfer of title to the Buddy House Trailer from the plaintiff to the defendants obtained by fraud and misrepresentation as alleged by *(sic)* the complaint? Answer: Yes.

"2. Is the plaintiff the owner of and entitled to the possession of the Buddy House Trailer as alleged in the complaint? Answer: Yes."

Judgment was entered on the verdict to the effect that plaintiff have and recover from the defendants possession of the said Buddy House Trailer and that defendants be taxed with the costs of this action.

Defendants appeal, assigning error.

Cecil D. May for plaintiff appellee.
Henry A. Grady, Jr., for defendant appellants.

PER CURIAM. The defendants assign as error the refusal of the court below to sustain their motion for judgment as of nonsuit at the close of plaintiff's evidence and when renewed at the close of all the evidence.

On a motion for nonsuit the evidence of the plaintiff must be taken as true and considered in the light most favorable to her. When the evidence of the plaintiff is so considered, we hold that it was sufficient to take the case to the jury. *Mills v. Lynch,* 259 N.C. 359, 130 S.E. 2d 541.

Since the case was one for the twelve, and no prejudicial error appears on the record, the ruling of the court below will be upheld.

Affirmed.

LETHA BELLE HARRINGTON v. J. BROOKS TUCKER.

(Filed 26 February 1964.)

APPEAL by defendant from *Bone, E. J.,* 16 September 1963 Civil Session of PITT.

Civil action to recover the penalty for usury under G.S. 24-2.

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

"1. Did the defendant loan to the plaintiff the sum of $23,000.00 and knowingly take, exact and receive from the plaintiff a greater rate of interest therefor than six per cent (6%), as alleged in the complaint?

"ANSWER: Yes.

"2. If so, what amount is plaintiff entitled to recover of defendant?

"ANSWER: $7,256.66."

From a judgment that plaintiff recover from defendant the sum of $7,256.66, with interest from the first day of the term, and taxing defendant with the costs, he appeals.

M. E. Cavendish for defendant appellant.
Albion Dunn for plaintiff appellee.

PER CURIAM. Defendant's assignments of error present no new question of law or point requiring extended discussion. A careful examination of the record and the assignments of error shows that the jury, under application of settled principles of law, resolved the issues of fact against the defendant. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment are upheld.

No error.

LESTER A. DEES v. BETTE ANNE VEAZEY McKENNA (DEES).

(Filed 4 March 1964.)

1. Constitutional Law § 26; Divorce and Alimony § 22—

Since the court of the state rendering a decree for the support and custody of minor children of the marriage has jurisdiction to modify or change such decree in its discretion in furtherance of the welfare and best interest of the infants, without a showing of change of condition, the Full Faith and Credit Clause of the Federal Constitution does not preclude the courts of another state from modifying or changing such decree in like manner. Art 4, § 1, Constitution of the United States.

2. Same—Courts of this State have jurisdiction to modify decree of another state awarding custody of children when children are in this State.

Unknown to plaintiff, defendant took the two children of the parties, one of whom was born prior to the marriage ceremony between them, to another state, and there obtained a decree awarding the custody of the children to her, in which action plaintiff was personally served with summons under its laws. During the pendency of that action and prior to the rendition of that decree plaintiff surreptitiously took the two children and returned with them to his home in this State, and instituted suit in which the marriage was annuled upon defendant's admission that at the time of the ceremony she had a living husband from whom she had not been divorced, but the court refused to award custody of the children on the ground that the foreign decree deprived it of jurisdiction. *Held:* The foreign decree was entered without that court being apprised of all the facts, and since that court had power to modify its decree, our courts have such jurisdiction, and the cause is remanded for further proceedings.

3. Same—

The fact that the child of the parties is born prior to their marriage ceremony does not affect the jurisdiction of the court, in decreeing annulment of the marriage, to award the custody of the child.

RODMAN, J., dissenting.

APPEAL by plaintiff from *Morris, J.*, November Session 1963 of CHOWAN.

This action was brought by the plaintiff (1) to annul the marriage ceremony entered into between him and the defendant on the ground that said marriage was bigamous as to the defendant for that at the time said ceremony was performed the defendant had a then living husband from whom she had not been divorced, and (2) for custody of the two children of whom he is the father and the defendant is the mother.

Prior to the time of the commencement of this action and at all times thereafter the said children resided and now reside with the plaintiff in Chowan County, North Carolina.

The plaintiff and the defendant first became acquainted in Alaska in September 1955. Both were married at that time, Bette Anne Veazey McKenna to one Daniel J. McKenna, and Lester A. Dees, the plaintiff, to one Trixie Webb Dees. Bette Anne Veazey McKenna employed an attorney in Alaska in 1955 to file a divorce action for her. Her divorce action was not prosecuted to a successful conclusion and was dismissed on 6 February 1958.

The defendant represented herself as a divorced person. Plaintiff and defendant lived together before the plaintiff was divorced. The older of the two children, Lorri Dianne, a girl, was born of their cohabitation 1 August 1957.

The plaintiff obtained a divorce from his wife, Trixie Webb Dees, in Chowan County, North Carolina, 26 November 1957. He and the defendant entered into a marriage ceremony on 29 November 1957 in Mississippi; their second child, a boy, Scott Alan, was born 13 November 1960 in Edenton, North Carolina.

Defendant in her answer in this action admitted that at the time of the marriage ceremony under attack she had a then living husband from whom she had not been divorced.

Based on the issues submitted and answered by the jury, the marriage ceremony entered into by the plaintiff and the defendant on 29 November 1957 was declared to be bigamous, and judgment was entered annulling said marriage ceremony and declaring the same void *ab initio*.

After the entry of said judgment, from which there is no appeal, the court announced it would proceed to hear the matter of the custody of the aforesaid two children and that before proceeding on the merits thereof the court would hear and pass upon the plea of *res judicata*.

When the plaintiff, a doctor of veterinary medicine, was released from military service he and the defendant returned to his former home, Edenton, North Carolina, to live, on 1 July 1960, and continued to live there as man and wife until 9 April 1963. On 9 April 1963, unknown to the plaintiff, the defendant took plaintiff's car and the two children, drove to Selma, North Carolina, abandoned the car and took the children to California where defendant's mother lives. Defendant has continuously since then lived in California.

On 1 May 1963, defendant instituted an action in California against plaintiff herein for separate maintenance and for custody and support for the two children. On 4 May 1963, the Sheriff of Chowan County, North Carolina, served on plaintiff a summons, complaint, and order to show cause in the action instituted in the Superior Court of Orange County, California. Whereupon, the plaintiff herein went to California and employed a private detective to help him locate his wife and children. On 7 May 1963, the plaintiff herein went to the residence of the mother of the defendant herein, to wit, Pearl Marie Graham, at which time the said Pearl Marie Graham handed the plaintiff herein an envelope with the name of plaintiff written thereon and with the name of the law firm of Schwab & Lambert written thereon, and stated to plaintiff herein that they were papers which she had been directed to hand to or serve upon the plaintiff herein. The plaintiff herein received the envelope in his hand, observed the writing thereon, and handed it back to said Pearl Marie Graham and stated at the time that he was advised of the contents, having been served with the same by the Sheriff of Chowan County.

Thereafter, the plaintiff herein left California and returned to North Carolina. He returned to California about 9 June 1963, and on 12 June

1963 surreptitiously took the two children involved herein and returned with them to Edenton, North Carolina, where they have lived since that time with their father, the plaintiff herein.

On 21 June 1963, a hearing was held in the action instituted in California for separate maintenance and custody of the children born to plaintiff and defendant. The court found that the defendant, plaintiff herein, had been duly served with summons and that the legal time for answering had expired; that no answer had been filed and no appearance had been made within the time provided by law or otherwise. Whereupon, the Superior Court of Orange County, California, entered a decree for separate maintenance and awarded the mother, the defendant herein, the plaintiff therein, custody of the children.

The defendant in this action set up the California decree as a bar to plaintiff's right to custody of the children involved. The court below held the California decree is valid and binding on the North Carolina courts; that no evidence tending to show there had been a change in conditions had been offered by either party, and denied the relief sought by plaintiff as to custody. From this order, the plaintiff appeals, assigning error.

William S. Privott and John H. Hall for plaintiff.
Pritchett & Cooke for defendant.

DENNY, C.J. The question for determination on this appeal is whether or not the court below committed error in ruling that the order entered in the Superior Court of Orange County, California, on 21 June 1963, awarding the custody of the children involved, is *res judicata,* and that the Superior Court of Chowan County, North Carolina, was without jurisdiction to consider or determine custody of the children involved.

We do not think the jurisdiction of the Superior Court of Chowan County depends on whether or not the California court obtained personal service on the plaintiff herein. However, our investigation of the statutory provisions of Section 410 of the California Code of Civil Procedure, together with the affidavits filed in the California proceeding, leads us to the conclusion that the California court did obtain personal service on the plaintiff herein, defendant in the California action.

Likewise, it would seem that the California court did not lose jurisdiction over these children if they were subject to its jurisdiction at the time of the institution of the action but were removed from the jurisdiction before the California decree was entered. *Lennon v. Lennon,* 252 N.C. 659, 114 S.E. 2d 571; *In re Orr,* 254 N.C. 723, 119 S.E. 2d 880; *Maloney v. Maloney,* 67 Cal. App. 2d 278, 154 P. 2d 426.

In *In re Orr, supra,* the wife was domiciled in North Carolina, the children were residing with her, and the father was domiciled in the

State of Florida. The father was personally served in a *habeas corpus* proceeding brought to determine custody of the children, and the father was ordered not to remove the children from this State. In violation of the order he removed the children from North Carolina. From an order awarding the custody of the children to the petitioner, respondent's wife, he appealed. *Rodman, J.*, speaking for the Court, said: "Respondent contends his flagrant violation of the lawful order of the court not to remove the children from its jurisdiction deprived the court of the right to hear and determine what would best promote the welfare of those children. The contention is wanting in merit. The right to hear and decide came into being the instant the writ was served on respondent. He could not thereafter deprive the court of the jurisdiction so acquired."

In the instant case, the order which the California court held was personally served on the defendant (plaintiff herein) in California, contained an express order restraining the plaintiff (defendant there) from removing the children involved from the State of California.

Even so, the jurisdiction of the Superior Court of Chowan County to entertain an action for custody of the children involved depends upon whether or not we are bound to give full faith and credit to the California decree, even if it be conceded that court had jurisdiction and the right to enter the decree which it did enter on 21 June 1963.

In *New York ex rel Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903, the parties were married in 1937 and lived together in New York until 1944. In 1938 a son was born. Marital troubles developed. In 1944 Mrs. Halvey, without her husband's consent, left home with the child, went to Florida and established her residence there. In 1945 she instituted a suit for divorce in Florida. Service of process on Mr. Halvey was obtained by publication, he making no appearance in the action. The day before the Florida decree was granted, Mr. Halvey, without the knowledge or approval of his wife, took the child back to New York. The next day a decree was entered by the Florida court, granting Mrs. Halvey a divorce and awarding her permanent custody and control of the child.

Thereupon, Mrs. Halvey brought a *habeas corpus* proceeding in the New York Supreme Court, challenging the legality of Mr. Halvey's detention of the child. After hearing, the New York Court ordered "(1) that the custody of the child remain with the mother; (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods in each year, and (3) that the mother file with the court a surety bond in the sum of $5,000, conditioned on the delivery of the child in Florida for removal by the father to New York for the periods when he had the right to keep the child with him."

The ruling was upheld by the Appellate Division and the Court of Appeals. The case was heard in the Supreme Court of the United States on a petition for writ of *certiorari,* which was granted because it presented an important problem under the Full Faith and Credit Clause of the Constitution, Article 4, Section 1.

The United States Supreme Court held that, under the Florida law the decree could be modified " 'on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the Court * * *.'

"The result is that custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere, except as to the facts before the court at the time of judgment. * * *

"Respondent did not appear in the Florida proceeding. What evidence was adduced in that proceeding bearing on the welfare of the child does not appear. But we know that the Florida court did not see respondent nor hear evidence presented on his behalf concerning his fitness or his claim 'to enjoy the society and association' of his son. * * * It seems to us plain, therefore, that under the rule of *Meadows v. Meadows,* 78 Fla. 576, 83 So. 392, * * * the Florida court would have been empowered to modify the decree in the interests of the child and to grant respondent the right of visitation, if he had applied to it rather than to the New York court and had presented his version of the controversy for the first time in his application for modification.

"So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * * But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. * * * Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (*Cf. Williams v. North Carolina,* 325 U.S. 226, 230, 89 L. Ed. 1577, 1581, 65 S. Ct. 1902, 157 A.L.R. 1366), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."

In the foregoing case the Court expressly reserved decision on the question whether the Florida court had jurisdiction over the Halvey child after his removal from that State before the custody decree was entered. It appears that the Supreme Court of the United States has not expressly decided that question, notwithstanding the numerous State decrees holding that where the State court once obtains jurisdiction it retains it, even though the child be removed from the State before the

entry of the custody decree. *Lennon v. Lennon, supra; In re Orr, supra; Maloney v. Maloney, supra.* In the *Halvey* case, Frankfurter, J., in a concurring opinion, said: "Since the jurisdiction of the Florida court in making the custodial decree is doubtful, New York was justified in exercising its power in the interest of the child."

In *Stack v. Stack,* 189 Cal. App. 2d 357, 11 Cal. Rptr. 177, upon a motion made on behalf of the father to modify a former decree awarding custody of the child to the mother, the Court said: "The only 'rule' consistently applied is that the court may modify or vacate its order 'at any time.' Civil Code, Section 138; cf. *Exley v. Exley, supra,* 101 Cal. App. 2d 835, 226 P. 2d 662.

"The mother's principal reliance is upon the change of circumstances 'rule.' As we have seen it, it is no longer a rule, if it ever was one."

In the case of *Frizzell v. Frizzell,* 158 Cal. App. 2d 652, 323 P. 2d 188, the Court said: "Questions of custody, support and education of children are addressed to the sound discretion of the trial court. * * *

"The rule that there must be a showing of 'changed circumstances' has no application where the trial court has modified a decree. That rule only applies where the trial court has refused to modify a decree and it is contended an abuse of discretion occurred. To show such abuse there must be a showing of changed circumstances. *Kelly v. Kelly,* 75 Cal. App. 2d 408, 171 P. 2d 95; *Dotsch v. Grimes,* 75 Cal. App. 2d 418, 171 P. 2d 506."

In the case of *Urquhart v. Urquhart,* 196 Cal. App. 2d 297, 16 Cal. Rptr. 469, the Court said: "The change of circumstances rule is no longer a rule even if it ever was one. The only rule consistently applied is that the court may modify or vacate its order at any time. Civil Code, Section 138; *Stack v. Stack,* 189 Cal. App. 2d 357, 11 Cal. Rptr. 177." See also *Stewart v. Stewart* (Cal.), 260 P. 2d 44.

In *Peterson v. Peterson,* 64 Cal. App. 2d 631, 149 P. 2d 206, the Court said: "In custody cases the underlying principle, paramount to all others, is the welfare and best interest of the child. * * * Therefore, an application for a modification of an award of custody must be addressed to the sound legal discretion of the trial court, * * * subject only to the qualifications contained in section 138 of the Civil Code."

Section 138 of the Civil Code of California, in pertinent part, reads as follows: "In actions for divorce or for separate maintenance the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody of such minor children as may seem necessary or proper and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the fol-

lowing considerations: (1) By what appears to be for the best interests of the child * * *."

In the case of *Starr v. Starr,* 121 Cal. App. 2d 633, 263 P. 2d 675, the plaintiff had secured a decree of divorce from the defendant in 1949 in the State of Nevada. Under the terms of that decree she was awarded the custody of the minor child of the parties, who was five years of age, and the defendant was ordered to contribute the sum of $25.00 per month for the support of the child. Thereafter, the plaintiff and the child became domiciled in Sonoma County, California. On 23 February 1951 the plaintiff filed an action in the Superior Court of said county in which she sought additional sums for the support of said child. The Court said: "The Nevada statutes in this regard (Section 9462 N.C.L. as amended in 1947) are substantially the same as Civil Code, Section 138 of this state, which gives a continuing jurisdiction to modify or vacate a prior award of support. * * *

"* * * In summary, our Supreme Court, in the *Sampsell* case (32 Cal. 2d 763, 197 P. 2d 739), held that 'if the decrees of California courts with respect to child custody are subject to modification or annulment in this state, they are likewise subject to modification or annulment in any state having jurisdiction over the subject matter, for such a decree "has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered".' *New York ex rel Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133."

It seems the court below relied on *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861, in denying the relief sought by the plaintiff. We think there is a substantial difference in the facts in the *Allman* case and the instant case. In the *Allman* case the defendant husband had abandoned his wife and children in the State of Virginia. An action was instituted for divorce, custody and separate maintenance by the wife. Personal service was obtained on the defendant husband in Virginia and the custody of the children duly awarded to the mother after a full hearing by the Virginia court. The children were definitely residents of and domiciled in the State of Virginia. The father of the children, pursuant to an agreement with the mother, had the children visit him in North Carolina in the summer of 1948, 1949 and 1950, returning the children to their mother's home in Virginia each year in time for them to enter school in the Fall in accord with the terms of the agreement, until the summer of 1950 when he refused to surrender them. Since the children were domiciled in Virginia, we held we were bound by the Virginia decree.

In the instant case, these children are no longer residents of California but are residents of and living in North Carolina. Furthermore,

the older one of these children resided in North Carolina from 1 July 1960 until removed therefrom by the mother without the consent of the father on 9 April 1963. The younger child lived in North Carolina with its parents from birth, 13 November 1960, until 9 April 1963, when the mother abandoned the father of these children and surreptitiously removed the children to California. In that State she obtained a decree for custody of the children and for separate maintenance upon a complaint in which she falsely alleged that she and Lester A. Dees were married on 29 November 1957 and ever since have been and now are husband and wife; that the plaintiff and the defendant have two children, the issue of said marriage, when, as a matter of fact, the older of the two children was born before the bigamous marriage was entered into in Mississippi.

In light of the existing facts, and the further fact that the statute and decisions with respect to custody in California authorize the modification or vacation of a custody decree without any showing of a change in circumstances, we hold that whatever California could do in this respect, North Carolina may do. *New York ex rel Halvey v. Halvey, supra.*

The fact that the children involved herein were not born of a legal marriage does not prevent the courts from extending their protective care and entering such decrees as may be deemed necessary for the best interest and welfare of said children. Since these children are now living in North Carolina, and all parties are subject to the jurisdiction of the Superior Court of Chowan County, the defendant mother having employed counsel to represent her, having filed answer and is opposing the modification of the California custody decree, we hold the Superior Court of Chowan County has jurisdiction to hear and determine what is for the best interest and welfare of these children, and to enter such decree with respect to their custody and support as the court may deem appropriate.

The order entered below with respect to lack of jurisdiction of the Superior Court of Chowan County is set aside and this cause is remanded for further hearing not inconsistent with this opinion.

Error and remanded.

RODMAN, J. Dissenting: I dissent because I think the majority has placed too strict and technical an interpretation upon the language used by Judge Morris.

These facts are important in determining the scope and effect of his decree. (1) Defendant did not intend to deceive the courts of California. When she applied to the courts of that state for a divorce, she

thought she had, prior to her marriage to plaintiff, been lawfully divorced from her first husband. She did not learn until July 1963 that her first marriage had not in fact been terminated. Defendant's mother resides in California. Defendant intended to make that her home. It had become apparent that her marriage to plaintiff was a failure. (2) The order of May 1, 1963, directing the father to show cause why custody should not be awarded to the mother expressly "enjoined and restrained" the father from "taking or removing the children, Lorri Dianne Dees and Scott Alan Dees from the State of California and the custody of the plaintiff." (Defendant here). (3) Plaintiff was aware of the provisions of the show cause order when he took the children from California. The court quotes the father as saying, "it was 'necessary for him to steal the children in order to get them'."

The judgment recites:

> "[I]n view of the manner in which said children were returned to North Carolina, this Court notwithstanding, under ordinary circumstances it would not be ousted of jurisdiction, is in this particular case because of the peculiar circumstances involved, precluded from further investigating the matter as to custody and is called upon to give full faith and credit to the decree entered in the Superior Court of Orange County, California."

The Court then adjudged:

> "[T]hat insofar as the custody of the minor children of the plaintiff and defendant is concerned, the court orders that the decree heretofore entered in the Superior Court of Orange County, California, is *res judicata* and leaves this Court without jurisdiction to further determine the custody of said minor children."

The words may not be technically correct; however, the order ought not to be held erroneous because Judge Morris said "without jurisdiction" when it is apparent he meant "the court refuses to exercise jurisdiction."

The Court's refusal to take jurisdiction was, obviously, based on plaintiff's contumacious defiance of a valid order of a court of a sister state. When one has, as plaintiff expresses it, "to steal" in order to invest a court with jurisdiction I do not think it becoming or proper for that court to aid him in his nefarious work. It should require him to assert his rights before the California court which had previously taken jurisdiction.

The rule here advocated is not new. We at least implied recognition of the rule in *In Re Orr,* 254 N.C. 723, 119 S.E. 2d 880. There, as here, the father wilfully disobeyed an order of the court of general jurisdiction

which enjoined him from removing the children from its jurisdiction. There, as here, the mother found it necessary to make a new home in another state. Having wrongfully taken the children to Florida, the father not only challenged the rights of the courts of this State to award custody but inquired how the courts of this State expected to enforce any decree here entered. We answered in this language:

> "If it be that respondent is beyond the jurisdiction and hence the power of this Court to enforce orders lawfully made, courts do exist where respondent resides with adequate power to compel respect and obedience to lawful orders of a court having jurisdiction of the parties and subject matter."

The Civil Court of Appeals of Texas said in *Autry v. Autry*, 359 S.W. 2d 278:

> "Barring exceptional circumstances creating an immediate emergency, we believe it is the duty of a court, on finding a child within its borders who is either domiciled in another state or has been wrongfully removed from such other state to escape jurisdiction in a pending proceeding, not to decide the question of proper custody on the merits, but to immediately grant or remand such child to the last lawful custodian without prejudice to the right of the other claimant or claimants to apply to the foreign court for a change of custody as the best interest of the child might appear to demand."

State v. Black, 196 So. 713 (Ala.); *Leathers v. Leathers*, 328 P. 2d 853 (Cal.); *Crocker v. Crocker*, 219 P. 2d 311 (Colo.); *Crabtree v. Superior Ct. In and For Stanislaus County*, 17 Cal. Rptr. 763; *Drake v. Drake*, 1 S.E. 2d 573 (Ga.).

The troublesome problem illustrated by this case is considered in *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345; and *Custody and Maintenance Law across State Lines*, 10 Law & Contem. Prob. 819. Dean Stansbury there said: "If there is a place anywhere in the laws for that much criticized word 'comity' it is surely here."

I give my approval to the observation made by the Supreme Court of New Mexico in *Evens v. Keller*, 6 P. 2d 200:

> "Any other rule would be disastrous in the extreme, would reward contempt, and place a premium on abduction. The courts of any one of the forty-eight different states would, in the mind of a designing claimant to a child's custody, offer hope that there could an adverse decision elsewhere be circumvented and a tortious custody of a minor made lawful. Fortunately the jurisprudence of our country has not so moulded the laws."

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA COACH COMPANY AND QUEEN CITY COACH COMPANY.

(Filed 4 March 1964.)

1. Carriers § 2—

In order to be entitled to a franchise authority the applicant has the burden of showing public convenience and necessity. G.S. 62-262.

2. Same; Carriers § 6—

The interchange of equipment by two carriers under lease agreement so as to afford passengers through service, instead of requiring them to change buses at interchange points along their respective routes, is authorized by statute and the rules of the Commission promulgated thereunder, G.S. 62-31, and does not involve any new or additional franchise requiring applicants to show public convenience and necessity, and such agreement, after the giving of proper notice and the filing of the agreement, is effective without the approval of the Commission, and may be suspended or disapproved by the Commission only when it finds upon supporting evidence that it is detrimental to the public interest.

3. Utilities Commission § 9—

An order of the Utilities Commission is *prima facie* just and reasonable, G.S. 62-26.10, and its findings are conclusive if supported by competent, material and substantial evidence; however, when its order is based on conclusions not supported by any competent, material and substantial evidence such order may not be upheld by the courts.

4. Utilities Commission § 1—

The Utilities Commission and not the court is authorized to regulate utilities.

5. Same; Carriers § 2—

Public policy does not condemn competition as such but only competition which is unfair or destructive. G.S. 62-121.44.

6. Utilities Commission § 9—

The rule that where an order of the Utilities Commission is not based on competent, material and substantial evidence the court must remand the cause to the Commission for further proceedings applies where the Commission has the duty to make a positive determination and does not apply when no action or order of the Commission is necessary.

7. Same—

Where a lease agreement of carriers to provide through service is disapproved by an order of the Utilities Commission which is not supported by any competent, material and substantial evidence, no remand to the Commission is necessary, but the order should be reversed by the Superior Court, the Commission being free at any time thereafter to institute another hearing to determine, upon proper evidence, whether the agreement is contrary to the public interest.

REVIEW on *certiorari,* issued on petition of the State of North Carolina, ex rel. North Carolina Utilities Commission, a judgment of *Copeland, S. J.,* September 22, 1963, "A" Civil Session of WAKE.

Proceeding before the North Carolina Utilities Commission (hereinafter referred to as Commission) relative to a Lease of Equipment Agreement between Carolina Coach Company (Carolina) and Queen City Coach Company (Queen).

The Lease, consisting of two instruments which together constitute the Agreement, is dated June 1962 and provides for through service without change of buses over the franchise routes of the respective agreeing parties, (1) between Charlotte and Winston-Salem via Salisbury, (2) between Charlotte and Winston-Salem via Lexington, (3) between Raleigh and Winston-Salem via Greensboro and High Point, and (4) between Fayetteville and Winston-Salem via Sanford, Greensboro and High Point. For example, if the agreement is put into effect, Carolina will operate buses over its franchise route from Charlotte to Salisbury and there deliver the buses to Queen's personnel who will operate them over Queen's franchise route to Winston-Salem and return them over the same route to Salisbury and there deliver them to Carolina's employees who will operate them over Carolina's franchise route back to Charlotte. Each party will be fully responsible for the operation and the cost thereof on its own franchise route, and the non-owner, lessee of the buses, will pay rental for the use thereof on its route at 18 cents per mile. The operations on the other routes will be conducted in the same manner and on the same basis. The agreement permits through travel over the franchise routes of Carolina and Queen between the points above stated without the necessity of changing buses at former interchange points—Salisbury, Lexington, Greensboro and High Point.

The agreement was filed with the Commission on 2 August 1962, and notices thereof were mailed to Greyhound Corporation (Greyhound) and Safety Transit Lines, the carriers which operate to, from or through the interchange points.

On 21 August 1962 Greyhound filed with the Commission a protest alleging that the agreement will create a new service never offered before, will permit Carolina and Queen to furnish through service between Charlotte and Winston-Salem and between Raleigh and Winston-Salem competitive with such service already provided by Greyhound, the service maintained by Greyhound is ample and frequent and more than adequate for both intrastate and interstate traffic, revenues from such service by Greyhound have been inadequate to defray proportionate costs, the proposed new service will cause Greyhound to compete at a loss, and the proposed service will require Greyhound to curtail its operations in detriment of the public interest.

At the hearing before the Commission Carolina and Queen introduced evidence, including a map showing franchise routes of the three carriers. The evidence explains the proposed operations, and tends to establish other facts, as follows: Carolina and Queen have previously filed with the Commission and put into effect many such agreements, affecting other routes. No schedules have been made out, but schedules will be filed if this agreement goes into effect. The agreement will permit through service between Winston-Salem and Durham (including Duke University), Chapel Hill (including the University of North Carolina) and Burlington, a service not now available. Likewise, it will supply heretofore unavailable through service between Winston-Salem and Concord, Kannapolis, Sanford and Siler City. The proposed through service between Winston-Salem and Fayetteville will not compete with Greyhound. The agreement will result in more efficient and economical service by Carolina and Queen on the routes in question, and will be a convenience to the public. The contracting parties have ample modern equipment to implement the service. The new service will create no operating problems. Greyhound has over 100,000 route miles in the country, and it doesn't need these agreements. Queen and Carolina together have less than 7,500; and the only way they can provide people in their areas with an improved through service and the only way they can compete with Greyhound is to lease each other's buses and put this type of service in operation. The number of passengers which would be involved in these operations is not known now. Presently a lot of the Durham, Chapel Hill and Burlington passengers, bound for Winston-Salem, are transferring to Greyhound at Greensboro rather than change buses at Greensboro and High Point on the Carolina and Queen routes. Even with the Lease Agreement the Carolina-Queen service will not be able to compete with Greyhound for traffic between Winston-Salem and Greensboro for the Greyhound route is shorter and faster. The Carolina-Queen operation between Raleigh and Winston-Salem will be a few miles shorter than Greyhound's. The only difference in service the agreement will make is that passengers will not have to change buses at interchange points. No new franchise authority is necessary to put the agreement into effect.

Greyhound offered no evidence.

The Commission by a three to two decision, Commissioners Wescott (Chairman) and Eller dissenting, entered an order disapproving the agreement. The findings and conclusions of the majority of the Commission are paraphrased, except where stated verbatim, as follows: "The real issues involved are (1) the competitive effect on competing carriers by the installation of what is termed an entirely new service, (2) the

over-all effect on the public interest." The evidence does not show what the service schedules will be, the extent of the proposed service, any public dissatisfaction with or complaints concerning present service, or any need for the proposed service. Through service has its advantages, but the present plan of operation has been in effect for many years and resulted from showings of "public convenience and necessity." The proposed service would give Carolina and Queen a competitive advantage and enable them to advertise through service. Combinations of this kind "could well be disastrously competitive to another carrier." The service planned under the agreement is in effect tantamount to a new franchise authority, and such authority is obtained only through a showing of public convenience and necessity. The new service "could well result in serious curtailment of services on the part of Greyhound and thereby result in decrease of needed services in its operating territory . . . and definitely be detrimental to the public interest." The agreement "is definitely not in the public interest and . . . provides a service and an operating authority that will be tantamount to a franchise . . ., will be unduly competitive and will tend to create an unsavory situation between carriers."

Upon appeal by Carolina and Queen to superior court, judgment was entered stating conclusions, which are discussed in the opinion proper, reversing the order of the Commission, and remanding the cause to the Commission "for such action as may be necessary and appropriate to allow the Lease of Equipment Agreement . . . to go into full force and effect."

Greyhound filed exceptions and gave notice of appeal, but abandoned the appeal. Thereupon, the Commission petitioned this Court for *certiorari*. The petition was allowed December 10, 1963.

Edward B. Hipp for the Commission.

Allen, Steed & Pullen and Joyner & Howison for Respondents Carolina Coach Company and Queen City Coach Company.

MOORE, J. The judge below concluded that the Commission erred (1) in holding that the proceeding before it was tantamount to a hearing upon an application for a franchise and that the proposed through service should not be allowed in the absence of a showing by Carolina and Queen of "public convenience and necessity" or the essential elements thereof, such as public demand and positive need for the service, and (2) in that the findings of the Commission that the proposed service is "unduly competitive" and "not in the public interest" are not supported by competent, material and substantial evidence.

The granting of franchise authority for the operation of buses over the highways of North Carolina, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity. The burden of proof is upon the applicant for franchise authority to show public convenience and necessity. G.S. 62-121.52 (recodified as G.S. 62-262 pursuant to the 1963 Public Utilities Act).

The rendering of the new service by Carolina and Queen under the Lease of Equipment Agreement does not involve any new or additional franchise. It is perfectly clear from all of the evidence, and appellant does not contend otherwise, that the contracting parties propose to maintain this service in connection with their already established franchises.

The Lease of Equipment Agreement and the proceeding before the Commission with respect thereto were respectively executed and instituted pursuant to Rule 14 of the rules and regulations of the Commission promulgated under authority of G.S. 62-121.45 (now G.S. 62-31), entitled "Interchange of Equipment," which is as follows:

> "Common carriers may interchange equipment for the purpose of providing through service without change of passengers from one bus to another, but no such interchange agreement shall become effective unless the parties thereto shall file a true copy thereof with the Commission and give notice thereof to all common carriers operating to, from or through the interchange point at least twenty (20) days prior to the effective date of such agreement; provided, the Commission may upon its own motion, or upon protest, suspend or disapprove the agreement for reasons considered to be in the public interest."

The carriers have legal right to contract *inter se,* and the law encourages cooperation and agreements between them respecting their service to the public. G.S. 62-121.64(a); *Utilities Commission v. Coach Co.,* 260 N.C. 43, 132 S.E. 2d 249. And Rule 14 authorizes carriers to interchange equipment "for the purpose of providing through service without change of passengers from one bus to another"—the very purpose for which the Carolina-Queen agreement was made. Affirmative approval of the agreement by the Commission is not required by Rule 14. The only conditions precedent to putting the agreement into effect is that 20-days notice be given all carriers "operating to, from or through the interchange point," and that the agreement be filed with the Commission. There is no contention that Carolina and Queen failed to comply with these conditions. ". . . (T)he Commission may on its own motion, or upon protest, suspend or disapprove the agreement for *reasons* considered to be in the public interest." This places no burden on the

parties to the interchange agreement. The presumption is that through service is in the public interest. In the absence of "reasons," based on evidence in the record, that the agreement is detrimental to the public interest, the agreement may not be suspended or disapproved.

The Commission's order is erroneous in that it places the burden on Carolina and Queen to show an affirmative public demand and need for the through service. The order declares, in effect, that where through service, without change of buses, is proposed by interchange of equipment between carriers, it is tantamount to an application for new franchise authority if the proposed service is competitive with another carrier, and to be permitted to institute such service the interchanging carriers must show public convenience and necessity. Rule 14 is not susceptible of such construction.

The sole issue before the Commission was whether the public interest would be adversely affected by the proposed service. Transportation of passengers by motor carriers for compensation is a business affected with a public interest. G.S. 62-121.44. The Commission concluded that the proposed service could be "unduly competitive" and would tend "to create an unsavory situation between carriers." These findings if supported by competent, material and substantial evidence, are binding on appeal. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. Tank Line*, 259 N.C. 363, 130 S.E. 2d 663; *Utilities Commission v. R. R.*, 256 N.C. 359, 124 S.E. 2d 510. The Utilities Commission, and not the courts, is authorized to regulate utilities. *Utilities Commission v. Champion Papers, Inc., supra.*

There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition. G.S. 62-121.44. "The public is best served in many circumstances when destructive competition has been removed and the utility is a regulated monopoly. 'Whether there shall be competition in a given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time see that the public and the public utilities involved are not prejudiced by efforts which flow from excessive competition brought about by excessive services. 73 C.J.S., Public Utilities, § 42, p. 1099 . . .' " *Utilities Commission v. Coach Co., supra.* The judgment and discretion of the Commission in this regard must, however, be based on facts.

We do not find any evidence in the record tending to show that the services proposed by Carolina and Queen will result in unfair and destructive competition. Competition will be involved to be sure, and the

competitive position of Carolina and Queen will be improved in some respects. The operation between Fayetteville and Winston-Salem is not competitive with Greyhound. The other routes are competitive with Greyhound without the proposed service. The only change the interchange agreement makes is that passengers will not be required to change buses—the service will otherwise be the same. There is evidence that the proposed through service will be an advantage and convenience to the public in travel between Winston-Salem and other places between Winston-Salem and interchange points, on the one hand, and such places as Concord, Kannapolis, Sanford, Siler City, Chapel Hill, Durham and Burlington, on the other. The proposed service, point to point, between Charlotte and Winston-Salem cannot be said to give Carolina and Queen an unfair advantage of Greyhound, for the Greyhound route via Lexington will still be the fastest service between those points since Greyhound operates on three-fourths of the route with closed doors. The proposed Carolina-Queen operation between Raleigh and Winston-Salem will be about ten miles shorter than Greyhound's competing service. But the Carolina-Queen routes are through one of the heaviest populated areas of the State, including Durham, Chapel Hill, Burlington and High Point, which their buses must serve. On the other hand the Greyhound route, which is via Asheboro, is through a relatively sparsely populated area, conducive of fast schedules. In point to point service between Greensboro and Winston-Salem, the proposed service cannot compete with Greyhound which has the shorter and faster route—Greyhound does not serve High Point. Heretofore many passengers, destined for Winston-Salem and originating on Carolina's routes between Raleigh and Greensboro, have changed to Greyhound at Greensboro rather than change to Queen at Greensboro and back to Carolina at High Point—they also used Greyhound on return trip. The proposed service in this phase will be a decided convenience to the passengers and will be new competition for Greyhound for traffic originating with Carolina and Queen. However, there is nothing in the record to show that it will impair the quality of Greyhound's service or endanger Greyhound's financial position.

It is true, as contended by the Commission, that an order made by it is *prima facie* just and reasonable. G.S. 62-26.10; *Utilities Commission v. Coach Co., supra; Utilities Commission v. R. R., supra.* But this does not preclude a carrier from showing on appeal that the order is not supported by competent, material and substantial evidence. *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780.

In its brief the Commission seeks to bridge the gap caused by lack of supporting evidence by saying: "The results were amply within the

Commission's expert knowledge as the agency established to regulate bus transportation." The superior capabilities of the members of the Commission and their expertness in dealing with utilities problems are fully recognized by us. But the Commission's knowledge, however expert, cannot be considered by us on appeal unless the facts embraced within that knowledge are in the record. Questions on appeal from the Commission must be determined upon the record certified by it. *Utilities Commission v. Mead,* 238 N.C. 451, 78 S.E. 2d 290.

It is further argued that the courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission except on showing of capricious, unreasonable or arbitrary action or disregard of law. *In re Department of Archives and History,* 246 N.C. 392, 98 S.E. 2d 487; *Utilities Commission v. Ray,* 236 N.C. 692, 73 S.E. 2d 870. To this we add that the weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission. *Utilities Commission v. Motor Express,* 232 N.C. 180, 59 S.E. 2d 582. Even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh.

It appears likely that the Commission was motivated to seek review in this proceeding because of the judge's order remanding the cause to the Commission "for such action as may be necessary and appropriate to allow the lease of equipment agreement . . . to go into full force and effect." Apparently the Commission felt that the court was usurping a function which lies solely within the authority of the Commission. The Commission is jealous, and rightly so, of the authority and jurisdiction vested solely in it by the Legislature. Every court and judicial body should jealously guard and firmly maintain its particular authority and jurisdiction. We understand, but do not entirely agree with, the Commission's interpretation of the judgment. The court below correctly reversed the order of the Commission. This reversal leaves Carolina and Queen free to put the agreement into effect, since there was no lawful disapproval thereof. It requires no affirmative approval. Whether the Commission will now or sometime in the future, based on operating experience, institute another hearing with respect to the agreement is a matter for its decision.

Finally, it is suggested that, where an order of the Commission is based on erroneous interpretation of law, the cause should be remanded to the Commission for further hearing and not be terminated by the court. This is true where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense and the utility is entitled to have the

determination made. *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 125 S.E. 2d 457; *Utilities Commission v. Gas Co.*, 254 N.C. 734, 120 S.E. 2d 77; *Utilities Commission v. Coach Co.*, 254 N.C. 668, 119 S.E. 2d 621; *Utilities Commission v. Motor Carriers Asso.*, 253 N.C. 432, 117 S.E. 2d 271; *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133. This is not the case here.

This cause is remanded to superior court for judgment in accordance with this opinion, i.e., reversing the order of the Commission and omitting any requirement of affirmative action on the part of the Commission.

Modified and affirmed.

BETTY PAT INGRAM v. CHARLOTTE SOFLEY McCUISTON, AND CHARLES T. McCUISTON, AS GUARDIAN AD LITEM FOR LINDA LEE McCUISTON, MINOR.

(Filed 4 March 1964.)

1. Evidence § 42—

The purpose of testimony of expert witnesses is to give the jury the benefit of opinions by experts upon factual situations of which the experts have no personal knowledge but which may be found by the jury from the evidence.

2. Evidence § 51—

A hypothetical question may include only facts which are supported by evidence theretofore introduced, and should not contain repetitious, slanted, and argumentative words and phrases.

3. Same—

A hypothetical question should not assume that plaintiff was in excellent psychological health prior to the accident when all of the evidence indicates plaintiff always had some nervousness; it should not assume plaintiff developed "suicidal tendencies" when the evidence discloses only mental depression; it should not assume injury to a part of the spine of which there was no evidence.

4. Same—

A hypothetical question to an expert may not be predicated in whole or in part upon the opinions, inferences, or conclusions of another witness, either expert or lay, but may be predicated upon such opinions or conclusions only when the opinions or conclusions are in evidence and are assumed to be facts; it is error to include in a question to one medical expert a statement that at the time of the examination by another expert such other expert diagnosed plaintiff's condition in a certain manner.

5. Same—

A hypothetical question relating to whether the accident could have caused specific physical injury to plaintiff's spine should not include facts assumed in regard to plaintiff's mental health.

6. Same—

A hypothetical question relating to whether plaintiff's injuries resulted in permanent mental or emotional injury should not assume the very facts sought to be established by the expert's opinion.

7. Same—

Hypothetical questions relating to whether the accident in suit caused specific injury to plaintiff's spine and permanent emotional injury should not contain references to plaintiff's childhood, the cost of medical bills, her consultation with another medical expert and his diagnosis, the route and manner of plaintiff's driving which brought her to the scene of the collision, or other entirely extraneous facts.

APPEAL by defendants from *Froneberger, J.*, May 20, 1963 Regular Civil "B" Session of MECKLENBURG, docketed in the Supreme Court as Case No. 242 and argued at the Fall Term 1963.

Plaintiff instituted this action to recover for personal injuries which she alleges she sustained on March 16, 1961 when the automobile of the defendant collided with the rear of her vehicle on South Tryon Street in the City of Charlotte. In broad outline the facts are these:

About 5:00 p.m. plaintiff, operating a Volkswagen, made a left turn from Woodlawn Road into Tryon Street, a two-lane roadway at that point. At the same time, the defendant Linda Lee McCuiston was approaching this intersection from the north on Tryon Street in a Dodge automobile owned by her mother, the other defendant. The distance of the Dodge from the intersection at the time of plaintiff's entrance is a matter of dispute between the parties. After plaintiff had proceeded south on Tryon Street in front of the defendant for about two hundred and sixty feet, she stopped three to four feet behind the last car in a long line of traffic which was waiting on a red traffic signal at the Yorkmont Road intersection approximately five hundred and twenty feet ahead. The defendant's Dodge then collided with the rear of plaintiff's Volkswagen causing it to strike the car immediately in front. Again the evidence is conflicting. Plaintiff contends she came to a gradual stop; defendant contends she stopped suddenly. In the two impacts plaintiff sustained an injury to her neck and back which, in the opinion of Dr. Robert E. Miller, the orthopedic specialist who treated her, resulted in a five percent permanent disability to her neck and thoracic spine. Plaintiff was "a nervous type individual," and at the time of the collision she was three months pregnant. She contends that her nervous condition

was so aggravated by the collision that in May 1962 she required psychiatric treatment. Plaintiff's psychiatrist, Dr. Thomas A. Wright, Jr., discharged her in August 1962 as much improved. In his opinion the emotional condition he observed in plaintiff at the time she was referred to him could have been produced by the automobile accident.

The pleadings and evidence raised issues of negligence, contributory negligence, and damages. The jury answered each in favor of the plaintiff and awarded her substantial damages. From judgment entered on the verdict the defendants appealed.

Ralph C. Clontz, Jr., for plaintiff appellee.

Charles V. Tompkins, Jr. and Kennedy, Covington, Lobdell & Hickman for defendant appellants.

SHARP, J. To establish the cause of plaintiff's injuries her counsel propounded to Dr. Miller, a hypothetical question which covers six pages in the record. The defendants' objections to this question, and to another which incorporated it by reference, were overruled. The defendants assign these rulings as error and contend that they were prejudicial because: (1) The question was based on assumed facts of which there was no evidence; (2) it was based in part on the opinion of another expert as to the plaintiff's condition; (3) it included assumed facts totally unnecessary to enable the doctor to form a satisfactory medical opinion; and (4) it was argumentative and unduly colored the evidence in plaintiff's favor.

We have concluded that in order to discuss appellants' contentions intelligibly we are forced to reproduce the hypothetical question here. It follows with paragraphs numbered for convenience of discussion:

(1) Q. "Now, Dr. Miller, for the purpose of this hypothetical question, assuming that the jury finds the facts to be, from the evidence, and by its greater weight, that on March 16, 1961, and prior thereto, plaintiff Betty Pat Ingram was in excellent physical, emotional and psychological health, and suffering from no disability whatsoever, being an extremely active person from birth, having been brought up on a farm and actually worked in the fields, having held down a full-time job and being gainfully employed as of March 16, 1961; and that on March 16, 1961, at approximately 4:50 P.M., plaintiff Betty Pat Ingram was operating her husband's car, a 1960 Volkswagen, two-door sedan automobile, proceeding in a westerly direction on Woodlawn Road just inside the city limits of

Charlotte, Mecklenburg County, North Carolina, and approaching the intersection of Woodlawn Road and South Tryon Street.

(2) "That the plaintiff *safely* brought her car to a complete stop on Woodlawn Road, in *lawful* obedience to a stop sign erected on said Woodlawn Road, directing traffic to stop completely before entering South Tryon Street, turning either left or right; and

(3) "That the plaintiff, after first having observed that no traffic was approaching on South Tryon Street close enough or in such a manner as to interfere with her safely entering South Tryon Street, and thus after first observing that her actions would not affect the movement of any other vehicle, and having given a *proper signal* of her intention to turn to her left, did then *lawfully* make a left turn, entering South Tryon Street and thereafter proceeding south along South Tryon St., in the right-hand or westerly lane.

(4) "Assuming, further, that the jury should find from the evidence and by its greater weight, that minor defendant Linda Lee McCuiston was operating her mother's 1950 Dodge and traveling in a southerly direction on South Tryon Street, here in Charlotte, also approaching the intersection of South Tryon Street and Woodlawn Road, at approximately 4:57 P.M.; and

(5) "Further, that at the time mentioned herein, traffic was *extremely heavy* and practically bumper to bumper from the intersection of South Tryon Street and Woodlawn Road all the way down to the intersection of South Tryon Street or York Road and Yorkmont Road, and at which intersection there was located a red traffic light; and

(6) "That, as plaintiff Betty Pat Ingram started her left turn and started proceeding into South Tryon Street, *she saw, and anyone who was properly observant could and should have seen,* that the traffic south of Betty Pat Ingram's vehicle was just barely moving and obviously preparing to make a stop, in obedience to the traffic control device aforementioned; and

(7) "That, after the plaintiff had driven a very few feet south on South Tryon Street, she saw all of the cars, numbering between 15 and 20, south of her from a certain bridge on South Tryon Street all the way to the traffic signal aforementioned come to

a complete stop, at which time the plaintiff also began slowing down and preparing to stop behind the long line of traffic;

(8) "Assuming, further, that the jury should find from the evidence and by its greater weight that when the plaintiff started slowing down and preparing to stop, as aforementioned, the minor defendant, Linda Lee McCuiston, was directly behind the plaintiff's vehicle, some two or three or more car lengths north, traveling exactly the same direction in the same traffic lane; and

(9) "That the plaintiff had no difficulty in stopping her car and did stop her car three or four feet behind another vehicle operated by a Mr. Guy V. Soule, at a point near the center of the bridge on South Tryon Street, at which time the plaintiff was sitting with the brake pedal on her car completely and fully depressed; and

(10) "That a very short time after the plaintiff stopped her vehicle, *in obedience to the traffic control device and because of the traffic stopped ahead of her,* she observed the minor defendant approaching at a rapid rate of speed, but did not have time to brace herself properly before her car was struck, *and actually had no place to go in her car anyhow;* and that the minor defendant struck the rear of the 1960 Volkswagen with the front of her larger 1950 Dodge, with such force as to drive the plaintiff's automobile forward *and ram the same* into the rear of the vehicle in front of her, despite the locked brakes on the car; and

(11) "Assuming that the jury further finds from the evidence and by its greater weight that at the moment of the first impact, *when the defendant rammed the front of her car into the rear of the car the plaintiff was driving,* the car was suddenly thrown forward, with the result that the body of the plaintiff was thrown back, snapping and whipping her neck and upper portion of her body; and that at the time of the second impact when the front of the plaintiff's car was driven by the force of the defendant's car into the rear of the vehicle operated by Mr. Guy V. Soule, that that impact caused the plaintiff's body to be *sharply* thrown forward, again snapping her neck in the manner of a whip and, likewise, throwing her suddenly and *with great force* forward, at which time her abdomen sustained a *severe impact* with the steering wheel of the car the plaintiff was driving; and

(12) "Further, assuming the jury should find from the evidence and by its greater weight that the accident and the two impacts aforementioned subjected the plaintiff to a *severe jolt and strain,* the force of the two said impacts producing immediately excruciating pain *and agony,* in the plaintiff's neck, back, shoulder and arms; and

(13) "That at the time of the collision on March 16, 1961, the plaintiff had been pregnant for approximately three and a half months; and

(14) "Assuming, further, that the jury should find from the evidence and by its greater weight, that whereas plaintiff had not suffered any substantial emotional difficulty or disability prior to the accident, that the collision and the separate impact, coupled with the pregnant condition of the plaintiff, proximately caused the plaintiff from the date of the accident through the entire remainder of her pregnancy, up until the child was born on September 2, 1961, or for a period of more than five months, *constant mental anguish and shock,* caused by the *reasonable fear* that her serious personal injuries and the blow to her abdomen might cause her to sustain a miscarriage; and

(15) "Assuming, further, that the jury should find from the evidence and by its greater weight that the impact and the collision aforementioned subjected the plaintiff to *an extremely severe nervous and mental shock,* which permanently, to some extent, injured her nervous and mental systems, causing extensive and *permanent dislocation, psychoneurosis, nervous shock, nervousness, and traumatic neurosis or anxiety neurosis,* with the result that whereas plaintiff had never suffered such prior to the date of the accident, from the date of the accident and even for a considerable period of time after the birth of the plaintiff's baby, on September 2, 1961, the plaintiff suffered extremely from nightmares, worry and constant fear, and became in such a condition, as the result of the impact and the collision aforementioned, that she cried easily, became depressed and subject to suicidal tendencies; and

(16) "That her emotional condition became such that her orthopedic specialist, Dr. Robert E. Miller, referred her to a duly accredited psychiatrist, Dr. Thomas H. Wright, Jr., which psychiatrist diagnosed her condition as being an extremely depressive reaction, with nervous tension and depression greatly

intensified since the date of the accident on March 16, 1961; and

(17) "That at the time the psychiatrist first examined the plaintiff in June of 1962, he found the plaintiff to have lost interest in life, being unable to concentrate and at times even not wishing to live; and

(18) "Assuming, further, that the jury finds from the evidence and by its greater weight that the plaintiff is still suffering emotional damage as the proximate result of the collision and the pain and suffering she endured, as above set out; and

(19) "Assuming, further, that from the time of the accident on March 16, 1961, despite extreme pain suffered in the neck, shoulder, back and other portions of the body, it was unsafe and impossible, safely, to take X-rays of the plaintiff, due to her pregnant condition, which in turn increased her anxiety and mental anguish; and

(20) "Assuming, further, that the jury should find from the evidence and by its greater weight that the plaintiff suffered from an extremely severe sprain of the cervical spine, thoracic spine, and the lumbar spine, and further, that the plaintiff presently is permanently partially disabled to the extent of 5% disability of said cervical spine, thoracic spine and lumbar spine; and

(21) "That the plaintiff, as a proximate result of the accident and the injuries sustained in the accident, has incurred medical expenses to date in the sum of approximately $600.00, including the cost of drugs and prescriptions, the charges to the Miller Clinic, the charges of the psychiatrist, the charges of the Presbyterian and the charges of the x-ray specialist, the charges for a special corrective girdle and for a cervical collar prescribed by the Miller Clinic; and

(22) "That the plaintiff would be likely to incur additional future medical expenses, directly attributable to her condition caused by the injuries; then

(23) "Assuming that the jury finds the above facts to be true, from the evidence and by its greater weight, then do you have an opinion satisfactory to yourself, as to whether or not the accident in which the plaintiff was involved on March 16,

1961, when the plaintiff was stopped in her husband's automobile on South Tryon Street, sitting with her foot on the brake, when the defendant *crashed* into the rear of the plaintiff's vehicle, *with tremendous force* and at a rapid rate of speed, driving the vehicle forward, and actually knocking the front of the plaintiff's vehicle into the rear of another vehicle, with the two separate impacts first knocking the plaintiff's body to the rear and then throwing the plaintiff's body to the front, *striking her abdomen, with a severe blow,* she being then and there three and a half months' pregnant, could or might have produced the severe nervous and mental shock, which injured her nervous and mental system, and further, could or might have produced the extensive and permanent psychoneurosis, nervous shock, nervous and traumatic neurosis, and further could or might have caused the plaintiff to suffer from the nightmares, worry and constant fear, the depression and being subject to crying easily and without reason and being subject to suicidal tendencies, and further, could or might have produced the 5% permanent partial disability to the cervical spine, the thoracic spine and the lumbar spine." (Italics ours).

The doctor answered that in his opinion the collision could or might have produced the conditions described.

The next question was:

Q. Dr. Miller, assuming that the jury finds the facts to be from the evidence and by its greater weight, as set out in the hypothetical question that was just put to you, do you have an opinion satisfactory to yourself as to whether or not the plaintiff has sustained any permanent injury, mentally or emotionally, or whether she presently is still partially disabled from the standpoint of her mental health?

A. Well, you have got an expert sitting back there in the Court. He can answer that question better than I can . . . Yes, I have an opinion. The question is, of course, in two parts. One is whether she has permanent partial disability from the emotional status and I think she does. The other is as to the permanent anxiety, and there is some permanency.

Under our system the jury finds the facts and draws the inferences therefrom. The use of the hypothetical question is required if it is to have the benefit of expert opinions upon factual situations of which the

experts have no personal knowledge. However, under the adversary method of trial, the hypothetical question has been so abused that criticism of it is now widespread and noted by every authority on evidence. *E.g.*, Stansbury, N. C. Evidence, s. 137 (2d Ed. 1963); McCormick on Evidence, s. 16; Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 427. Wigmore has urged that the hypothetical question be abolished: "Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus; and logic must here be sacrificed. After all, Law (in Mr. Justice Holmes' phrase) is much more than Logic. It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence." II Wigmore, Evidence, s. 686 (3d Ed. 1940). The comment contained in 2 Jones, Evidence, s. 422 (5th Ed. 1958) might well have been directed at the hypothetical question involved in this appeal.

> "The most meritorious of the criticisms are that the questions are often slanted for partisan advantage and are often so long and involved as to confuse rather than assist the jury, and, like some appellate court opinions, contain detailed recitals of factual surplusage not essential to support the conclusion reached."

To be competent, a hypothetical question may include only facts which are already in evidence or those which the jury might logically infer therefrom. *Jackson v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817; Stansbury, N. C. Evidence, s. 137 (2d Ed. 1963) and cases therein cited. After a careful examination of the record, we find no evidence to support the following facts which were assumed in the hypothetical question involved on this appeal: (Figures in parentheses refer to correspondingly numbered paragraphs of the question.)

1. That the plaintiff "was in excellent physical, emotional, and psychological health," (1). All the evidence indicates that plaintiff had "always had some nervousness." Indeed, she told Dr. Miller that she was "an extremely apprehensive type individual."

2. That as a result of the collision plaintiff "became depressed and subject to suicidal tendencies," (15). There was ample evidence that plaintiff was abnormally depressed after the accident and during her entire pregnancy. However, there is no evidence either that she developed suicidal tendencies or that she lost the desire to live, as paragraph (17) of the question assumes the phychiatrist "found." Depression and suicidal tendencies are not necessarily synonymous.

3. "That the plaintiff presently is permanently partially disabled to the extent of 5% disability of said cervical spine, thoracic spine and lumbar spine," (20), (23). The evidence of such disability related only to the neck and thoracic spine. The doctor testified to no such disability in the lumbar spine.

Defendants' objection that the hypothetical question asked Dr. Miller, an orthopedic surgeon, was based in part upon the opinion of Dr. Wright, a psychiatrist, must also be sustained. Paragraphs (16) and (17) of the question reveal its reference to Dr. Wright's diagnosis of the plaintiff's condition "as being an extremely depressive reaction, with nervous tension and depression greatly intensified since the date of the accident on March 16, 1961." The question does not assume that plaintiff was actually suffering from an extreme depressive reaction; it merely states that Dr. Wright made this diagnosis. The inclusion of such a statement violates the rule in this jurisdiction that the opinion of an expert witness may not be predicated in whole or in part upon the opinions, inferences, or conclusions of other witnesses, whether they be expert or lay, unless their testimony is put to him hypothetically as an assumed fact. *State v. David,* 222 N.C. 242, 22 S.E. 2d 633. When the hypothetical question is properly asked the jury can determine whether the assumed facts have been proven and weigh the opinion of the expert accordingly. An excellent statement of this rule appears in *Quimby v. Greenhawk,* 166 Md. 335, 340, 171 A. 59, 61:

> "Although a medical expert may base his opinion upon the facts testified to by another expert, the witness may not have submitted to him, as a part of the facts to be considered in the formation of his inference and conclusion, the opinion of such other expert on all or some of the facts to be considered by the witness from whom the answer is sought. To do so would destroy the premises of fact upon which an expert, by reason of his own peculiar technical skill and knowledge, is permitted to give in evidence his own inference and opinion."

The purpose of the first hypothetical question asked Dr. Miller was to elicit his opinion whether the collision on March 16, 1961 could have produced the five percent permanent disability which he found in plaintiff's neck and thoracic spine. The references therein to plaintiff's mental health had no bearing on the query whether the collision might have caused the injury to her neck and thoracic spine.

The purpose of the second question, which incorporated the first, was to find out whether, in his opinion, the plaintiff had sustained any permanent mental or emotional injury. As Dr. Miller himself told coun-

sel, that question might have been more properly addressed to Dr. Wright, the psychiatrist. Furthermore, when paragraph (15) of the question stated that the collision on March 16, 1961 did proximately cause some "permanent dislocation, psychoneurosis, nervous shock, nervousness, and traumatic neurosis or anxiety neurosis," it assumed the very fact which plaintiff's counsel sought to establish by the doctor's opinion.

The references in the question to plaintiff's childhood on the farm, the route and manner of driving which brought her to Tryon Street immediately before the collision, her consultations with Dr. Wright and his diagnosis of her condition, the fact that her lumbar spine could not be X-rayed because of her pregnancy, and the cost of medical bills in the past and in the future were totally irrelevant to the question of causation. An examination of paragraphs (2), (3), (4), (5), (6), (16), (17), (18), (19), (21), and (22) discloses the validity of defendants' objection to the question on grounds that it contained an assumption of irrelevant facts. Each of the other paragraphs in question contain one or more references to facts which, more succinctly phrased, might be included in a properly stated question.

The italicized words in paragraphs (3), (6), (11), (12), (14), and (23) are examples of the repetitious, slanted, and argumentative words and phrases of which the defendants properly complain. It was no part of the legitimate purpose of the hypothetical question under consideration to establish defendants' negligence; nor are six pages required to state a proper hypothetical question based on the relevant evidence in this case. A shorter question should be no more difficult to frame and it will be easier for the court to rule upon and the jury to understand.

Defendants' assignments of error based on their objections to the hypothetical questions must be sustained. Since the case goes back for a new trial, it is not necessary to consider the other assignments involving questions which may not arise thereon.

New trial.

STATE v. LEO EDSELL SHEPARD.

(Filed 4 March 1964.)

Criminal Law § 26; Forgery § 2—

A prosecution for forging and uttering a specifically described check will not support a plea of former jeopardy in a subsequent prosecution for forging

an endorsement upon the identical check and uttering the check with the forged endorsement, knowing it had been forged.

CERTIORARI to review judgment of *Parker, J.*, June, 1963 Criminal Session, NEW HANOVER Superior Court.

Criminal prosecution upon two bills of indictment returned at the May, 1963 Session, New Hanover Superior Court. Each of the indictments charged that the defendant forged the endorsement on a certain specifically described check by writing the name of the payee, "Charles V. Norris," on the back of the check. A second count in each bill charged that the defendant uttered and published as true the check with the forged endorsement.

Upon arraignment, the defendant entered a plea in abatement upon the ground of former jeopardy. In support of this plea he introduced two bills of indictment returned at the April, 1963 Session of the court, each of which charged (1) that the defendant forged a specifically described check, and (2) that he uttered the check knowing it to have been forged. Each indictment referred to a different check on the Rea Construction Company and payable to Charles V. Norris. At the trial in April all the evidence disclosed the two checks were genuine. All the evidence likewise showed that the offense consisted in forging the endorsement by writing the name of the payee, Charles V. Norris, on the back of each check. At this stage in the proceedings, the court, of its own motion, quashed the indictments.

The Solicitor for the State submitted, and the grand jury returned, new indictments, each charging that the defendant forged the endorsement by writing the name of the payee, Charles V. Norris, on the back of each check. A second count in each bill charged the uttering of the check with the forged endorsement, knowing it to have been forged. These are the bills upon which this defendant was placed on trial. They referred to the same checks described in the indictments which the court had quashed.

After hearing the defendant's evidence on the plea in abatement, the court entered the following: ". . . IT IS ORDERED that the foregoing motion (plea in abatement) be, and it is hereby denied, upon the authority in *STATE v. RENNY COLEMAN, JR.*, 253 N.C. 799."

The defendant excepted to the order overruling his pleas of former jeopardy and entered pleas of not guilty. The two charges were consolidated for trial. The jury returned a verdict, "Guilty of all four counts in the two bills of indictment." From a judgment of imprisonment, the plaintiff appealed.

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

Robert R. Bond for defendant appellant.

HIGGINS, J. The defendant has abandoned all assignments of error except those which relate to his plea of former jeopardy. He was first placed on trial on indictments each charging (1) that he forged a check issued by Rea Construction Company, payable to Charles V. Norris; and (2) that he uttered the check knowing it to have been forged. At the trial in April the evidence disclosed the checks were genuine but that the defendant had forged the name of the payee. Upon this disclosure the trial judge, of his own motion, quashed the indictments and instructed the Solicitor to send new bills charging forgery of the endorsements and uttering the checks with knowledge of that forgery.

The Solicitor sent new bills as directed. The grand jury returned them. When arraigned, the defendant entered his pleas of former jeopardy. The trial court, in quashing the original bills and in overruling the plea of former jeopardy to the new ones, followed the procedure approved by this Court in *State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742.

In *Coleman,* the first bill of indictment charged that the defendant forged a certain check "and forged endorsement." The check, but not the endorsement, was set out in the indictment. Three members of this Court were inclined to the view that since the indictment referred to a "forged endorsement," and the evidence showed the forged endorsement, the original indictment was valid and Coleman's plea of former jeopardy was good. However, the first indictments against this defendant contained neither the endorsement nor any reference thereto. Hence the basis for the dissents in *Coleman* is not present on this appeal. (See also, Ch. 94, Session Laws, 1961, now G.S. 14-20, 1963 Cumulative Supplement.)

The decision in *State v. Coleman* is controlling and disposes of the defendant's appeal adversely to his contentions.

No error.

CHARLIE BENBOW v. WESTERN UNION TELEGRAPH COMPANY, INC., AND EDWARD E. JACKSON, ORIGINAL DEFENDANTS, AND CECIL C. BROWN, ADDITIONAL DEFENDANT.

(Filed 4 March 1964.)

1. Automobiles § 17—

Where two automobiles approach an intersection at approximately the same time, the driver on the right has the right of way, notwithstanding that the

other driver may have entered the intersection a hairsbreadth before him. G.S. 20-155(a).

2. Negligence § 30; Trial § 54—

Where a passenger sues both drivers involved in a collision at an intersection he is not entitled as a matter of right to have a verdict exculpating both drivers set aside for inconsistency.

APPEAL by plaintiff from *Mintz, J.*, September 1963 Civil Term of NEW HANOVER.

About 9:15 a.m. on February 1, 1963 plaintiff was a guest passenger in a motor vehicle being operated by the defendant Brown in a southerly direction on Eighth Street in Wilmington. At the same time, the defendant Jackson was operating a Ford truck belonging to his employer, defendant Western Union Telegraph Company, in an easterly direction on Bladen Street approaching its intersection with Eighth Street. The two cars collided in the southwest quadrant of the intersection which was controlled by neither signals nor signs. The front of the Jackson truck struck the Brown vehicle about the right front wheel.

Plaintiff instituted this action on March 11, 1963 to recover damages for injuries to his back which he alleged were proximately caused by the negligence of both Jackson and Brown. On the trial Brown testified that when he was about fifteen feet from the intersection, traveling at a speed of from ten to fifteen miles an hour, he observed the Jackson vehicle approaching from his right at a distance of about thirty feet; notwithstanding, he drove out into the intersection. Jackson testified that when he was twenty feet from the intersection, traveling at about ten miles an hour, he observed the Brown vehicle approaching on Eighth Street approximately twenty-five feet from the intersection at a speed of about twenty-five miles an hour. Jackson applied his brakes but was unable to stop. A building in the northwest corner of the intersection obstructed the view of both drivers until they were within twenty feet of the intersection. Plaintiff, after having testified that Brown came to a complete stop and looked both ways before entering the intersection, stated on cross-examination that he did not know how the collision occurred or where the cars stopped after the accident. He also testified that prior to the collision on February 1st he had never had any trouble with his back, but as a result of the injuries he received therein, he was out of work for two months and still wears a brace. On cross-examination plaintiff admitted that in July 1960, he had instituted a suit against Mitchell Johnson, John Harvey Mobley and Harvey Graham Mobley alleging that as a result of their negligence he has received "a serious and permanent injury to his neck and cervical spine, as well as injuries to his lower back, hips and pelvis."

The jury answered NO to the issue, "Was the Plaintiff injured and damaged by the negligence of the Defendant Edward E. Jackson, as alleged in the Complaint?" To an identical issue with respect to the negligence of Brown, it also answered NO. From the judgment entered on the verdict that he recover nothing of either defendant, the plaintiff appealed.

Addison Hewlett, Jr., and Elbert A. Brown for plaintiff appellant.

Poisson, Marshall, Barnhill & Williams for defendants Western Union and Edward E. Jackson.

Royce S. McClelland and W. Allen Cobb for additional defendant Cecil C. Brown.

PER CURIAM. The conclusion is inescapable that the two defendants approached the intersection at approximately the same time. Jackson, being on Brown's right, had the right of way notwithstanding Brown may have entered the intersection a hairsbreadth before him. G.S. 20-155(a); *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554. Hence, the jury's verdict exonerating Jackson was clearly correct. Indeed, defendants Jackson and Western Union were entitled to their motion of nonsuit. *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544.

Plaintiff contends, however, that one of the defendants was necessarily negligent and that the verdict exculpating both was manifestly so inconsistent that the judge committed error when he declined to set it aside. Conceding Brown's negligence, in order to recover against him, plaintiff was required to satisfy the jury by the greater weight of the evidence that his negligence proximately caused the back injury of which he complained. The judge instructed the jury as to Brown's duty to yield the right of way to Jackson. The weight and credibility of plaintiff's testimony, as well as the question of proximate cause, was for the twelve. The evidence in this case was not complicated. It simply failed to convince the jury that plaintiff was injured as he alleged.

We have examined all the assignments of error and prejudice justifying a new trial does not appear.

No error.

IN RE DRAINAGE OF AHOSKIE CREEK AND ITS TRIBUTARIES, WHITE OAK SWAMP, KNEE BRANCH, TURKEY CREEK, FORT BRANCH, TURKEY BRANCH, MILL BRANCH, PEGGY BRANCH, OTHER TRIBUTARIES, AND LANDS ADJACENT THERETO.

(Filed 4 March 1964.)

Appeal and Error § 3; Drainage § 7—

There is no statutory provision for appeal by a drainage district from order of the clerk allowing specified sums to landowners for easements taken for rights of way; G.S. 156-70.1 provides for appeal only on the part of landowners.

APPEAL by Bertie, Hertford, Northampton Drainage District No. 1 (drainage district) from *Parker, J.*, September 4, 1963, Civil Session of BERTIE.

The drainage district was established February 9, 1961, by order of the Clerk of Superior Court of Bertie County. See *In re Drainage,* 257 N.C. 337, 125 S.E. 2d 908.

By notices mailed June 27, 1961, the landowners were notified as to the areas over which the drainage district had acquired rights of way. In apt time, North Carolina Pulp Company (predecessor in title of Weyerhaeuser Company) filed claims for compensation. Upon denial of their claims by the board of viewers, the claimants excepted and appealed to the said clerk. Pursuant to claimants' appeal, a hearing was conducted by the clerk on July 20, 1961. Evidence was offered as to the value of the timber and land embraced in Tract 181 (2.26 acres) and in Tract 273 (7.68 acres).

On August 24, 1961, the clerk entered an order which, after recitals, provided: "That the claimants have and recover of the Drainage District the sum of $75.00 an acre for 2.26 acres, aggregating $169.50, and that the claimants have and recover of the Drainage District the sum of $200.00 per acre for 7.68 acres, aggregating $1536.00, that the foregoing amounts are adjudged to be the fair and reasonable value of the land rights of way, and the Drainage District is required to compensate the claimants according to this judgment. Let the Drainage District pay the cost."

The drainage district filed no exceptions to the clerk's order but gave notice of appeal as follows: "Notice of appeal in open Court by the Drainage District to the Superior Court in the manner provided by law, and further notice waived."

When the matter came on for hearing in the superior court, Judge Parker, allowing claimants' motion therefor, disallowed the drainage district's purported appeal, affirmed the clerk's order of August 24, 1961,

and entered judgment in accord with the clerk's order of August 24, 1961. The drainage district excepted to the signing of said judgment and appealed.

Frank M. Wooten, Jr., and Stuart A. Curtis for appellant.
Norman, Rodman & Hutchins for appellees.

PER CURIAM. The drainage district bases its asserted right to appeal from the clerk's order of August 24, 1961, solely on the final paragraph of the statute codified (see 1963 Cumulative Supplement, also S.L. 1959, ch. 597) as G.S. 156-70.1, *viz.*: "If the board of viewers shall not approve said claim, the clerk of the superior court shall consider the claim and determine what in his opinion is a fair value and the amount so determined shall be shown in the said final report as amended and confirmed by said adjudication. If landowner does not accept the value fixed by the clerk of the superior court, appeal may be had upon the question of value, to the superior court and such appeal shall follow the procedure provided in G.S. 156-75." The appeal referred to is by a landowner who "does not accept the value fixed by the clerk of the superior court." No provision is made for an appeal by the drainage district. It is not a landowner within the meaning of the quoted statutory provision. Since the drainage district had no right of appeal from the clerk's order of August 24, 1961, we do not consider whether its purported appeal complied with the procedural requirements of G.S. 156-75.

Affirmed.

JAMES PEARCE AND WIFE, ISABELLE T. PEARCE v. O. CALLOWAY HEWITT AND RACHEL HEWITT, HIS GUARDIAN, AND RACHEL HEWITT, INDIVIDUALLY.

(Filed 4 March 1964.)

1. Registration § 5—

Purchasers by warranty deed from the grantee in a registered instrument take free of such grantee's prior executed but subsequently registered agreement tending to constitute the deed a mortgage instead of an absolute conveyance.

2. Mortgages § 1—

Evidence *held* insufficient to show that a warranty deed and an agreement giving the grantors twenty years within which to redeem the property were intended by the parties to be a mortgage.

3. Appeal and Error § 34—

The pages of the record in an appeal *in forma pauperis* must be numbered.

APPEAL by plaintiffs from *Hubbard, J.,* November Session 1963 of ONSLOW.

This action was instituted by the plaintiffs on 6 October 1959 and summons was served on defendant O. Calloway Hewitt (hereinafter referred to as O. C. Hewitt) on 7 October 1959 and on defendant Rachel Hewitt on 9 October 1959, for the purpose of having that certain warranty deed executed by Hosea W. Pearce and wife, Annie Pearce, to O. C. Hewitt, dated 27 December 1928, and recorded in the office of the Register of Deeds in Onslow County in book 156, page 132, declared a mortgage.

Thereafter, by warranty deed dated 21 April 1941, O. C. Hewitt conveyed the lands described in the above deed to his sister R. E. (Rachel) Hewitt, defendant herein, for a consideration of $250.00. O. C. Hewitt was dead at the time of the trial below leaving Rachel Hewitt as the sole defendant.

The warranty deed from O. C. Hewitt to R. E. (Rachel) Hewitt, the defendant herein, was duly recorded in the office of the Register of Deeds in Onslow County in book 192, page 464, 6 March 1943.

An undated agreement, allegedly entered into 21 November 1932 by and between Hosea W. Pearce and O. C. Hewitt, purports to give Pearce 20 years to redeem the property Pearce and wife had deeded to Hewitt, otherwise Hewitt was to make additional payments to Pearce and account to him for rents, et cetera. This agreement was not filed for record until 21 July 1955.

In the meantime, Hosea W. Pearce and wife, Annie Pearce, executed what purported to be a warranty deed, subject to the life estate of the grantors, conveying to James William Pearce and wife, Isabelle T. Pearce, the plaintiffs herein, the lands they had theretofore conveyed to O. C. Hewitt on 27 December 1928. This instrument was recorded in the office of the Register of Deeds in Onslow County on 15 July 1955, in Book of Deeds 256, at page 285.

At the close of plaintiffs' evidence the defendant moved for judgment as of nonsuit. The motion was allowed. The plaintiffs appeal, assigning error.

Earl Whitted, Jr. and Samuel Smith Mitchell attorneys for plaintiff appellants.

Venters & Dotson attorneys for defendant appellee.

PER CURIAM. A review of the evidence adduced in the trial below, including the documentary evidence, leads us to the conclusion that the

plaintiffs did not make out a valid claim to the premises involved, and now owned by the defendant Rachel Hewitt, or any interest therein, *Ricks v. Batchelor,* 225 N.C. 8, 33 S.E. 2d 68; *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899; *Waters v. Crabtree,* 105 N.C. 394, 11 S.E. 240; G.S. 47-18; neither was the evidence sufficient to establish the fact that the parties intended the warranty deed executed on 27 December 1928 to be a mortgage.

We call attention to the fact that this appeal in *forma pauperis* does not comply with Rule 19 of the Rules of Practice in the Supreme Court, 254 N.C. 783, *et seq.* This Rule requires that the pages of the record on appeal shall be numbered. This was not done, requiring us to search through the record to find the pertinent evidence, documents and orders involved. Such carelessness is inexcusable. See *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

The ruling of the court below from which the appeal was taken will be upheld.

Affirmed.

BILLY RAY PHILLIPS v. JOE PARNELL.

(Filed 4 March 1964.)

Automobiles § 43—

The vehicle of the additional defendants was parked without lights on the highway and was struck by the original defendant's vehicle, causing the additional defendants' vehicle to strike plaintiff pedestrian, *held,* the evidence of the additional defendants' concurring negligence was properly submitted to the jury on the cross action of the original defendant.

APPEAL by all defendants from *Hubbard, J.,* September, 1963 Civil Session, SAMPSON Superior Court.

The plaintiff instituted this civil action to recover for his personal injury. The plaintiff alleged, and offered evidence tending to show, that he was standing in the ditch line on Rural Paved Road No. 1005 in Sampson County at about eleven o'clock on the night of December 22, 1962. "The weather was real foggy." The defendant Parnell's vehicle collided with the defendant Elliott's vehicle parked without lights in the highway, causing the latter vehicle to strike the plaintiff, inflicting somewhat serious injuries.

The original defendant Parnell filed an answer in which he denied negligence, but alleged conditionally that if he should have been negli-

gent that the defendants Blue and Elliott were negligent in that they left their 1954 black Ford parked in his traffic lane on the highway without lights, and on account of the lights of still another automobile he was unable to see the Ford until he was so close to it that he was unable to avoid a collision; and that the negligence of Blue and Elliott concurred with his negligence, if he were negligent, inflicting injuries upon the plaintiff. On defendant's motion, Blue and Elliott were made additional parties defendant for purposes of contribution.

Both Blue and Elliott filed answers denying negligence.

The plaintiff testified as a witness, describing the accident and his injuries. He called as a witness the Highway Patrolman who described the physical evidence at the scene of the accident.

The defendant Parnell testified. However, the additional defendants did not offer evidence.

The court submitted issues which the jury answered as here indicated:

"1. Was plaintiff injured and damaged by the negligence of defendant Joe Parnell as alleged in the complaint?

Answer: Yes.

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

Answer: No.

"3. What amount, if any, is plaintiff entitled to recover?

Answer: $3,500.00.

"4. Was plaintiff injured and damaged by the joint and concurrent negligence of defendants Ottis Davis Blue and William Elliott, as alleged in the cross-action?

Answer: Yes."

From the judgment on the verdict, the additional defendants appealed. The original defendant filed a brief as appellee.

Teague, Johnson and Patterson by Robert M. Clay for defendant Joe Parnell, appellee.

Dupree, Weaver, Horton & Cockman by F. T. Dupree, Jr., Jerry S. Alvis for additional defendants, Ottis Davis Blue and William Elliott appellants.

No counsel contra.

PER CURIAM. The pleadings of all parties were direct and concise. They presented clear-cut issues of fact. The evidence consisted of the

testimony of the plaintiff, the original defendant, and the investigating officer. The controversy in this Court, however, involves only the fourth issue—the original defendant's claim for contribution against the additional defendants. The evidence was ample to sustain the jury's findings.

No error.

DAVID S. CANADY v. GARY JONES COLLINS.

(Filed 4 March 1964.)

Automobiles § 41a—

Allegations that plaintiff pedestrian, while waiting to cross a city street, was struck by defendant's car, with evidence tending to show that plaintiff pedestrian was crossing the street and had gotten two feet beyond the center line of the street when he was struck, *held* to warrant nonsuit for variance.

APPEAL by plaintiff from *Mintz, J.*, November 1963 Session of NEW HANOVER.

Isaac C. Wright and Aaron Goldberg for plaintiff.
Poisson, Marshall, Barnhill & Williams for defendant.

PER CURIAM. This is an action to recover damages for personal injuries suffered by plaintiff on 11 May 1962. Plaintiff assigns as error the granting of defendant's motion for nonsuit at the close of plaintiff's evidence.

The complaint alleges that plaintiff "prepared to cross" a street in the City of Wilmington, he observed defendant's automobile approaching from his left and "was afraid to proceed across the street, he came to a complete stop," and while "waiting to cross" was struck and injured by defendant's car. Plaintiff's evidence tends to show that he was crossing the street in the middle of a block to get to his automobile which was parked on the south side of the street, and when he had gotten two feet beyond the center line of the street he turned to see if his wife was following, and while in this position he was struck by defendant's automobile which was proceeding westwardly.

There is a material variance between allegation and proof. *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924; *Bundy v. Belue*, 253 N.C. 31, 116 S.E. 2d 200. Therefore the judgment of involuntary nonsuit is

Affirmed.

JOHNNIE CARL FALLS, BY AND THROUGH HIS NEXT FRIEND, PAUL S. FALLS v. JACK ODELL WILLIAMS AND ROOSEVELT TIRE SERVICE, INC.

(Filed 4 March 1964.)

APPEAL by plaintiff from *Riddle, S. J.*, September 1963 Session of GASTON.

Johnnie Falls, a seven year old child, was injured 25 May 1961, when he and an automobile, owned by individual defendant, collided in the intersection of Vista Drive and Wayside Place in Gastonia. Williams is employed by corporate defendant. He was at the time of the collision about his employer's business. Vista Drive runs north and south. It is intersected on the west by Wayside Place. Each street is approximately 20 feet wide.

Just prior to the collision, plaintiff was a passenger on a city bus. It was going north. It stopped adjacent to the east curb of Vista Drive and just north of the intersection of that street with Wayside Place. When the bus stopped, infant plaintiff alighted from the rear. He started across the street from the east to the west side of Vista Drive. He was struck and injured in the intersection by defendant's car going south.

Plaintiff seeks compensation for his injuries caused, as he alleges, by Williams' failure to keep his vehicle under control, failure to keep a lookout for pedestrians whose presence he should have anticipated, failure to yield the right of way as required by G.S. 20-173 (a), and excessive speed under the existing conditions.

Defendants denied the collision was the result of any negligent act on the part of Williams but was an unfortunate and unavoidable accident caused by the child running from the rear of the bus directly into the path of defendant's car. As an additional defense, they pleaded contributory negligence.

Defendants' motion for nonsuit, at conclusion of plaintiff's evidence was allowed.

Henry M. Whitesides for plaintiff appellant.

Mullen, Holland & Cooke by James Mullen for defendant appellee Jack Odell Williams.

Hollowell & Stott by Grady B. Stott for defendant appellee Roosevelt Tire Service, Inc.

PER CURIAM. A careful examination of the evidence convinces us the case should have been submitted to the jury on appropriate issues. How the conflicts in the testimony should be resolved is a matter for the jury—not the court. A detailed discussion of the evidence presently be-

fore us is not appropriate. *Sprueill v. Hamlet,* 260, N.C. 546, 133 S.E. 2d 173.

New trial.

CLEVELAND REALTY COMPANY, MARGARET LOVE BURGESS, RALPH W. GARDNER, MONTROSE MULL MEACHAM, MONTROSE PALLEN MEACHEM, BY HER NEXT FRIEND, EARL H. MEACHEM, OTIS MULL MEACHEM, BY HIS NEXT FRIEND, EARL H. MEACHEM, MRS. O. MAX GARDNER, N. E. BURGESS, MRS. O M. MULL, MRS. D. FORREST MOORE, DR. D. F. MOORE, MRS. J. D. LINEBERGER, MRS. E. J. McKEITHAN, SUZANNE GARDNER HAYES, JIM GARDNER, MRS. DRAPER WOOD, M. A. SPANGLER, SR., SUE SPANGLER, SUE ROSTAN, ATHOS ROSTAN, MRS. R. W. STONE, R. W. STONE, SHERRILL W. LINEBERGER, EARL H. MEACHAM, DR. H. C. THOMPSON, DR. D. T. BRIDGES, MRS. R. F. BRACKETT, DR. J. D. JOHNSON, ALMA McBRAYER WEBB, MRS. JAP SUTTLE, MRS. PENRY OWEN, PENRY OWEN, PEARL WEATHERS SMITH, MRS. I. D. STONE, MRS. RUSH STROUPE, MRS. J. L. YELTON AND R. T. LEGRAND, JR. v. HELEN S. HOBBS, L. LYNDON HOBBS, AND CLEVELAND COUNTRY CLUB AND ITS BOARD OF DIRECTORS, RAY WEBB LUTZ, DR. WARREN J. COLLINS, MRS. CHARLES PADGETT, JEAN W. SCHENCK, A. W. ARCHER, B. P. SHERER, BEN HENDRICKS, CHARLES R. DUVAL, EARL W. SPANGLER, DR. EDWIN PLASTER, EARL A. HAMRICK AND MRS. JACK VINCENT.

(Filed 18 March 1964.)

1. Deeds §§ 12, 19—

Restrictive covenants inserted in a warranty deed between the description and the *habendum* are not invalid as repugnant to the unqualified fee conveyed by the instrument, since such restrictions do not delimit the fee and are not repugnant to the conveyance of the fee simple.

2. Deeds § 19—

The servitude imposed by restrictive covenants in a deed is a species of incorporeal right which runs with the land and is binding upon mesne purchasers from the grantor, even though the restrictions are not inserted in subsequent deeds.

3. Same—

The grantee of lands in a deed restricting its use to a golf course may not convey an easement for a street across the golf course to the owners of land in an adjacent subdivision, since such use is inconsistent with the use contemplated by the restrictive covenants.

4. Dedication § 1—

The sale of lots in a subdivision by deed referring to a recorded plat showing lots, streets, and a golf course, and containing restrictions that the developers were dedicating the golf links and the playground for the use and

pleasure of the owners of the lots, *is held* a valid dedication of the golf course to the purchasers of lots in the subdivision, irrespective of acceptance by the public, but the dedication is to owners of lots and lands within the development and does not constitute a dedication to the owners of lots in the neighborhood or in an adjacent subdivision.

5. Appeal and Error § 1—

The owner of a subdivision dedicated a part thereof for use as a golf course and thereafter conveyed the golf course to a country club with restrictive covenants to the same effect. The country club thereafter conveyed an easement across the golf course for a street. *Held:* The conveyance of the easement for the street is void, either because repugnant to the purpose of the dedication or because in violation of the restrictive covenant, and the question whether the developer, after effecting the dedication, had any right to impose further restrictions by deed, need not be determined on this appeal.

APPEAL by plaintiffs from *Froneberger, J.*, September-October 1963 Civil Session of CLEVELAND.

Action to permanently enjoin the construction of a roadway over and across a golf course and recreational area.

Prior to 25 May 1926 Cleveland Realty Company acquired in fee, without any restrictions as to use, a tract of land situate about two miles east of Shelby, known as the Cleveland Springs Estate. The Realty Company developed a part of the property for residential and recreational purposes and located thereon a nine-hole golf course. On 25 May 1926 it caused to be recorded a plat of the development showing lots, streets and the golf course. There is included on the plat certain provisions and restrictions, the pertinent portions of which are as follows:

> Developers "do hereby dedicate the streets and alleys as indicated on the plat to the public use forever . . .
>
> "We further dedicate the golf links and playgrounds, and the land occupied by the same indicated on the map, for such use and pleasure of the owners of the lots . . .
>
> "We restrict the use of all lots shown on this plat . . . in the following manner, to wit:
>
> "1. The lots shown on this plat are to be used as the location of residences, with only one residence to the lot . . ."
>
> . . . . .
>
> "3. All title, rights and property not specifically conveyed are hereby reserved to (developers) . . .
>
> "4. Further restrictions may be prescribed in several conveyances by (developers) which together with the foregoing shall perpetually attach to and run with the land."

Thereafter, Realty Company sold lots for residential purposes. On 25 June 1955 it conveyed to Cleveland Country Club, Inc., the nine-hole golf course in fee simple by deed of bargain and sale with the usual warranties. Following the description in the deed and preceding the *habendum* clause, there is inserted the following (irrelevancies omitted);

> ". . . (A)s conditions precedent and running with the land herein conveyed and perpetually attached thereto, this conveyance is hereby restricted as follows:
>
> "1. That the land herein conveyed is to be used as the site of a nine-hole golf course and tennis courts as now used and located.
>
> . . . . .
>
> "3. That said land shall be used for no other purpose than as the site of a golf course and tennis courts and other recreational purposes, but . . . any portion not occupied by same may be used for parks and playgrounds for the use and enjoyment of the members of said golf course and tennis courts, including their families and guests.
>
> "4. That in the event of the violation of any of the restrictions or reservations herein set forth, the grantor, its successors and assigns, shall have the right to have the same abated.
>
> "5. That all of said conditions, easements and reservations shall perpetually attach to and run with the land conveyed."

The granting and *habendum* clauses of this deed are regular in form and do not contain the restrictions, but the deed recites consideration as follows: ". . . in consideration of One Hundred ($100.00) Dollars and the stipulations hereinafter contained and other valuable consideration . . ."

The defendants Hobbs own approximately forty acres of land, not a part of Cleveland Springs Estate, to the north of and adjoining the golf course. This tract has access to Highway 150 without crossing the golf course or any part of Cleveland Springs Estate. Hobbs planned a development of a portion of their tract into residential area of seven lots or less, to have ingress and egress by a road not more than 22 feet wide over and across the golf course between number 7 green and number 8 tee, this road to connect with Fairway Drive in the Cleveland Springs Estate Development just south of the golf course. On 17 June 1963 Cleveland Country Club, Inc., by authority of its board of directors granted to defendants Hobbs an easement of right of way for said road across the golf course. About 13 July 1963 Hobbs began construction of the road.

Plaintiffs, Cleveland Realty Company, certain owners of lots in Cleveland Springs Estate Development, and certain stockholders and members of Cleveland Country Club, Inc., instituted this action against defendants, Mr. and Mrs. Hobbs, Cleveland Country Club, Inc., and the directors of the Country Club, to permanently enjoin the construction and maintenance of the road. A temporary restraining order was issued 23 July 1963.

Defendants demurred to plaintiffs' complaint on the grounds that there was a misjoinder of parties and causes, certain parties plaintiff and defendant have no justiciable interest in the controversy, and the purported restrictions in the deed to the Country Club are void as a matter of law.

Defendants waived hearing on the demurrer. Plaintiffs and defendants stipulated the facts, set out in substance above, and agreed that the judge might hear the matter and enter judgment without the intervention of a jury. It was further stipulated that the questions "to be determined by the court are as follows:

> "1. Was the dedication of the nine-hole golf course effected by virtue of the dedicatory words appearing on the original plat of Cleveland Springs Estates property . . . ?
>
> "2. If the Court determines that a valid dedication was effected by virtue of the original plat . . . could Cleveland Realty Company later impose valid restrictions as to the dedicated property?
>
> "3. Were the restrictions which appeared in the deed from Cleveland Realty Company to the Cleveland Country Club, Inc., which were included in the said deed following the description of the golf course property, valid?
>
> "4. Is the conveyance and agreement entered into on June 17, 1963, between L. Lyndon Hobbs and wife, Helen S. Hobbs, and the Cleveland Country Club, Inc., . . . valid?
>
> "5. Are the plaintiffs entitled to a permanent injunction restraining the defendants from using their right of way across the said nine-hole golf course as ingress and egress for the said residential property?"

The judge made findings of fact according to the stipulations of fact, and conclusions of law (pertinent excerpts therefrom will be set forth in the opinion proper), and entered judgment dissolving the temporary restraining order and decreeing that defendants Hobbs "have the right to the full use and enjoyment of said easement . . . free from the interference of the plaintiffs or any of them . . ."

Horn, West & Horn for plaintiff appellants.

Horace Kennedy, John J. Mahoney, Jr., and L. Lyndon Hobbs for defendant appellees.

MOORE, J. The trial judge concluded as a matter of law "that since the . . . restrictions which are contained in the deed from Cleveland Realty Company to Cleveland Country Club, Inc., did not appear in either the granting clause or in the *habendum* clause, but were merely contained therein after the description of the property being conveyed, . . . such restrictions were of no effect and were invalid, and as such, amounted to mere surplusage." Appellants contend that this is error, and we agree.

The judge probably had in mind the following well established rule of law: "When the granting clause in a deed to real property conveys an unqualified fee and the *habendum* contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto and not by reference made a part thereof, inserted in the instrument as a part of, or following the description of the property conveyed, or elsewhere other than in the granting or *habendum* clause, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect." *Jeffries v. Parker,* 236 N.C. 756, 757-8, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706. But this rule of law does not apply to the restrictions in the deed to the Country Club. These restrictions are not repugnant to and do not delimit the fee; they affect the use to which the property may be put, but do not tend to debase the fee simple quality of the estate or to make the estate subject to a lesser estate. Furthermore, the restrictions are by reference made a part of the consideration for the conveyance, in these words: ". . . in consideration of One Hundred ($100.00) Dollars and the stipulations hereinafter contained . . ."

The holding in *Barrier v. Randolph,* 260 N.C. 741, 133 S.E. 2d 655, is decisive of this question. In the deed in that case the granting, *habendum* and warranty clauses are sufficient to convey a fee simple, and after the description but before the *habendum* clause it is stated: "And this deed is made subject to the following conditions, reservations and restrictions which constitute covenants running with the land and binding upon the parties hereto, their heirs and assigns, to wit" (here the restrictions are set out in numbered paragraphs, and among other things restricting the property to residential use and specifying lot sizes and location, cost and composition of residences to be constructed thereon). *Bobbitt, J.,* speaking for a unanimous Court, rejected the contention that the restrictions are repugnant to the fee simple quality of the estate, and said:

"'In the interpretation of a deed, the intention of the grantor or grantors must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable or a provision which is contrary to public policy or runs counter to some rule of law.' *Lackey v. Board of Education,* 258 N.C. 460, 462, 128 S.E. 2d 806, and cases cited; *Rouse v. Strickland,* 260 N.C. 491, 495, 133 S.E. 2d 151.

"The sufficiency of the . . . deed as a conveyance in fee simple . . . is not controverted. There is no contention it conveyed a life estate or other estate less than a fee simple.

"In express terms, the . . . deed provides that it is made subject to the conditions, reservations and restrictions therein set forth and that such conditions, reservations and restrictions constitute covenants. . . . The intention of the grantors that such conveyance is made subject to such conditions, reservations and restrictions is manifest. Moreover, '(i)t is a settled principle of law that a grantee who accepts a deed poll containing covenants or conditions to be performed by him *as the consideration of the grant,* becomes bound for their performance, although he does not execute the deed as a party.' *Maynard v. Moore,* 76 N.C. 158, 165; *Herring v. Lumber Co.,* 163 N.C. 481, 485, 79 S.E. 765; *Williams v. Joines,* 228 N.C. 141 143, 44 S.E. 2d 738." (Emphasis added).

". . . (T)he conditions, reservations and restrictions set forth in the . . . deed are not void *ab initio* on the ground that they are repugnant to the granting, habendum and warranty clauses of said deed."

In the instant case, if the Realty Company had the legal right to make the conveyance to the Country Club and to impose the restrictions which are set out in the deed, it has the right to enforce the restrictions as against the Country Club and its assignees and successors in title. The servitude imposed by restrictive covenants in a deed is a species of incorporeal right which runs with the land and is binding upon mesne purchasers from the grantor, even though the restrictions are not inserted in subsequent deeds. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344.

A collection of leading American cases dealing with the question of whether the maintenance, use, or grant of a right of way over restricted property is a violation of a restrictive covenant limiting the use of such property is found in 25 A.L.R. 2d at page 904. A survey of those cases has led the editor to conclude:

"Generally speaking, the cases disclose that the courts are inclined to hold that the maintenance, use, or grant of a right of way

> across property restricted in its use is a violation of the restriction if such maintenance, use, or grant seems to be inconsistent with the parties' intention in creating or agreeing to the restriction and with the object sought to be thereby accomplished, while if it does not interfere with the carrying out of the parties' intention and the purpose of the restriction, it will not be held to be a violation."

To the same effect is the text in 14 Am. Jur., Covenants, Conditions and Restrictions, s. 255, p. 635.

Applying these principles, this Court held in *Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E. 2d 134, that a purchaser of a lot in a subdivision restricted to residential purposes could not construct a roadway across the lot for access to a business or commercial establishment, a commercial cemetery. The Court said: "Since it took the . . . tract with notice of restrictive stipulations, the defendant cannot equitably refuse to perform them. . . . As an original party to the restrictive covenants, the plaintiff (developer of the subdivision) is entitled to restrain the threatened breach." Further: "Such use would violate the restrictions in question for it would be tantamount to dedicating the . . . tract to a prohibited business or commercial purpose. Our conclusion harmonizes with the decisions of the courts of other jurisdictions which have been confronted by the same problem."

The roadway which the Hobbs propose to construct and maintain would be inconsistent with and violative of the restrictions which the Realty Company undertook to impose. The golf course was restricted to recreational uses. It was not the intention of the Realty Company that it should be even a limited thoroughfare for public travel and have a roadway or roadways thereon incidental to the development of residential subdivisions by independent developers of lands outside the Cleveland Springs Estate, and thereby become a consideration and inducement to prospective purchasers in independent subdivisions. It was undoubtedly contemplated that the golf course would be a relatively private and secluded area where those entitled thereto, children and adults, might enjoy recreational activities without the dangers, interruptions and molestation of vehicular traffic.

The court below concluded "that the Cleveland Realty Company . . . did effect a valid dedication of the part of their property being used as a nine-hole golf course, to the owners of the lots in the neighborhood.

The evidence of the dedication is the inscription on the plat of the Cleveland Springs Estates, to wit: "We further dedicate the golf links and playgrounds, and the land occupied by same as indicated on the plat, for such use and pleasure of the owners of the lots, and the owners of other reserves shown on the plat and to the owners of the lots and the reserves

and land in any subsequent Cleveland Springs Estates subdivision which may consist of lands now owned by Cleveland Springs Company or any subsequently acquired lands in Cleveland County, N. C." The Cleveland Realty Company acquired title to the Cleveland Springs Estate and the lands of Cleveland Springs Company, and recorded the plat and sold lots in the Cleveland Springs Estate Development with reference to the plat. The evidence does not support the conclusion that the golf course was dedicated "to the owners of the lots in the neighborhood." The purported dedication is to the owners of lots and lands of the Cleveland Springs Estate development or developments.

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102; *Conrad v. Land Company,* 126 N.C. 776, 36 S.E. 282. It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. *Jackson v. Gastonia,* 246 N.C. 404, 98 S.E. 2d 444. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Todd v. White,* 246 N.C. 59, 97 S.E. 2d 439. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. *Hughes v. Clark,* 134 N.C. 457, 47 S.E. 462; *Conrad v. Land Co., supra.* Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13; *Conrad v. Land Co., supra.*

In the *Conrad* case defendant owned a tract of land in the suburbs of Winston, laid it off into lots, with streets and a public square or court, and recorded a map of the layout. Plaintiffs bought lots in the subdivision by deed referring to the map. Defendant thereafter attempted to sell off parts of the square or court and planned to narrow and close a part of the streets around the square. Plaintiffs instituted an action for a permanent injunction. The trial court decreed that defendant be permanently enjoined, and this Court affirmed, saying: "We think . . . those pieces of land which were marked on such a plat as squares, or courts or parks, and the streets and public grounds designated on such a map should forever be open to the purchasers . . ." (Citing authorities). Further:

"It is immaterial whether the public authorities of the city or county had formally accepted the dedication of the court. The plaintiffs have been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should be forever open to the purchasers and their assigns."

If, as the court below declared and appellees contend, the golf course was irrevocably dedicated, the principles declared in the *Conrad* case apply here. The map of Cleveland Springs Estate shows no roadway between the seventh green and the eighth tee, and no roadways extending across the golf course to property outside the subdivision. To permit a roadway, open to public use, to be constructed, maintained and used over and across land dedicated for the purpose of a golf course would amount to a dedication of the land to a purpose in conflict with that for which it was originally dedicated. If it is permissible in this instance, we see no reason why a roadway, open to the public, could not be maintained between each green and tee and outside each fairway. What was said above with reference to the violation of the restrictions is equally applicable on the question of conflict with the purposes of the dedication.

The court below concluded that Cleveland Realty Company dedicated the golf course "and thereby divested itself of any right, title or interest as would later permit it to impose restrictive covenants with respect to the golf links, or to support the same in equity; . . . that there was an expressed dedication on the plat . . . and such dedication was and is irrevocable, and the said Cleveland Realty Company . . . did not have the right to further restrict or in any way alienate the property occupied by the golf links subsequent to such dedication in 1926."

When considered in the light of our holdings above, these conclusions are immaterial and do not support the judgment or the contentions of appellees. We express no opinion as to whether the conclusions are legally correct or erroneous. Conceivably controversies may arise between lot owners, the Realty Company and the Country Club which may require a determination of some or all of the matters involved in the conclusions set out in the preceding paragraph. But no such determination is required here.

It is stipulated that prior to the recordation of the map in 1926 the Realty Company owned the Cleveland Springs Estate land, including the golf course land, in fee and unrestricted. If there was no valid dedication of the golf course, the Realty Company had the right to convey the land on which the golf course is located to the Country Club and to place the restrictions thereon. As stated above, Hobbs' claim of easement for a road over and across the golf course is repugnant to and violates the restrictions.

If the dedication of the golf course is valid, and if such dedication divested the Realty Company of the right to "in any way *alienate* the property occupied by the golf links," defendants Hobbs acquired nothing by the purported grant of easement from the Country Club. Obviously, if the Realty Company could not alienate the property, the Country Club acquired nothing by virtue of its deed from the Realty Company and had nothing it could convey to Hobbs.

The court's conclusions appear to be ambiguous and conflicting. At one point they seem to indicate that the Realty Company had the right to convey the golf course property to the Country Club, but by reason of the valid and irrevocable dedication could not impose further restrictions. If this is true the Hobbs claim of easement is, as we have already stated, repugnant to and in violation of the purpose of the dedication, and the owners of the lots and lands in the Cleveland Springs Estate Development have the right to restrain the construction and maintenance of the road over and upon the golf course.

The judgment below is

Reversed.

NANNIE W. McDANIEL, BETTY W. MOORE, KYLE W. SHIPLEY, RUTH W. SHIRLEY, HILDA W. RODER AND HUSBAND RAY RODER, BRUCE W. MOORE AND HUSBAND T. C. MOORE, PEARL W. BREEDLOVE AND HUSBAND L. L. BREEDLOVE, GRACE W. COX AND HUSBAND ADOLPH COX, SYBIL W. BANKS AND HUSBAND P. N. BANKS v. R. L. FORDHAM AND WIFE CLARINE W. FORDHAM, HELEN W. MOORE AND HUSBAND MATTHEW MOORE.

(Filed 18 March 1964.)

1. Trusts § 13—

A parol trust may be impressed upon the legal title when the grantee takes title under an express agreement to hold the property for the benefit of a person other than the grantor, provided such agreement is made contemporaneously with or prior to the execution of the conveyance.

2. Same—

An express trust cannot be engrafted by parol upon an inheritance.

3. Same—

Where a deed is executed under a contemporaneous parol agreement that grantors should remain in possession and that the grantees would pay off the existing mortgage indebtedness, and, after the grantors had repaid them, would hold the land in trust until the death of the survivors of the grantors

and then convey the property to the grantors' children, the parol trust is not on the prospective inheritance of the grantors' children, since the beneficial interest is in the grantors' children at all times after the execution of the deed.

4. Same—

An action to establish a parol trust and to compel an accounting of the rents and profits by the alleged trustees is not demurrable for misjoinder of parties and causes of action, notwithstanding the asserted trust is in favor of the daughters of a decedent and is instituted by some of the daughters, with the joinder of their respective husbands, against two other daughters and their respective husbands, one of which was the alleged trustee and the other the grantee of a portion of the land in satisfaction of her interest in the trust estate.

APPEAL by plaintiffs from *Stevens, J.*, September Session 1963 of JONES.

This is a civil action instituted by the plaintiffs against the defendants, seeking to establish a parol trust in favor of the feme plaintiffs and the feme defendants.

The feme plaintiffs are nine of the eleven daughters of S. H. Wilcox and his wife, Irene Wilcox. The feme defendants are the remaining two daughters of the couple. The husbands of those who are married have been joined with their wives as plaintiffs or defendants, as the case may be.

The plaintiffs' complaint alleges the following facts:

In 1940, S. H. Wilcox was the owner of a 194.54 acre tract of land in Jones and Lenoir Counties, and a 28.30 acre tract of land in Lenoir County. Prior to 16 December 1940 the parents agreed to convey the lands to their daughter Clarine W. Fordham and her husband, R. L. Fordham, two of the defendants herein, pursuant to an agreement and promise that the Fordhams would pay the existing indebtedness against the land to the Federal Land Bank of Columbia, South Carolina, and allow the grantors to remain in possession of the lands conveyed and repay the Fordhams, the Fordhams to hold the land in trust until the death of the survivor of the grantors, and then convey the property to the eleven daughters of the grantors.

Pursuant to this agreement the lands were conveyed to the Fordhams by warranty deed on 16 December 1940 and duly recorded. Subsequent to this time, S. H. Wilcox fully repaid the Fordhams for their discharge of the indebtedness against the lands. On 28 September 1946, the Fordhams conveyed 58 acres of the land to the defendants Matthew Moore and wife, Helen W. Moore. It is alleged on information and belief that S. H. Wilcox received the consideration for this conveyance, a part of

said consideration being that Helen W. Moore would relinquish her interest in the trust estate. Until 1951, S. H. Wilcox listed the property for taxation and obtained from the Jones County A.S.C. Committee acreage allotments for crops in his own name.

Irene Wilcox died in 1951. On 25 June 1951, R. L. Fordham filed an affidavit in the office of the Clerk of the Superior Court of Jones County, stating that S. H. Wilcox was incompetent to manage his affairs, and procured the appointment as guardian for S. H. Wilcox. Beginning in 1951 the property was listed for taxation in the name of R. L. Fordham and acreage allotments were transferred to him. S. H. Wilcox died in 1956.

On information and belief it is alleged that R. L. Fordham never filed an account with the Clerk of the Superior Court of Jones County until a purported final accounting was filed on 19 February 1963. In February 1963 the plaintiffs demanded that Fordham convey the property to the daughters of S. H. and Irene Wilcox. The Fordhams refused to convey the land but offered the plaintiffs $700.00 each for their interest.

It is also alleged on information and belief that the Fordhams hold the land in trust for all the daughters of S. H. and Irene Wilcox except Helen W. Moore; that the Fordhams are in wrongful possession of the land; that plaintiffs are entitled to have a receiver appointed *pendente lite;* that the plaintiffs are entitled to the rents and profits for each year subsequent to 1951; and that the annual rental value of the land is $3,000.

Plaintiffs seek a declaration that the Fordhams hold the remaining land in trust for the benefit of all the daughters of S. H. and Irene Wilcox except Helen W. Moore, for the appointment of a receiver and an accounting for the years subsequent to 1951.

Defendants demurred on the grounds that there was a misjoinder of parties and causes and that the complaint fails to state any cause of action.

The trial court sustained the demurrer "for the reasons stated therein, and particularly in that it appears to the court and the court finds that there is a misjoinder of both parties and causes, and that the complaint attempts to allege and impress a parol trust on a perspective (*sic,* prospective) inheritance."

The plaintiffs appeal from the judgment dismissing the action, assigning error.

Brock & Hood, Darris W. Koonce for appellants.

George R. Hughes, Wallace & Wallace, Whitaker & Jeffress for appellees.

DENNY, C.J. This appeal presents two questions for consideration and determination. (1) Do the plaintiffs in their complaint attempt to en-

graft a parol trust on a prospective inheritance? (2) Is there a misjoinder of parties and causes of action?

In this jurisdiction an express trust may be impressed on land by a parol agreement accompanying the conveyance of the legal title. *Taylor v. Addington,* 222 N.C. 393, 23 S.E. 2d 318; *Peele v. LeRoy,* 222 N.C. 123, 22 S.E. 2d 244; *Wilson v. Jones,* 176 N.C. 205, 97 S.E. 18; *Anderson v. Harrington,* 163 N.C. 140, 79 S.E. 426; *Blackburn v. Blackburn,* 109 N.C. 488, 13 S.E. 937; *Riggs v. Swann,* 59 N.C. 118.

It is equally well settled that an express trust cannot be engrafted by parol upon an inheritance which is a gift of the law and not a grant of the decedent.

In *Taylor v. Addington, supra,* it is said: "The transaction out of which an express parol trust of this nature may arise is necessarily one of contract. In considering the effect of the parol promise or agreement, we must not forget that the principal role in the creation of an express trust is taken by the owner with that intent; the parol promise is complementary and incidental to such action as is taken by the owner and in furtherance thereof. It is effectual only when made in connection with the transfer of title and, by necessary inference, to the party who makes the transfer. *Dover v. Rhea,* 108 N.C. 88, 13 S.E. 164. It pre-supposes that such party has control of the subject matter of the trust which he desires to create, and contributes it by conveyance of the land with that intent (Tiffany, Real Property, 1939, section 250), the grantee, at the same time, accepting the title as affected by his agreement. *Peele v. LeRoy, supra.* Devolution of title in a case of intestacy is no more the voluntary act of the decedent owner than is his own dissolution. It is a thing that will happen if let alone; the resulting inheritance is a gift of the law and not the grant of the decedent. The inheritance law is certainly innocent of any purpose to create a trust in determining the succession, and it imposes no condition of acceptance other than inheritability. There is nothing, in the legal sense, upon which a parol trust may be engrafted."

The seventh section of the English Statute of Frauds, which forbids the creation of a parol trust in land, has never been enacted in this jurisdiction. Therefore, a parol trust may be enforced when the grantee takes title to property under an express agreement to hold the property for the benefit of another, other than the grantor. *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418, and cited cases.

The facts in *Hughes v. Pritchard,* 122 N.C. 59, 29 S.E. 93, are very similar to those in the present case. There, the elderly grantor, who was in debt, conveyed by absolute deed to his nephew a tract of land, with the agreement that his nephew would hold the land in trust; that out of the rents and profits of said land the grantee should first pay off and satisfy

the grantor's debts, and then convey two-thirds of the property to the plaintiffs, the daughter and granddaughter of the grantor, and the remaining one-third to the children of the grantee as compensation for his services. Although the question of a demurrer was not raised, the following statement of this Court is pertinent to the instant case: "* * * The evidence (tending to show that there was a parol agreement) was objected to by the defendant upon the ground that it contradicted the deed. The objection cannot be sustained. It does not contradict the deed in any respect. The conveyance to the defendant in fee stands. It is necessary that he should have this to perform the trust. It is not an instance of declaring an absolute deed to be a mortgage, where it is necessary to show the ignorance of the draftsman or the mutual mistake of the parties. The title passed to the defendant, and, as there was a transmission of title, the plaintiffs have the right to show by parol evidence that the defendant took the title conveyed to him, subject to the parol trust declared by the grantor."

In the instant case, the daughters of the grantors were in no event entitled to a conveyance of the property in question until the deaths of S. H. Wilcox and his wife; while in the *Hughes* case, the plaintiffs were entitled to a conveyance of the property when the grantor's debts were paid. But the fact that the plaintiffs here were not entitled to receive the legal title to the property until the deaths of the grantors, does not make this a parol trust on a prospective inheritance. If the allegations of the complaint can be supported by competent evidence, the beneficial interest was in the plaintiffs at all times after the grantors' deed was executed on 16 December 1940. In the *Hughes* case, it was necessary that the nephew have the legal title in order to perform the trust; in the present case, it was necessary for the defendants Fordham to retain the legal title until the deaths of S. H. Wilcox and wife, in order to insure the fulfillment of one of the provisions of the alleged trust, to wit, that S. H. Wilcox and wife were to remain in possession of the land so long as they or the survivor of them lived.

On the question of misjoinder of parties and causes, the case of *Bellman v. Bissette*, 222 N.C. 72, 21 S.E. 2d 896, is very similar. E. W. Pridgen and wife conveyed three tracts of land to defendants Bissette, and contemporaneously therewith executed in writing a trust agreement whereby defendants Bissette agreed to hold in trust the lands conveyed, to cultivate the lands, pay off encumbrances, contribute to the support of the grantors during their lives, and upon their deaths to convey the property to the children of the grantors, share and share alike. Out of the money derived from the use of the lands, defendants Bissette were to retain certain compensation, pay funeral expenses of the grantors, and to divide the remainder in the manner directed.

The complaint alleged that defendants Bissette failed to comply with the terms of the agreement, committed waste, traded with themselves, failed to account for rents and profits, and, in further violation of the trust, conveyed one tract of the trust estate to the defendants Barbee, who, it is alleged, took with notice of the terms of the trust and who also committed waste, sold timber and failed to account for rents and profits and for money received from a loan on the land extended by defendant insurance company.

It was further alleged in the complaint that the equitable title to the lands was in the children of the grantors. A demurrer was interposed by defendants Barbee on the ground of misjoinder of parties and causes of action. The demurrer was overruled and defendants Barbee appealed to this Court. Devin, J., later C.J., said: "Manifestly this is an equitable proceeding among members of the same family to close a trust in which both plaintiffs and defendants are interested, and to require the reconveyance of lands, the legal title to which is held by the defendants Bissette and Barbee as trustees for the benefit of all the children of E. W. Pridgen and wife, including the defendants Mrs. Minnie Bissette and Mrs. Nettie P. Barbee. The rights of the parties are controlled by the trust agreement under which the lands were conveyed by E. W. Pridgen and wife, and the transactions set out in the complaint affect all of the parties and beneficiaries of that trust, both plaintiffs and defendants. Mrs. Barbee is a beneficiary of the trust and hence interested, as one of the children of E. W. Pridgen and wife, in having a conveyance of the land made to her, as well as to the other children, by defendants Bissette. And equally Mrs. Bissette, as well as all the other children of E. W. Pridgen and wife, is interested in securing a conveyance and accounting by defendant Barbee.

"It would seem necessary for the proper enforcement of the rights of the plaintiffs, as well as of the defendants, that all those who hold the lands in trust for them, under the same trust agreement, be joined as parties, in order that the whole matter may be concluded in one suit. The causes of action set out in the complaint arise out of the same transaction or transactions connected with the same subject of action, and affect all the parties to the action. C.S. 507. The basis of the plaintiffs' action, as set out in the complaint, is the trust agreement which affects the rights of all, and out of which the rights of all arise. *Cole v. Shelton,* 194 N.C. 741, 140 S.E. 734.

"The principle is stated in *Young v. Young,* 81 N.C. 92 (headnote), as follows: 'Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in

order to (have) a conclusion of the whole matter in one suit.' Upon similar facts in *Leach v. Page,* 211 N.C. 622, 191 S.E. 349, it was decided that a demurrer on the ground of misjoinder of parties and causes of action was properly overruled." This Court held that the demurrer upon the ground of misjoinder of parties and causes of action was properly overruled.

Likewise, in *Bundy v. Marsh,* 205 N.C. 768, 172 S.E. 353, the receiver of an estate was allowed to sue the executrix (individually and as executrix), the heir, and the heir's corporation for the wrongful diversion of estate funds. In discussing the demurrer for misjoinder of parties and causes, Brogden, J., speaking for the Court, said: "The governing principle is quoted in *Chemical Co. v. Floyd,* 158 N.C. 455, 74 S.E. 465, as follows: 'If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end — if one connected story can be told of the whole, the objection cannot apply. And it has been held not to apply, when there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct. Nor will it apply when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights; and in such a case they may all be charged in the same bill, and a demurrer for that cause will not be sustained'." *S. v. McCanless,* 193 N.C. 200, 136 S.E. 371. *Cf. Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145.

In McIntosh, North Carolina Practice and Procedure, Second Edition, Joinder of Parties — Estate Litigation, Section 650, it is said: "Joinder is proper when plaintiffs are heirs or legatees or next of kin, as long as all the relief sought is directly connected with obtaining plaintiff's shares of the estate assets, and as long as there is some central, unifying thread—such as the provisions of a trust or agreement or will, or a misapplication of funds by the principal defendant with which the other defendants are somehow connected," citing *Ezzell v. Merritt,* 224 N.C. 602, 31 S.E. 2d 751; *Bellman v. Bissette, supra, Leach v. Page,* 211 N.C. 622, 191 S.E. 349, and numerous other decisions of this Court.

As we construe this complaint, only one cause of action is stated and that is to enforce the parol trust agreement and to require the defendant Fordham to account for the rents and profits that have come into his hands constituting trust funds, if any, whether he received them as trustee or as guardian of S. H. Wilcox. The plaintiffs might have alleged a separate cause of action by demanding the reconveyance of the land conveyed by defendant Fordham to Helen W. Moore and her husband, but no such demand has been made.

Of course, it will be necessary for the plaintiffs to establish the alleged parol trust, but once that is done it is a matter of accounting and a determination as to whether one beneficiary had received her share of the trust property prior to the accounting.

We hold that the joint demurrer interposed in the court below by all the defendants, should have been overruled. Therefore, the ruling of the court below sustaining the demurrer is

Reversed.

JAMES A. MILLER, SR., ADMINISTRATOR OF THE ESTATE OF JAMES A. MILLER, JR., DECEASED v. D. R. COPPAGE AND WIFE, CASSIE COWELL COPPAGE.

(Filed 18 March 1964.)

1. Evidence § 1—

The courts will take judicial notice that Neuse River in Pamlico County is a large, navigable river.

2. Waters and Water Courses § 6—

The State owns lands covered by navigable waters within its territorial limits, except insofar as private rights have been acquired therein by State grant or otherwise, subject to the control of the Federal Government over commerce.

3. Same—

The owner of land having a State highway between it and a navigable river is not a riparian owner.

4. Negligence § 7—

The only negligence of legal import is negligence which proximately causes or contributes to the death or injury under judicial investigation.

5. Negligence § 24a— Evidence held insufficient to show causal relation between excavation of sand from river bed and drowning of boy.

Evidence tending to show that the male defendant dredged sand from the bed of a river, resulting in the existence of deep water some 12 feet from shore near a place where the public, including children, swam, that he failed to erect warning signs, and that plaintiff's intestate, a seven year old boy, drowned in the river and his body was recovered by grappling hooks, without evidence as to the spot where the boy was at the time he drowned, *held* insufficient to be submitted to the jury on the issue of actionable negligence, even if it be conceded that the boy's body was recovered from the hole or excavation created by the male defendant's dredging operations, since the boy's body could have been carried there by the current after he had drowned, and therefore there is no evidence that the creation of the excavation or failure to

erect warning signs was a proximate cause of the boy's drowning. *A fortior* the *feme* defendant's motion to nonsuit should have been allowed upon failure to prove that she was in any way responsible for the dredging operations.

6. Trial § 22—

Evidence which leaves the facts in issue in mere conjecture is insufficient to be submitted to the jury.

APPEAL by plaintiff from *Bone, E. J.*, October 1963 Session of PAMLICO.

Civil action to recover damages for the death of a seven-year-old boy caused by drowning in Neuse River.

From a judgment of compulsory nonsuit entered upon defendants' motion at the close of plaintiff's case, he appeals.

John W. Beaman and Robert G. Bowers for plaintiff appellant.
Henry A. Grady, Jr. and Ward and Tucker for defendant appellees.

PARKER, J. Plaintiff's complaint alleges in substance: On 22 June 1961, and prior thereto, defendants owned certain lands on the northwest side of a highway known as Dawson's Creek Road in the vicinity of the mouth of Dawson's Creek in Pamlico County. For many years the general public, including children, have used the Neuse River shore beach property on the southeastern side of the Dawson's Creek Road for recreational purposes, including swimming, fishing, church picnics, and family gatherings, all to the knowledge of defendants. The beach and river bottom were sandy and even and suitable for recreational purposes, and the river with its sandy bottom was a safe place for people, including young children, to swim and play in. Defendants dredged out a few feet from the shore line and a few feet from Dawson's Creek Road a large hole many feet in depth and extending over a large area of the river bottom customarily used by the general public for recreational purposes, thereby creating a hazard and dangerous condition not visible to the general public, including children, without posting any signs or giving any notice or warning of such hazard and dangerous condition. Defendants used the sand which they dredged from the river bottom to fill in lands owned by them on the opposite side of Dawson's Creek Road.

On ..... June 1961 plaintiff's intestate, a seven-year-old boy who could not swim, in company with his grandfather and other children went to the beach and shore line of Neuse River, and while playing in the shallow water he fell into a hole or excavation and met his death by drowning. That his death was proximately caused by defendants' negligence in dredging the bottom of Neuse River, thereby creating a trap

and hazard, and in failing to provide adequate warning of the dangerous condition they created.

Defendants filed separate answers, which are *ipsissimis verbis*. Each defendant in his or her answer denies all the allegations of the complaint, except as to residence of the parties and that plaintiff's intestate was drowned on 22 June 1961, and alleges that each answering defendant "was the owner of an interest in one lot lying between the State Highway and Dawson's Creek, in the vicinity of the mouth of Dawson's Creek in Pamlico County."

Plaintiff's evidence shows these facts: At the point in Pamlico County where Dawson's Creek runs into Neuse River, Neuse River is about five miles wide and is a navigable stream. A State highway 20 feet wide with shoulders 15 feet wide runs in a westerly direction, as it approaches the bridge over Dawson's Creek, parallel with the beach of Neuse River. There is a large rock bulkhead or breakwater bordering the highway in the vicinity of Dawson's Creek, which extends east from Dawson's Creek probably 150 or 200 feet. The water of Neuse River extends to within about eight or ten feet of this rock bulkhead or breakwater.

There is sand all along the Neuse River shore at Dawson's Creek. For a number of years during the summer months a lot of people, children and families, and the public generally have used the beach of Neuse River in the vicinity of the mouth of Dawson's Creek for bathing, fishing, picnics and different recreational purposes. Few people bathed and swam at the point where there was a lot of rock, because they had to climb over the rocks to get to the beach and water. Generally, in the vicinity of Dawson's Creek the water of Neuse River was about 18 inches deep out to a distance of about 100 or 150 yards.

Prior to June 1961 John W. Cowell, Sr., father of the *feme* defendant and father-in-law of the male defendant, owned 1,600 acres of land in the area of Dawson's Creek, and the male defendant owned some to the east of his property. The male defendant's business is ditching and dredging. Mr. Cowell testified: "Almost across the road from where this hole was dug in Neuse River there is a summer cottage or rather in that neighborhood. I have a home there and Mr. Furney Gaskins, the ex-Postmaster of Stonewall has one there. I am familiar with a shack that was put over on that side of the road that came from the airport that was put there by Dr. Coppage. I knew that dredging was being done in the Neuse River when it was being done and that Dr. Coppage was the man, but I don't recall his name, but it was under Dr. Coppage's supervision, I think. The dirt and sand, etc., that came from the dredging operation was put across the highway on the marsh, which was own-

ed by me at that time, upon land where the shack was placed, which is now owned by Dr. Coppage and conveyed to him by me."

On 22 June 1961 plaintiff's intestate James A. Miller, Jr., was seven years and four days old and in good physical condition. About 9:15 a.m. on this day he left his home in company of his grandfather and another boy. He had his bathing suit with him. They were going to a Mr. Edwards' to pick up some children, and then to Camp Don Lee for swimming instructions. Plaintiff testified: "I don't personally know whether he could swim, but he was taking swimming lessons at that time at Camp Don Lee." Plaintiff alleges in his complaint that his son James A. Miller, Jr., was "unable to swim."

On the afternoon of 22 June 1961 Alton Lee, a witness for plaintiff, went to Dawson's Creek Road in the vicinity of where it crosses the bridge over Dawson's Creek. When he arrived about 50 or 75 people were there. He first saw the dead body of plaintiff's intestate in Neuse River about 200 or 250 feet from the State highway and between 100 and 150 yards east of Dawson's Creek bridge. His recollection is that the boy's body was pulled out of the water by Messrs. Barkley and Hudson, game protectors. Hudson is now dead. He is familiar with where the deep water is in Neuse River, and it gets deep because the sand was dredged out. He does not know who did the dredging. On that day the water was muddy, and he could not see the bottom anywhere in the river, even up near the shore, over three or four inches deep or a foot anyway. He did not see plaintiff's intestate drown and does not know the point in the river where he drowned. Alton Lee, recalled for further cross-examination, testified: "I arrived there between two and three o'clock as a rough guess, and had been there probably an hour when Mr. Edwards arrived and I saw the sign that said 'Danger, Deep Water.' My best opinion is that the sign was 90 feet from the high-water mark of the Neuse River."

L. L. Wise, a witness for plaintiff and a deputy sheriff of Pamlico County, on the afternoon of 22 June 1961 went to the scene. He testified in substance: He was not there when the dead body of Luther Miller, the grandfather of plaintiff's intestate, was pulled out of the river. He was there a good while before they found the body of plaintiff's intestate. Some people tried to find it by diving, but did not. They sent for hooks. When the hooks arrived, Messrs. Barkley and Hudson went out on the river in a boat with the hooks, and dragging with them they hooked the boy's dead body and brought it in to the wharf. The hole was dug about 200 or 250 feet from the highway. The water in the hole was over people's heads. That is where people were diving trying to find the boy's body. He testified: "The only way I can describe the

hole as far as width and length is concerned is by seeing people walking around in the water with nets. Like I said, they took a net, got a net up there to draw across there to try to find the boy. A group of people took ahold of the net and walked around the hole and they pulled it across and didn't find the boy — the child — that way, and then they got some hooks." He also testified: "* * * I'm familiar with the area where young James A. Miller, Jr., was drowned. I am familiar with the hole or excavation in the Neuse River in that area. I saw a dredge out there dredging sand out of it. I don't remember the date — it was, I would say, somewhere in the neighborhood of a couple of months or three months before this drowning happened. I don't remember the time of the year. It was not in the wintertime, but in relationship to June 22, 1961, it was about two or three months before — probably in March or April. I saw a dredge there and I stopped there a time or two when they were dredging sand across there and talked to some of the men. They were putting dirt across the highway in front of where the hole was dug a little bit east into a marsh out there where it was kind of low. They were building it up."

E. R. Edwards, Jr., a brother-in-law of plaintiff and a witness for him, testified in substance, except when quoted: He heard of the drowning and arrived on the scene about 3:30 p.m. Upon arrival he learned his daughter was with the swimming party, had been found hysterical on the beach, and was O.K., and saw the dead body of Luther Miller lying behind an ambulance. He immediately entered the water of Neuse River to search for the body of plaintiff's intestate. He testified: "Well, from my first observation, when I walked out to the end of the water to look for Al's body [he had formerly testified plaintiff's intestate was called Al by his family and friends], I immediately went over my head and searched this hole out, which was near the shore, and I would say the hole was approximately 15 feet from, in fact, it was 12 feet from the shore. To begin with, I skirted the hole because there was a little jetty formed by the sand approximately 4 or 5 feet at the time. And this was after a mean, low tide of approximately 11 o'clock that day. So there wasn't too much tide and it wasn't too rough and I could see the bottom and I walked out to this little jetty to a point approximately 25 feet, and since I could see the bottom in that area, I turned to the left where the deeper water was. I had to assume it was dark and I entered the hole at that point and searched for the body." He later drew a diagram on a blackboard and testified: "I parked immediately behind the ambulance, walked down on the beach in this direction, over the rock and entered the water at this point, which would be the west end. Now, the sand bar runs parallel with the beach at approximately 125 yards

out and the wave action had formed a little jetty which was visible at mean low tide which is an average tide with good weather conditions making a projection out from the shore about 50 yards. It was real shallow and I walked out on this and turned to the left and entered this hole at this point and, let's see, later we finally found James Miller's body, James Miller, Jr.'s body, at this point, which was within 25 feet of the beach and this is the shore-line here." When Al's body was found, he disconnected the hooks. We do not have a picture of this diagram drawn on the blackboard. There were no markings to keep children from getting into the hole, so far as he saw. The next day he went back and measured the hole. Its length parallel with the beach was 154 feet, its width 92 feet, and its depth 16 feet. There were rocks in the area where the hole was dredged. When children stopped by, they walked down the rocks and out on the jetty to the sand bar to play. Since the State highway was placed there, the area adjacent to the river between the highway and the river has been used by the public for about 15 years.

Plaintiff's evidence shows that where his intestate was drowned, Neuse River is about five miles wide, is a navigable stream, and has an ebb and flow of the tide. In addition, we take judicial notice of the fact that Neuse River in Pamlico County is a large, navigable river. *Hampton v. Pulp Co.*, 223 N.C. 535, 27 S.E. 2d 538; Stansbury, North Carolina Evidence, 2d Ed., Judicial Notice, sec. 14, note 65.

It is settled law in this State that the State of North Carolina owns the land within its territorial limits covered by navigable waters, except as far as private rights in it have been acquired by express grant by the State, and subject to the rights of control of the Federal Government over commerce with foreign nations and among the several states, including its power over navigation. *Land Co. v. Hotel,* 132 N.C. 517, 44 S.E. 39; *R. R. v. Way,* 172 N.C. 774, 90 S.E. 937; *Insurance Co. v. Parmele,* 214 N.C. 63, 197 S.E. 714; 65 C.J.S., Navigable Waters, secs. 89-92 both inclusive. As to whether private rights can be acquired in such lands in this State by prescription or usage is not a question presented here.

According to all the evidence, neither of the defendants are riparian owners, because any lot or land owned by them jointly or separately has a State highway between it and the waters of Neuse River. *Young v. City of Asheville,* 241 N.C. 618, 86 S.E. 2d 408. There is nothing in the record to show that the male defendant had any right to dredge sand from a place covered by the waters of Neuse River.

Plaintiff's complaint alleges that the defendants dredged sand from the bottom of Neuse River, thereby creating near the shore a large hole or excavation; that they negligently failed to place any warning signs

there of such a hazardous condition created by them; that the public generally, including children, had used the sandy beach of Neuse River adjacent to such hole or excavation for many years for bathing, swimming and recreational purposes to the knowledge of defendants; and that his intestate while playing in the shallow water fell into this hole or excavation and was drowned. There is no evidence that the *feme* defendant participated in any way in the dredging of Neuse River or in the creation of a hole or excavation therein. As to her, plaintiff has *allegata,* but no *probata.* The trial court properly nonsuited the case as to her.

It is a fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the death or injury under judicial investigation. *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459; *Cox v. Freight Lines* and *Matthews v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442; *Byrd v. Express Co.,* 139 N.C. 273, 51 S.E. 851.

There is no evidence as to when during the day or at what place plaintiff's intestate, a boy seven years and four days old, entered the waters of Neuse River or what he did when he entered the water. There is no evidence as to where he was in the river when he drowned or at what time he drowned. His father testified: "I don't personally know whether he could swim, but he was taking swimming lessons at that time at Camp Don Lee." The complaint alleges he was "unable to swim."

Alton Lee testified to the effect that when he first saw the boy's dead body it was in the river about 200 or 250 feet from the State highway and between 100 and 150 yards east of Dawson's Creek bridge. L. L. Wise testified: "A group of people took ahold of the net and walked around the hole and they pulled it across and didn't find the boy — the child — that way, and then they got some hooks." E. R. Edwards, Jr., testified: "I entered the hole at that point and searched for the body." The boy's body was taken out of the river by hooks operated by Messrs. Barkley and Hudson. Hudson is now dead. Barkley did not testify. It is not clear from the evidence where the boy's body was in the river when it was seized by the hooks. Even if the boy's body was seized by the hooks in a hole or excavation created by the male defendant's dredging operations, it is conjecture to assert that the place where the boy's body was hooked and brought to the surface of the water was where he drowned, for his body may have been carried there from the place of his drowning by the current of Neuse River or by the ebb and flow of the tide.

Plaintiff has evidence to show that the male defendant a few months before 22 June 1961 was dredging sand from the bed of Neuse River,

creating a hole or excavation, but there is no evidence in the record before us to warrant a reasonable inference that plaintiff's intestate got into this hole or excavation and was drowned, or that this hole or excavation had anything to do with his untimely death. In brief, plaintiff has no evidence to show a causal connection between the hole or excavation created in the bed of Neuse River by the male defendant and his failure to post any warning sign in the vicinity, and the drowning of his intestate.

"This Court said in *Brown v. Kinsey,* 81 N.C. 245: 'The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the Court will not leave the issue to be passed on by the jury.' This has been quoted with approval in *Byrd v. Express Co., supra* [139 N.C. 273, 51 S.E. 851], and in *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12, where Brogden, J., the writer of the opinion, adds in apt and accurate words: 'This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation'." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. "A resort to a choice of possibilities is guesswork, not decision." *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258.

The trial court correctly entered a judgment of compulsory nonsuit of plaintiff's action against both defendants.

Affirmed.

PINK L. HUNT AND HOWARD J. HUNT v. ALBERT A. HUNT.

AND

PHILIP E. LUCAS, PUBLIC ADMINISTRATOR OF THE ESTATE OF CURTIS T. HUNT, DECEASED v. ALBERT A. HUNT.

(Filed 18 March 1964.)

1. Compromise and Settlement—

In an action by cotenants to recover their proportionate part of the funds received from the sale of the lands and deposited by one tenant to his sole account, evidence that there was a dispute as to the interests of plaintiffs in the fund and that this dispute was settled by the payment of a specified sum, tends to establish an affirmative defense, and the burden of establishing the defense of settlement is on defendant.

2. Same—

Where heirs at law sell in separate transactions different tracts of land inherited by them, a check by one tenant to another in full settlement of his

part of the "estate" will not be held, as a matter of law, a full settlement of all the transactions when there is evidence that the amount of the check was the sum justly due from only one transaction, and the question of settlement is properly submitted to the jury and motion to nonsuit correctly denied.

3. Tenants in Common § 3—

Evidence that one tenant in common collected the rents from the property is sufficient to support a cause of action in favor of the other tenants for an accounting of the rents.

4. Frauds, Statute of § 6b—

Plaintiff's evidence to the effect that the holder of the legal title orally promised to convey the property to his intestate in extinguishment of a debt owed the intestate is insufficient to establish an enforceable contract when the owner denies the alleged contract to convey, since the denial of the contract is a sufficient pleading of the statute of frauds and under the statute such contract is void notwithstanding the introduction of evidence tending to establish the parol agreement.

5. Betterments § 1—

Where the evidence tends to show a parol agreement by the owner of realty to convey to plaintiff's intestate to extinguish a debt and that intestate, in reliance upon the agreement, made improvements on the land, plaintiff administrator is entitled to recover for the estate the amount his intestate paid on the purchase money and the amount by which the improvements made on the land by his intestate enhanced its value, notwithstanding no recovery may be had on the parol agreement to convey in the face of defendant's denial thereof.

6. Interest § 2—

Where one tenant in common receives the total purchase price for the property and deposits same to his account under an agreement that the income from the fund should be paid to another tenant for life and at the death of such other tenant the principal should be paid to the surviving tenants, such agreement fixes the date from which interest on this sum accrues.

7. Same—

Interest does not begin to run on an account until there is a demand and refusal to pay, and therefore where an agent collects rentals from houses, interest on the amounts so collected does not begin to run until demand and refusal, and in the absence of evidence of any demand, interest begins to run only from the date of the institution of the action for the recovery of the funds.

APPEALS by defendant from *McLaughlin, J.*, March 16, 1963 Session of FORSYTH. These appeals were docketed and argued as Case No. 395 at the Fall Term 1963.

Because of their factual background these cases were consolidated for trial. Individual plaintiffs state two causes of action. The administrator states three. Separate judgments were rendered but one record was sufficient to present the questions this Court is called upon to answer.

In 1958 Pink L. Hunt, Howard J. Hunt, Albert A. Hunt and Curtis T. Hunt conveyed two lots in Winston-Salem to the Highway Commission. These properties were known as the Homeplace and the Miller property. The purchase price was $37,400, paid by the Commission's check to the joint order of the grantors. At the same time, Albert Hunt conveyed another tract (hereafter Belews Street) to the Highway Commission. The purchase price for this tract was $26,100.

Grantors, hereafter referred to by their given names, are the children of Theophilus Hunt and wife, Adeline Hunt. Theophilus died in 1923. He owned at his death a farm in Davidson County containing 120 acres, a tract in Forsyth County containing 10¼ acres, the Homeplace, and the Miller property. He devised his properties to his wife for life and, upon her death, to his four sons. The widow died in 1938. Curtis never married. After the death of his parents, he erected rental houses on the Homeplace and the Miller property. He died 25 December 1958.

The first cause of action in each suit alleged: Each plaintiff is entitled to one-fourth of the moneys derived from the sale of the Homeplace and Miller property. Pink, Howard and Curtis endorsed the Highway Commission's check for the purchase money and delivered it to Albert for deposit with the Savings & Loan Association. The parties agreed Curtis would have the income thereon for his life. At his death, the fund would be divided into four parts, one for each of the four brothers.

Defendant denied the alleged agreement. He admitted he deposited the check in his personal account in the Wachovia. He alleged: A controversy arose about how the money should be divided. This was settled when the four brothers met on 23 September 1958. At that time, Pink and Howard sold their interest in the farm in Davidson County, the 10¼ acres in Forsyth County, and relinquished any claim they might have to the proceeds of the sale of the Homeplace and Miller property to defendant and Curtis. Albert drew checks on a special account in the Wachovia, where he had deposited the moneys received from the Highway Commission. The check payable to Pink had written on its face, "Full settlement with P. L. Hunt for his part of the T. Hunt Estate in Forsyth and Davidson Counties." Howard was at that time indebted to Curtis in the sum of $1,800. Settlement was made with Howard by check drawn by Albert on his special account with Wachovia for $3,500. That check, likewise, had a statement showing that it was in full settlement of Howard's part "in the T. Hunt Estate in Forsyth and Davidson Counties." Curtis, thereafter, gave Albert all of Curtis' share in the proceeds derived from the sale of the properties to the Highway Commission.

The second cause of action, alleged by Pink and Howard, relates to rents collected from tenants occupying two houses on Cleveland Ave-

nue alleged by plaintiffs to have passed to them, Curtis and Albert, by inheritance from their mother. They make no claim for rents for houses erected on the property by Curtis.

Defendant, to defeat this claim, alleged: While his mother had legal title to this property, she held as a mere trustee for Curtis, who had furnished the purchase money.

Administrator's second cause of action is a claim for the $26,100 paid by the Highway Commission for property on Belews Street. He alleged: This property was prior to 1943 owned by Albert. He was at that time indebted to Curtis in a substantial sum. To extinguish this debt, Albert agreed to convey the Belews Street property to Curtis. No deed was made. Curtis took possession of the property. He erected several tenant houses thereon. Albert wired these houses for Curtis. Curtis paid him for this work. Curtis collected the rents on these properties until 1948 or thereabouts. From 1948 until Curtis' death, Albert collected the rents as agent for Curtis. Albert, at the request of Curtis, conveyed the property to the Highway Commission. Albert held the proceeds derived from the sale as a mere trustee for Curtis.

Albert admitted he held title to the Belews Street property. He denied the alleged parol contract to convey. He admitted that Curtis had erected tenant houses on the property and that he (Albert) had collected the rents. He alleged Curtis had released him from any obligation that might have existed with respect to the Belews Street property.

The administrator's third cause of action relates to rents collected by Albert from the tenants of the 12 houses constructed by Curtis on the four lots in Winston. Albert, the administrator alleged, collected these rents as agent for Curtis. Defendant denied the collection of rents for Curtis. He alleged a cross-action against the administrator for the sum of $3,793.06 for moneys paid for the benefit of Curtis' estate.

The jury found Pink and Howard were jointly entitled to recover $18,700 on their first cause of action, and $1,820 on their second cause of action. It found plaintiff administrator was entitled to recover $9,350 on his first cause of action, $26,100 on his second cause of action, and $13,450 for rents. It found plaintiff administrator was not indebted on the counterclaim alleged by defendant. Judgments were entered on the verdicts. Defendant appealed.

White and Crumpler and Hudson, Ferrell, Petree, Stockton, Stockton and Robinson for plaintiff appellees.

Deal, Hutchins and Minor for defendant appellant.

RODMAN, J. Defendant assigns as error the Court's refusal to allow his motions for nonsuit and directed verdicts. Because these assign-

ments are fundamental and are the errors principally relied on by defendant, they must be examined and their merit evaluated before considering other asserted errors. Since the motions are directed to all five causes of action alleged by plaintiffs, each having a foundation distinct from the others, we deal with the motions as they relate to each cause of action.

(1) *Proceeds of sale of the Homeplace and Miller property.* The following facts are admitted in the pleadings or established by the evidence: These properties were devised to defendant and his brothers by their father. The four sold to the Highway Commission. The check for the purchase price payable to all four grantors was endorsed by three and delivered to defendant. He endorsed and deposited the funds in a special account in his individual name. If nothing else appeared, the Court would have been warranted in directing the jury to find that each of the plaintiffs was entitled to one-fourth of the amount paid by the Highway Commission. To prevent that result, defendant alleged, and offered evidence from which the jury could have found, a dispute existed with respect to Pink's and Howard's interest in the fund (why and how controversy with respect to the division of the fund arose is not made clear by the evidence.) This dispute, according to defendant's allegations and evidence, was settled by the payment of $5,000 to Pink and $3,500 to Howard for their interest in the moneys received from the Highway Commission, as well as the 120 acre farm and the 10¼ acre tract in Forsyth. This was an affirmative defense. The burden of proof was on defendant. *Paving Company v. Speedways, Inc.*, 250 N.C. 358, 108 S.E. 2d 641; *Winkler v. Amusement Company*, 238 N.C. 589, 79 S.E. 2d 185.

Defendant's contention that the language, "Full settlement with P. L. Hunt for his part of the T. Hunt Estate in Forsyth and Davidson Counties," appearing on his check given when P. L. Hunt conveyed his interest in the 10¼ acre tract and the 120 acre farm in Davidson County is, as a matter of law, sufficient to defeat plaintiff's claims to the moneys paid by the Highway Commission cannot be sustained. The word "estate" as commonly used has many meanings. *Trust Company v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246; *In Re Estate of Wright*, 204 N.C. 465, 168 S.E. 664; *Powell v. Woodcock*, 149 N.C. 235, 62 S.E. 1071.

Whether the word "estate" written on check was understood by the parties to include the moneys paid by the Highway Commission was a question for the jury. *Lumber Company v. Construction Company*, 249 N.C. 680, 107 S.E. 2d 538; *Williams v. Insurance Company*, 209 N.C. 765, 185 S.E. 21; *Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 856; *Hite*

v. Aydlett, 192 N.C. 166, 134 S.E. 419. Plaintiffs testified that the checks were given and received in payment for their share of the 10¼ acres Forsyth County tract and the Davidson County land. To support their contention as to the meaning of the word "estate," they point to the fact that the revenue stamps on their deeds were exactly the amount they would have affixed for a sale for $8,500. They testified that the value of these two pieces was $20,000. They call attention to the fact that the moneys which the Highway Commission paid was not paid to the personal representative of the T. Hunt Estate but to them as individuals. They properly say that where an heir sells land which he inherits from his parent, the proceeds derived from that sale cannot be held as a matter of law to be a part of a parent's estate. Defendant is in no position to complain that the Court called on the jury to ascertain the meaning of the language defendant put on the check. It follows from what has been said that the Court properly refused to allow the motions to nonsuit or to direct verdicts on the first causes of action.

(2) *Pink's and Howard's claims for rent.* The pleadings and evidence establish the fact that the legal title to this property was in Mrs. Hunt, mother of the four children. She died intestate. There is evidence for plaintiffs showing that Albert collected rents from this property from 1948 until Curtis' death in December 1958. Pink, Howard and Albert executed a deed to Curtis for this property in September 1958. Co-tenancy having been established, plaintiffs were entitled to an accounting for the rents collected. *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479; *Whitehurst v. Hinton,* 209 N.C. 392, 184 S.E. 66; *McPherson v. McPherson,* 33 N.C. 391; 14 Am. Jur. pp. 99-100. Defendant was not entitled to nonsuits or directed verdicts on this cause of action for rents.

(3) *Belews Street property.* The pleadings and the evidence show that this property was conveyed to Albert prior to 1943. It was his home. Plaintiff administrator, as a basis for his claim for the moneys paid by the Highway Commission for this property, alleges a parol contract by Albert in 1943 to convey to Curtis. He alleges he took possession, and erected tenant houses thereon. Albert, as his agent, collected the rents from these properties for Curtis. Albert, in recognition of Curtis' ownership of this property, and at Curtis' direction, conveyed it to the Highway Commission. He agreed to hold the proceeds for Curtis' benefit. Albert denied the alleged contract. He admitted Curtis had taken possession and erected houses thereon—Plaintiff offered evidence to establish the parol contract to convey, his payment in 1943 of the purchase price, and the erection of improvements. This evidence was not sufficient to establish an enforceable contract. Defendant's denial of

the alleged contract to convey, "invoked the statute of frauds as effectively as if it had been expressly pleaded. Furthermore, a denial of the agreement is equivalent to a plea of the statute of frauds." *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524; *McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575. The fact that witnesses were permitted to testify without objection to the parol contract did not make it enforceable. *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561; *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331. We fail to discover in the record any evidence to the effect that Albert conveyed this property to the Highway Commission at the direction of Curtis or that he declared Curtis was entitled to the proceeds.

The Court was in error in submitting to the jury an issue relating to the administrator's right to recover the amount paid by the Highway Commission. The fact that plaintiff administrator is not entitled to recover from Albert the amount paid by the Highway Commission does not relieve Albert from the duty to account for the amount which Curtis contributed to the enhancement of the value of the property. The evidence offered with respect to the parol contract, the erection of improvements, and the sums paid by Curtis to Albert were competent for the purpose of showing that Albert had benefited by these expenditures. If he was unwilling to convey, equity required him to refund the amount paid by Curtis on the purchase money and to reimburse Curtis, or his estate, to the extent the property sold was enhanced by Curtis' work and expenditures. *Rochlin v. Construction Company,* 234 N.C. 443, 67 S.E. 2d 464; *Jamerson v. Logan, supra; Rhyne v. Sheppard,* 224 N.C. 734, 32 S.E. 2d 316; *Carter v. Carter,* 182 N.C. 186, 108 S.E. 765. The theory of the trial with respect to these properties was erroneous.

(4) *Administrator's claim for rents.* The jury found defendant was indebted to the estate of his brother Curtis in the sum of $13,450 for rents. This sum includes rents, not only from the Homeplace and Miller properties and the Cleveland Avenue property, but rents collected for use of the Belews Street property. It is impossible to determine what portion of this amount the jury attributed to rents for the Belews Street property. Defendant would not be responsible to Curtis' estate for all the rents collected for use of that property. In addition to the improvements erected thereon by Curtis, there were buildings erected by Albert. The rents from this property should be apportioned between Curtis' estate and Albert in accordance with their relative rights in the property.

The judgments charge defendant with interest on the sums found to be owing from 25 December 1958, the day of Curtis Hunt's death. Defendant has excepted and assigned this allowance of interest as error.

The verdicts on the first issues, finding defendants indebted, as plaintiffs alleged, for their portions of the moneys received for the Miller-

Homeplace properties is equivalent to a finding that Albert had agreed to deposit the funds so that the income would be paid to Curtis for life with the principal then payable to the brothers or their estates. This fixed the date and the amount to be paid to each of the brothers. Interest accrued from that date on these sums.

Albert acted as agent in collecting rentals from the houses on Cleveland Avenue. Interest does not run on an account until there is a demand and refusal to pay. *Construction Company v. Crain & Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590; *Bond v. Cotton Mills*, 166 N.C. 20, 81 S.E. 936; *Jolly v. Bryan*, 86 N.C. 458; *Neal v. Freeman*, 85 N.C. 441; *Hyman v. Gray*, 49 N.C. 155.

Plaintiffs plead a demand and refusal to account, but there is neither in the pleadings nor in the evidence anything to establish the date of the alleged demand, other than the institution of this action on 19 May 1960. The Court should have fixed that date as the time on which interest began to accrue on the rents collected. The judgment rendered in favor of plaintiffs Hunt will be reformed so that interest will run on the $1,820 from 19 May 1960, and not from 25 December 1958.

We have examined each of the other assignments of error in the action brought by the plaintiffs Hunt. We find neither prejudicial error nor any assignment requiring further discussion in that action. That judgment, modified as here directed, is free from prejudicial error.

The action brought by the administrator and the defendant's counterclaim present four separate and distinct controversies. We find no error in that portion of the judgment that plaintiff recover of the defendant $9,350 with interest from 25 December 1958, on plaintiff's first cause of action relating to the sale of the Homeplace and Miller property; nor has defendant, appellant, shown error with respect to that portion of the judgment adjudging that he is not entitled to recover anything on his counterclaim.

There was error in the trial as it relates to plaintiff's second and third causes of action. This entitles defendant to a new trial on appropriate issues relating to those causes of action.

Hunt v. Hunt. Modified and affirmed.

Lucas, administrator v. Hunt. Partial new trial.

MATT T. EDWARDS, JR. v. LOUISE EDWARDS.

(Filed 18 March 1964.)

1. Pleadings § 30—

A motion for judgment on the pleadings is to be determined from an examination of the pleadings alone.

2. Appeal and Error § 28—

No case on appeal is required upon an appeal from a judgment on the pleadings since the record proper constitutes the case to be filed in the Supreme Court.

3. Appeal and Error § 12—

G.S. 1-287.1 does not apply when no case on appeal is required, and in such instance the judge of the Superior Court has no authority to dismiss the appeal for failure to file case on appeal.

4. Pleadings § 30—

A motion for judgment on the pleadings admits the truth of the facts well pleaded.

5. Trusts § 14—

Where a party furnishes the consideration for the purchase of land and title is taken in the name of another in violation of the agreement between them a resulting trust arises by operation of law.

6. Pleadings § 30—

Judgment on the pleadings is not favored by the law, and on motion for judgment on the pleadings the pleadings will be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

7. Ejectment § 6—

Where, in an action in ejectment, the defendant alleges facts constituting a sufficient predicate for the declaration of a resulting trust in her favor, the pleadings raise material issues of fact and plaintiff is not entitled to judgment on the pleadings, and further, the fact that defendant's further answer alleges that she had suffered a loss in a specific sum "in her sale of said premises prior to the filing of this action" will not be construed as an admission defeating defendant's defense, it not appearing that she had parted with all of her interest in the premises prior to the action.

APPEAL by defendant from a judgment on the pleadings entered by *Joseph W. Parker, J.*, at the August Session 1963 of NORTHAMPTON.

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

E. B. Grant for plaintiff appellee.

PARKER, J. This action was instituted in superior court on 25 February 1963. The complaint alleges in substance: Both parties are citi-

zens and residents of Northampton County, North Carolina. Plaintiff is the owner of a certain tract or lot of land situate in Jackson Township, Northampton County, on which there is a dwelling house now occupied by defendant, which tract or lot of land is described with particularity. Defendant is a tenant at will on this property, and refuses his demand to surrender possession of it to him. He is entitled to immediate possession of this property and prays that a writ of ejectment issue removing defendant from the property and putting him in possession thereof.

Defendant filed an answer and a further answer and counterclaim. In her answer she denies the allegations of the complaint, except as admitted in her further answer and counterclaim, and except that she admits she is a citizen and resident of Northampton County. In her further answer and counterclaim she alleges in substance, except when quoted: Plaintiff obtained a verdict and judgment in an ejectment action against defendant in a justice of the peace's court. She made a motion at the special January Session 1963 of the superior court of Northampton County to vacate the judgment rendered in the justice of the peace's court on 27 October 1962, but the presiding judge "did not rule on said motion of the defendant but allowed plaintiff a judgment of nonsuit which judgment is dated January 16th, 1963, and is here pleaded as a bar to plaintiff's present action, for the reason that said action in Superior Court was derivative and only in the Superior Court for review of law errors and the judgment and the nonsuit ended plaintiff's right of action." When plaintiff and defendant were husband and wife, they entered into an agreement by which plaintiff was to use her money to purchase the house and lot described in the complaint as a homeplace. Plaintiff purchased the house and lot with her money, but failed to have the deed made in her name as agreed upon, and instead had title of the property made in his name and has refused to convey the property to her. In December 1962 she instituted a civil action in the superior court of Northampton County against plaintiff, entitled *Louise Edwards v. Matt T. Edwards,* to have defendant in this suit declared a trustee for her of the house and lot, the subject matter of this action, in that he had used her money to pay for the property and took title in his name contrary to the agreement between them. Plaintiff deceived her and caused her to believe that he had taken title to the property in her name, and she did not discover that he had taken title in his name until after he had separated from her and obtained a divorce from her. The reasonable market value of the house and lot is $5,000, "which value was lost to the defendant as a result of the plaintiff's failure to secure defendant a marketable title to said premises and that defendant suffered a loss of

$5,000.00 in her sale of said premises prior to the filing of this action by the plaintiff." Wherefore, she prays that plaintiff recover nothing in this action, and that she recover from him $5,000 as damages caused by his breach of his contract with her.

Plaintiff filed a reply to defendant's further answer and counterclaim in which he alleges in substance: He did obtain a verdict and judgment in a summary ejectment action in a justice of the peace's court against defendant as alleged in her further answer; that defendant appealed to the superior court; and that in the superior court plaintiff, upon his motion, was allowed to take a voluntary nonsuit. He admits defendant here instituted a suit against him in the superior court in December 1962 to establish a parol or resulting trust as alleged in her further answer and counterclaim; that this suit was calendared for trial at the August Session 1963 of the superior court; that when it was reached on the calendar for trial neither Louise Edwards, the plaintiff in this suit, nor her lawyer was present, that they were called and failed to appear, and the case was nonsuited. On 25 August 1963 Louise Edwards, by her lawyer James R. Walker, Jr., who is her present attorney of record, filed a motion to vacate the judgment of nonsuit, which motion was denied by Cowper, J., presiding judge at the Fall Session of the superior court.

At the August Session 1963 the instant suit came on to be heard by the presiding judge, Joseph W. Parker, on a motion by plaintiff for a judgment on the pleadings. Judge Parker in his judgment finds "that the defendant has admitted that title to the property described in the complaint is in the plaintiff, and that in defendant's Further Answer and Counterclaim, that she had sold all of her interest in the premises the subject of this action, prior to the filing of the action by the plaintiff," and being of the opinion that plaintiff's motion for judgment on the pleadings should be allowed, he ordered and adjudged that defendant be ejected from the premises described in plaintiff's complaint and that plaintiff be put in possession of the property and that defendant be taxed with the costs. From this judgment, defendant appealed to the Supreme Court.

Plaintiff filed a motion in this Court to dismiss defendant's appeal for the reason that Mintz, J., presiding at the January Term 1964 of the superior court of Northampton County, entered a judgment dismissing defendant's appeal to the Supreme Court from Judge Joseph W. Parker's judgment on the pleadings, for the reason that defendant failed to make up and serve a case on appeal on appellee or his counsel. Judge Mintz's judgment recites that he acted pursuant to the provisions of G.S. 1-287.1. From this judgment defendant appeals.

The sole question presented for decision by defendant's appeal from Judge Joseph W. Parker's judgment on the pleadings was the correct-

ness of this judgment, and this must be decided from an examination of the pleadings, and nothing else. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Crew v. Crew,* 236 N.C. 528, 73 S.E. 2d 309. The only error relied on by appellant in her appeal from Judge Joseph W. Parker's judgment on the pleadings is presented by the record proper. Consequently, the record proper constitutes the case to be filed in this Court, and defendant was not required to serve it on appellee or his counsel. *Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155; *Bishop v. Black,* 233 N.C. 333, 64 S.E. 2d 167; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364. Judge Mintz's judgment was improvidently entered, because G.S. 1-287.1 specifically provides that it "shall not apply in any case with respect to which there is no requirement to serve a case on appeal," as here. Appellant filed the record proper in apt time in this Court. Plaintiff's motion to dismiss the appeal is without merit.

Defendant contends in her brief that the instant action should be abated and dismissed for the reason that she appealed to the superior court from a verdict and judgment in an ejectment action obtained against her by plaintiff in a justice of the peace's court. Her appeal vacated this judgment, and the action was pending in the superior court for trial *de novo.* G.S. 1-299; *Pridgen v. Lynch,* 215 N.C. 672, 2 S.E. 2d 849; *Brake v. Brake,* 228 N.C. 609, 46 S.E. 2d 643. At the January Session 1963 of the superior court of Northampton County, plaintiff in this case on appeal from a justice of the peace was allowed by the presiding judge to take a voluntary nonsuit and to pay the costs. Plaintiff instituted the present action on 25 February 1963. McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 2, sec. 1643. This contention of defendant is not tenable.

Plaintiff alleges in his complaint that he is the owner of the house and lot therein described, that defendant refuses to surrender possession to him, and he prays for a writ to eject her and put himself in possession. Defendant in her further answer and counterclaim alleges that the house and lot were purchased with her money under an agreement between her husband and herself that title should be taken in her name, but instead that title was taken by plaintiff in his name alone, and that plaintiff is not entitled to recover anything in this action against her, and plaintiff, for the purpose of his motion for a judgment on the pleadings, admits, either directly or impliedly, the truth of these pleaded facts in defendant's further answer and counterclaim. 41 Am. Jur., Pleadings, sec. 335, where a legion of cases is cited to support the text. Hence, accepting as true these allegations of fact in defendant's further answer and counterclaim for the purpose of passing on the judgment on the

pleadings, a resulting trust, which is a creature of equity, arises in defendant's favor by implication or operation of law to carry out the presumed intention of the parties, that she, who furnished the consideration for the purchase of the house and lot, intended the purchase for her own benefit, and, therefore, plaintiff would not be entitled to have her ejected from the premises and to have himself put in possession thereof. *Lyon v. Akin,* 78 N.C. 258; *Cunningham v. Bell,* 83 N.C. 328; *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475; *Wise v. Raynor,* 200 N.C. 567, 157 S.E. 853; *Bullman v. Edney,* 232 N.C. 465, 61 S.E. 2d 338; 89 C.J.S., Trusts, sec. 127, b, p. 986-988.

The trial judge in his judgment "finds that the defendant has admitted that title to the property described in the complaint is in the plaintiff, and that in defendant's Further Answer and Counterclaim, that she had sold all of her interest in the premises the subject of this action, prior to the filing of the action by the plaintiff." This finding of the trial judge is based on paragraph 2, d, of the further answer and counterclaim, which reads: "That the reasonable market value of said premises is $5,000.00 which value was lost to the defendant as a result of the plaintiff's failure to secure defendant a marketable title to said premises and that defendant suffered a loss of $5,000.00 in her sale of said premises prior to the filing of this action by the plaintiff."

G.S. 1-151 requires that the allegations of a pleading shall be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. A motion for judgment on the pleadings "is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader." 41 Am. Jur., Pleadings, sec. 336.

The quoted language from the further answer and counterclaim is far from clear. If the reasonable market value of the house and lot is $5,000, it seems incredible that defendant suffered a loss of $5,000 in the sale of it, if as plaintiff contends and the judge found that she admitted in her further answer and counterclaim she had sold it prior to the institution of the instant action. Clearly, defendant in her further answer and counterclaim has stated a defense sufficient in law to the cause of action alleged by plaintiff, and construing liberally her further answer and counterclaim in her favor, she has not in our opinion admitted in paragraph 2, d, of her further answer and counterclaim that she has actually sold all her interest in the house and lot described in the complaint, so that she no longer has an interest in the house and lot and has destroyed thereby her defense to plaintiff's action.

The pleadings in the instant case raise material issues of fact as to whether plaintiff is the owner of the house and lot described in the com-

plaint and entitled to the possession thereof, or whether a resulting trust in favor of defendant arises by implication or operation of law in respect to the house and lot so that plaintiff would not be entitled to eject her from the possession thereof and be placed in possession himself. The judgment upon the pleadings was improvidently entered and is set aside, and the case is remanded for a new trial in order that the material issues of fact raised by the pleadings may be submitted to a jury for decision. *Crew v. Crew, supra.*

The record proper shows that Judge Joseph W. Parker fixed bond to stay execution on his judgment in the sum of $1,500.

Defendant in her counterclaim prays that she recover $5,000 as damages caused by plaintiff's breach of their contract in failing to secure her a marketable title to the house and lot. The facts she alleges in respect thereto are so meager and obscure that it is impossible to determine whether in this respect she has alleged any cause of action at all.

Error.

IN RE DISCHARGE OF ROBERT C. BURRIS BY THE CITY MANAGER, THE CIVIL SERVICE COMMISSION AND THE CITY COUNCIL OF THE CITY OF ASHEVILLE.

(Filed 18 March 1964.)

1. Administrative Law § 4; Municipal Corporations § 9—

The discharge of a municipal employee by the Civil Service Board in accordance with the procedure outlined in Chapter 757, Session Laws of 1953, is in the exercise of a quasi-judicial function and is reviewable in Superior Court upon a writ of *certiorari.*

2. Appeal and Error § 49—

In the absence of an exception to the findings of fact by an administrative board it will be presumed that the findings are supported by competent evidence, but nevertheless an appeal constitutes an exception to the judgment and presents the question whether the facts found are sufficient to support the judgment.

3. Administrative Law § 4; Municipal Corporations § 9—

On the hearing of a writ of *certiorari* used as a substitute for appeal from order of a municipal Civil Service Board discharging a municipal employee for conflict of interest, the findings of fact of the administrative board are conclusive when supported by the evidence, but the Superior Court has the jurisdiction and duty to determine whether the facts found are sufficient under the law and the regulations of the board to constitute a valid cause for discharge. G.S. 1-269.

IN RE BURRIS.

APPEAL by petitioner Robert C. Burris from *McLean, J.*, 23 September 1963 Regular Session of BUNCOMBE.

The petitioner was discharged from his position with the Tax Department of the City of Asheville on 5 July 1963. The petitioner was notified of his discharge by a letter from the City Manager, and the reason for the discharge was assigned as being a conflict of interest arising from the petitioner's acquisition of an interest in real property which the City of Asheville was interested in buying for use in connection with ingress and egress to its municipal airport.

At the time of his discharge, the petitioner was a member of the classified service of the City under an enactment of the General Assembly creating the Department of Civil Service for the City of Asheville, consisting of a Director of Civil Service and a Board of Civil Service comprised of the Director and four additional members, being Session Laws of 1953, Chapter 757. Pursuant to the provisions of this Act, petitioner appealed to the Civil Service Board. The Board held a hearing at which oral testimony and documentary evidence was introduced. The Board, among other things, found as a fact:

"That sometime prior to the present year the employee and his wife procured some eight deeds signed by some forty persons purporting to convey to them an interest in the land on which is constructed a church building commonly known as the 'Boiling Springs Baptist Church.' It appears that the original deed to the Trustees of said church contained a provision to the effect that when the property ceased to be used for a church or school purposes the title to such property would revert to the original owners or their heirs.

"The City of Asheville at the time said deeds were executed intended and still intends to acquire the said church property because it is clearly a hazard to the entrance to the City Airport, and that it is needed for public convenience and necessity so that the airport may properly function. Said property is situated adjacent to the Asheville Airport, but lying in Henderson County."

Whereupon, the Civil Service Board made the following recommendation:

"This Board, after considering all the evidence and argument of counsel, concludes that the efforts of the employee to acquire the church property hereinbefore mentioned were in direct conflict with the interests of the City of Asheville and appear to be for the personal advantage of the employee. We recommend that the action of the City Manager in discharging the employee be approved."

The petitioner requested the City Council to disapprove the findings and recommendation of the Civil Service Board. The City Coun-

cil, after giving the petitioner a full hearing, voted unanimously to approve the findings of fact and recommendation of the Civil Service Board.

This proceeding was brought up for review in the Superior Court of Buncombe County on a writ of *certiorari* issued by the Resident Judge of the Twenty-eighth Judicial District.

The court below being of the opinion it was without authority to review the findings of fact of the Civil Service Board or of the City Council, and that both findings tendered by the petitioner show agreement that the procedure required by law as set forth in Chapter 757 of the 1953 Session Laws of North Carolina, have been complied with, dismissed the proceeding.

The petitioner appeals, assigning error.

W. M. Styles for petitioner appellant.
O. E. Starnes, Jr., for City of Asheville, respondent appellee.
William J. Cocke for Civil Service Board, respondent appellee.

DENNY, C.J. Section 14 of Chapter 757 of the Session Laws of 1953 provides, among other things, that any employee in the classified service of the City of Asheville may be laid off, suspended or removed from employment, either by the City Manager or by the officer by whom appointed. An employee, when laid off or discharged, may, within five days of the time he received notice of his discharge, demand a written statement of the reasons therefor. Upon such demand, the officer who discharged the employee shall supply the person discharged and the Civil Service Board with a written statement of the reasons for such discharge. Thereupon, the Board shall fix a time and place for a public hearing. At such hearing, the testimony shall be reduced to writing. The Board shall make a written report of its findings and recommendations and this report, together with the evidence and the charges, shall be filed with the City Clerk and be open to public inspection. Within five days after the filing of the report of the Board with the City Clerk, the City Manager or the employee affected, may request the City Council to approve or disapprove the report. "In the absence of any such request, the report shall be final and conclusive at the expiration of said five day period. Otherwise, the City Council shall, at a regular session, vote on the approval or disapproval of the same. It shall require the affirmative votes of five members of the Council to disapprove the report. Lacking such five votes, the report shall be approved. In either event, the action of the City Council is final."

It is said in McQuillin, Municipal Corporations, section 12.267, page 397, et seq.: "In most jurisdictions *certiorari* to review removal proceedings is sanctioned. The general rule is that if the act of removal is executive it is not reviewable on *certiorari*, but if it is on a hearing and formal findings, it is so reviewable. Stated in another way, the writ may be invoked only to review acts which are clearly judicial or *quasi*-judicial. * * * *Certiorari* has also been denied where appeal is allowed, but a statute forbidding appeals in removal proceedings does not preclude resort to the remedy. * * *

"On *certiorari* the probative force and sufficiency of the evidence to sustain the charge of removal will not be reviewed. The province of the court is to enforce substantial observance of the law; it is not to pass upon the merits * * *."

Rhyne, Municipal Law, section 8-39, at page 182, states: "Although boards and commissions authorized to dismiss or demote personnel are not courts, they exercise *quasi*-judicial functions and generally follow judicial procedures."

Of the scope of review by *certiorari* Rhyne says, in section 8-41, at page 187: "*Certiorari* or a statutory appeal in the nature of *certiorari*, is available in many jurisdictions to test the validity of a removal. In such cases, the decision of removal will be upheld if the administrative body had jurisdiction, its findings are supported by competent evidence, and it has otherwise acted legally."

In the case of *Russ v. Bd. of Education*, 232 N.C. 128, 59 S.E. 2d 589, Ervin, J., speaking for the Court, said: "G.S. 1-269 expressly stipulates that 'writs of *certiorari* * * * are authorized as heretofore in use.' It is well settled in this jurisdiction that *certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or *quasi*-judicial functions in cases where no appeal is provided by law," citing numerous authorities.

In view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a *quasi*-judicial function and is reviewable upon a writ of *certiorari* issued from the Superior Court. *Russ v. Bd. of Education, supra; Warren v. Maxwell*, 223 N.C. 604, 27 S.E. 2d 721, and cited cases.

The regulations adopted by the Civil Service Board are not included in the record on appeal. Likewise, the testimony offered at the hearing before the Civil Service Board is not brought forward in the record. Nor were any exceptions taken to the findings of fact or to the

recommendation of said Board. Therefore, it must be presumed that the findings of fact are supported by competent evidence. *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; *Carter v. Carter,* 232 N.C. 614, 61 S.E. 2d 711; *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Radeker v. Royal Pines Park, Inc.,* 207 N.C. 209, 176 S.E. 285.

Ordinarily, an appeal constitutes an exception to the judgment and presents the question whether the facts found are sufficient to support the judgment, i.e., whether the court correctly applied the law to the facts found. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Roach v. Pritchett, supra,* and cited cases.

Since the writ of *certiorari* issued in this proceeding was used as a substitute for appeal, as provided in G.S. 1-269, and the petitioner in his petition for the writ challenged the legality of his discharge pursuant to the Act creating the Civil Service Board and the regulations made pursuant thereto, in our opinion, while the court below was bound by the facts found by the Civil Service Board and approved by the City Council, the petitioner was entitled to have the court pass upon the question whether or not the facts found are sufficient under the law and the regulations of the Civil Service Board to constitute a valid cause for the petitioner's discharge.

The order dismissing this proceeding is set aside and the cause remanded for further hearing not inconsistent with this opinion.

Error and remanded.

BOBBITT, J., dissents.

ROBERT HARDY AND LOLA M. HARDY v. J. P. NEVILLE AND CARRIE W. NEVILLE AND LONSO W. LOCK.

(Filed 18 March 1964.)

1. Mortgages and Deeds of Trust § 1—

A deed and contract by the grantee to reconvey will be declared an equitable mortgage if it is the intent of the parties at the time to secure the payment of a debt and the relationship of debtor and creditor continues to exist after the execution of the instruments, and factors to be considered in determining the question are the financial distress of the grantor at the time of the execution of the instruments, whether he is permitted to remain in possession, and whether the agreement to reconvey is for the amount of the debt plus taxes and interest.

2. Same—

Where it appears from the pleadings that plaintiffs were indebted in a specified sum and executed a deed to defendants and, contemporaneously therewith, defendants by written contract agreed to reconvey the land upon payment in ten annual installments of the exact amount plaintiffs were indebted, plus interest and taxes, and that plaintiffs were unable to meet the first payment and the parties entered into a second contract extending the time for payment in order to give the plaintiffs additional opportunity "to redeem" the land, plaintiffs are entitled to judgment on the pleadings that the instruments constitute an equitable mortgage.

3. Mortgages and Deeds of Trust §§ 13, 39—

Where a deed and contracts constitute an equitable mortgage, neither the equitable mortgagee nor the equitable mortgagor alone may convey a clear title, and, the instruments being recorded, a grantee solely from the equitable mortgagee takes with notice and is in no better position than the equitable mortgagee, and is properly made a party to the action to have the transaction declared a mortgage.

PARKER, J., did not take part in the disposition of this case.

APPEAL by plaintiffs from *Parker, J.*, September-October, 1963 Civil Session, HALIFAX Superior Court.

The plaintiffs instituted this civil action to have the court declare that the documents (a deed and two contracts) executed between the plaintiffs and J. P. Neville and wife established a mortgagor-mortgagee relationship between them; and that the grantees be required to accept payment of the amount due and cancel the deed.

The defendants, by answer, denied the mortgagor-mortgagee relationship, contending the transactions consisted of a fee simple conveyance and an option to repurchase which the plaintiffs failed to exercise; that the described lands were sold to the defendant Lock, who is now the owner; and that the amount due the plaintiffs from the sale in excess of the debt has been deposited for them in the office of the Clerk Superior Court.

Demurrers to the complaint and to the further defenses and motion by the plaintiffs for judgment on the pleadings were filed. The parties, by stipulation, waived a jury trial and "agreed that the court might find the facts, apply the law and render judgment thereon."

At the conclusion of the hearing, the court, without any findings of fact, or without stating any conclusions of law, ordered and decreed "that the plaintiffs be and they are hereby nonsuited and that said cause be and it is hereby dismissed."

The plaintiffs excepted and appealed.

Samuel S. Mitchell, R. Conrad Boddie, Theaoseus T. Clayton, Earl Whitted, Jr., for plaintiff appellants.

Branch & Hux, by George A. Hux; Rom B. Parker for defendant appellees.

HIGGINS, J. The plaintiffs moved for judgment on the pleadings, contending the allegations and admissions in the defendants' answer show conclusively that the deed executed by the plaintiffs to J. P. Neville and wife on February 2, 1961, was in fact security for a debt and in equity a mortgage. The defendants alleged that prior to January 1, 1961, the plaintiffs were heavily indebted and threatened with the foreclosure of two deeds of trust on their farm. The plaintiffs applied to defendants J. P. Neville and wife for financial help. At the time the plaintiff's indebtedness, which is itemized in the answer, amounted to $8,736.70. We quote here two paragraphs from the defendants' answer:

> "2. That pursuant to the conversation between the plaintiffs and the defendant, J. P. Neville, as set out in the preceding paragraph and after extensive discussion and negotiations the defendants, J. P. Neville and his wife, Carrie W. Neville, entered into an agreement on the 2nd day of February, 1961, with Robert Hardy and his wife, Lola M. Hardy, whereby the said Robert Hardy and his wife, Lola M. Hardy, executed a Deed to J. P. Neville and his wife, Carrie W. Neville; which deed is of record in Book 658, at page 99, Halifax County Public Registry.
>
> "3. That contemporaneous with the execution of the said deed referred to in the preceding paragraph J. P. Neville and his wife, Carrie W. Neville, entered into a contract in the nature of an option with the said Robert Hardy and his wife, Lola M. Hardy, by the terms of which said J. P. Neville and his wife, Carrie W. Neville, agreed to sell and reconvey the real estate described in said deed for the purchase price of $8,736.70, plus interest at the rate of six per cent per annum, plus all taxes paid by the said J. P. Neville and wife, Carrie W. Neville, on said real estate and all premiums of insurance advanced by J. P. Neville and his wife, Carrie W. Neville."

The defendants treat the first contract as in the nature of an option to repurchase. The document is before us. It is a contract of purchase and sale on fixed terms; that is, the payment of the debt, interest, insurance, and taxes in ten annual installments and upon the final payment it binds the Nevilles, their heirs and personal representatives to execute and deliver to the Hardys "or their nominee a deed in fee simple for said land." This contract executed with the deed has the effect of inserting the conditions as a defeasance clause in the deed.

The plaintiffs were unable to meet the first payment due under the contract of February 2, 1961, and according to the defendants' answer, ". . . J. P. Neville advised Robert Hardy . . . that he did not wish to be forced to take possession of the farm . . . and after extended negotiations . . . J. P. Neville and wife . . . entered into another written contract . . . *extending the time for payment in order to give the plaintiffs additional opportunity to redeem the real estate referred to in this cause.*" (emphasis added.)

The second contract, dated January 1, 1962, was attached to and made a part of the defendants' answer. It provided that in the event the plaintiffs were unable to obtain adequate financing to operate the farm, or if "they were unable to meet the payment of principal, interest, insurance and taxes (due on December 30, 1962) then, and in that event the farm shall be sold. . . . In the event the said parties are unable to agree among themselves then said farm shall be sold at public auction to the highest bidder, after two weeks advertisement in the Enfield Progress, and any amount that it brings over and above the purchase price of $8,736.70, plus all accrued interest, and plus taxes and insurance as of the date of the sale, shall be divided equally . . . J. P. Neville, et ux, receiving one-half, and Robert Hardy, et ux, receiving one-half."

The plaintiffs' motion for judgment on the pleadings required the court to determine as a matter of law whether the deed and contract of February 2, 1961, and the followup contract of January 1, 1962, together with the other admissions in the answer, established the relationship of the parties as debtors and creditors and fixed the deed as in equity a mortgage to secure the debt.

Our cases furnish ample guides pointing to the right answer. "If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage." *Ricks v. Batchelor,* 225 N.C. 8, 33 S.E. 2d 68. A material question also is: does the relationship of debtor and creditor continue to exist after the conveyance? *Ferguson v. Blanchard,* 220 N.C. 1, 16 S.E. 2d 414. If the intent is to secure an obligation at the inception of the transaction it will be considered in equity a mortgage, and nothing else. *McKinley v. Hinnant,* 242 N.C. 444, 87 S.E. 2d 568.

Other questions material to decision in favor of holding a deed a mortgage are: The grantor is in distress at the time of the transaction. *O'Briant v. Lee,* 214 N.C. 723, 200 S.E. 865. The grantor is permitted to remain in possession. *Culbreth v. Hall,* 159 N.C. 588, 75 S.E. 1096. The price for reconveyance was not the value of the land but exactly the amount the grantees had advanced, plus interest, insurance and taxes. *Kemp v. Earp,* 42 N.C. 167.

The defendants' answer shows (1) the consideration for the deed was exactly the amount paid in discharge of the plaintiffs' debts; (2) the contract price for repurchase was the exact amount of that indebtedness, plus interest, insurance and taxes; (3) *the second contract was for the purpose of giving the plaintiffs additional time to redeem;* (4) in case of further default, provision was made for a sale, private by agreement, public otherwise; and the satisfaction of the debt from the proceeds. Thus the defendants' pleading makes out a clear case of debtor-creditor relationship between the Hardys and the Nevilles. The Nevilles held the legal title as security for their debt. The Hardys owned the equity of redemption. Both together, but neither alone, could sell and convey a good title to the purchaser.

Mr. Lock, who appears to have purchased at a sale made presumably by the Nevilles since they executed the deed to him, nevertheless was charged with notice of the lack of their authority to sell at public auction. The deed and the contracts were known to him because of registration and the reference to them in his deed from the Nevilles. However, he does not claim to be in any better position than they are. He joins with them in the answer and in the brief here. The Hardys were not parties to his deed. "All persons having an interest in the equity of redemption should be made parties to a bill of foreclosure." *Jones v. Williams,* 155 N.C. 179, 71 S.E. 222.

The court did not pass on plaintiffs' motion for judgment on the pleadings. The question is presented here by plaintiffs' Assignment of Error No. 6. The court should have ruled as a matter of law the plaintiffs and J. P. Neville and wife occupied the relationship of debtors and creditors, and the deed dated February 2, 1961, was in equity a mortgage conveying the lands to the grantees as security for the indebtedness due by the grantors. Subject to this indebtedness, Robert Hardy and wife, being the owners of the equity of redemption, are entitled to have the deed cancelled upon the payment of that indebtedness. If the indebtedness is not paid, J. P. Neville and wife may apply to the court for foreclosure. This is an equity proceeding. The court has ample power to require an accounting and to make such other orders as may be necessary to protect the interests of all parties.

The judgment of nonsuit is reversed and the cause is remanded for disposition in accordance with this opinion.

Reversed.

PARKER, J., did not take part in the disposition of this case.

ADDIE LANGLEY v. DURHAM LIFE INSURANCE COMPANY OF RALEIGH, N. C.

(Filed 18 March 1964.)

1. Appeal and Error § 51—

On appeal from judgment as of nonsuit, the Supreme Court must consider all the evidence admitted in the court below, even though some of it may have been incompetent.

2. Insurance § 34—

There is a difference between "accidental death" and "death by external, violent and accidental means" within the coverage of a policy of insurance, and death by external, violent and accidental means imports not only that the means which caused the death were external and violent but that they were also accidental, and if death results from a voluntary act it is not the result of accidental means.

3. Same—

Evidence tending to show that insured was found, lying face down on his bed some six to ten hours after death, his face buried, but not entangled, in the bed covers, and his nose, lips and entire face flat, *is held* insufficient to show that death resulted from external, violent and accidental means within the coverage of a policy of insurance, since even assuming that the death resulted from suffocation, the evidence raises the inference that insured voluntarily laid down on his bed and that the death resulted from his voluntary act in so doing.

APPEAL by defendant from *Bundy, J.*, October 21, 1963, Civil Session of PITT.

Plaintiff is named as beneficiary in each of two policies issued by defendant. The same person is the insured in each policy. The insured died March 5, 1961. The policies were in full force and effect. Each policy provided defendant would pay to the beneficiary $2,400.00 if the insured "shall sustain bodily injury effected directly through external, violent and accidental means, exclusively and independently of all other causes, which shall, within ninety days of the event causing the bodily injury, result in the death of the Insured." Whether the insured's death was the result of bodily injury so effected was the only issue raised by the pleadings.

Plaintiff offered evidence consisting of the policies, the testimony of E. Withers Harvey, Jr., Coroner of Pitt County, and a death certificate signed by Harvey.

Harvey testified: "On March 6, 1961, I, as Coroner, was called upon to investigate the death of one Charlie Langley, also known as Charlie Ebram. I went to 1117 Douglas Avenue, Greenville, at approximately 5:45 a.m., and proceeded to the back bedroom of the house at this address. I found a man lying on a bed, crossways, and by crossways I

mean not straight in the bed but his head and feet from one corner diagonally to the other, face down, dressed, with his head—with his face buried in the bed covers, which had not been turned back, lying flat on his face. This person was dead. I found that his face, his nose, lips, and his entire face was flattened, was mashed in and flattened."

After hearing evidence in the absence of the jury, the court held Harvey to be "an expert." Defendant excepted. Thereafter, over defendant's objections, Harvey was permitted to testify: (1) that, in his opinion, insured had been dead from six to ten hours; (2) that his opinion was based on "the condition of the body," that rigor mortis had set in and that, according to his best information, rigor mortis "will set in on a dead body during a period of from five to ten or eleven hours, based upon the temperature of the immediate surroundings"; and (3) that, in his opinion, the cause of death was suffocation. The death certificate was admitted only as it might tend to corroborate Harvey's (opinion) testimony that suffocation was the cause of death. On cross-examination, Harvey testified he did not know whether the insured died as a result of a heart attack or whether he had a stroke and that "there could be many, many reasons for his death."

Defendant offered one witness, Dr. E. B. Aycock, admitted by plaintiff to be "a medical expert in the general practice of medicine." Plaintiff's objections to hypothetical questions asked Dr. Aycock were sustained. Defendant excepted.

The court submitted and the jury answered the following issue: "Did the insured Charlie E. Langley (Charlie Ebram), under Policies A 25329 and A 52862, sustain bodily injury effected directly through external, violent and accidental means, exclusively and independently of all other causes, thereby resulting in the death of the insured? Answer: Yes."

Judgment that plaintiff have and recover of defendant the sum of $4,800.00 and costs was entered. Defendant excepted and appealed.

Richard Powell and Charles H. Whedbee for plaintiff appellee.
L. W. Gaylord, Jr., for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of its timely motion(s) for judgment of nonsuit. In passing upon this assignment, the admitted opinion testimony of Harvey, whether competent or incompetent, must be considered. *Early v. Eley*, 243 N.C. 695, 700, 91 S.E. 2d 919, and cases cited; *Kientz v. Carlton*, 245 N.C. 236, 246, 96 S.E. 2d 14.

"Where . . . a policy provides for indemnity for injuries inflicted by external, violent, 'and' accidental means, to support a recovery it must

be shown not only that the means were external and violent, but also that they were accidental—that is, all three tests must be met before coverage is afforded." 29A Am. Jur., Insurance § 1165; 45 C.J.S., Insurance § 754; 1 Appleman, Insurance Law and Practice, § 393. Plaintiff, to establish coverage, must show the insured's death was effected "directly through external, violent and accidental means, exclusively and independently of all other causes." *Fallins v. Insurance Co.,* 247 N.C. 72, 100 S.E. 2d 214; *Slaughter v. Insurance Co.,* 250 N.C. 265, 108 S.E. 2d 438; 21 Appleman, *op. cit.,* § 12482.

While there is a division of authority elsewhere (see 29A Am. Jur., Insurance § 1166 and Comment Note, 166 A.L.R. 469), this Court has consistently drawn a distinction between the terms "accidental death" and "death by external accidental means." *Fletcher v. Trust Co.,* 220 N.C. 148, 16 S.E. 2d 687, and cases cited. For later cases, see Strong, N. C. Index, Insurance § 34.

In *Fletcher,* Barnhill, J. (later C.J.), said: "'Accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation. The insurance is not against an accidental result. To create liability it must be made to appear that the unforeseen and unexpected result was produced by accidental means."

In *Fletcher,* a spinal anesthetic was administered. The respiratory system became completely paralyzed or anesthetized and the patient (insured) died. The injection of the anesthetic was intentional and authorized. This Court held the death (although accidental) was not caused by accidental means.

In *Scott v. Insurance Co.,* 208 N.C. 160, 179 S.E. 434, the extraction of the insured's tooth "was intentional, skillfully done in the ordinary and usual manner, with no mishap, unforeseen element, or mis-adventure." However, an infection set in which produced an embolus which caused insured's death. This Court held the evidence insufficient to show death was caused by accidental means.

In *Mehaffey v. Insurance Co.,* 205 N.C. 701, 705, 172 S.E. 331, Brogden, J., states: "If the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by accidental means." This statement is quoted with approval by Winbourne, C.J., in *Allred v. Insurance Co.,* 247 N.C. 105, 100 S.E. 2d 226.

In *Allred,* plaintiff's evidence tended to show insured's death resulted from being struck by an automobile after he had voluntarily laid prone in the center of the highway. It was held the evidence disclosed insured's death flowed directly from his own voluntary act and was not caused by accidental means. Judgment of nonsuit was affirmed.

In Webster's Third New International Dictionary (unabridged), suffocation is defined as follows: "the act of suffocating or state of being suffocated: stoppage of breathing." It is also stated: "SUFFOCATE commonly refers to conditions in which breathing is impossible through lack of available oxygen or through presence of noxious or poisonous gas (prisoners *suffocated* in the underground dungeon)" and "SUFFOCATE also refers to situations in which breathing is impossible because mouth and nose are covered (*suffocating* under the mud and earth which had fallen over his head)."

According to Harvey's opinion testimony, suffocation, "stoppage of breathing," caused insured's death. If so, the question is whether there was evidence sufficient to support a finding that suffocation was caused "through external, violent and accidental means."

There was no evidence tending to show: (1) the presence of noxious or poisonous gas; (2) the insufficiency of available oxygen; (3) bruises or other bodily injury; (4) when and under what circumstances insured lay down on his bed; (5) insured's physical condition prior to and at the time he lay down on his bed.

The evidence tends to show: When observed, some six to ten hours after death, insured was lying flat on his face, his face buried in the bed covers. Rigor mortis ("rigidity of muscles after death," Webster, *op. cit.*) had "set in." *At that time,* insured's "nose, lips, and his entire face was flattened, was mashed in and flattened."

There was no evidence to support plaintiff's allegation that insured became "entangled in the bed covers" while asleep. Indeed, the evidence contradicts this allegation.

It is noted that plaintiff alleged insured, shortly after arriving at his home on March 5, 1961, about 5:30 p.m., "went to his bedroom and laid across the bed and went to sleep."

In our view, the only reasonable inference to be drawn from plaintiff's evidence is that insured voluntarily laid down on his own bed. When Harvey observed the body of insured, insured was lying on the bed, diagonally, on top of the bed covers. Assuming death by suffocation caused in whole or in part from contact with the bed covers, this was the unintended and unexpected result of insured's voluntary act. In our opinion, the admitted evidence was insufficient to show that death by suffocation was caused by accidental means.

For the reasons stated, defendant's motion(s) for judgment of nonsuit should have been allowed. Hence, the judgment of the court below is reversed.

Reversed.

STATE v. ELLEN MARIE DAVIS.

(Filed 18 March 1964.)

1. Trespass § 12; Constitutional Law §§ 20, 30—

A person who, without permission or invitation, enters upon premises in the peaceful possession of another and who, after his presence is discovered and he is unconditionally ordered to leave by the one in legal possession, refuses to leave and remains on the premises, is a trespasser from the beginning, and may be convicted of violating G.S. 14-134, and such result does not violate any constitutional rights. Constitution of North Carolina, Article I, § 17; Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

2. Same; Innkeepers § 1—

G.S. 72-1 has no application to a prosecution of defendant for trespass in refusing to leave a restaurant after she had been ordered to do so by the manager of the restaurant, notwithstanding that the manager also owned an adjacent motel, when there is no evidence that he operated or managed the motel, or that defendant ever applied for lodging at the motel.

APPEAL by defendant from *Parker, J.*, October Criminal Session 1963 of HALIFAX.

The defendant was tried upon a bill of indictment charging her with a violation of the provisions of G.S. 14-134, in that she unlawfully trespassed upon the premises of the Plantation Restaurant at Enfield, North Carolina. The restaurant is owned and operated by William R. Davis, the prosecuting witness, who also owns the Enfield Motel located about 50 feet north of the restaurant on the same side of Highway 301. The restaurant serves white people only and has a sign to that effect at the entrance thereof.

The State's evidence tends to show that the Plantation Restaurant is located about 65 feet from Highway 301 within the town limits of Enfield; that on the night of 6 August 1963 the defendant and other Negroes, approximately 35 in number, forced their way into the Plantation Restaurant through the back door and took seats at tables where white customers were being served. That around noon on 7

August 1963 the defendant, accompanied by approximately 35 other Negroes, approached the front entrance of the Plantation Restaurant, and the owner of the restaurant locked the front door. The defendant sat down on the floor mat in front of the door. The owner of the restaurant unlocked the front door and repeatedly requested the defendant and others to move away from the front door in order that his customers might enter the restaurant. He also requested them to leave the premises. Neither the defendant nor the other Negroes present paid any attention to the requests of the proprietor of the restaurant. Officers were called, and the request to the defendant and the other Negroes to leave the premises of the restaurant was again made in the presence of the officers, and upon the failure of the defendant and others to unblock the entrance to the restaurant and leave the premises, the defendant and others were arrested and charged with trespass.

The State's evidence also tends to show that on this occasion the defendant never requested service at the restaurant.

The defendant moved for judgment as of nonsuit at the close of the State's evidence. Motion denied. The defendant offered no evidence.

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Ralph Moody for the State.

Theaoseus T. Clayton, W. O. Warner, Samuel S. Mitchell, Floyd B. McKissick for the defendant.

DENNY, C.J. The appellant assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit.

The defendant contends that G.S. 14-134, which in pertinent part reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor," is unconstitutional by reason of conflict with Article I, Section 17 of the Constitution of North Carolina and the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; that said prosecution here rests upon an unlawful exercise of legislative power by a private citizen, to wit, the prosecuting witness. In other words, the defendant contends she has the inherent right to exercise the fundamental freedom to enter upon the premises of any private business which is open to the public generally, whether she is forbidden to do so or not, and any abridgment of that right is unconstitutional.

This Court, in *S. v. Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, speaking through *Rodman, J.*, said: "Our statutes, G.S. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

"The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws. * * *

"* * * (I)t is apparent the Legislature intended to prevent the unwanted invasion of the property rights of another. *S. v. Cooke, supra* (246 N.C. 518, 98 S.E. 2d 885); *S. v. Baker,* 231 N.C. 136, 56 S.E. 2d 424. It is not the act of entering or going on the property which is condemned; it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under G.S. 14-126. An entry under a *bona fide* claim of right avoids criminal responsibility under G.S. 14-134 even though civil liability may remain. *S. v. Faggart,* 170 N.C. 737, 87 S.E. 197; *S. v. Wells,* 142 N.C. 590; *S. v. Fisher,* 109 N.C. 817; *S. v. Crosset,* 81 N.C. 579.

"What is the meaning of the word 'enter' as used in the statute defining criminal trespass? The word is used in G.S. 14-126 as well as G.S. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G.S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. *S. v. Goodson, supra* (235 N.C. 177, 69 S.E. 2d 242); *S. v. Fleming,* 194 N.C. 42, 138 S.E. 342; *S. v. Robbins,* 123 N.C. 730; *S. v. Webster,* 121 N.C. 586; *S. v. Gray,* 109 N.C. 790; *S. v. Talbot,* 97 N.C. 494. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass.' It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent. * * *"

In light of the foregoing decision and the authorities cited therein, we hold that where a person without permission or invitation enters

upon the premises of another, and after entry thereon his presence is discovered and he is unconditionally ordered to leave the premises by one in the legal possession thereof, if he refuses to leave and remains on the premises, he is a trespasser from the beginning.

Likewise, "it is the law of this jurisdiction that although an entry on lands may be effected peaceably and even with permission of the owner, yet if, after going upon the premises of another, the defendant uses violent and abusive language and commits such acts as are reasonably calculated to intimidate or lead to a breach of the peace, he would be liable for trespass *civiliter* as well as *criminiliter* (*S. v. Stinnett,* 203 N.C. 829, 167 S.E. 63), for 'It may be, he was not at first a trespasser, but he became such as soon as he put himself in forceable opposition to the prosecutor'." *Freeman v. Acceptance Corp.,* 205 N.C. 257, 171 S.E. 63.

The defendant further contends that her arrest and prosecution were violative of her rights under G.S. 72-1, which reads as follows: "Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers *whom he may accept* as guests in his inn or hotel." (Emphasis ours.)

There is evidence in the record to the effect that the prosecuting witness owned the Enfield Motel; however, there is no evidence in the record tending to show that the prosecuting witness operated or managed the motel. Furthermore, there is no evidence tending to show that the defendant ever applied for lodging at the motel. Therefore, we hold that G.S. 72-1 has no application to the facts in this case.

We further hold that the provisions of G.S. 14-134 do not conflict with Article I, Section 17 of the Constitution of North Carolina or with the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. *United States v. Harris,* 106 U.S. 629, 27 L. Ed. 290.

The evidence adduced by the State in the trial below was sufficient to carry the case to the jury and to support the verdict rendered.

The motion for judgment as of nonsuit was properly overruled.

We have examined the remaining assignments of error and they present no prejudicial error.

In the trial below, we find

No error.

STATE v. ROBERT BLOW.

(Filed 18 March 1964.)

APPEAL by defendant from *Parker, J.,* October Criminal Session 1963 of HALIFAX.

The defendant was tried upon a bill of indictment charging him with a violation of the provisions of G.S. 14-134, in that he unlawfully trespassed upon the premises of the Plantation Restaurant at Enfield, North Carolina. The restaurant is owned and operated by William R. Davis, the prosecuting witness, who also owns the Enfield Motel located about 50 feet north of the restaurant on the same side of Highway 301. The restaurant serves white people only and there is a sign to that effect at the entrance thereof.

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Ralph Moody for the State.

Theaoseus T. Clayton, W. O. Warner, Samuel S. Mitchell, Floyd B. McKissick for the defendant.

PER CURIAM. The State's evidence against this defendant was substantially the same as the evidence in the case of *S. v. Davis, ante,* 463.

The defendant's assignments of error purport to raise the same questions raised in the above case. The trial, verdict and judgment entered in this case will be upheld on authority of the opinion in *S. v. Davis, supra.*

No error.

ROBERT F. DEANES v. ALEX ANDERSON CLARK, MAGGIE F. BOWERS, ROBERT A. BOWERS AND BARRUS CONSTRUCTION CO.

(Filed 18 March 1964.)

1. Pleadings § 1—

While the clerk of the Superior Court has authority, at the time of issuance of summons, to extend the time for filing complaint to a day certain, not to exceed twenty days, upon plaintiff's application stating the nature and purpose of the suit, the clerk has no authority to extend the time for filing

complaint beyond the time specified in such order unless the plaintiff has secured an order to examine the defendant prior to filing complaint. G.S. 1-121.

2. Same—

Where, upon issuance of summons, the clerk has extended the time for filing complaint, the judge of the Superior Court has discretionary power to permit plaintiff to file a complaint after the time specified in the order and after the expiration of the statutory time, the discretionary power of the judge in this respect not being limited by G.S. 1-121. G.S. 1-152.

3. Same; Courts § 6—

Where the clerk at the time of issuance of summons extends the time for filing complaint for twenty days, and thereafter enters an order dismissing the action for failure to file complaint within the time limited, the Superior Court on appeal acquires jurisdiction of the entire cause, and has discretionary power to permit plaintiff to file complaint notwithstanding that the clerk had no authority to do so.

4. Appeal and Error § 55—

Where an order of the Superior Court is entered under the Court's erroneous holding that it had no discretionary authority in the matter, the cause will be remanded in order that the Court may determine the matter in the proper exercise of its discretion.

APPEAL by plaintiff from an order entered by *Judge Joseph W. Parker* on 23 January 1964 and from a supplementary order entered by the same judge on 28 January 1964 at the January 1964 Session of EDGECOMBE, both orders affirming an order of the clerk of the superior court of Edgecombe County entered on 10 January 1964.

Bridgers, Horton & Britt by Marvin V. Horton for plaintiff appellant.

Battle, Winslow, Merrell, Scott & Wiley by Thomas L. Young for defendant appellants.

PARKER, J. On 18 November 1963 plaintiff commenced this action by the issuance of summonses. The summons to be served on defendant Alex Anderson Clark was directed to the sheriff of Warren County; the summons to be served on the defendants Maggie F. Bowers and Robert A. Bowers was directed to the sheriff of Stanly County; and the summons to be served on the defendant Barrus Construction Company was directed to the sheriff of Lenoir County. At the time of the issuance of these three summonses, the clerk of the superior court of Edgecombe County on three written applications of plaintiff by three written orders extended the time for filing complaint to 8 December 1963, and directed that a copy of plaintiff's application for extension

of time to file complaint showing the nature and purpose of the suit and a copy of his order extending the time for filing complaint be served with a copy of the complaint on each defendant. G.S. 1-121. Plaintiff's written applications for extension of time to file complaint in each case state: "* * * the nature and purpose of this action are as follows: to recover for personal injuries received in an automobile-truck collision which occurred on June 12, 1963, at about 2:30 p.m. in Halifax County, N. C. on highway under construction between Weldon and Roanoke Rapids, N. C." Service of process as commanded by the clerk's order was had in apt time on each defendant.

On 2 January 1964 defendants Clark, Maggie F. Bowers and Robert A. Bowers made a written motion before the clerk to dismiss the action as to them, because a complaint had not been filed as of the date of the filing of their motion.

On 3 January 1964 plaintiff left a complaint in the clerk's office and filed a written application with the clerk requesting that he in his discretion allow him to file his complaint, and issue an order for service of copies of the complaint on each defendant. In his application he recites that his counsel had had correspondence with the liability insurance carrier for defendant Barrus Construction Company, and had had no contacts from the individual defendants, and his counsel had the belief that the complaint could be filed within a reasonable time after 8 December 1963.

On 10 January 1964 the clerk entered an order, on motion of the individual defendants, dismissing the action as to them and allowing plaintiff's application for an order of service of the complaint on the corporate defendant. From that part of the order dismissing the action against the individual defendants, plaintiff appeals.

On 23 January 1964 Judge Joseph W. Parker entered an order affirming the clerk's order and dismissing the appeal.

On 28 January 1964 Judge Parker entered a supplementary order, wherein he found as facts the facts we have set forth above. Thereafter, his supplementary order reads:

> "9. That the delay in filing the complaint was not unreasonable, and there has been no laches or unreasonable neglect on the part of the plaintiff to proceed in the cause against the defendants served.
>
> "And the Court being of the opinion that the Clerk of Superior Court of Edgecombe County was without discretionary authority to issue orders of service of the said complaint upon the defendants, Alex Anderson Clark, Maggie F. Bowers and Robert A. Bowers;

"And the Court being of the further opinion that the question presented by the appeal from the Order of the Clerk does not invoke the discretionary authority of the Judge of the Superior Court to allow the plaintiff to have his complaint served on the defendant, Alex Anderson Clark, Maggie F. Bowers and Robert A. Bowers, but is only addressed to the question of whether or not the Clerk of Superior Court of Edgecombe County had authority to issue the order of service of said complaint;

"It is, therefore, ORDERED that the order entered by the Clerk of Superior Court of Edgecombe County on January 10, 1964, be and the same is hereby affirmed, and that this appeal is dismissed."

By virtue of the provisions of G.S. 1-121 "the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days"; and the application and order must state the nature and purpose of the suit. This statute now expressly provides that "the clerk shall not extend the time for filing complaint beyond the time specified in such order," unless the plaintiff has secured an order to examine the defendant prior to filing complaint. Hence, the power of the clerk to extend the time for filing complaint is clearly limited. McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. I, sec. 1115. See *O'Briant v. Bennett*, 213 N.C. 400, 196 S.E. 336. The part of G.S. 1-121 quoted above was enacted at the 1927 Session of the General Assembly, Public Laws, Session 1927, Ch. 66.

On 18 November 1963 the clerk, on applications of plaintiff, extended the time for filing complaint to 8 December 1963. Under the plain and unambiguous language of G.S. 1-121—plaintiff having secured no order to examine defendants or any one of them—the clerk had neither authority nor discretion on 3 January 1964 to extend the time for filing complaint beyond 8 December 1963, and to order it served on the defendants.

However, since G.S. 1-121 mentions only the clerk, and the well-established general rule is that the judge has inherent discretionary power to permit plaintiff to file a complaint after expiration of statutory time or to permit untimely pleadings to be filed, G.S. 1-121 does not affect the discretionary power of the judge. *Veasey v. King*, 244 N.C. 216, 92 S.E. 2d 761; *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919; *O'Briant v. Bennett, supra; Hines v. Lucas*, 195 N.C. 376, 142 S.E. 319; *Church v. Church*, 158 N.C. 564, 74 S.E. 14; *Griffin v. Light Co.*, 111 N.C. 434, 16 S.E. 423; *Gilchrist v. Kitchen*, 86 N.C. 20; *Anderson v.*

Anderson, 1 N.C. 20. Further, another statute, G.S. 1-152, stemming from our original code provides, "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time." G.S. 1-152, formerly C.S. 536, has been held applicable to complaints. *Hines v. Lucas, supra.*

When plaintiff in the instant case appealed from the clerk's order to the judge, the judge was not limited to a review of the action of the clerk, but was vested with jurisdiction "to hear and determine all matters in controversy in such action," and render such judgment or order within the limits provided by law as he deemed proper under all the circumstances made to appear to him. G.S. 1-276; *Hudson v. Fox,* 257 N.C. 789, 127 S.E. 2d 556; *Blades v. Spitzer,* 252 N.C. 207, 113 S.E. 2d 315; *Langley v. Langley,* 236 N.C. 184, 72 S.E. 2d 235; *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; Strong's N. C. Index, Vol. I, Courts, sec. 6.

Rich v. R. R., 244 N.C. 175, 92 S.E. 2d 768, was an action to recover personal and property damage caused by a collision at a grade crossing between plaintiff's automobile and defendant's train. The clerk entered a judgment by default and inquiry against the individual defendants. Later the individual defendants moved in superior court before the judge that the judge in his discretion set aside the judgment by default and inquiry against them, and permit them to verify the answer theretofore filed by them or in lieu thereof permit them to file a new verified answer. The judge heard the motion, made full findings of fact, and in the exercise of his discretion and in furtherance of justice vacated the judgment by default and inquiry and allowed the individual defendants 30 days within which to verify *nunc pro tunc* the answer theretofore filed in their behalf. Upon appeal this Court affirmed the order of the judge.

Indubitably, a judge of the superior court in North Carolina has inherent power in his discretion and in furtherance of justice to extend the time for filing a complaint, and he is also vested with such authority by statute. G.S. 1-152; *Rich v. R. R., supra; Griffin v. Light Co., supra; Gilchrist v. Kitchen, supra.*

The judge below erred in holding in his supplementary order "that the question presented by the appeal from the Order of the Clerk does not invoke the discretionary authority of the judge of the Superior Court * * *, but is only addressed to the question of whether or not the Clerk of the Superior Court of Edgecombe County had authority to issue the order of service of said complaint." It would seem that the judge below was of the same erroneous opinion that the appeal from

the clerk did not invoke his discretionary power, when he entered his order dated 23 January 1964, for the supplementary order entered five days later merely gives the grounds for his ruling—the ultimate ruling in each order being identical. The whole matter was before the judge below on appeal, and he was vested with the power as to whether or not he should exercise his discretion in furtherance of justice to permit or to refuse plaintiff's motion for an extension of time to file his complaint. The trial judge is presumed best to know what order and what indulgence will promote the ends of justice in each particular case. How the discretion of the trial judge should be exercised in this case we are not authorized to express an opinion. The case is remanded to be proceeded with according to law for there is error.

Error.

PAULINE TURNER v. LOYD EUGENE TURNER, ERNEST JAMES THOMPSON, AND BOARD OF SCHOOL COMMISSIONERS OF GASTONIA GRADED SCHOOLS DISTRICT.

(Filed 18 March 1964.)

1. Automobiles §§ 41g, 43—

In an action by a passenger in an automobile to recover for injuries received in a collision at an intersection, evidence that the driver of the car in which plaintiff was riding stopped before entering the intersection with the dominant highway but then drove into the intersection although he could have seen the other car approaching from his right, and that the driver of the other car failed to keep a proper lookout and drove at an unlawful speed into the intersection and collided with the first car, which was first in the intersection, *held* sufficient to be submitted to the jury on the question of the actionable negligence of each driver.

2. Appeal and Error § 40—

A new trial will not be awarded for mere technical error but only for error which is prejudicial.

3. Negligence § 8—

Where the active negligence of each of two responsible agents combines and constitutes a proximate cause in producing the injury, each is civilly liable notwithstanding one may have been more or less negligent than the other.

APPEAL by defendants from *Froneberger, J.*, October, 1963 Civil Session, GASTON Superior Court.

The plaintiff instituted this civil action to recover damages for personal injuries she sustained in a Gastonia street crossing collision be-

tween a Plymouth automobile owned and driven west on West Third Avenue by her husband, the defendant, Loyd Eugene Turner, and a Ford truck owned by the defendant Board of School Commissioners and driven south on South Chester Street by the defendant Thompson.

On the day of the accident the weather was clear. Both streets were paved. West Third Avenue was 20 feet wide; South Chester Street, 30 to 35 feet wide. Stop signs were in place on West Third Avenue, making South Chester the dominant street. According to plaintiff's evidence, the defendant Turner approached the intersection, driving west on West Third Avenue, stopped at the stop sign. "He stayed stopped long enough to look both ways. He looked to the right first and then to the left. Then he pulled out at a speed of about 10 miles per hour. Yes, sir, I saw a Ford truck coming from my right. Yes, sir, I did after we'd started into the intersection. Well, the front wheels of our car was half way in the intersection when I saw the Ford truck. The Ford truck was going south. I'd say the Ford truck was 120 feet away when I first saw it. It was to my right. Yes, I have an opinion satisfactory to myself as to what speed the Ford truck was making when I saw it. My opinion is 50 miles an hour."

The defendant Thompson testified: "As I was going down Chester, I did not pay strict attention to whether there was any car to my left in the left lane or not. There wasn't any as I noticed. As I was going down Chester I was going between 20 or 25, no more. I didn't see the car (Turner's) crossing Chester until he was right at me. . . . When I seen (*sic*) him I was about 10 feet from him." Chester was a one-way street for travel south.

According to the testimony of the police officer who investigated the accident, the Plymouth automobile was demolished. The front fender and the grill of the truck were damaged. The debris indicated the collision occurred in the northwest quadrant of the intersection. The truck left 10 or 12 feet of skid marks but stopped almost at the point of impact. The defendant Turner had the odor of beer on his breath and an unopened can of beer was found in his car.

On the oral argument the parties agreed the Board of School Commissioners waived its governmental immunity by procuring indemnity insurance sufficient to cover its liability in this accident.

The plaintiff offered medical evidence of her serious and permanent injuries. The court submitted, and the jury answered, issues as here indicated:

"1. Was the plaintiff injured by the negligence of the defendant Loyd Eugene Turner, as alleged in the Complaint?

Answer: Yes.

"2. Was the plaintiff injured by the negligence of the defendants Ernest James Thompson and Board of School Commissioners of Gastonia Graded School District, as alleged in the Complaint?

Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover?

Answer: $37,500.00."

From the judgment on the verdict, the defendants appealed.

W. N. Puett, Childers & Fowler by Max L. Childers, Henry L. Fowler, Jr., for plaintiff appellee.

Hollowell & Stott, by Grady B. Stott for defendant appellants.

HIGGINS, J. The plaintiff alleged that her injuries were proximately caused by the joint and concurrent acts of negligence on the part of the defendants. She alleged (1) the defendant Turner was negligent in that he entered the arterial highway from a stop street without ascertaining the movement could be made in safety, and (2) the defendants Thompson and the Board of School Commissioners were negligent in that Thompson drove the truck into the Turner Plymouth, which was first in the intersection, without keeping a proper lookout and at an unlawful rate of speed.

The plaintiff offered medical evidence of her serious and permanent injuries. She called both defendants Turner and Thompson as adverse witnesses. The evidence of each tended to magnify the negligent acts of the other and to minimize his own. Neither defendant, however, offered other testimony. The collision occurred at noon on a clear day. The evidence permitted the inference that concurrent acts of negligence on the part of both drivers caused the plaintiff's injuries. *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894; *Tillman v. Bellamy*, 242 N.C. 201, 87 S.E. 2d 253.

Attorneys for both parties were meticulous in the examination, and especially so in the cross-examination, of witnesses. Exceptions to the admission and exclusion of testimony were numerous. However, the variation from the script approved by this Court in such cases is too slight and too microscopic to have misled the jury or to have influenced the verdict. "New trials are not awarded because of technical errors. The error must be prejudicial." *Davis v. Ludlum*, 255 N.C. 663, 122 S.E. 2d 500. After all, two vehicles slammed into each other in the intersection in broad daylight, injuring the passenger in one of them. One driver may have been more or less negligent than the other, but

the law does not measure negligence on a percentage basis in cases of this nature. *Cashatt v. Seed Co.,* 202 N.C. 383, 162 S.E. 893. Each defendant is civilly responsible if some negligent act of his, combined with the negligent act of the other, produces the harmful result. *Darroch v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589.

This appeal does not present any new or novel legal problem. The many assignments of error have been examined. A seriatim discussion would add nothing of value to the traffic law of this State. While the judgment is for a substantial sum, the plaintiff's injuries were serious. In the trial, we find

No error.

HAYNES PETROLEUM CORPORATION v. J. A. TURLINGTON.

(Filed 18 March 1964.)

1. Principal and Agent § 5—

Ordinarily a collecting agent has authority to accept only money or legal tender, but when a check accepted by the agent is duly paid the principal is bound regardless of whether the agent gets the actual cash or only a credit at the bank to his own account.

2. Same—

Where the evidence discloses that a collecting agent also operated a separate business owned by him and that payments on account for monies due the principal were made to the agent by checks, some of which were made payable to the principal and some to the agent's business, but further that the agent had authority to accept checks payable to his individual business provided he endorsed them over to the principal, *held,* the agent's authority being admitted, payment to the agent constituted in law payment to the principal, and, in the absence of notice the payer was not under duty to see to the application of payment.

APPEAL by plaintiff from *Bundy, J.,* November 1963 Session of PITT.

Blount & Taft and Fred T. Mattox for plaintiff.
No counsel contra.

MOORE, J. Plaintiff sues on an open account for merchandise sold and delivered. Plaintiff alleges that there is a balance due of $1525.49, demand was made and payment refused. Defendant admits that he purchased and received all of the items charged to him except one, alleges payment in full, and counterclaims for overpayment of $329.56.

Plaintiff corporation is engaged in the business of selling petroleum products through its bulk plant in the town of Fountain, North Carolina. From August 1960 through November 1961 defendant operated a sawmill in the area and purchased diesel fuel, gasoline and other products from plaintiff. The merchandise was delivered to defendant by James B. Fountain, Jr., who was in charge of plaintiff's plant. There is evidence that James B. Fountain, Jr. also operated, under the name of Fountain Enterprises, a separate service station business in front of plaintiff's plant on land belonging to plaintiff. Mr. W. F. Haynes, president of plaintiff—Haynes Petroleum Corporation—testified: "Fountain Enterprises was an individual, James B. Fountain, Jr. . . . Fountain Enterprises is a distinct and separate entity from Haynes Petroleum Corporation. This station (Fountain Enterprises) . . . was an entirely independent corporation entity . . ."

Defendant contends that he was not credited with ten payments aggregating $1691.23 which were made to Mr. Fountain. He introduced in evidence ten cancelled checks, three of which were made payable to Haynes Petroleum Corporation, one payable to Fountain Enterprises and endorsed for deposit to Haynes Petroleum Corporation, and six payable to Fountain Enterprises.

Defendant testified that he bought petroleum products only from Haynes Petroleum Corporation and that he did not make purchases of any kind from Fountain Enterprises. To explain why some checks were made payable to Haynes Petroleum Corporation while others were made payable to Fountain Enterprises, defendant said: "He (Mr. Fountain) made them out and I signed them. I don't know how they handled that. I never asked why they were payable that way."

Mr. Haynes, president of plaintiff corporation, testified:

"I do not know whether Mr. Turlington (defendant) received cash for those checks not reflected on the account. Mr. Fountain worked for me from the Spring of 1960 until the Spring of 1962. He had authority to collect and deposit money for Haynes Petroleum Corporation. He had authority to deposit money (*sic*) made out to Fountain Enterprises if he endorsed it over to Haynes Petroleum Corporation just as anybody could any check. . . . Mr. Fountain had no authority to collect accounts for Haynes and deposit it in Fountain Enterprises. He did have authority to collect from Fountain Enterprises and deposit to the account of Haynes Petroleum Corporation."

After stating the contentions of the parties, the court charged the jury as follows:

> "Now, gentlemen, if the defendant paid Fountain and Fountain was the plaintiff's agent, then that in law constituted paying the

plaintiff, for payment to its agent is payment to the principal. If Fountain didn't apply the money to the right place, didn't turn it over to Haynes and didn't deposit it to Haynes, then that's a matter between Haynes and Fountain."

A verdict was returned in favor of defendant on his counterclaim, and judgment was entered accordingly.

Plaintiff contends that the instruction quoted above is insufficient to inform the jury of the law arising on the evidence with respect to agency. It is argued that defendant had the burden and duty to use due diligence and prudence to ascertain whether Mr. Fountain was acting and dealing within the scope of his authority as agent of plaintiff, and defendant, being put on notice by the checks made payable to Fountain Enterprises and the endorsements thereon that Mr. Fountain might be misapplying the payments, would not be entitled to credit for such checks if he failed to make reasonable investigation as to the agent's authority to bind plaintiff in receiving them. (Plaintiff cites *Edgewood Knoll Apartments v. Braswell,* 239 N.C. 560, 80 S.E. 2d 653; *Williams v. Johnston,* 92 N.C. 532). In short, plaintiff contends that the court should have instructed the jury that the burden was on defendant to ascertain the agent's exact authority and to prove that Fountain was authorized to receive the particular payments in the manner and form in which they were made.

In the absence of special circumstances, the authority of an agent for collection is limited to the acceptance of money or legal tender. 3 Am. Jur., 2d, Agency, s. 138, p. 531. This rule is subject to an exception where the agent, although without authority to discharge the debt by acceptance of something other than money, actually realizes money on the thing taken by him. 94 A.L.R. 784. While it is generally recognized that an agent having authority to collect a debt has no authority to receive a check in payment, it is nevertheless held that, where he cashes the check and receives the money thereon, the principal is bound. *Kloewer v. Associates Discount Corp.,* 62 N.W. 2d 244 (Iowa 1954); Restatement of the Law, Agency, s. 178; 3 Am. Jur., 2d, Agency, s. 139, pp. 531, 532; 94 A.L.R. 786. Checks made payable to the order of an agent, which are cashed by him, are not different from payments made in cash so far as the legal effect of the transaction is concerned. *Zummach v. Polasek,* 227 N.W. 33 (Wis. 1929). The weight of authority seems to be that it is immaterial whether the agent gets the actual cash from presentation of the check or only a credit at the bank to his own account. 94 A.L.R. 791.

The existence of the agency relationship and the extent of the agent's authority are not at issue in the instant case. These matters were made

definite by the testimony of Mr. Haynes, president of plaintiff corporation. He testified in effect that Mr. Fountain was authorized to sell and deliver the merchandise on credit and to collect the account, and had authority to receive on behalf of plaintiff checks made out to Fountain Enterprises if they were endorsed over to Haynes Petroleum Corporation. From this it is clear that Mr. Fountain was acting within his authority in receiving checks payable to Fountain Enterprises as credits on the account of defendant with plaintiff, if they were given by defendant and received by Mr. Fountain for that purpose. The provision that the agent endorse them in favor of plaintiff and deposit them to the account of plaintiff placed no burden on debtor defendant to see to the proper application of the funds. As the judge stated, that was a matter between the principal and the agent. No duty rests upon a debtor, who makes a payment to an agent designated to receive it, to see that the money reaches the principal, if the debtor is without notice of an improper purpose or intention on the part of the collecting agent. *Shriver v. Sims,* 255 N.W. 60, 94 A.L.R. 779 (Neb. 1934). Three of defendant's checks were made payable to plaintiff, one payable to Fountain Enterprises was endorsed for deposit to plaintiff, five payable to Fountain Enterprises were endorsed in blank, and one payable to Fountain Enterprises and dated "6-17-1961" was not endorsed but had an entry on the back, "Credit account of the within named payee in Edgecombe Bank & Trust Co." This check dated "6-17-1961" was the last check which defendant made payable to Fountain Enterprises. The check or checks given by defendant after that date were made payable to Haynes Petroleum Corporation. There is no contention that the agent did not receive money for the checks. There is no evidence of timely notice to defendant that the agent had failed to account to plaintiff for the payments.

The jury was not concerned with the application of agency law. They were concerned with a simple factual controversy, whether the checks were given by defendant and received by Mr. Fountain as a credit on defendant's open account with plaintiff. They resolved this question in favor of defendant.

In the trial below we find

No error.

WILLIAM SCOTT WHEELER D/B/A FURNITURE FACTORY OUTLET v. SAM THABIT AND WIFE, AMERICA M. THABIT.

(Filed 18 March 1964.)

1. Appeal and Error § 12—

Notice of appeal from an order overruling a demurrer interposed on grounds other than a matter of right for misjoinder of parties and causes does not oust the jurisdiction of the lower court, since appeal from such order is not authorized. Rule of Practice in the Supreme Court No. 4(a).

2. Pleadings § 6—

A defendant has thirty days after order overruling his demurrer in which to file answer or petition the Supreme Court for *certiorari*. G.S. 1-125, G.S. 1-131; Rule of Practice in the Supreme Court No. 4(a).

3. Appeal and Error §§ 12, 16—

While *certiorari* has the effect of a supersedeas, it cannot preclude the lower court from proceeding in the cause by order entered prior to the filing of the petition for *certiorari*. Whether the jurisdiction of the lower court is ousted from the time of filing of the petition or only from the time the petition is granted, *quaere?*

4. Same; Judgments § 13—

Where more than thirty days after order overruling a demurrer has transpired, the court has jurisdiction to enter a judgment by default, and the court's authority to do so is not affected by the subsequent filing of a petition for *certiorari*, even though the petition be filed later on the same day.

5. Courts § 9—

Where the entry of judgment by default is within the authority of the presiding judge, another judge of the Superior Court has no power to set the default judgment aside except in proceedings to vacate the judgment in accordance with statutory procedure.

APPEAL by plaintiff from *Martin, J.*, August 28, 1963 Session of BUNCOMBE.

Plaintiff lessee instituted this action to recover damages for loss of business and injury to his personal property allegedly caused by the negligent failure of defendant lessors to properly maintain the water system and elevator in the leased premises. Plaintiff appeals from an order of Judge Martin vacating a judgment by default and inquiry entered by Judge W. K. McLean at a previous term.

Wade Hall for plaintiff appellant.
Lee and Allen for defendant appellees.

SHARP, J. This action was commenced on December 27, 1962 by the issuance of summons and filing of complaint. On January 10, 1963

the assistant clerk of the Superior Court extended defendants' time in which to plead until February 15th. On February 5th the defendants demurred to the complaint on grounds other than a misjoinder of parties and causes of action. Judge Martin overruled the demurrer on June 26th; defendants excepted and gave notice of appeal to the Supreme Court. However, as they subsequently concluded, the Supreme Court will not entertain an appeal from an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. N. C. Sup. Ct. R. 4(a).

After their demurrer was overruled on June 26th, the defendants then had thirty days in which to file answer or to petition this Court for *certiorari*. G.S. §§ 1-125, 131; N. C. Sup. Ct. R. 4(a). They did neither within the prescribed time, but on July 26th the clerk of the Superior Court entered an order extending the time "in which to file answer or to otherwise plead" through August 15th. This was the second extension granted to the defendants by the clerk. It was not granted with the consent of the plaintiff or his attorney; hence, it was inoperative. G.S. 1-125. On July 29th, thirty-three days after the ruling on the demurrer, the presiding judge, Honorable W. K. McLean, signed a judgment by default and inquiry which was filed at 9:41 a.m. At 7:30 p.m. on the same day, the plaintiff's attorney was served with a copy of a petition to this Court for a writ of *certiorari*.

On July 30th defendants moved in the Superior Court to set aside the judgment by default and inquiry on the following grounds: (1) Defendants' notice of appeal from the ruling upon the demurrer ousted the jurisdiction of the court at the time it was entered, and (2) defendants had, "within the time allowed by law," filed a petition for a writ of *certiorari* which was then pending in the Supreme Court. The record does not substantiate this representation of timely filing. The petition for *certiorari* was not filed in the office of the Clerk of the Supreme Court until 9:00 a.m. on July 31st, thirty-five days after the ruling on the demurrer.

On August 28th Judge Martin vacated and set aside the judgment by default and inquiry upon the ground that Judge McLean was *functus officio* on the date he signed the judgment because "this case was on appeal to the Supreme Court of North Carolina." On September 3rd the Supreme Court denied the defendants' petition for *certiorari*.

Certiorari is a common law writ issuing from a superior court to an inferior court, tribunal, or board commanding it to send up the record of a particular case for review. *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E. 2d 896; 14 C.J.S., *Certiorari* § 1. At common law the writ had the effect of a supersedeas and, except where it has been abrogated

or modified by statute, this rule universally prevails today. *State v. Driskell,* 117 Fla. 717, 158 So. 277; 14 C.J.S., *Certiorari* § 108(a). In this regard see G.S. 1-269. Thus, it is quite clear that, *when issued,* the writ suspends the authority of the lower court in the case pending the action of the reviewing court. *State v. Walters,* 97 N.C. 489, 2 S.E. 539; *Great American Ins. Co. of N. Y. v. Peters,* 105 Fla. 380, 141 So. 322; *Waskey v. Hammer,* 179 F. 273; *State v. Bland,* 354 Mo. 391, 189 S.W. 2d 542, 161 A.L.R. 423; *Wilson v. Clary,* 212 S.C. 250, 47 S.E. 2d 618; Pound, Appellate Procedure in Civil Cases, 61.

The general rule seems to be that neither notice of intention to file a petition for *certiorari* nor the mere filing of such petition will remove the case to the higher court; the lower court loses jurisdiction and the higher court acquires it only when the writ is allowed. *Red Top Cab Co. v. Garsides,* 155 Tenn. 614, 298 S.W. 263; *McArthur v. Faw,* 183 Tenn. 504, 193 S.W. 2d 763; *First Nat'l Bank Bldg. Co., Ltd. v. Dickson & Denny,* 202 La. 970, 13 So. 2d 283. However, there is authority to the contrary, *State v. Ellison,* 287 Mo. 654, 230 S.W. 970, *McRae v. Boykin,* 54 Ga. App. 158, 187 S.E. 271, and, in one case, it was held that while mere notice of a petition for *certiorari* would not operate as a supersedeas, if granted, it would relate back. The Inhabitants of Adams, Petitioners, 10 Pick. (Mass.) 273.

In this case *certiorari* was denied. The chronology makes it unnecessary for us to decide whether the mere filing of a petition for the writ ousts the jurisdiction of the Superior Court. Certainly its jurisdiction was not removed on June 26th by the notice of an unauthorized appeal from the order overruling the demurrer. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377. At the time Judge McLean entered the judgment by default and inquiry at 9:41 a.m. on July 29th there was neither appeal nor petition for *certiorari* pending. Therefore, his authority to render the judgment is clear. Judge Martin had no power to set it aside. *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82.

The judgment by default and inquiry is a valid judgment which must stand unless vacated by the Superior Court under the authority of G.S. 1-220. The defendants still have ample time to invoke the protection of this statute if they can meet its requirements.

The order vacating the judgment by default and inquiry is

Reversed.

JOSEPH PORTER, APPEARING HEREIN BY HIS NEXT FRIEND, L. E. PORTER v. CLARENCE EDWARD PITT, ERICA GRAY UMSTEAD, DONALD R. HAISLIP AND MILLIE U. HAISLIP.

(Filed 18 March 1964.)

Automobiles § 43—

Where there is plenary evidence of negligence on the part of defendant and that such negligence continued to the moment of impact and was a proximate cause thereof, such defendant is not entitled to nonsuit on the ground that his negligence was insulated by the negligence of his co-defendant.

APPEAL by defendant Pitt from *Fountain, J.*, 21 October 1963 Civil Session of NASH.

Civil action to recover damages for personal injuries.

The jury found by its verdict that plaintiff was injured by the negligence of defendant Pitt as alleged in the complaint, was not injured by the negligence of defendant Erica Gray Umstead as alleged in the complaint, and awarded damages in the amount of $10,000. Defendant Pitt in his answer did not plead contributory negligence as a defense to plaintiff's action. The other defendants did. The court instructed the jury that if they answered the issue of negligence in respect to Erica Gray Umstead, a minor 16 years old, who admittedly was driving a family purpose automobile owned jointly by defendant Donald R. Haislip, his stepfather, and defendant Millie U. Haislip, his mother, No, they would not consider the issue as to plaintiff's contributory negligence, and the jury left this issue unanswered.

From a judgment that plaintiff recover $10,000 from defendant Pitt and the costs, he appeals.

William L. Thorp, Jr. and William D. Etheridge for defendant Clarence Edward Pitt, appellant.

Valentine & Valentine by I. T. Valentine for plaintiff appellee.

PER CURIAM. Defendants offered no evidence. Defendant Pitt assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of plaintiff's evidence.

Plaintiff's evidence would permit a jury to find the following facts: About 10:30 p.m. on 1 April 1962 plaintiff, a boy 14 years old, was riding as a passenger in an automobile driven by Erica Gray Umstead, a 16 year old boy. They were returning from a show in Rocky Mount. When they reached the Nashville-Red Oak Highway, a rural paved road, they turned left and proceeded south to Nashville. The Nashville-

Red Oak Highway runs approximately north and south between Nashville to the south and Red Oak to the north. About a mile north of Nashville this highway goes over an overpass over U. S. Highway #64, which is the bypass around Nashville. On the north side of the overpass coming down off the bridge there is a slight curve in the highway. The Dog Pound Road, a dirt road, enters the Nashville-Red Oak Highway from the east about three-tenths of a mile north of the overpass. At this point both roads are built up.

Umstead was driving his automobile about 30 or 35 miles an hour with his lights on, and on his side of the highway. When they approached the overpass, an automobile driven by the defendant Pitt, who had the odor of intoxicating liquor upon him and was drunk, was coming down from the overpass on the Nashville-Red Oak Highway meeting the Umstead automobile at a high rate of speed and zig-zagging on the highway. Whereupon, Umstead stopped his automobile about 20 or 30 feet from the entrance of the Dog Pound Road into the Nashville-Red Oak Highway and backed up into the Dog Pound Road and stopped. Plaintiff testified: "When the automobile in which I was riding was struck by the Pitt vehicle, it was on the Dog Pound Road. Our car was parked about four feet off the Red Oak Road on the Dog Pound Road. While our car was thus situated, it was hit by Clarence Pitt's car." In the collision plaintiff sustained serious injuries, Umstead was knocked unconscious, and Umstead's automobile was damaged to a great extent.

Plaintiff has offered plenary evidence which would permit a jury to find, as alleged in the complaint, that Pitt was negligent in operating his automobile while under the influence of intoxicating liquor in violation of G.S. 20-138, and in driving his automobile in a reckless and careless manner in violation of G.S. 20-140, and that such negligence on Pitt's part was a proximate cause of plaintiff's injuries.

There is no merit in defendant Pitt's contention that plaintiff's action should be nonsuited because any negligence on his part was insulated by Umstead's stopping his automobile and backing up into the Dog Pound Road, for the reason that Pitt's negligence continued to the actual collision of the two automobiles and played a substantial and proximate part in plaintiff's injuries. *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847.

The trial court properly overruled defendant Pitt's motion for a judgment of compulsory nonsuit.

We have examined the assignments of error to the charge, and none is sufficient to warrant a new trial. All defendant's assignments of error are overruled. In the trial below we find

No error.

LULA F. MEDLIN, ADMINISTRATRIX OF THE ESTATE OF BRENDA JEAN FORD, DECEASED v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 18 March 1964.)

Railroads § 5—

Evidence tending to show that intestate, with an unobstructed view of the approaching train, drove onto the track in front of the locomotive, which had its headlights burning, and was killed in the collision between the locomotive and the automobile, *is held* to disclose contributory negligence barring as a matter of law recovery for wrongful death.

APPEAL by plaintiff from *Hobgood, J.*, August 12, 1963 "A" Civil Session of MECKLENBURG.

Action for wrongful death. Plaintiff appeals from a judgment of involuntary nonsuit entered against her at the close of all the evidence.

Ledford & Ledford for plaintiff appellant.
Cansler & Lockhart for defendant appellee.

PER CURIAM. Plaintiff's evidence tends to show these facts:

Rural Road 1008 crosses the track of the defendant Railroad at grade in the hamlet of Indian Trail at Benton's Store. About 7:30 p.m. on March 31, 1961, two automobiles traveling south on Highway No. 1008 approached this crossing. There was a heavy drizzle and visibility was poor. The first car was operated by Reginald Gaddy, aged nineteen; the second, close behind the first, was driven by plaintiff's intestate, Brenda Ford, aged sixteen. The decedent was a high school student on her way to a dance at the school gymnasium. She had lived in the vicinity of Indian Trail all of her life and was very familiar with the crossing.

Upon the trial Gaddy testified that as he neared the crossing his mind was on other things and he looked neither left nor right. Not until his front wheels were on the track did he hear the whistle of an approaching train. He then looked to his right and saw its headlights about two hundred and twenty-five feet to the west of the crossing. He "showered down on the gas" and managed to clear the track, but the train struck the vehicle being operated by Brenda Ford. Her body was found on the south side of the railroad about fifty feet east of the crossing. The twenty-six car train carried her automobile about one mile down the track before it stopped. Its brakes had been applied in emergency approximately sixty feet from the crossing when the fireman informed the engineer that the deceased was not going to stop. This particular train, No. 96, passed through Indian Trail every night at about the same time.

Witnesses for the plaintiff who were in the vicinity at the time of the collision testified that if the train whistle blew or its bell rang as it approached the crossing at a speed of about sixty miles per hour, the sound did not register on them. None, however, were willing to swear positively that the train did not so signal at the Benton's Store crossing.

Witnesses for the defendant testified positively that the whistle was blowing and the bell was ringing. J. B. Ivey who crossed the tracks from the south in front of the oncoming train, testified that its headlight was burning brightly and its whistle began blowing when the train was three hundred feet west of the crossing. After he stopped on the north side of the track, he observed Gaddy and Miss Ford approaching at a moderate, unabated rate of speed. The decedent followed the Gaddy vehicle onto the crossing without looking either left or right. Others testified that the crossing was unobstructed. From the south side of Benton's Store it was ninety-six feet to the track. The track was straight and in the daytime a person standing twenty-five feet north of the crossing could see for three quarters of a mile to the west. At night the gleam of a train's headlight could be seen continuously for the same distance.

In spite of the positive evidence to the contrary, if it be conceded that the train failed to signal its approach to the crossing, all the evidence manifests that negligence on the part of plaintiff's intestate was at least one of the proximate causes of her tragic and untimely death. When conditions are such that a diligent use of the senses would have avoided injury, a failure to use them constitutes contributory negligence which will bar a recovery. We have said that a railroad crossing is of itself a notice of danger. While a traveler has the right to expect a timely warning from the train crew, a failure to give it will not justify an assumption by him that no train is approaching. "It is still his duty to keep a proper lookout . . . and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty." *Herndon v. R. R.*, 234 N.C. 9, 65 S.E. 2d 320; *Owens v. R. R.*, 258 N.C. 92, 128 S.E. 2d 4.

The deceased had a clear, unobstructed view of the approaching train. If she had looked she would have seen it. Instead, she blindly followed Gaddy onto the track in front of a locomotive with its headlight burning. He escaped the consequences of his folly; she unfortunately paid for the negligence of them both.

The judgment of involuntary nonsuit must be

Affirmed.

EVE PEARSON BAILEY WILLIFORD v. PENNSYLVANIA THRESHERMEN & FARMERS MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 18 March 1964.)

Insurance § 49—

Where, in an action to recover on a policy for the destruction of the insured automobile by fire, the court categorically instructs the jury on the issue of coverage that plaintiff was not entitled to recover unless the fire occurred prior to the expiration of the policy and unless it was accidental within the meaning of the policy, insured may not complain of the refusal of the court to submit a separate issue as to whether the loss was accidental.

APPEAL by defendant from *Fountain, J.*, October, 1963 Civil Session, NASH Superior Court.

The plaintiff instituted this civil action to recover $1,750.00, the value of her automobile destroyed by fire during the night June 30-July 1, 1962. The defendant's policy, insuring against loss, expired at 12:01 a.m., July 1.

The defendant denied liability on two grounds: (1) The fire occurred after the policy had expired; (2) the plaintiff, or someone under her control, intentionally burned the insured vehicle; hence the loss was not accidental within the meaning of the policy.

Both parties introduced evidence. The court submitted two issues: (1) Coverage, and (2) amount of the loss. The defendant tendered another issue: whether the loss was accidental. The jury found the defendant's policy covered the loss and fixed the amount at $1,645.00. From judgment on the verdict, the defendant appealed.

Narron, Holdford & Holdford by William H. Holdford for plaintiff appellee.

Battle, Winslow, Merrell, Scott & Wiley by Robert L. Spencer for defendant appellant.

PER CURIAM. The parties agreed the policy sued on provided coverage only for direct and accidental loss of, or damage to, the insured vehicle. The defendant stressfully contends the court committed error in refusing to submit a separate issue whether the fire resulted from accident. The court in its charge, however, gave the defendant the benefit of both its defenses:

> "So the question for you to determine is whether there was a fire to her vehicle prior to 12:01, July 1st, 1962, and, if so, whether it was accidental within the meaning of the policy. If there was a fire causing her loss or damage to her automobile, which was direct

and accidental, prior to 12:01 a.m., July 1, 1962, then it would be the duty of the company to pay the actual cash value of the damage sustained. Otherwise, there would be no duty on the part of the company to pay anything for loss by fire."

In repeating the substance of the foregoing instructions, the court charged the jury to answer the first issue, "no," if the plaintiff had failed to carry the burden of showing the loss by fire before 12:01, July 1, and that the loss was accidental.

The trial was hotly contested. The evidence was sharply conflicting. The jury resolved the conflict in favor of the plaintiff. The record discloses

No error.

T. G. STEGALL, T/A T. G. STEGALL TRUCKING COMPANY v. McRAE PRODUCE COMPANY, INC.

(Filed 18 March 1964.)

Trial § 57; Judgments § 3—

Where, in a trial by the court under agreement by the parties, the court finds that the defendant is indebted to the plaintiff in a specified sum, but fails to adjudicate that plaintiff recovered the sum so found, *held* the facts found by the court have the force and effect of a verdict, and judgment, with interest from the time of the rendition of the verdict, should be rendered thereon by the judge holding a subsequent term when the matter is brought to his attention.

APPEAL by defendant from *Clark, J.*, September 1963 Session of MECKLENBURG.

The verified complaint filed 9 November 1962 alleged: Plaintiff had rendered services to defendant for which defendant had contracted to pay $1348.01; defendant had paid $100, leaving a balance owing on 1 November 1962 of $1248.01.

Defendant denied plaintiff had performed any services for it, hence it was not indebted in any sum.

The cause came on for trial in June 1963. The parties waived jury trial. The presiding judge made detailed findings concluding with this finding:

"That the defendant is indebted to the plaintiff for services rendered for matters and things as set forth in the pleadings and

brought forward in the evidence of this trial in the sum of One Thousand, Two Hundred Forty-Eight and 01/100 Dollars ($1,248.01).

"This 21st day of June 1963."

There was no adjudication that plaintiff recover the sum found to be owing. Counsel for plaintiff moved in September 1963 to correct the "judgment" rendered in June by inserting therein a paragraph assertedly inadvertently omitted, reading as follows:

"WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the plaintiff have and recover of the defendant the sum of Twelve Hundred Forty-Eight and 01/100 Dollars ($1,248.01) with interest thereon from the 4th day of August 1962, until paid, together with the costs of this action to be taxed by the Clerk."

Judge Clark found the quoted paragraph was inadvertently omitted. He thereupon adjudged that plaintiff recover from defendant the sum of $1248.01 with interest from 4 August 1962.

Lindsey, Schrimsher & Griffin for plaintiff appellee.
Webb & Lee by Joseph G. Davis, Jr., for defendant appellant.

PER CURIAM. Was the omission of the judicial declaration that plaintiff recover the sum found to be owing a clerical error? That is the technical question here debated. We find it unnecessary to answer. A jury trial having been waived, the facts found by the judge at the June Term had the force and effect of a verdict on which a judgment could, and should, have been entered. It was not only in the power of the judge but was his duty when the omission was called to his attention to render a judgment on the verdict. *Ferrell v. Hales,* 119 N.C. 199, 25 S.E. 821; *McDonald v. Howe,* 178 N.C. 257, 100 S.E. 427.

The judgment entered goes beyond the findings made in June 1963. The amount of defendant's debt was then determined. Judgment should have been entered at that time and should bear interest from 21 June 1963 in accordance with the finding then made and not from 4 August 1962 as adjudged in September 1963. The judgment will be modified so that the sum adjudged to be owing will bear interest from 21 June 1963 and not from 4 August 1962.

Modified and affirmed.

HARRY M. HICKS v. THOMAS G. LANE, ADMINISTRATOR OF THE ESTATE OF BRUCE SISTRUNK, DECEASED.

(Filed 18 March 1964.)

APPEAL by defendant from *Hobgood, J.*, August 12, 1963, Schedule "A" Session of MECKLENBURG.

Plaintiff's action for damages for personal injuries and property damage, and defendant's counterclaim for damages for the wrongful death of his intestate, grow out of a collision that occurred Sunday, May 7, 1961, about 12:20 a.m., on The Plaza, a street in the City of Charlotte, North Carolina, between a 1959 Chevrolet station wagon operated by plaintiff and a 1957 Ford operated by Bruce Sistrunk, defendant's intestate.

Issues arising on the pleadings were answered as follows: "1. Was the plaintiff injured by the negligence of the deceased, Bruce Sistrunk, as alleged in the Complaint? ANSWER: Yes. 2. What amount of damages, if any, is plaintiff entitled to recover of the defendant for; A. Property Damage? ANSWER: 1500. B. Personal Injuries? ANSWER: 4071.40. 3. Was the death of Bruce Sistrunk caused by the negligence of the plaintiff, as alleged in the Counterclaim? ANSWER: No. 4. Did the plaintiff operate his automobile heedlessly and in willful or wanton disregard of the safety of others, as alleged in the Counterclaim? ANSWER: No. 5. What damages, if any, is the defendant entitled to recover of the plaintiff? ANSWER: None."

The court, in accordance with the verdict, entered judgment that plaintiff have and recover of defendant the sum of $5,571.40, that defendant be taxed with the costs, and that defendant recover nothing of plaintiff on his counterclaim.

Defendant excepted and appealed.

Sanders & Walker and J. Howard Bunn, Jr., for plaintiff appellee.

Jones, Hewson & Woolard for defendant appellant.

PER CURIAM. The two vehicles were proceeding in opposite directions. The collision occurred on the portion of The Plaza for northbound traffic. It is conceded that the negligence of the driver of the southbound vehicle was the sole proximate cause of the collision and its tragic consequences.

Plaintiff was the sole occupant of the Chevrolet station wagon. He testified he could not remember anything from 7:00 or 7:30 p.m. on Saturday, May 6, 1961, until he "became awake" in the hospital the following Tuesday. Sistrunk was the sole occupant of the 1957 Ford.

Plaintiff offered evidence tending to show his Chevrolet station wagon was the northbound car. Defendant offered evidence tending to show the Ford operated by Sistrunk was the northbound car. Whether plaintiff or Sistrunk was the driver of the southbound vehicle was the crucial controverted fact. This question was resolved by the jury in plaintiff's favor.

After careful consideration of defendant's assignments of error, the conclusion reached is that none discloses prejudicial error or merits particular discussion. Hence, the verdict and judgment will not be disturbed.

No error.

STATE v. BERTHA PRUITT.

(Filed 18 March 1964.)

APPEAL by defendant from *Clarkson, J.*, October 28, 1963 Regular Criminal Session of MECKLENBURG.

Criminal action. The indictment charges defendant with the murder of one Willie James Nelson. The State did not seek a conviction of murder in the first degree. The jury returned a verdict of guilty of murder in the second degree. From judgment thereon imposing a prison sentence, defendant appeals.

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

Bailey & Booe and William L. Stagg for defendant.

PER CURIAM. Defendant admits that she shot deceased with a pistol, but contends that in so doing she was acting in the proper defense of her person, that deceased was assulting her with a knife while they were in an automobile and she had no means of safe retreat.

Defendant excepts to portions of the judge's charge, particularly to certain instructions relating to defendant's plea of self-defense. The challenged instructions involve no novel or unusual applications of law. When considered in context and in the light of the evidence they do not constitute prejudicial error and could not have misled the jury. The instructions are in substantial accord with the repeated pronouncements of this Court. *State v. Washington,* 234 N.C. 531, 67 S.E. 2d 498, and authorities therein cited.

No error.

OSCAR LEE UNDERWOOD, BY HIS NEXT FRIEND, ELVIRA UNDERWOOD v. WILLIAM HENRY USHER.

(Filed 25 March 1964.)

Automobiles § 42k—Evidence held not to show contributory negligence as matter of law on part of plaintiff in pushing car on highway.

Plaintiff's evidence to the effect that he and two companions were pushing a car on the straight and level highway in a residential section of a municipality, that street lights and the headlights and taillights of the car were burning, that, though it was raining, visibility was good, and that the persons pushing the car positioned themselves so as not to obstruct the right taillight, that other vehicles, traveling in the same direction, passed the car without mishap, but that defendant's car, driven in the same direction, collided with the rear of the pushed car and with plaintiff, inflicting the injuries in suit, *held*, not to show as the only reasonable conclusion that plaintiff was guilty of contributory negligence in taking a position of peril or in failing to jump after he discovered defendant was not going to pass the pushed car in safety, and nonsuit on the ground of contributory negligence was correctly denied.

APPEAL by defendant from *Hubbard, J.*, September Civil Session 1963 of SAMPSON.

Civil action to recover damages for personal injuries.

The jury answered the issues of negligence and contributory negligence in plaintiff's favor and awarded him $6,000 in damages.

From a judgment on the verdict, defendant appeals.

Britt & Warren by Miles B. Fowler for defendant appellant.
Bryan & Bryan by Robert C. Bryan for plaintiff appellee.

PARKER, J. Both parties introduced evidence. Defendant assigns as error the court's denial of his motion for judgment of involuntary nonsuit made at the close of all the evidence.

Defendant in his brief concedes actionable negligence on his part, but contends that his motion for judgment of involuntary nonsuit should have been allowed by the trial court, for the reason that plaintiff's evidence clearly shows that by his own negligence he proximately contributed to his injuries.

Plaintiff's evidence shows: About 7 p.m. on 23 October 1959 plaintiff, 18 years old, Sherill Jackson, and Mack Underwood pushed a borrowed 1949 Ford automobile, which they were trying to start, from an alley into Highway 102, the main highway between Goldsboro and Fayetteville, and then proceeded to push the automobile in a westerly direction along their right side of the highway. When they entered the highway and started in a westerly direction, there was a traffic circle

about 200 or 250 feet behind them. The two taillights and the headlights of the pushed automobile were turned on and shining. According to a stipulation of the parties, the automobile was being pushed on the highway in a residential district of the town of Newton Grove. Sherill Jackson, a witness for plaintiff, testified: "The road where we were pushing the car was about as light as this room because of street lights. There were several street lights burning in the vicinity. It was raining, but visibility was good. I could see down the road about 800 feet, and I could see behind us all the way back to the circle. There were no obstructions between our car and the circle. The road was straight and level back to the circle."

Plaintiff was on the right rear side of the automobile pushing against the metal panel to the right of the rear glass so as not to cover the taillight; Sherill Jackson was pushing at the center of the automobile; and Mack Underwood had the right front door open and was pushing and steering the automobile. Plaintiff and his two companions pushed the automobile along the highway 250 or 300 feet during a period of from three to five minutes, and deciding it was out of gas had started to push it off the highway, when an automobile driven by defendant in a westerly direction along the highway ran into its rear knocking it forward. Then defendant's automobile hit plaintiff, who was on the shoulder of the highway pushing the automobile, and then hit their automobile a second time. The collision occurred about 500 feet west of the traffic circle. Plaintiff saw the headlights of defendant's approaching automobile before he was struck.

While they were pushing the automobile along the highway, several automobiles traveling in a westerly direction pulled around them and passed.

Defendant, according to his testimony, drove around the traffic circle, and was traveling west on the highway when the collision occurred. His testimony is to the effect that it was raining and there was fog, that the automobile being pushed had no lights on, that he had his lights on low beam, that when he saw the pushed automobile he applied his brakes and ran into its rear.

The facts in *Burton v. Oldfield,* 195 Va. 544, 79 S.E. 2d 660, are quite similar to the facts in the instant case. This suit arose out of an automobile collision which occurred on 10 December 1950 between 1:30 and 2:00 a.m. on a highway running approximately east and west between Norfolk and Virginia Beach. At the point of the collision the highway is straight for more than a mile and the main road is divided into two traffic lanes, each 24 feet wide, separated by a grass plot. Beyond the shoulder on either side of the main highway is a paved parallel service

road. While a disabled 1940 Ford sedan was being pushed westwardly along the main highway by Carl Heglmeier and three other young men, it was run into in the rear by a 1950 Buick sedan driven in the same direction by Lloyd H. Burton. Heglmeier was killed almost instantly in the collision and Charles B. Oldfield, his administrator, brought this action against Burton alleging that the collision was due to the latter's negligence. The evidence on behalf of the plaintiff shows that just before the collision the Ford sedan, occupied by five sailors on leave from the U.S.S. Franklin D. Roosevelt and proceeding westwardly along the highway, stalled because of an overheating engine. Four of the occupants, including Heglmeier, got out and began pushing the car while Michael Rectenwald, the owner, sat behind the wheel and steered with the purpose of either getting the motor started or reaching the nearest service station. They had been pushing the car some fifteen minutes and had gone about one-fourth of a mile when the collision occurred. There is evidence that a misty rain was falling and that the visibility was poor. The further evidence on behalf of the plaintiff is that the car was being pushed along the right-hand edge of the pavement of the westbound lane of the main highway and that its headlights and left taillight were burning. The right taillight had been broken. Heglmeier was pushing on the left side of the car while the three other young men were at the rear of the vehicle, but not covering or concealing the rear light. The westbound Buick car, proceeding at a rapid speed, after skidding approximately 60 feet, ran into the left rear of the Ford car, crossed the medial grass plot, and traveled 534 feet before coming to a stop in the eastbound lane on the opposite side of the road. The impact carried the Ford car 15 feet along the road and Heglmeier's body was thrown 66 feet beyond this. Just before the impact Karl W. Reeb, who was pushing on the right rear of the Ford car, saw the lights of the approaching Buick car and with a cry of warning to his companions jumped to the right and escaped injury. He estimated the speed of the oncoming car at 90 miles per hour. The Court held it was for the jury to say whether the plaintiff's decedent was guilty of contributory negligence and upheld the verdict and judgment for the plaintiff. On a former appeal of this case, 194 Va. 43, 72 S.E. 2d 357, a new trial was awarded by reason of error in the charge.

In *Wright v. Ponitz,* 44 Cal. App. 2d 215, 112 P. 2d 25, the Court held the evidence that plaintiff and another were pushing their automobile after its motor had failed on a six-lane highway at about 7 p.m. on 14 February 1936 in a slight drizzle, that they were attempting to push it about 300 feet down a grade to a service station, that they were traveling at a speed of about 7 or 8 miles an hour, that plaintiff was

pushing against a spare tire from the middle and rear of the automobile, and that plaintiff's position did not obscure the view of the taillight, presented a question for the jury as to whether plaintiff was guilty of contributory negligence, when struck by an automobile approaching from the rear. A judgment for injuries sustained by plaintiff in the collision was upheld.

In *Holman v. Uglow,* 137 Ore. 358, 3 P. 2d 120, the facts were these: The automobile in which deceased was riding as a guest ran out of gas. Deceased and his companions decided to push the automobile to a place about 450 feet ahead where it could be parked upon a graveled area on the side of the roadway out of reach of traffic. Beyond the right shoulder of the pavement where the automobile ran out of gas was an area approximately 6 feet wide sloping towards a ditch 2½ feet deep, but because of rain the wheels of the automobile would probably sink into the mud to such a depth that the car could not be moved without assistance. While deceased was helping to push the automobile along the pavement, he was struck by an automobile approaching from the rear. The accident occurred at night while a heavy rain was falling. The Court held the question of whether plaintiff was guilty of contributory negligence was an issue for the jury. A judgment for plaintiff was upheld.

In *Victor Lynn Lines v. State,* 199 Md. 468, 87 A. 2d 165, the Court held that in an action for the death of a motorist who was struck by an overtaking tractor-trailer while pushing a disabled automobile at night in the right or slow lane of a dual highway after removing it from a position of safety on the shoulder, the motorist's contributory negligence was for the jury under evidence from which the jury could find that all lights on the disabled automobile were lighted. The judgment for damages was upheld.

In *Dickerson v. Mutual Grocery Co.,* 100 N. J. Law 118, 124 A. 785, the facts were these: Plaintiff, who was pushing his automobile along a roadway to a place where he expected to replenish his exhausted supply of gasoline, was struck by defendant's car approaching from behind at the rate of 7 miles per hour through fog on a dark night. The Court held that the question of plaintiff's contributory negligence was an issue for the jury, even though the evidence of defendant indicated that plaintiff's body obscured the taillight of his car. A judgment for damages for the plaintiff was upheld.

In the instant case plaintiff's evidence shows that the highway at the scene of the collision was straight and level, the collision occurred in a residential section of the town of Newton Grove about 7 p.m. on 23 October 1959, that the street lights were burning in the vicinity of the

accident, that though it was raining visibility was good, that the headlights and taillights of the pushed automobile were turned on and shining, and that plaintiff was pushing on the right rear of the automobile so as not to obscure the right taillight. While plaintiff's evidence further shows several cars passed them in safety, there is no evidence of heavy traffic. The path of defendant's automobile was not fixed, like a railroad train, to any particular line of travel. He had ample room to pass the pushed car to its left. Plaintiff, under the circumstances, could not know defendant would not see him and the car ahead and turn to the left to avoid striking him. Whether or not plaintiff had time to stop or jump aside, after he discovered defendant was not going to turn aside but keep straight on, was under all the circumstances here a question for the jury. We believe that fair-minded men could reasonably draw from plaintiff's evidence a legitimate conclusion that plaintiff did not voluntarily place himself in a position of peril known to him and voluntarily continue therein and that he was free from contributory negligence. Certainly, plaintiff's own evidence does not show contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. The trial court properly overruled defendant's motion for judgment of involuntary nonsuit and submitted the issues of negligence and contributory negligence and damages to the jury.

A careful examination of the assignments of error to the charge discloses no new question or feature requiring extended discussion or that would warrant a new trial. The jury, under application of settled principles of law, resolved the issues of fact against the defendant. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

JORDAN R. WHITE, EMPLOYEE v. SHOUP BOAT CORPORATION, EMPLOYER; AND SHELBY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 25 March 1964.)

1. Master and Servant § 82—

The N. C. Industrial Commission has statutory authority to promulgate rules for the orderly administration of the Act. G.S. 97-80.

2. Master and Servant § 74—

An agreement to pay compensation, when approved by the Industrial Commission, is equivalent to an award, G.S. 97-82, and the one year limita-

tion for an application for additional compensation for change of condition runs from the last payment of compensation under such agreement and not from the date the agreement is approved by the Commission. G.S. 97-47.

3. Same—

The employer and insurance carrier may be estopped from asserting the one year limitation for application for additional compensation for change of condition, G.S. 97-47, and when the insurer makes a single payment of compensation under an agreement of the parties, approved by the Commission, and claim for additional compensation for change of condition is filed more than one year thereafter, but neither the employer nor the insurer gives the employee notice as required by the rules of the Commission (Form 28B) that if the employee claimed further benefits he would have to notify the Commission in writing within a year, the one year limitation does not begin to run.

APPEAL by defendants from *Parker, J.*, in Chambers in HERTFORD on November 12, 1963.

On September 13, 1961 plaintiff employee sustained a compensable injury resulting in a hernia. On October 27, 1961 he, his employer, and its insurance carrier signed Industrial Commission's Form 21.

This form, entitled "AGREEMENT FOR COMPENSATION FOR DISABILITY," is used to stipulate facts on which the Commission may make an award. Here the parties stipulated: (1) they were subject to the Workmen's Compensation Act; (2) plaintiff sustained a compensable injury on September 13, 1961; (3) the accident resulted in a hernia; (4) employee's weekly wage was $60.00; (5) disability began September 14, 1961; (6) employer and his insurance carrier agreed to pay compensation at the rate of $35.00 per week beginning September 14, 1961 "and continuing for five weeks"; (7) employee returned to work on October 18, 1961 at a wage of $60.00; (9) the effective date of the agreement was October 26, 1961.

Below the signatures there appears, "FIRST PAYMENT RECEIVED: Oct. 27, 1961. AMOUNT RECEIVED: $175.00. cc: Mr. Jordan R. White." (The letters "cc" presumably indicate a carbon copy was furnished employee.) The original of this agreement was filed with the Industrial Commission. The date of filing does not appear. The Commission stamped its approval of the agreement on January 12, 1962.

On August 13, 1962 employee, when he stepped from a truck, felt pain at the site of the incision made to reduce the hernia. On August 14, 1962 he consulted a physician who ascertained employee had "an abscess around silk sutures in the incisional scar." He opened and drained the abscess. Employee, because of the abscess, was unable to work from August 13, 1962 to January 8, 1963.

On November 23, 1962 employee requested the Industrial Commission to direct payment of additional compensation because of the change in his condition. A Deputy Commissioner heard the claim. The parties then stipulated no payment had been made to employee other than the $175.00 paid October 27, 1961. The Commissioner was of the opinion carrier was not estopped to assert the protection afforded by G.S. 97-47, and concluded the time began to run from October 27, 1961. He denied employee's claim.

The Commission, on appeal, vacated and set aside the Deputy Commissioner's findings and award. It found the facts as here summarized and concluded, because the agreement for compensation was not approved until January 12, 1962, the employee's claim for additional compensation was not barred. It directed payment of compensation for the period from August 13, 1962 to January 8, 1963.

The Superior Court affirmed the Commission's findings of fact and approved the award made by it.

Clarence C. Boyan, Sapp & Sapp for plaintiff appellee.
John H. Hall for defendant appellants.

RODMAN, J. The Legislature when it enacted our first Workmen's Compensation Act anticipated employers and employees would, in most cases, be able to reach an agreement with respect to the employee's right to compensation. Hence it inserted in the Act a provision authorizing such agreements when made in the manner prescribed by the Industrial Commission. G.S. 97-82. The wisdom of the statutory provision was referred to in *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559, decided in 1956. As there noted, more than 95% of all claims for compensation because of industrial injuries were disposed of by agreements executed in conformity with the provisions of G.S. 97-82. The percentage of claims so disposed of since the filing of that opinion has not decreased. See 17th Biennial Report of the North Carolina Industrial Commission.

The Commission has statutory authority to promulgate rules, G.S. 97-80. Rule XI, promulgated by the Commission prior to September 1961, still in effect, is entitled "AGREEMENTS FOR PAYMENT OF COMPENSATION." This rule requires the use of Forms 21, 26 and 28B in disposing of claims under G.S. 97-82. The information required by Form 21 is indicated in stating the facts in this case. Form 26, a supplement to Form 21, is not material to the disposition of this case.

Form 28B captioned, "REPORT OF COMPENSATION AND MEDICAL PAID," replaced Form 27 quoted in *Smith v. Red Cross,*

supra. In substance the forms are the same. Item 14 inquires: "Does this report close the case?" It is the form required when carrier reports the closing of a claim. The insurance carrier is required to send a copy of this form to the employee within 16 days after the last payment of compensation. At the bottom of the form in bold face type is: **"NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is 'Yes', this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check."**

An injured employee may, if his condition changes, apply to the Commission for additional compensation. The time, in which additional compensation may be requested, is limited to 12 months "from the date of last payment of compensation pursuant to an award * * *" G.S. 97-47.

In interpreting this statute, we have said that an agreement to pay compensation, when approved by the Commission, is the equivalent of an award. *Smith v. Red Cross, supra; Neal v. Clary,* 259 N.C. 163, 130 S.E. 2d 39; *Pratt v. Upholstery Co.,* 252 N.C. 716, 115 S.E. 2d 27; *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777.

The language of the statute is clear. The claim is barred, if the request for compensation is not made within 12 months *from the date of the last payment,* unless perhaps the carrier is estopped to plead the lapse of time. The Commission was in error in concluding the statute began to run from January 12, 1962 when it approved the agreement to settle.

The conclusion we reach necessitates a reversal and consequent remand to the Industrial Commission; but this conclusion does not necessarily defeat employee's claim. The agreement which the Commission approved stated, "FIRST PAYMENT RECEIVED: Oct. 27, 1961." Notwithstanding this statement, carrier insists it was also the last payment. It is the mathematical product of the amount to be paid weekly for the agreed number of weeks. Did the carrier execute Form 28B and furnish the employee with a copy of that form? If so, was it furnished within 16 days as required by the Commission's order? What date does that form show as the date of last payment? If that form was not given the employee, as the rules require, he was deprived of information which the Commission specifically directed the carrier to furnish for his protection. It had legislative authority to require the insurance carrier to give employee this information. If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation.

The hearing commissioner concluded the carrier was not estopped to plead the bar provided by G.S. 97-47. This conclusion was vacated by the Commission on employee's appeal. Presumably, because it was of the opinion the statute of limitations started to run from January 12, 1962, it did not find it necessary to make findings of fact or conclusions on this question. Employee is, we think, entitled to have the Commission find whether the insurance carrier complied with its rule.

Employee's assignments of error on his appeal to the Commission also seem to present the question of estoppel by conduct after notice of employee's change of condition. *Ammons v. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575. These questions have not been, but should be, determined by the Commission.

Reversed.

JAMES LEE HARRIS v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 25 March 1964.)

1. Pleadings § 7—

Where insured alleges payment to insurer's agent of a stipulated sum for a binder and that the agent entered into an agreement for the issuance of a policy of liability insurance as required by the Financial Responsibility Act, insurer's denial of payment and of the agreement entitles it to introduce its evidence with respect to nonpayment of the premium and nonexistence of the agreement, and such matters are not affirmative defenses which must be specifically pleaded.

2. Appeal and Error § 47—

Where defendant insurer denies plaintiff insured's allegation of payment of premium and agreement of its agent to issue a binder for automobile liability insurance, defendant is not prejudiced by order of the court sustaining plaintiff's demurrer to insured's further answer setting up such defenses specifically, since defendant would be entitled to set up the defenses under its denial, and order sustaining demurrer will not be disturbed on appeal.

3. Insurance § 60—

Where insurer refuses to defend an action against insured after request by insured accompanied by the suit papers, such refusal is tantamount to a denial of liability, and as a general rule such denial waives notice of the accident.

4. Same—

Request by insured that insurer defend an action brought against insured, accompanied by the suit papers, constitutes notice to insurer of the accident,

and whether such notice is given within a reasonable time depends upon the facts and circumstances of each case.

5. Same; Insurance § 53.2—

As between insurer and insured, the issuance by insurer of Form FS-1 does not estop insurer from denying that the policy was in force or that notice of the accident was given as required by the policy.

6. Insurance § 63—

If insured in a liability policy gives timely notice of a suit against him within the coverage of the liability policy, and insurer refuses to defend such suit, insured is entitled to recover of insurer the amount he is reasonably required to spend by virtue of the failure of insurer to defend the suit.

7. Insurance § 53.2—

In insured's action against insurer to recover for sums expended in defending a suit against insured within the coverage of the policy, insured's allegations of the payment of a sum to insurer's agent under agreement for the issuance of a binder do not relate to liability imposed by the Financial Responsibility Act, and therefore furnish no basis for a counterclaim against insured under G.S. 20-279.21.

APPEAL by defendant from *Bone, Emergency Judge,* 26 August 1963 Schedule "D" Session of MECKLENBURG.

This is a civil action instituted against the defendant to recover attorneys fees and other expenses incurred in defending a suit brought against the plaintiff by Robert B. Wilson, Jr., for personal injuries and property damage allegedly sustained in an automobile collision on 9 January 1961 between the plaintiff's car and an automobile operated by said Robert B. Wilson, Jr., in Forsyth County.

The complaint alleges that the defendant's agent on 19 November 1960 entered into a binder agreement with the plaintiff for a policy of automobile liability insurance, as required by the Financial Responsibility Act of 1957, covering the plaintiff and his 1955 Chevrolet automobile, serial No. VC55B156315; that plaintiff paid the defendant's agent $12.00 on the premium for said automobile liability insurance policy; that on or about 25 November 1960 the defendant, acting through its agent, prepared and forwarded to the North Carolina Motor Vehicles Department Form FS-1, as required by said Department of Motor Vehicles, stating thereon that said insurance was effective as of 19 November 1960.

It is alleged that on 18 January 1961 the aforesaid Robert B. Wilson, Jr. instituted a civil action against the plaintiff herein for personal injuries sustained on 9 January 1961, while the aforesaid insurance was in full force and effect. in the sum of $10,000, and damage to property

in the sum of $1,200, as a result of the alleged negligence of plaintiff herein.

Upon being served with summons and complaint in the above action, the plaintiff herein sent the summons and complaint to the defendant insurance company and requested it to defend the action. The defendant failed and refused to do so.

The plaintiff alleged that he obligated himself to pay his attorneys the sum of $1,350 to defend the aforesaid action and incurred other expenses in connection therewith in the sum of $101.92. Plaintiff was successful in the defense of said action.

The defendant filed answer admitting the agency as alleged, notice of suit, and defendant's refusal to defend. The answer denies that premium was paid or that any agreement was made or binder or policy issued. The further answer sets up four defenses as follows: (1) Nonpayment of premium; (2) lack of any agreement, binder, or policy; (3) failure of plaintiff to give defendant notice as required by defendant's policy, if it be found that a policy was issued, and (4) a counterclaim for whatever the plaintiff may recover in this action on the ground that defendant's policies provide that the insured shall reimburse the company for any amount of expense incurred for which amount the company would not have been liable except for the provisions of the Financial Responsibility Act of 1957.

The plaintiff demurred to each of these defenses for failure to state facts sufficient to constitute an affirmative defense. The demurrer was sustained as to each of the four further answers and defenses, and the defendant appeals, assigning error.

Welling, Welling & Meek for plaintiff appellee.
Haynes, Graham & Bernstein for defendant appellant.

DENNY, C.J. The appellant's only assignment of error is to the ruling of the court below in sustaining the demurrer to each of the four further defenses set out in the defendant's answer.

The first further answer and defense to which the plaintiff's demurrer was sustained, was based on the allegation that no premium had been paid for the alleged insurance coverage. The plaintiff alleges in his complaint that a premium of $12.00 was paid to the agent of the defendant for the insurance binder. The defendant denied this allegation in its answer. Likewise, the second further answer and defense to which the demurrer was sustained was the allegation that no agreement had been made at any time by the defendant or any of its agents to issue a binder for automobile liability insurance coverage to the

plaintiff as alleged in the complaint. The defendant denied in its answer that any such coverage had ever existed; therefore, upon the trial of this cause, the defendant may introduce its evidence with respect to nonpayment of premium, as well as to the nonexistence of any agreement to issue the binder for insurance coverage, as alleged in the complaint.

In *Chandler v. Mashburn,* 233 N.C. 277, 63 S.E. 2d 553, it is said: "The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them. That is all that is required of the defendant to admit of presentation of his defense. McIntosh N. C. P. & P., 461. In such case the defendant may show any facts which go to deny the existence of the controverted facts."

The sustaining of the demurrer as to the first and second further defenses is in no way prejudicial to the defendant, and, as to it, the appellant has failed to show prejudicial error. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

The third further answer and defense is to the failure of the plaintiff to give notice as required by defendant's policy, if it be found that such a policy was issued.

The complaint alleges that the accident out of which the subsequent litigation arose, occurred on 9 January 1961; that on 18 January 1961 a civil action for damages and personal injuries was instituted against the plaintiff herein; that the complaint was filed in said action on 7 February 1961; that the plaintiff herein upon being served with summons and complaint, forwarded the same to the defendant, the receipt of which is admitted in defendant's answer. The date these papers were received by the defendant is not disclosed by the pleadings. However, the defendant admitted in its answer that it refused to defend the action.

The general rule is that denial of liability under a policy of insurance waives notice of accident. Moreover, the request to defend an action, accompanied by the suit papers, constitutes notice. However, whether such notice was given within a reasonable time depends upon the facts and circumstances. *Anderson v. Insurance Co.,* 211 N.C. 23, 188 S.E. 642; Strong's North Carolina Index, Volume 2, Insurance, section 60.

We think the refusal of the defendant to defend the action was tantamount to a denial of liability under the terms of the alleged binder agreement. Even so, there is no allegation on the part of the defendant in its answer that it was in any way prejudiced by not receiving notice of the accident prior to the receipt of the suit papers. Moreover,

the defendant's pleadings are to the effect that neither the defendant nor any of its agents ever entered into an agreement to issue a binder for automobile liability insurance coverage as alleged in the complaint and that if such agreement was made, the plaintiff failed to pay any premium in connection therewith.

In light of these allegations, did the issuance of Form FS-1 and the forwarding of same to the Department of Motor Vehicles estop the defendant from denying coverage under the alleged binder?

The mere issuance of such form and the forwarding thereof to the Motor Vehicles Department, under our decisions, would not constitute an estoppel as between the insurer and the insured. *Seaford v. Insurance Co.*, 253 N.C. 719, 117 S.E. 2d 733, and cited cases. However, it is otherwise as to third party beneficiaries. In *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149, *Moore, J.*, speaking for this Court, said: "By the issuance of the certificate (FS-1) an insurer represents that it has issued and there is in effect an owner's motor vehicle liability policy. *Swain v. Insurance Co.*, 253 N.C. 120, 126, 116 S.E. 2d 482. In substance, by the issuance of the certificate the insurer represents that everything requisite for a binding insurance policy has been performed, including payment, or satisfactory arrangement for payment, of premium. Once the certificate has been issued, nonpayment of premium, nothing else appearing, is no defense in a suit by a third party beneficiary against insurer."

If upon the trial of this cause the plaintiff can establish his allegations with respect to the insurance coverage, timely notice, and the payment of premium, the plaintiff would be entitled to recover of the defendant the amount he was reasonably required to spend by virtue of the failure of the defendant to defend the suit instituted against the plaintiff for personal injuries and damages growing out of the alleged negligent operation of plaintiff's 1955 Chevrolet. *Anderson & Co. v. Insurance Co.*, 212 N.C. 672, 194 S.E. 281.

The fourth defense in defendant's further answer is based on G.S. 20-279.21 (h) which reads as follows: "Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article."

The plaintiff alleges in his complaint that the agent of the defendant agreed to issue the binder for automobile liability insurance coverage as required by the Financial Responsibility Act of 1957, and that such coverage was in full force and effect on the date of the automobile accident complained of and growing out of which the plaintiff herein was

sued. Even so, as we construe the allegations in the plaintiff's complaint, if proven by the greater weight of the evidence, they furnish no basis for affirmative relief as alleged in defendant's further answer and defense by way of counterclaim or recoupment in favor of the defendant.

The ruling of the court below sustaining the demurrer as to each of the four further defenses set out in the defendant's answer, is

Affirmed.

FOREMAN MANUFACTURING COMPANY, INC. v. W. A. JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 25 March 1964.)

Taxation § 28c—

The forgiveness of an indebtedness by an officer-stockholder constitutes a contribution to capital and does not constitute income of the corporation, and therefore the forgiveness of such indebtedness does not offset a net operating loss of the corporation for a taxable year, and the corporation is entitled to carry forward such loss under the provisions of G.S. 105-147 (9) (d).

APPEAL by defendant from *Morris, J.*, September 1963 Civil Session of PASQUOTANK.

Action to recover income taxes paid by the plaintiff corporation under protest.

The complaint alleges, and the answer admits the following facts:

During the fiscal year ending August 31, 1957 plaintiff, a North Carolina corporation, suffered a net operating loss of $48,575.87. In the same year an officer-stockholder forgave and canceled the corporation's unrelated debt in the amount of $70,654.21.

The $48,575.87 deficit was carried forward by the taxpayer as net economic loss and used as an offset against its taxable income for the fiscal years ending August 31, 1958, 1959, 1960, and 1961. Subsequently, the plaintiff's tax returns for the fiscal years 1959, 1960, and 1961 were adjusted by the North Carolina Department of Revenue and the economic loss deductions for those years disallowed. An additional assessment of taxes and interest resulted. Within thirty days after receiving notice of the assessment, plaintiff applied in writing to the defendant for a hearing. The hearing was held and the Commissioner

sustained the assessment. Plaintiff then paid it and the accrued interest thereon under protest and, within thirty days, demanded in writing a refund of the tax paid as provided by G.S. §§ 105-241.4, 267. The demand was denied and this action instituted to recover the sum of $2,456.09 with interest from February 7, 1963. When the case came on for trial both plaintiff and defendant moved for judgment on the pleadings. His Honor allowed plaintiff's motion, and from a judgment that the plaintiff recover the amount claimed, the defendant appealed.

John H. Hall for plaintiff appellee.

Attorney General Bruton and Assistant Attorneys General Barham and Brady for defendant appellant.

SHARP, J. Plaintiff claimed the 1957 net operating loss of $48,575.87 as an allowable deduction against income in succeeding fiscal years under G.S. 105-147 (9) (d) which, in pertinent part, provides:

> § 105-147. Deductions. —In computing net income there shall be allowed as deductions the following items:
> * * * * *
> (9) Losses of such nature as designated below:
> * * * * *
> d. Losses in the nature of net economic losses sustained in any or all of the five preceding income years arising from business transactions or to capital or property as specified in a and b above subject to the following limitations:
> 1. The purpose in allowing the deductions of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the taxpayer such as to result in a net economic loss as hereinafter defined.
> 2. The net economic loss for any year shall mean the amount by which allowable deductions for the year other than personal exemptions, nonbusiness deductions and prior year losses shall exceed income from all sources in the year including any income not taxable under this article.

Defendant contends that the cancellation of the $70,654.21 indebtedness due its officer-stockholder during the fiscal year 1957 offset the plaintiff's net operating loss and actually resulted in a $22,078.34 improvement in its net economic situation for that year; that, therefore, plaintiff was not entitled to a carry-over deduction because of the limitation in subsection 1 of G.S. 105-147 (9) (d). He concedes, however, that if the amount which the corporation realized by the forgiveness of the indebtedness were not income, it did sustain a net economic loss within the meaning of subsection (2) of G.S. 105-147 (9) (d).

The case presents this single question for decision: Does the forgiveness of an indebtedness by an officer-stockholder constitute income to the corporation or a contribution to its capital?

"Contributions to capital are, of course, not taxable as corporate income." *Carroll-McCreary Co. v. Commissioner,* 124 F. 2d 303 (2d Cir. 1941). Capital is the money and other property adventured in the business. 12 C.J.S. 1121, 1122. Income is the fruit of capital. The phrase "contribution to capital" is a term which, when applied to private corporations, is ordinarily understood to mean the fund or property contributed or agreed to be contributed by stockholders as the financial basis for the prosecution of the business. It signifies those resources which support the capital stock and which are irrevocably dedicated to the satisfaction of all obligations of the corporation. *Detroit Edison Co. v. Commissioner,* 131 F. 2d 619 (6th Cir. 1942). Therefore, a stockholder who, in order to aid a corporation in financial difficulty, gratuitously cancels its indebtedness to him, simply makes an additional investment in the capital of the corporation. He may not deduct such forgiveness as a loss in computing his income tax for the year in which the contribution was made. *Johnson, Drake & Piper, Inc. v. Helvering,* 69 F. 2d 151 (8th Cir. 1934); 27 Am. Jur. *Income Tax* § 113; Annot., 39 A.L.R. 2d 878, 935. "Where a stockholder gratuitously forgives the corporation's debt to himself, the transaction has long been recognized by the Treasury as a contribution to the capital of the corporation." *Helvering v. American Dental Co.,* 318 U.S. 322 (1943); *Carroll-McCreary Co. v. Commissioner, supra, Chenango Textile Corp. v. Commissioner,* 148 F. 2d 296 (2d Cir. 1945); Reg. § 1.61-12(a); 3 Rabkin & Johnson, Federal Income, Gift & Estate Taxation, § 36.08.

Under Int. Rev. Code of 1954, § 61(12) gross income includes "income from discharge of indebtedness," but by a special rule of exclusion in § 108, the discharge of any indebtedness for which a corporate taxpayer is liable is not included in its gross income for the taxable year if it reduces the basis of its property by the amount of the debt discharged in accordance with § 1017.

The North Carolina Income Tax Law contains no provision similar to § 108 of the 1954 Code. Our statute taxes "income derived from any source whatever and in whatever form paid." G.S. 105-141(a).

The value of property acquired by gift is excluded from both State and Federal income tax. G.S. 105-141 (b) (3); Int. Rev. Code of 1954 § 102. A gift is usually defined as a voluntary transfer of property by one to another without any consideration therefor. Theoretically, a contribution by a stockholder increases the resources of the corporation and the value of all the stock, including his own, proportionately. This business aspect removes such a transaction from the concept of a pure gift. However, such a gift to a corporation necessarily constitutes a gift to the other stockholders.

In *American Dental Co., supra,* the Supreme Court held that the gratuitous release by creditors of accrued rent and interest on merchandise purchased constituted a gift to the corporation which was not subject to income tax. The court said: "The fact that the motives leading to the cancellation were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute." (Section 22(b) (3) of the Revenue Code of 1939). The creditor-donors in *American Dental Co.* were not stockholders. When a creditor who is a stranger to the corporation forgives its debt to him, the forgiveness is exempt from income tax under the exclusion of gifts. When a stockholder gratuitously cancels the debt the corporation owes him, the transaction is denominated a contribution to capital. See *George Hall Corp. v. Commissioner,* 2 T. Ct. 146; *Pacific Magnesium, Inc. v. Westover,* 86 F. Supp. 644, 649, (S.D. Cal. 1949). Subject to Int. Rev. Code of 1954, § 1017, the tax result is the same. However, neither constitutes income under state or federal law.

We hold that the forgiveness of the debt in question constituted a contribution to the capital of the plaintiff corporation and was therefore not taxable income. The judgment of the Superior Court is

Affirmed.

DAVID O'MARY v. LAND CLEARING CORPORATION AND FIDELITY & CASUALTY COMPANY OF NEW YORK.

(Filed 25 March 1964.)

1. Master and Servant § 53—

To establish a claim under the Workmen's Compensation Act claimant has the burden of proving that he sustained an injury by accident arising out of and in the course of his employment.

2. Same—

Plaintiff's evidence to the effect that while he was walking over cleared land in the usual and customary manner in the performance of his duties he felt a stinging on his right foot, discovered a blister on his toe, and that later the blister became infected, resulting in serious injury, *held*, not to show that the injury resulted from an accident within the meaning of the Workmen's Compensation Act.

3. Appeal and Error § 61; Constitutional Law § 10—

An interpretation consistently and repeatedly given a statute by the Court constitutes a part of the statute and any change in such interpretation must be effected by the Legislature, and if the Legislature does not do so the interpretation of the Court must be considered in accord with the legislative intent.

APPEAL by plaintiff from *Parker, J.*, October Civil Session 1963 of HALIFAX.

Proceeding under Workmen's Compensation Act, G.S. Chapter 97, Article 1. The requisite jurisdictional facts were stipulated. The only controversy is whether plaintiff suffered a compensable injury. Findings of fact and conclusions of law, made initially by the hearing (deputy) commissioner, together with his "award" (order) denying plaintiff's claim for compensation, were adopted, upon plaintiff's appeal, by the full commission; and, upon plaintiff's further appeal, the court entered judgment affirming the action of the full commission. Plaintiff excepted and appealed.

Allsbrook, Benton & Knott for plaintiff appellant.
Teague, Johnson & Patterson for defendant appellees.

BOBBITT, J. The one question presented by plaintiff's appeal is stated in his brief as follows: "Were the facts found by the North Carolina Industrial Commission sufficient to support the judgment of the Superior Court which affirmed that the plaintiff's injury on August 10, 1961 did not constitute an accident within the meaning of the North Carolina Workmen's Compensation Act?"

The pertinent findings of fact are set out verbatim in the following numbered paragraphs:

"1. That the plaintiff employee went to work for the defendant employer on August 4, 1961, as a foreman, with eight men under him, and that he was employed to direct these men in clearing up land which had been recently cut through.

"2. That the plaintiff, in the course of directing his crew, walked through the land which was being cleared and this was rough and rugged land, up and down hills; that the land was rough and rugged due to the fact that it had been recently cleared by means of bulldozing; that the plaintiff did no clearing himself, his job was to supervise colored laborers who were working under him.

"3. That the plaintiff was wearing his own clothes, including a pair of combat shoes which he had bought the previous winter, with socks on his feet; that the shoes were a good fit and were in good condition.

"4. That on or about August 10, 1961, in the morning, the plaintiff felt a stinging in his right foot, pulled off his shoe and found a broken blister on the second toe of his right foot; that the plaintiff put his sock back on, put his shoe on, and walked the remainder of the day; that he went home and applied salve to the area of the blister which he had purchased from a drug store; that the toe looked bloody and the salve did not help.

"5. That August 10, 1961, was a Thursday; that due to union troubles the plaintiff did not return to work until the following Tuesday but was unable to walk because of the pain in his toe, left the job and consulted Dr. Hall of Roanoke Rapids, North Carolina."

In brief summary, subsequent findings of fact are as follows:

The toe became infected. On account thereof, the toe was amputated on November 11, 1961; and on January 16, 1962, a second operation was performed in which "the bone underlying the second toe," in the area of the instep of the right foot, was "excised." It was stated (as a conclusion of law) "that the plaintiff suffered considerable temporary total disability and a permanent partial disability of eighteen per cent of the right foot."

" 'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." G.S. 97-2(6).

To establish a compensable claim, the burden was on plaintiff to prove he sustained an injury by accident arising out of and in the course of his employment. *Matthews v. Carolina Standard Corp.*, 232

N.C. 229, 233, 60 S.E. 2d 93; *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403, 82 S.E. 2d 410.

The denial of compensation was based on the legal conclusion that plaintiff's injury was not *by accident.* Plaintiff challenges this legal conclusion. The question is whether the facts found establish *an injury by accident.*

In *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109, *Higgins, J.*, in accordance with cited decisions, said: "The . . . Act does not provide compensation for injury, but only for injury by accident. G.S. 97-2(6). The term 'accident' as used in the Compensation Act has been defined by this Court as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." In *Slade v. Hosiery Mills,* 209 N.C. 823, 825, 184 S.E. 844, decided in 1936, this Court, in opinion by Stacy, C.J., said: "Death from injury by accident implies a result produced by a fortuitous cause. . . . There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute." Absent accident (fortuitous event), death or injury of an employee while performing his regular duties in the "usual and customary manner" is not compensable. *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289, and cases cited; *Holt v. Mills Co.*, 249 N.C. 215, 105 S.E. 2d 614; *Turner v. Hosiery Mill,* 251 N.C. 325, 111 S.E. 2d 185; *Harding v. Thomas & Howard Co., supra; Byrd v. Cooperative,* 260 N.C. 215, 132 S.E. 2d 348.

The facts stated in the Commission's findings do not disclose any fortuitous event. Nor do they show plaintiff was performing his duties on August 10, 1961, otherwise than in the usual and customary manner. Hence, they do not show an "injury by accident" within the meaning of that phrase as interpreted by this Court.

Plaintiff cites decisions from other jurisdictions. Each cited decision and others from the same jurisdiction and pertinent statutory provisions have been considered. However, discussion thereof would serve no useful purpose.

In *Hensley,* this Court, in opinion by *Rodman, J.*, said: "We are aware that the interpretation given to our statute does not harmonize with the interpretation given by a majority of the courts to the compensation statutes of their States." Again: "If the question was now presented for the first time, we would feel at liberty to give more consideration to the reasoning of the cases which reach conclusions differing from our own, but we are not dealing with a new question. Twenty years and more ago the Court placed its interpretation on the Act. Except for the *dicta* to be found in the opinion by *Justice Seawell* in

the case of *Smith v. Creamery Co.*, (217 N.C. 468, 8 S.E. 2d 231), the language used as well as the conclusions reached have supported the interpretation *that injury and accident are separate and that there must be an accident which produces the injury before the employee can be awarded compensation.*" (Our italics). Again: "The interpretation so consistently given to the statute is as much a part of the statute as if expressly written in it. We have no right to change or ignore it. If it is to be changed, it must be done by the Legislature, the law-making power. If, in its wisdom, a change is desirable, it can readily do so."

The subject having been called to the attention of the General Assembly by *Rodman, J.*, in *Hensley,* and again by *Higgins, J.*, in *Harding,* it must be considered that, unless and until the statute is amended, the interpretation placed by this Court upon the phrase, "injury by accident," is in accord with the legislative intent.

Affirmed.

STATE v. JAMES HUMPHREY.

(Filed 25 March 1964.)

1. Criminal Law § 65—

The courts will not hold as a matter of law that a witness could not identify defendant by the lights of an automobile and street lights when the defendant was some 20 feet away.

2. Criminal Law § 108—

Where defendant testifies that he was with a person who was not his "girl friend" but "just a friend, girl" the remark of the court drawing the jury's attention to the fact that defendant seemed to make a distinction will not be held for prejudicial error.

APPEAL by defendant from *Cowper, J.*, August 19, 1963 Regular Session of LENOIR.

Defendant was charged in a warrant issuing from the Municipal County Court of Lenoir with the possession of alcoholic beverages on which the taxes imposed by the laws of the United States had not been paid, a misdemeanor, G.S. 18-48. He was found guilty, a prison sentence of 18 months was imposed. He appealed to the Superior Court. There, the jury returned a verdict of guilty. A prison sentence of 18 months was imposed. He appealed.

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

Fred W. Harrison for defendant.

PER CURIAM. Defendant's assignments of error present two questions: (1) Should his motion for nonsuit have been allowed? (2) Did the court prejudice defendant by an expression of opinion respecting the facts?

Defendant contends his motion to nonsuit should have been allowed because the evidence identifying him as one of two men carrying packages of non-tax paid whiskey was not credible. The State's witness, an ABC officer, testified he had known defendant for more than 16 years. He, the officer, was in an automobile with its lights turned off. About 5 a.m. on March 19, two men came from the direction of a warehouse and headed toward a street light. They came within 50 feet of him. They were talking. He recognized them but could not understand what they said. He started his automobile and turned on his lights when 20 feet from them; they dropped their packages and ran.

We are not impressed with the argument that we should hold, as a matter of law, that the lights on the street and automobile were not bright enough to enable the witness to recognize the defendant. The court properly left that question to the jury.

The officer gave chase. One of the men escaped, the other was caught. The officer then went to the home of defendant. He was not there but drove up some 30-45 minutes later. When the officer inquired where defendant had been, he first stated he had been to a fertilizer plant where he was employed to turn on a light. When the officer offered to go to the plant, defendant said, "There is no need of going there because I want to tell you the truth about it. I spent the night with a friend of mine."

Defendant, when on the stand, was asked about the friend with whom he claimed he spent the night. He said, "The girl friend I was talking about is not my girl friend, but she is just a friend, girl."

The court, in stating defendant's contentions, repeated his testimony with respect to his visit to his friend. The court then said, "I don't know what the difference is between girl friend and friend, girl, but there apparently is some." Defendant excepted to the quoted portion of the charge. The exception is without merit. The court was merely directing the jury's attention to the fact that the defendant himself made a distinction.

No error.

LULA C. BURKEY, ADMINISTRATRIX OF THE ESTATE OF ROBERT C. BURKEY, DECEASED V. L. G. KORNEGAY AND WIFE, VICKIE GRANT KORNEGAY, PARTNERS TRADING AS "BARBECUE LODGE," AND HUEY LONG GINN.

(Filed 25 March 1964.)

Trial § 35—

A remark of the court in its charge that a witness was "of perhaps weak mentality" must be held for prejudicial error as tending to discredit the witness, there being no admission, stipulation or testimony in the record bearing on the mental condition of the witness.

APPEAL by plaintiff from *Cowper, J.*, November 1963 Session of LENOIR.

Wallace & Langley for plaintiff appellant.
White & Aycock for defendant appellees.

PER CURIAM. This is an action for wrongful death. G.S. 28-173 and 174. On 26 September 1962 plaintiff's intestate was struck by a motor vehicle owned by defendants Kornegay and operated by defendant Ginn. From the injuries received he died "a few moments later." The accident occurred near the center of Vernon Avenue in the City of Kinston. Deceased had walked northwardly to a point at or near the center of the avenue; Ginn was driving westwardly along the avenue.

The jury found that the death was proximately caused by the negligence of defendants, and that deceased's negligence was a contributory cause. From judgment denying recovery, plaintiff appeals.

Two eyewitnesses testified for plaintiff. One was a young lady who could not read or write. She gave an account of the occurrence favorable to plaintiff. Thereafter, on both direct and cross examination there were conflicts and discrepancies in her testimony; at times she was hesitant; on two or more occasions she did not answer questions propounded to her.

In charging the jury the judge commented: "Plaintiff offered the testimony of (naming the witness), a young lady of perhaps weak mentality."

There is no admission, stipulation or testimony in the record bearing on the mental condition of the witness. The judge undoubtedly concluded from her manner of testifying that the young lady's mental capacity was subnormal. But G.S. 1-180 prohibits the judge from expressing such opinion. The challenged comment tended to discredit the witness and amounted to an expression of opinion that her testimony was of little weight. The credibility of the witness and the weight of

her testimony were matters solely for the determination of the jury uninfluenced by any opinion of the judge. "The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner." 4 Strong: N. C. Index, Trial, s. 35, p. 339; *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520; *Curruthers v. R. R.,* 218 N.C. 49, 9 S.E. 2d 498. The fact that the expression of opinion is an inadvertence renders the error nonetheless prejudicial. *Miller v. R. R.,* 240 N.C. 617, 83 S.E. 2d 533.

New trial.

RUPERT FRANKLIN SCARLETT, ADMINISTRATOR OF THE ESTATE OF LARRY NELSON SCARLETT DECEASED v. WILLIAM LAFAYETTE ABERNETHY, HOUSTON DONNELL HAVNAER, AND ABERNETHY'S, INCORPORATED.

AND

EDNA WRENN SCARLETT, ADMINISTRATRIX OF THE ESTATE OF RUSSELL WAYNE SCARLETT, DECEASED v. WILLIAM LAFAYETTE ABERNETHY, HOUSTON DONNELL HAVNAER, AND ABERNETHY'S, INCORPORATED.

(Filed 25 March 1964.)

APPEAL by defendants from *Farthing, J.,* Regular September 1963 Session, CATAWBA Superior Court.

Civil actions to recover damages for the alleged wrongful deaths of plaintiffs' intestates who were instantly killed in a three vehicle, rear-end collision on Highway 64-70 near Conover on the night of February 23, 1961. Twice heretofore this Court has reviewed cases growing out of the same accident. They are reported in 256 N.C. 677 and 258 N.C. 114. The plaintiffs' evidence in the present actions, which were consolidated for trial, was not essentially different from that recited in the former appeals.

The driver of the defendants' station wagon testified he stopped at an intersection not far from the scene of the accident, "to let traffic (also going west) go around me." He continued at about 50 miles per hour until he discovered the fog, then reduced speed until the crash.

The jury found the issues of negligence against the defendants and awarded damages of $22,500.00 for the wrongful death of Larry Nelson Scarlett, passenger, and $25,000.00 for the wrongful death of Russell Wayne Scarlett, driver of the Chevrolet. The defendants appealed.

Corne & Warlick by Stanley J. Corne for plaintiff appellees.
Willis & Sigmon by Emmett C. Willis for defendant appellants.

PER CURIAM. The plaintiffs alleged the defendants were guilty of actionable negligence in a number of respects, principally by failure of their driver to reduce speed upon discovering the dense ribbon of fog which blanketed the road over a stream; and as a result of such failure the vehicle crashed into the Chevrolet, killing the occupants. There was allegation the defendants' vehicle was following too closely. However, the evidence in support is lacking, except, perhaps, the defendants' evidence that some traffic passed at the nearby intersection, also going west. The court charged: ". . . (T)he driver of a motor vehicle shall not follow another . . . more closely than is reasonable and prudent, with regard to the safety of others and due regards to the speed of such vehicles and the traffic . . . and the condition of the highway. . . . The rule would vary with conditions existing from time to time and would always mean that distance at which a reasonable and prudent person would follow under the conditions as they existed at the time."

We are doubtful whether the evidence was sufficient to warrant any charge of following too closely. If error, we consider it to be nonprejudicial. The force of the collision and other evidence of speed were decisive. No other assignment of error is seriously debated. We conclude that in the trial below there was in law

No error.

SAMUEL THOMAS KORNEGAY v. FLOYD HEATH AND ALBERT LEE COOMBS.

(Filed 25 March 1964.)

APPEAL by defendants from *Cowper, J.*, October 1963 Session of LENOIR.

On June 14, 1962, plaintiff was injured while riding as a passenger in a 1956 Ford owned by defendant Heath and operated by defendant Coombs. Coombs lost control of the car. It ran off the rural paved road, turned upside down and stopped in a field.

Plaintiff instituted this action to recover damages in the amount of $30,000.00. He alleged his injuries were proximately caused by the negligence of Coombs and that Coombs was operating the car as agent for Heath.

Issues as to agency, negligence and contributory negligence were answered in favor of plaintiff; and the jury awarded damages in the amount of $2,500.00. Judgment for plaintiff in accordance with the verdict was entered. Defendants excepted and appealed.

Lamar Jones for plaintiff appellee.
Whitaker & Jeffress and Thomas H. Morris for defendant appellants.

PER CURIAM. As to each and all issues, there was ample evidence to support the jury's verdict. Assignments of error pertinent to the agency, negligence and contributory negligence issues are untenable. With reference to assignments of error pertinent to the issue as to damages: It may be conceded certain of the court's rulings relating to the admissibility of evidence are not free from error. However, after full consideration, we have concluded such errors did not substantially prejudice defendants and do not constitute sufficient ground for a new trial either of the entire case or of the issue relating to damages. In these circumstances, the verdict and judgment will not be disturbed.

No error.

ETHEL DOVE, ADMINISTRATRIX OF THE ESTATE OF ADOLPH DOVE, DECEASED v. ELISHA (HOTFOOT) LAWSON, DECEASED, AND E. R. WOOTEN, ADMINISTRATOR OF THE ESTATE OF ELISHA (HOTFOOT) LAWSON.

(Filed 25 March 1964.)

APPEAL by plaintiff from *Cowper, J.*, November Civil Session 1963 of LENOIR.

This is an action to recover for the wrongful death of plaintiff's intestate. The accident which resulted in the death of plaintiff's intestate occurred on 11 February 1955, about 1:00 p.m., on North Carolina Highway 11, approximately 300 feet south of Stonington Creek Bridge.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed and the action dismissed. The plaintiff appeals, assigning error.

H. E. Beech, Fred Harrison, D. D. Pollock for plaintiff appellant.
Whitaker & Jeffress, Thomas H. Morris for defendant appellee.

PER CURIAM. A careful review of the evidence adduced in the trial below, when considered in the light most favorable to the plaintiff,

as it must be on a motion for judgment as of nonsuit, leads us to the conclusion that it is sufficient to carry the case to the jury.

Therefore, the ruling of the court below, sustaining defendant's motion for judgment as of nonsuit, is

Reversed.

SOUTHERN RAILWAY COMPANY, PETITIONER v. GEORGE HOOK, MAYOR; P. L. LUTZ, MILES L. RHYNE, CARL G. CARPENTER, WALTER J. HEATHERINGTON, ROY J. BULLARD, JR., AND CEASAR RAMSEY, COUNCILMEN OF THE TOWN OF BESSEMER CITY, NORTH CAROLINA; AND TOWN OF BESSEMER CITY, NORTH CAROLINA, RESPONDENTS.

(Filed 8 April, 1964.)

1. Municipal Corporations § 2—

A proceeding by a municipality to annex territory pursuant to G.S. 160-453.1 et seq., is summary in nature and the material statutory requirements must be complied with.

2. Same—

Where about a tenth of a tract of land, marked off by a bumper strip or barrier, is used for parking, and the rest of the tract is graded and held by the owner for possible future industrial development, *held*, the vacant part of the tract is not "used" for industrial purposes within the purview of G.S. 160-453.4(c).

APPEAL by petitioner, Southern Railway Company, from *Riddle, S.J.*, September 16, 1963, Civil Session of GASTON.

W. T. Joyner, Jr.; Mullen, Holland & Cooke; Geo. B. Mason for Petitioner appellant.

Henry L. Kiser and Hugh W. Johnston for defendants, appellees.

MOORE, J. This is a proceeding for the extension of the corporate limits of Bessemer City, N. C., pursuant to General Statutes, Chapter 160, Subchapter VI, Article 36, Part 2 (G.S. 160-453.1 to G.S. 160-453.12). Bessemer City has a population of less than 5000.

On 10 December 1962 the governing board adopted a resolution stating the intent of the municipality to extend its limits to include an area of 63.29 acres which adjoins its eastern boundary. A report of plans

for extension of city services to the area proposed for annexation was adopted and filed. Notice of a public hearing on the proposed annexation was given, and the hearing was held, pursuant to the notice, on 14 January 1963. On 4 February 1963 an annexation ordinance was adopted.

The area proposed for annexation includes a segment of the right of way of the Southern Railway Company, about two-fifths of a mile long. In apt time the Railway Company petitioned for review, pursuant to G.S. 160-453.6. It alleges, among other things, that the area sought to be annexed is not subject to annexation in that it is not developed for urban purposes within the meaning of G.S. 160-453.4(c), which provides as follows:

> "The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty per cent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty per cent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

The annexation ordinance declares: The number of lots and tracts in the area is 34, of which 12 are vacant, and 22 are in use — residential 14, commercial 3, industrial 5. Thus 65% of the lots and tracts are in use. The total residential and undeveloped acreage is 36. Of this, the acreage in lots and tracts of five acres and less in size is 24, or 66%.

On the other hand, the Railway Company's petition alleges: The number of lots and tracts in the area is 186, of which 81 are vacant. Only 56.5% of the lots and tracts are in use. The total residential and undeveloped acreage is 50.23. Of this, the acreage in lots and tracts of five acres and less is 24.73, or 49% only.

The petitioner and the municipality each offered evidence which, they contend, tends to support their respective analyses of the makeup of the area. It is not necessary to consider and discuss the wide discrepancy in the evidence as to the number of lots and tracts in the area. The crucial question on this appeal involves the proper classification of a tract of land owned by Ideal Industries, Inc., and situate on the north side of Highway 274. It contains 13.747 acres, of which about one-tenth (1.4 acres) is used for parking. There are no buildings or structures of any kind on the tract. The plant and buildings of

Ideal Industries are in the area proposed for annexation, but are on tracts and lots which do not adjoin this 13.747 acre tract. It is conceded that if, as petitioner contends, the part of the tract not used for parking (more than 12 acres) is vacant unused land, the area sought to be annexed to the City clearly does not meet the requirements of G.S. 160-453.4(c).

The evidence concerning the 13.747 acre tract is as follows:

(1). Charles H. Davis, Jr., registered engineer, testified for petitioner: ". . . (T)he property shown (on map) labeled 'Ideal Industries, Inc.', of 13.747 acres is vacant property; the front of it is used for parking. . . . The area I have shown (on map) and denominated 'Parking' is used for nothing but the parking of automobiles. This is delineated by a bumper strip or barrier at the back of it." (Cross Examination) "I testified that there was 25.503 acres of undeveloped land over five acres in size. That involves two tracts, one of J. A. Bess (Best) estate which is on the West end of the area, and the other is the Ideal Industries tract on the East end of the area. . . . I also designate the 13.747 acres lying on the North side of Highway 274 as belonging to Ideal Industries. About 90% of the property North of the highway I designate as being undeveloped, and I designate a small portion of it as parking. . . . I did not talk to anyone from Ideal Industries about the property I designated as to why it was undeveloped."

(2). C. Jack Costner, Secretary of Ideal Industries, Inc., testified for respondents: "The tract of land owned by Ideal Industries on the North side of 274 at this time has been graded." In January 1963 it was used for a "cow pasture." Before the first of the year "we had plans to, actually, at that time to move our entire operation across the road and the plans — that is, at some future time — not at this, you know, we didn't have any particular date set when we would move, but that road is a line on a water shed. . . . In regard to our plans prior to the first of the year to use this for industrial purposes, we had graded about 30 to 35 thousand yards of dirt and practically levelled about 14 acres of it. . . . Our plans are to move as fast as business requires us to expand because we have no further room where we have to expand. That was the purpose of buying the property in the first place." (cross Examination). ". . . (T)he land we acquired was half of Miss Martha Torrence's farm, and at that time it was a cow pasture . . ., and the only pasturing done was of animals that some fellow who lives on Dr. Froneberger's place was using . . ., I believe it was a cow pasture. . . . Right at this time there is some discussion (of

plans) but no concrete plans of any sort." On February 4, 1963, there was no use whatever being made of this land by Ideal.

(3). Clyde Robinson, expert engineer and surveyor, testified for respondents: "I consulted with Mr. Costner and other officials at Ideal, we asked them how they considered that there was a question in our mind as to whether it was vacant or should be considered as being held for future expansion and so forth; and they told us they considered it industrial. . . . As a result of our consultation with the owners we placed this land in the category of industrial." (Cross Examination). "The land was vacant except for the parking lot at the time I examined it. I didn't see any cows. . . . My interpretation as to its then use was based upon what Mr. Costner told me he considered the use of the land, and I in my own mind considered the use was predicated upon what they had purchased it for at that time. . . . (T)here wasn't any use being made of the land at that time."

The municipality classified the entire 13.747 acre tract of Ideal Industries, Inc., as property in use for industrial purposes. The court below found that this classification was proper. This is error. G.S. 160-453(c) employs the expression ". . . are *used* for . . . industrial purposes . . ." The verb "use" means "to put into . . . service." Webster's Third New International Dictionary — Unabridged (1961). The proceeding employed by the municipality in this instance is summary in nature, and material statutory requirements must be complied with. *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681. There is no evidence that the twelve acres of land in question were being used either directly or indirectly for industrial purposes. All of the evidence tends to show that it was not being *used* for any purpose. When Ideal Industries purchased the land, it was pasture and farm land; Ideal Industries graded it. It is being held for possible industrial use at some indefinite future time. It is industrially owned but not industrially used. A small space next to the highway is used for parking; the evidence does not show, but we assume, that the parking of automobiles on this space is incidental to the business of Ideal Industries. This space may be reasonably classified as in use for industrial purposes. This user does not determine the character of the other 90% of the tract, which is undeveloped and serving no active industrial purpose.

The area sought to be annexed does not qualify for annexation under G.S. 160-453.4(c). It is not subdivided into lots and tracts such that at least 60% of the total acreage, not counting the acreage *used* at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

This proceeding is remanded to superior court for judgment not in conflict with this opinion. If so advised, respondents may move in superior court for remand of the proceedings for amendment of boundaries, and for other amendments and proceedings. See G.S. 160-453.6 (g); *Huntley v. Potter, supra.* If the municipality does not desire remand to the governing board, the proceedings will be dismissed.

We make no decision with respect to questions raised on this appeal and not discussed in this opinion. If the matter is remanded to the governing board for amendment and further proceedings, other objections presently urged may be obviated.

Error and remanded.

GEORGIANNA REEVES RICHARDSON v. VAN V. RICHARDSON, JR.

(Filed 8 April, 1964.)

1. Husband and Wife § 13—

The wife may sue in her own name to recover the amount the husband is delinquent in payments for the support of the minor children of the marriage as set forth in a deed of separation executed by the parties, but the wife holds the recovery of such amounts as trustee for her children.

2. Trusts § 6—

The trustee of an express trust may sue without joining the *cestui que trust.* G.S. 1-63.

3. Pleadings § 17—

A demurrer to the complaint on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action will not be sustained when no such jurisdictional defect appears on the face of the complaint. G.S. 1-127.

4. Courts § 3—

The Superior Court has statewide jurisdiction.

5. Husband and Wife § 13; Divorce and Alimony § 22; Judgments § 30; Election of Remedies § 1—

An order entered in a divorce action that the husband pay specified sums for the support of the children of the marriage, the court having refused to adjudicate in the divorce action the question of the wife's right to recover the amount the husband was delinquent in payments for the support of the children under a prior separation agreement, does not preclude the wife from thereafter instituting an action to recover the amounts delinquent under the separation agreement at the time of institution of the action for divorce.

6. Election of Remedies § 1—

A party is put to his election only when the remedies available to him are mutually inconsistent so that if he asserts the one he must necessarily repudiate the other, and the doctrine does not apply to co-existing and consistent remedies.

7. Husband and Wife § 13; Divorce and Alimony § 22—

Where, in the husband's action for divorce, the court enters an order that he pay a specified sum monthly for the support of the children of the marriage and no appeal is taken from this provision of the order, such order precludes the wife from thereafter recovering the amount by which payments in conformity with such order failed to equal the monthly payments thereafter falling due under a prior separation agreement between them.

APPEAL by plaintiff and defendant from *Clarkson, J.*, June Civil "B" Session 1963 of MECKLENBURG.

Civil action by Georgianna Reeves Richardson, the mother, to recover alleged arrears under a deed of separation entered into by and between her and Van V. Richardson, Jr., her husband and defendant here, providing, *inter alia*, she should have custody of the three minor children born of the marriage between them, to wit, Katharine M. Richardson, age 12 years, Van V. Richardson, III, age 7½ years, and LeRoy R. Richardson, age 6 years, and that Van V. Richardson, Jr., their father, should pay to Georgianna Reeves Richardson, their mother and plaintiff here, for the maintenance and support of these three minor children the sum of $200 on 3 March 1960, $200 on 17 March 1960, $200 on 3 April 1960, $200 on 17 April 1960, and thereafter $300 on the third day of each month thereafter, and that "said payments shall continue until said children reach the legal age of dependency."

The deed of separation contains a number of other provisions in respect to the maintenance and support by the father of these three minor children which are not material on this appeal; e.g., an agreement to pay all medical, doctor, and hospital expenses of the children; further agreement to contribute additional sums if children enter college; and an increase of the $300 monthly payments if the father's net income exceeds $500 monthly. The deed of separation provides for no payment by defendant for the support of plaintiff, his wife.

The deed of separation is dated 29 February 1960, was duly executed and acknowledged by the parties on that date, and, in accordance with G.S. 52-12, the assistant clerk of the superior court of Mecklenburg County on the same date, after private examination of the wife, plaintiff here, certified that it was not unreasonable or injurious to the wife, but, considering all the attendant facts and circumstances, was "reasonable, just, and fair to her."

On 16 March 1962 Van V. Richardson, Jr., defendant here, instituted an action in the superior court of Lincoln County against Georgianna Reeves Richardson, plaintiff here, for an absolute divorce on the grounds of two years' separation. G.S. 50-6. In his complaint he alleges that he is a resident of Lincoln County and defendant is a resident of Mecklenburg County, and defendant in that action, plaintiff here, admits in her answer the truth of these allegations. In her verified answer in the divorce action defendant, who is plaintiff here, alleges in her further answer and counterclaim that plaintiff in that action, who is defendant here, is in arrears as of 31 March 1962 in an amount of over $3,025 in payments required to be made by him to her under the deed of separation between them for the maintenance and support of their three children, and by way of affirmative relief she prays that the court enter an order giving her custody of the three children born of the marriage between the parties, requiring plaintiff in that action, defendant here, to pay the arrears due her by him for the support and maintenance of the three children under the deed of separation in an amount of not less than $3,025, and further ordering plaintiff in the divorce action, defendant here, to pay a reasonable sum each month for the maintenance and support of the three children.

Upon the filing of the answer in the divorce action, plaintiff made a motion at the May Civil Term 1962 of the superior court of Lincoln County before Judge Patton to strike from defendant's further answer and counterclaim in her answer, *inter alia,* the allegations to the effect that plaintiff as of 31 March 1962 is in arrears in the amount of over $3,025 in the payments required to be made by him to her for the support of their three minor children under the deed of separation between them, and that she is entitled to a judgment to recover from him that amount. Judge Patton entered an order allowing the motion to strike what is set forth above, holding that the cause of action set forth in the further answer and counterclaim to recover the arrears in payment by plaintiff under the deed of separation should be brought in an independent action, and is not appropriate as a part of the divorce action.

This divorce action came on to be heard at the May Civil Term 1962 of the superior court of Lincoln County before Patton, J., and a jury. In the divorce action, plaintiff in that action offered in evidence the deed of separation between the parties. In this divorce action Patton, J., upon return of the verdict entered a judgment denying plaintiff a divorce. After entering this judgment Patton, J., entered an order relating to the three children, which is in substance as follows: He finds as facts that the defendant in that action is a fit and suitable per-

son to have the custody of the three children born of the marriage between the parties, and that plaintiff in that action is an able-bodied man gainfully employed in the town of Lincolnton as local agent for State Farm Insurance Company selling various forms of insurance for his employer, and that in the year 1961 his gross income was $5,871.20. He decreed that custody of the three children be awarded to defendant in that action, their mother, subject to prescribed visitation rights of plaintiff, and ordered that, pending further orders of the court, plaintiff in that action pay to defendant in that action $200 each month for the maintenance and support of the three children, said payments to be made through the office of the clerk of the superior court of Lincoln County, and further ordered plaintiff to pay reasonable medical expenses for the three children. Judge Patton made no order in respect to the amounts allegedly in arrears under the deed of separation for the maintenance and support of the three children; he, on motion of plaintiff in the divorce action, having stricken from the further answer and counterclaim of defendant the allegations in respect to such arrears. Nothing appears to indicate defendant in the divorce action excepted to Judge Patton's order relating to the three children and their support or appealed therefrom. However, plaintiff did appeal from Judge Patton's judgment denying him a divorce. This appeal is reported in 257 N.C. 705, 127 S.E. 2d 525. On appeal this Court awarded plaintiff a new trial of his divorce action by reason of error in the charge. No question relating to payments by defendant here for the maintenance and support of the three children was presented for decision on that appeal.

On 13 November 1962 Georgianna Reeves Richardson instituted the instant action against defendant Van V. Richardson, Jr., in Mecklenburg County. In her complaint she alleges in substance: She is a resident of Mecklenburg County and defendant is a resident of Lincoln County. On 29 February 1960 the parties entered into a deed of separation in which defendant agreed to pay her $300 a month from 3 May 1960 for the support and maintenance of the three minor children born of the marriage between them, and further agreed to pay medical, doctor, etc., bills of the three children. As of 31 March 1962 defendant was in arrears in the payment of such amounts in the sum of $3,025, plus certain medical expenses. Defendant paid her for the maintenance and support of the three children $100 for April 1962, $150 for May 1962, and $200 monthly since May 1962, and that defendant is in arrears in such payments since 31 March 1962 in the sum of $850. Wherefore, she prays a recovery from defendant in the sum of $3,875. Van V. Richardson, Jr., defendant, filed an amended answer admitting

the residence of the parties as set forth in the complaint, the execution of the deed of separation between them on 29 February 1960, but denies that he owes plaintiff anything for the maintenance and support of their three minor children. And for a further answer and defense and as a plea in bar to plaintiff's right to recover anything for the maintenance and support of the three minor children, he alleges in substance: The custody, maintenance and support of the three minor children born of the marriage between the parties has been determined and adjudicated by Judge Patton's order entered in the divorce action at the May Civil Term 1962 of the superior court of Lincoln County, subject to the further orders of the court, upon the prayer for affirmative relief of Georgianna Reeves Richardson contained in her answer in the divorce action in which she requested the court to take jurisdiction as to the custody, maintenance and support of the three children. That Georgianna Reeves Richardson thereby abrogated the deed of separation between the parties, which is set forth verbatim in his answer, insofar as its provisions relate to the custody, maintenance and support of the three children. That since the issuance of Judge Patton's order he has paid into the office of the clerk of the superior court of Lincoln County $200 a month for the maintenance and support of the three children, as required in the order.

When the instant case came on to be heard before Judge Clarkson, defendant demurred *ore tenus* to the complaint. Judge Clarkson did not pass on the demurrer *ore tenus* at the time, and the parties agreed that the judge might pass on the case without a jury.

The parties agreed that Judge Clarkson should hear the case upon an agreed statement of facts, which consists of the following: An agreement that the instant action is brought by plaintiff upon the deed of separation, and not upon Judge Patton's order in the divorce action; the deed of separation entered into by and between the parties on 29 February 1960; the record in the divorce action of *Van V. Richardson, Jr. v. Georgianna Reeves Richardson,* and particularly the judgment and orders entered by Judge Patton in the divorce action; an agreement that Judge Patton's order in the divorce action required Van V. Richardson, Jr., to pay to Georgianna Reeves Richardson the sum of $200 a month from 3 June 1962 through November 1962 for the maintenance and support of their three minor children, and that he has paid these required amounts in full, which is a difference of $100 a month or $600 between the amount called for in the deed of separation and the amount called for in Judge Patton's order; an agreement that the deed of separation called for total payments to Georgianna Reeves Richardson for the support and maintenance of the three minor

children up to the date of issuance of Judge Patton's order on 24 May 1962 in the amount of $8,300, and that as of this date Van V. Richardson, Jr., had paid the sum of $4,980, which leaves a difference of $3,320; and that plaintiff foregoes any claim for medical expenses for the three children up to the date of this action.

Judge Clarkson entered a judgment which, after reciting that he had considered the agreed and stipulated facts and the briefs of counsel, contains the following conclusions of law:

"1. The demurrer *ore tenus* of the defendant should not be allowed.

"2. The plaintiff is entitled to recover as Trustee for the minor children the sum of $3,320.00, representing the total of the delinquent sums due under the Separation Agreement up to June 4, 1962, the effective date of the Order of Judge Patton.

"3. The claim of the plaintiff for the sum of $600.00, representing the difference between: (a) the amounts paid pursuant to the Order of Judge Patton up to November 13, 1962, the time of the filing of the complaint in the within case, and (b) the amounts required under the Separation Agreement to said date, should not be allowed, the Court holding as a matter of law that when the plaintiff in the within action filed an Answer in the divorce action instituted by the husband in Lincoln County and asked for custody of the children and for support of the children and when she further failed to appeal from the Order of Judge Patton granting the wife custody and setting payments required of the husband less than the payments required under the Separation Agreement, the wife submitted to the jurisdiction of the Divorce Court, waived her right to recover the full amounts as set forth in the Separation Agreement, and the Order of Judge Patton superseded the support requirements set forth in the Separation Agreement from June 4, 1962, the effective date of Judge Patton's order."

Whereupon, Judge Clarkson ordered and decreed that plaintiff as trustee recover from defendant the sum of $3,320 with interest from 4 June 1962, and that any sums collected by plaintiff pursuant to this judgment shall not be the separate estate of plaintiff, but shall be held by her as trustee for the use and benefit of the three minor children, and further that plaintiff recover her costs. This judgment further provides for the payment of counsel fees to plaintiff's lawyer out of the recovery.

Plaintiff appeals from the part of Judge Clarkson's judgment denying her a recovery of $600 as set forth above in his third conclusion of law.

Defendant appeals from that part of Judge Clarkson's judgment not allowing his demurrer *ore tenus* to the complaint, and from the judgment.

Myers & Rush by Charles T. Myers for plaintiff appellant and appellee.

W. H. Childs, Jr., for defendant appellant.

PARKER, J.

DEFENDANT'S APPEAL

Defendant assigns as error the disallowance of his demurrer *ore tenus* to the complaint. The record does not state the ground for the demurrer *ore tenus*. However, defendant in his brief contends it should be sustained on two grounds: (1) plaintiff has no legal capacity to maintain the action, and (2) want of jurisdiction in the Mecklenburg County superior court.

There is no allegation or contention on this appeal, or on the former appeal, that there was any fraud or duress in the execution of the deed of separation, or that either party thereto lacked mental capacity. The complaint in the instant case alleges in substance that on 29 February 1960 plaintiff and defendant executed a deed of separation in which defendant agreed to pay to plaintiff for the support and maintenance of the children born of the marriage between them the sum of $300 a month, and that defendant is in arrears in such payments in the sum of $3,875 as of November 1962. Wherefore, she prays that she recover from defendant the sum of $3,875 for the support of their three minor children. Under our decisions plaintiff has legal capacity to maintain this action upon the deed of separation to recover from defendant the alleged arrears in payments of money due her by him under the deed of separation for the support of the three minor children born of the marriage between them. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E. 2d 148; *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113; *Campbell v. Campbell*, 234 N.C. 188, 66 S.E. 2d 672; 67 C. J. S., Parent and Child, sec. 20, e, p. 710. Plaintiff is not the beneficiary of the recovery of the amount in arrears under the deed of separation, if there is any; she is merely trustee for the three minor children. *Goodyear v. Goodyear, supra.* In this jurisdiction a trustee of an express trust may sue without joining his *cestui que trust.* G.S. 1-63; *Ingram v. Insurance Co.*, 258 N.C. 632, 129 S.E. 2d 222.

Defendant contends in his brief that there is want of jurisdiction in the superior court of Mecklenburg County. The complaint in the instant case alleges plaintiff is a resident of Mecklenburg County, North

Carolina, and defendant is a resident of Lincoln County, North Carolina. The subject matter of the action is to recover arrears of payments due to be paid to plaintiff by defendant for the support of the minor children born of the marriage between them under the deed of separation entered into by and between them. A demurrer to a complaint on the ground that the court has no jurisdiction of the person of the defendant, or of the subject of the action, will be sustained when, and only when, such defect appears upon the face of the complaint. G.S. 1-127, 1; *Credit Corp. v. Satterfield,* 218 N.C. 298, 10 S.E. 2d 914; McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 1, sec. 1184. The superior court is one court having statewide jurisdiction. *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723. No want of jurisdiction appears upon the face of the complaint in the instant case.

Judge Clarkson properly overruled defendant's demurrer *ore tenus* to the complaint.

Defendant's second and last assignment of error is: "The court erred in signing the judgment dated September 18, 1963, appearing of record, the same being contrary to the law and facts."

The parties stipulated before Judge Clarkson: "* * * this suit is brought by the plaintiff upon the alleged contract, and not for anything alleged to be due to be paid under Judge Patton's Order." The parties further stipulated before Judge Clarkson: "It is agreed that the Separation Agreement called for a total sum of payments for the support of the children up to the date of Judge Patton's Order, May 24, 1962, to be in the sum of $8,300.00, and that as of that date Van V. Richardson, Jr. paid for the support of the said children the total sum of $4,980.00, which leaves a difference of $3,320.00."

There is no merit in defendant's contentions that, when plaintiff filed an answer in the divorce action brought against her as defendant by defendant here, she, in that suit, submitted the entire matter of the custody and support of the children born of the marriage between them to the superior court of Lincoln County and abandoned any right to recover any arrears in payments due under the deed of separation for the support of the children, and thereby made an election of remedies to abandon the provisions of the deed of separation for their support and chose to rely upon an order of the court to enforce allowances for their support, and therefore cannot maintain the instant suit.

Plaintiff here, in her answer in the divorce action, alleged as a further defense and counterclaim in substance: Plaintiff, Van V. Richardson, Jr., is in arrears as of 31 March 1962 in an amount of over $3,025 in payments required to be made by him under the deed of separation between them for the maintenance and support of their three

children, and by way of counterclaim she prays that the court enter an order giving her custody of the three children born of the marriage between them and requiring him to pay the arrears due her by him for the support of the three children under the deed of separation in an amount of not less than $3,025, and further ordering him to pay a reasonable sum each month for their support. Upon motion of defendant in the instant action, who was plaintiff in the divorce action, Judge Patton entered an order striking from the answer in the divorce action the allegations to the effect that plaintiff in the divorce action as of 31 March 1962 is in arrears in the amount of not less than $3,025 in the payments required to be made by him to her for the support of their three minor children under the deed of separation entered into by them, and that she is entitled to a judgment to recover from him that amount. Judge Patton stated in his order striking these allegations that the cause of action set forth in the further answer and counterclaim to recover these arrears of payments due under the provisions of the deed of separation should be brought in an independent action, and is not appropriate as a part of the divorce action. Judge Patton in his order entered in the divorce action, awarding custody of the children to the mother and requiring the father to pay to her $200 a month for their support, made no reference to the amount of not less than $3,025 allegedly in arrears under the deed of separation for the support of the three children.

Defendant's plea in bar alleged in his answer that he owes plaintiff nothing, because Judge Patton in his order in the divorce action had determined the question of the arrears due by him to plaintiff for the support of the children under the deed of separation, and that the matter is *res judicata,* is not supported by the facts and is untenable. *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233, is in point. In that case the Court held that in an action by a husband against his wife for divorce on the ground of two years' separation, in which the wife set up in her answer a separation agreement entered into between them when they were about to separate in which the husband contracted that she should have the care and custody of the two children born of the marriage and that the husband should pay her certain sums for each child with her for their support and asked for a judgment that she recover according to the terms of such agreement, this plea of the wife being ignored by the court and no judgment rendered thereon, though the court rendered a judgment of absolute divorce for the husband, such decree is not *res judicata* in a subsequent action by the wife against the husband based on the agreement. In this case the trial court held that plaintiff recover of the defendant the amounts due under the contract, and this Court on appeal affirmed.

The Court said in *Surratt v. Insurance Agency,* 244 N.C. 121, 93 S.E. 2d 72: "The 'whole doctrine of election [of remedies] is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other.' But 'the principle does not apply to co-existing and consistent remedies.' *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345."

"To make them inconsistent one action must allege what the other denies, or the allegation in one must necessarily repudiate or be repugnant to the other. It is the inconsistency of the demands which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of action are different." 28 C. J. S., Election of Remedies, sec. 4, p. 1068.

No reason occurs to us why the assertion in a counterclaim by Georgianna Reeves Richardson in the answer filed by her in the divorce action brought against her by Van V. Richardson, Jr., that she is entitled to recover from him the arrears due by him to her under the deed of separation entered into by and between them for the support of the three children born of the marriage between them and asking for an order for their support, which claim for a judgment for the arrears was stricken from her answer by motion of her husband and not considered by the judge, should bar an independent action by her against her husband to recover the arrears due by him under the deed of separation. Her counterclaim in the divorce action to recover the arrears due under the deed of separation and her independent action to recover these arrears are consistent in theory, and the allegations in the counterclaim do not repudiate and are not repugnant to the allegations in her independent action, the instant suit.

Defendant makes no contention in his brief that Judge Clarkson erred in awarding custody of the children to plaintiff, or that he erred in his third conclusion of law set forth above, which is favorable to him.

On defendant's appeal we find

No error.

PLAINTIFF'S APPEAL

Plaintiff has one assignment of error as follows: "The Court erred in failing to allow the additional $600.00 claim of the plaintiff." This assignment of error has reference to Judge Clarkson's third conclusion of law, which is set forth verbatim above. As stated above, the deed of separation provides for no payment by defendant for the support of plaintiff, his wife.

Plaintiff here, in her answer in the divorce case, alleged that plaintiff, her husband, was in arrears in payments under the deed of separation in an amount of not less than $3,025. And in her further answer in the divorce action, she requested the court to enter an order requiring plaintiff in the divorce action, her husband, to pay a reasonable sum each month for the support of the children in the future. It seems apparent that plaintiff here desired the security of a court order for the support of their children, which she could enforce, if necessary, by contempt proceedings in the event of a wilful failure by her husband to pay the amount for the children's support ordered by Judge Patton. Judge Patton acceded to her request and entered an order finding that the father's gross income in 1961 was $5,871.20, and requiring him, pending further orders of the court, to pay to plaintiff here $200 each month for the support of their children. Plaintiff here, defendant in the divorce action, did not except to or appeal from Judge Patton's order.

In the appeal in the divorce action between the parties here, 257 N.C. 705, 127 S.E. 2d 525, the Court said: "The terms of the separation agreement do not limit the authority of the court to make and enforce such allowances for the support of the children as circumstances may require."

This Court said in *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235: "The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Such agreements, including consent judgments based on such agreements with respect to marital rights, however, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children."

Plaintiff contends that, although Judge Patton had authority to order the father to pay less for the support of his children than called for in the deed of separation, his order did not abrogate the deed of separation, and that the plaintiff here in her independent action has the right to recover the difference between the amount called for in the deed of separation of $300 a month and the $200 a month set forth in Judge Patton's order, which amount is $600.

Judge Patton in fixing the payments to be made by the father for the support of the children at $200 a month, pending the further orders of the court, upon a finding that his gross income in 1961 was $5,871.20, although the deed of separation called for the payment by him of $300 a month for their support, acted pursuant to authority vested in him by our decisions to make and enforce such allowances for the support of

the children as circumstances may require, *Kiger v. Kiger, supra; Richardson v. Richardson, supra; Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136. Judge Patton's order, there being no exception thereto, is final and binding in fixing the amount to be paid by defendant here for the support of the children, irrespective of the provisions set forth in the deed of separation, and plaintiff is not entitled to recover the difference between the amount required to be paid for the support of the children by Judge Patton's order and that called for in the deed of separation, amounting to $600. Judge Clarkson's third conclusion of law is correct in denying plaintiff a recovery of the $600 which she contends is due her under the deed of separation, though the statement in this conclusion of law that the wife "waived her right to recover the full amounts as set forth in the separation agreement" is surplusage.

On plaintiff's appeal we find

No error.

LITHIUM CORPORATION OF AMERICA, INC., PETITIONER v. TOWN OF BESSEMER CITY, A NORTH CAROLINA MUNICIPAL CORPORATION; GEORGE HOOK, MAYOR; P. O. LUTZ, MILES L. RHYNE, CARL G. CARPENTER, WALTER J. HEATHERINGTON, ROY J. BULLARD, JR., AND CEASAR RAMSEY, MEMBERS OF THE GOVERNING BOARD OF THE TOWN OF BESSEMER CITY, NORTH CAROLINA, RESPONDENTS.

AND

SOUTHERN RAILWAY COMPANY, PETITIONER v. TOWN OF BESSEMER CITY, A NORTH CAROLINA MUNICIPAL CORPORATION; GEORGE HOOK, MAYOR; P. O. LUTZ, MILES L. RHYNE, CARL G. CARPENTER, WALTER J. HEATHERINGTON, ROY J. BULLARD, JR., AND CEASAR RAMSEY, MEMBERS OF THE GOVERNING BOARD OF THE TOWN OF BESSEMER CITY, NORTH CAROLINA, RESPONDENTS.

(Filed 8 April, 1964.)

1. Constitutional Law § 6; Municipal Corporations § 2—

Changes in municipal boundaries are legislative matters, and the exercise of legislative authority by a municipality in annexing additional territory is not subject to judicial interference.

2. Constitutional Law § 10—

It is the function of the courts to construe a statute of doubtful meaning.

3. Administrative Law § 4—

It is the function of the courts in proper instances to determine whether an administrative board acted arbitrarily, unreasonably or unjustly in applying the provisions of a statute.

4. Statutes § 5—

The intent of the Legislature controls the interpretation of a statute.

5. Same—

When the meaning of a statute is doubtful, the courts may consider the history of the legislation in question in connection with the object, purpose and language of the statute in ascertaining the legislative intent.

6. Same—

Where clauses of a statute setting forth the requirements for the application of the statute are connected by the conjunctive "and", it is generally necessary that the conditions set forth in both clauses be met in order for the statute to be applicable.

7. Municipal Corporations § 2—

In order for an area to be subject to annexation by a municipality under the provisions of G.S. 160-453.4(c), it is necessary that at least 60 per cent of its total number of lots and tracts be in use for residential, commercial, industrial, institutional or governmental purposes and also that at least 60 per cent of its total acreage, not counting the acreage used at that time for commercial, industrial, governmental or institutional purposes, be subdivided into lots and tracts of five acres or less in size.

8. Same—

An area owned by two industrial concerns and used exclusively for commercial purposes does not comply with the literal requirements of G.S. 160-453.4(c) or come within the reasonable intent and application of the statute, and an ordinance of a municipality annexing such area must be set aside by the courts.

APPEAL by petitioners, Lithium Corporation of America, Inc., and Southern Railway Company, from *Riddle, S.J.*, September 16, 1963, Civil Session of GASTON.

Mullen, Holland & Cooke and Davis & White for petitioners.
Henry L. Kiser and Hugh W. Johnston for respondents.

MOORE, J. This is a proceeding for extension of the corporate limits of Bessemer City, N. C., a municipality having a population of less than 5000. The proceeding is had pursuant to Chapter 160, Subchapter VI, Article 36, Part 2 of the General Statutes of North Carolina (G.S. 160-453.1 to G.S. 160-453.12).

On 19 November 1962 the City's governing board adopted a resolution of intent (G.S. 160-453.5) to consider annexation of an area of 69.62 acres contiguous to the city's western boundary.

The northern portion of the area proposed for annexation consists of an arc-shaped segment of the Southern Railway Company right of

way, about 1600 feet in length. State Highway 216, running generally east and west, crosses the area a short distance south of the railroad. Lithium Corporation of America, Inc., (Lithium) owns all of the land in the area except that embraced within the railroad and highway right of ways. A road leading from the highway southwardly bisects the area. Between the highway and railroad right of ways there is a small parcel, about 2½ acres, of vacant land. From the bisecting road westwardly to the highway there is about 25 acres which is vacant except for a 4-acre artificial lake which was constructed by Lithium and is maintained by it as a stand-by source of water should an emergency require its use. Between the road and the city limits are about 30 acres upon which is located Lithium's plant, buildings and structures, including some lagoons. The area sought to be annexed contains no residences, and it has not been subdivided into streets and lots; it consists only of the properties of Lithium and the Railway Company. To the north, west and south of the area is open and undeveloped country. Lithium owns 425 acres contiguous to the area. The land to the east of the area and within the city limits is vacant and undeveloped for several hundred feet except along the highway. Lithium has about 180 employees; it purchases from the city approximately 15 million gallons of water per month; Lithium provided the water lines and a pumping station at a cost of $52,000. The city provides no other utilities or services to Lithium. If the annexation becomes effective Lithium will pay annually about $31,000 in city taxes.

A report setting forth plans for extension of services to the area was approved by the governing board of the municipality and filed with the Clerk. On 14 January 1963 a public hearing was held pursuant to notice given. Lithium and the Railway Company had representatives at the hearing and opposed annexation. On 4 February 1963 the governing board adopted an ordinance annexing the area.

In apt time Lithium and the Railway Company, in separate petitions, requested review pursuant to G.S. 160-453.6. Each alleges, among other things, that the area does not qualify for annexation in that it is not "developed for urban purposes" in accordance with the requirements of G.S. 160-453.4(c), which provides as follows:

> "The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty per cent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such

> that at least sixty per cent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

The annexation ordinance recites that the area contains two tracts, none residential, one commercial and one industrial, that the "area is developed for urban purposes as defined by the statutes in that 100 per cent of the total number of lots and tracts in the area are used for industrial and commercial purposes."

In superior court the petitions were consolidated for hearing. It was stipulated by petitioners and respondents "that all of the property under consideration for annexation is either commercial or industrial and that there is no subdivision of any of the acreage into tracts of five acres or less. That the Southern Railway right of way is used for commercial purposes and that the land belonging to Lithium . . . is used for industrial purposes."

The court entered judgments, concluding that "the character of the area to be annexed is developed for urban purposes and meets the requirements of General Statute 160-453.4," and affirming in all particulars the action of the municipality in annexing the subject area. Both petitioners appeal.

Petitioners contend that to meet the statutory test for annexation "some portion of the subject area must consist of or be composed of lots and tracts five acres or less in size, not counting the acreage used by Lithium and Southern Railway for industrial and commercial purposes." Petitioners say that G.S. 160-453.4(c) contains two clauses setting up standards for determining whether an area is "developed for urban purposes" — an area is so developed, (1) if at least 60% of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, *and* (2) if the area is subdivided into lots and tracts such that 60% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts of five acres or less in size. They point out that the two clauses are connected by the conjunctive "and," and contend that the clauses are coordinate and mutually complementary, and that an area does not meet the test, "developed for urban purposes," unless it substantially complies with the requirements of both clauses of the statute. Ordinarily, when the conjunctive "and" connects words, phrases or clauses of a statutory sentence, they are to be considered jointly. 50 Am. Jur., Statutes, s. 281, p. 267. Obviously the subject area does not comply with the last clause of the second sentence of G.S. 160-453.4(c).

On the other hand, respondents contend that an area may be annexed if it meets the standards set by the first of the clauses, that it need not comply with both. The subject area clearly complies with the requirements of the first clause, for more than 60%, 100% in fact, of the lots and tracts are used (according to the stipulation of the parties) for commercial and industrial purposes.

The narrow question thus presented is not without difficulty. Changes in municipal boundaries are legislative matters, and the exercise of legislative permission therefor is not subject to judicial interference. *Dunn v. Tew*, 219 N.C. 286, 13 S.E. 2d 536; *Highlands v. Hickory*, 202 N.C. 167, 162 S.E. 471; *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758. However, where a statute is of doubtful meaning it is the function of the courts to construe it. This function encompasses the duty, in some instances, to determine whether administrative authority is applying the provisions of the statute in an arbitrary, unreasonable and unjust manner, not in keeping with legislative intent. *In re Hickerson*, 235 N.C. 716, 71 S.E. 2d 129; *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410; *Hilgreen v. Cleaners & Tailors, Inc.*, 225 N.C. 656, 36 S.E. 2d 252.

The spirit and intent of an act controls its interpretation. *Porter v. Yoder & Gordon Co.*, 246 N.C. 398, 98 S.E. 2d 497; *Smith v. Davis*, 228 N.C. 172, 45 S.E. 2d 51. When the meaning of a statute is doubtful the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning. *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433. The statute we are considering is section 4, Chapter 1010, Session Laws of 1959. It was not copied from the laws of other states. It is a result of a study and recommendations made by the Municipal Government Study Commission which was established in accordance with Joint Resolution 51 of the General Assembly of 1957. The Commission made two comprehensive reports, one dated November 1, 1958, the other February 26, 1959. We repeat here in substance, except where quoted verbatim, some pertinent comments and recommendations of the Commission (numbering and paragraphing ours):

(1). Standards for changing municipal boundaries should be more specific than formerly. It is for the Legislature, not judicial or administrative agencies, to fix policy. It is a matter for statewide policy, and the Legislature should define the type and character of land which should be annexed by municipalities. Report 1, pp. 20, 21.

(2). The factors important in deciding what lands should be annexed are: (a) the actual distribution of developed and vacant land

in an area, (b) the extent to which the area needs municipal services, (c) the extent to which the owners of developed property in the area desire municipal services, (d) the availability inside the corporate limits of land suitable or desirable for residential, commercial and industrial development, (e) the extent to which municipal services can be provided, and (f) the impact of services and taxation upon lands being annexed. Report 2, pp. 7, 8.

(3). ". . . (T)he General Assembly should not delegate unlimited power to the governing boards. Exercise of discretion to extend corporate boundaries must and should be subject to general standards or limitations . . . And we think the primary standards should be . . . that the land to be annexed is either developed for urban purposes or is reasonably expected to be so developed in the near future . . ." Report 2, p. 9.

(4). "We do not believe that a precise municipal boundary can be fixed by reference to specific factual standards. Somewhere in the process there must be the exercise of judgment by some board or agency. Therefore, whether the decision is made by a city council or a state administrative board, the most practical method of reviewing the administrative decision is to provide judicial review. . . . And the scope of review must necessarily be whether the agency making the decision made a reasonable decision in accord with the statutory standards. This, we believe, is the best protection for the individual property owners." Report 2, p. 10.

(5). The Commission recommends that an area to be qualified for annexation must be developed for urban purposes or undergoing urban development. Land is " 'undergoing urban development' if (1) there has been substantial subdivision of land into lots and tracts of five acres or less, and/or (2) that there has been substantial residential, commercial or industrial development along the streets or highways or in small communities, settlements or subdivisions, and/or (3) there is a reasonable expectation that land not already subdivided or developed will soon be developed by reason of being a logical service area into which municipal water and sewer systems should be extended, or by reason of being adjacent to land now subdivided or developed for urban purposes." Report 2, p. 11.

(6). "The requirement that land be 'undergoing urban development' is made general on purpose. . . . (M)ore specific definition would rob the cities of necessary flexibility in fixing boundary lines. In short, we believe the legislative standard should act as a brake only with respect to attempted annexation of large tracts of agricultural or vacant land where no evidence of urban development can be shown."

The reports of the Commission do not furnish a direct answer to the specific question with which we are here concerned, but they are helpful in determining the intent of the Legislature on this point. The Commission recognized that no definition of the phrase, "developed for urban purposes" could be formulated which would provide exact guidance for municipalities under any and all circumstances. It concluded that standards should be more specific than under prior annexation laws, but not so specific as to exclude the necessity in some instances for the exercise of judgment and discretion. Large tracts of agricultural or vacant lands, where no evidence of urban development can be shown, should not be annexed in any event, except upon petition of the landowners. (G.S. 160-452). Areas not adaptable to municipal services should not be annexed for the arbitrary purpose of imposing tax burdens. In the formulation of plans for legislation, the Commission centered attention upon, and made recommendations having in mind, typical suburban areas undergoing development, containing subdivisions with streets, lots and tracts, having a substantial portion in actual use, and being adaptable to water, sewer and other service extensions. The Commission recognized that there would be variations from this pattern.

The General Assembly adopted a standard containing two tests for determining availability for annexation. (1) *the use test* — that not less than 60% of the lots and tracts in the area must be in actual use, other than for agriculture, and (2) *the subdivision test* — not less than 60% of the acreage which is in residential use, if any, and is vacant must consist of lots and tracts of five acres or less in size. Bessemer City contends that the *use test* is alone sufficient to qualify an area for annexation, and the subject area, which contains two tracts 100% in use for commercial and industrial purposes, complies with statutory standards. To hold that this test alone is sufficient will lead to absurd and unintended results. Under such construction of the statute a municipality could annex a single lot. It could annex a segment of a railroad or power line right of way and nothing more; it could annex a single service station, store or dwelling. Certainly no such result was intended without the request and consent of the landowner pursuant to G.S. 160-452. The fact that the General Assembly connected the two test clauses with the conjunctive "and," and the clear abuses and hardships which a literal application of the *use test,* if alone applied, would produce, leads us to the conclusion that the legislative intent is that both tests be complied with.

However, it must be conceded that literal insistence upon the application of both tests might in some extreme and improbable circum-

stances bring about absurd results adverse to municipalities. For example, a large suburban area might be subdivided into streets, blocks and lots, and all thereof be in actual use for commercial purposes (stores, banks, restaurants, offices, parking lots, etc.) — no residences. Under the literal application of both tests, it would not be subject to annexation. Such circumstances are, however, extremely unlikely; and a municipality would undoubtedly find it possible to fix the boundaries of the area proposed for annexation so as to include enough vacant or residential property to comply with the statute.

The difficulties of applying the standards in extreme cases is the reason the Commission recommended a provision for court review to determine "whether the agency making the decision made a reasonable decision in accord with statutory standards." The General Assembly made provision for such review. G.S. 160-453.6.

If a municipality clearly complies with the standards of G.S. 160-453.4(c), there is nothing to review with respect to the availability of an area proposed for annexation. Where compliance is in doubt, the determination must be made upon the facts in the particular case.

In our opinion the subject area does not comply with the literal requirement of G.S. 160-453.4(c). Furthermore, the annexation of such area is not within the reasonable intent and application of the statute.

Parenthetically, the problem in this case arose by reason of the stipulation of the parties as to use. All of the evidence, except the stipulation, tends to show there is vacant, unused land in the area. There is a small vacant tract between the highway and the railroad. There is a 25-acre tract which is vacant, except for a 4-acre lake which is maintained on a stand-by basis. This tract, except the lake, is vacant, and according to the evidence is suitable for future residential development. If there had been no stipulation, the area would so clearly have been unavailable for annexation as not to permit debate.

The judgment below is

Reversed.

LEWIS VAN LEUVEN AND RUTH ARDREY VAN LEUVEN v. AKERS MOTOR LINES, INC., A CORPORATION.

(Filed 8 April, 1964.)

1. Highways § 5; Eminent Domain § 2—

The Highway Commission has exclusive control of a highway easement and authority to make reasonable rules and ordinances to implement such

control, G.S. 136-18(10), G.S. 136-93, and it may issue a permit authorizing the holder of the permit to construct a sewer line within the right of way over lands owned by another in fee, but in such case the owner of the fee is entitled to compensation for the additional burden placed upon the land.

2. Same—

In an action by the owner to recover for the additional burden placed upon the land by the construction of a sewer line within the highway right of way, defendant is entitled to plead that it had permission from the Highway Commission to construct the sewer line, since the pre-existing easement for highway purposes has a bearing upon the question of damages, the owner of the fee being entitled to recover only for the decrease in the value of his land because of the additional burden of the sewer line.

3. Election of Remedies § 1; Judgments § 30—

An action solely for an injunction to restrain defendant from constructing a sewer line across plaintiff's property, amended after the construction of the sewer line to request a mandatory injunction to compel its removal, which suit is dismissed, will not bar a subsequent action to recover damages for the burden of the easement, even though damages might have been, but were not, demanded in the prior suit.

4. Damages § 10—

A party constructing, under written permission of the Highway Commission, a sewer line within the highway easement across land owned by another in fee may not be held liable for punitive damages by such owner of the fee.

APPEAL by defendant from *Clark (Edward B.), Special Judge,* September 9 and September 16, 1963, Schedule "C" Civil Session of MECKLENBURG.

When this cause came on to be heard at the above session of the Superior Court of Mecklenburg County before Clark (Edward B.), Special Judge, "upon consent of counsel for plaintiffs and defendant for a pre-trial hearing and the court in its discretion determined that the defendant's pleas in bar be disposed of prior to trial; whereupon the defendant introduced into evidence the complete record in this action and in the action entitled *'Lewis Van Leuvan vs. Akers Motor Lines, Inc.'* * * * instituted in the Superior Court of Mecklenburg County on the 20th day of October, 1959, the record on appeal to the Supreme Court of North Carolina including the transcript of evidence, and briefs, and the decision of the Supreme Court reported in 256 N.C. 610. After hearing oral arguments of counsel and studying written briefs filed by counsel and after examination and study of the records in the aforesaid decision of the Supreme Court, the court finds facts as follows:

"1. Lewis Van Leuvan instituted an action in the Superior Court of Mecklenburg County * * * against Akers Motor Lines, Inc. on

the 20th day of October, 1959, alleging ownership of a house and lot on Little Rock Road, a State highway in Mecklenburg County, for a permanent order restraining the installation through his lot of a sewer line by the defendant and on said date Judge Clarkson issued a temporary restraining order.

"2. Upon hearing, the temporary restraining order was dissolved.

"3. In November, 1959, after dissolution of the temporary order, the defendant completed construction of the sewer line through plaintiff's lot, the line constructed of an iron pipe four inches in diameter buried to a depth of about four feet along the shoulder of Little Rock Road about four feet from the edge of the pavement.

"4. Soon thereafter the plaintiff was allowed to amend his complaint, which he did by alleging that the sewer line had been constructed and installed through his lot over his objection and the plaintiff demanded a mandatory injunction requiring the defendant to remove the line and did not seek damages or other relief.

"5. That upon trial Judge Patton sustained a demurrer to the plaintiff's evidence.

"6. The plaintiff appealed to the Supreme Court which affirmed the judgment of the Superior Court without the decision becoming a precedent, the Justices being equally divided (one Justice not sitting). The Supreme Court decision established that the plaintiff was the owner of the said house and lot and that the plaintiff was not entitled to the relief demanded, a mandatory injunction for removal of the defendant's sewer line from the lot.

"7. The Supreme Court found that the plaintiff was the owner of the lot on Little Rock Road. The question of ownership was not raised on appeal. The defendant in its appeal brief admitted that the plaintiff was the owner, subject to the thirty-foot highway easement of the State Highway Commission.

"8. On the 15th day of August, 1962, Lewis Van Leuven and his wife, Ruth A. Van Leuven, instituted this action against Akers Motor Lines, Inc. * * * in the Superior Court of Mecklenburg County alleging substantially the same facts in their complaint that the plaintiff Lewis Van Leuven alleged in the prior action referred to in paragraph 1 above, but pray for: (1) possession of their lot free from the burden of the defendant's sewer line and (2) compensatory damages and (3) punitive damages.

"9. The defendant filed answer setting up his pleas in bar as follows: (1) The judgment of the Supreme Court in the first action and

(2) that the defendant had the right to install and maintain its sewer line through the plaintiffs' lot within the State Highway right of way under permits from the State Highway Commission and the State Stream Sanitation Committee."

Upon the facts found, the court ordered and decreed as follows:

"1. The decision of the Supreme Court in the first action is conclusive of right of both plaintiffs herein to have the sewer line removed from the lot; that they are not entitled to possession of their lot free from the burden of the sewer line.

"2. The sewer line of the defendant is a burden on plaintiffs' lot and in addition to that of the highway easement for travel, and the plaintiffs are entitled to maintain this action against the defendant for the imposition of this additional burden.

"3. The defendant's plea that it had permission to construct and maintain the sewer line within the highway easement from the State Highway Commission is not a bar to this action but may be properly pleaded for its bearing on the question of damages.

"4. The plaintiffs have a single cause of action for trespass by the defendant in the construction and maintenance of the sewer line through their lot, for the taking of the added easement and the plaintiffs cannot split this action to recover damages for the period from the initial trespass to the time of the institution of this action and thereafter bring successive actions for the continued maintenance of the sewer line through plaintiffs' lot, as counsel for plaintiffs contended in oral argument and in his written brief.

"5. On the question of punitive damages raised by both plaintiffs and defendant no conclusion is made for that previously this court denied the defendant's motion to strike the punitive damages alleged and prayed in the complaint."

From the foregoing order, the plaintiffs and the defendant gave notice of appeal to the Supreme Court. However, only the defendant perfected its appeal, assigning error.

Hollowell & Stott; Helms, Mulliss, McMillan & Johnston for defendant.

No counsel contra.

DENNY, C.J. The defendant's first assignment of error is to the ruling of the court below that the sewer line of the defendant is a

burden on plaintiffs' lot in addition to that of the highway easement for travel, and that the plaintiffs are entitled to maintain this action against the defendant for the imposition of this additional burden.

The State Highway Commission or its duly authorized officers may give in writing a permit to an individual, firm or corporation authorizing the holder of such permit to construct or install a sewer line within the right of way along any highway under the control of the Commission, provided the installation of such sewer line is made under the supervision and to the satisfaction of the Commission or its officers or employees. G.S. 136-93.

In the case of *Highway Commission v. Young,* 200 N.C. 603, 158 S.E. 91, this Court upheld an ordinance passed by the State Highway Commission pursuant to statutory authorization to the effect, "That the right of way of all State highways, except as otherwise designated by appropriate signs on the ground, shall extend thirty feet from the center of the highway on either side * * *, and it shall be unlawful for any person to construct or maintain any structure within the limits of said right of way, except with the written permission of the State Highway Commission."

Likewise, the State Highway Commission is empowered by G.S. 136-18 (10), "To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles, signboards, fences, gas, water, sewerage, oil, or other pipe lines, and other similar obstructions that may, in the opinion of the Highway Commission, contribute to the hazard upon any of the said highways or in anywise interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Commission shall require the removal of, or changes in, the location of telephone, telegraph, or other poles, signboards, fences, gas, water, sewerage, oil, or other pipe lines, or other similar obstructions, the owners thereof shall at their own expense move or change the same to conform to the order of the said Commission."

In *Hildebrand v. Telegraph Co.,* 219 N.C. 402, 14 S.E. 2d 252, it is said: "It may be conceded that the easement acquired by the State for a public highway is, under existing law, so extensive in nature and the control exercised by the Highway Commission is so exclusive in extent that the subservient estate in the land, from a practical standpoint, amounts to little more than the right of reverter in the event the easement is abandoned. Nevertheless, the subservient estate still exists and any encroachment thereon entitles the owner to nominal damages at least."

In the case of *State Highway Commission v. Black,* 239 N. C. 198, 79 S.E. 2d 778, this Court said: "Where it (the State Highway Com-

mission) exercises the power of eminent domain vested in it by the statute codified as G.S. 136-19 and in that way appropriates the land of another to public use as the right of way for a public highway, the State Highway and Public Works Commission acquires once for all the complete legal right to use the entire right of way for highway purposes as long as time shall last. From the viewpoint of practicality, the difference between an easement of this nature and extent and a fee simple estate in the land covered by the right of way is negligible."

In *Hildebrand v. Telegraph Co.*, 221 N.C. 10, 18 S.E. 2d 827, in discussing the control of highway easements by the State Highway Commission, this Court said: "The State Highway & Public Works Commission has been granted exclusive control over the State Highway system. Ch. 2, sec. 10 (b), Public Laws 1921, as amended. It has full authority to make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles within the right of way, and it may, at any time, require the removal of, change in, or relocation of any such poles. Ch. 160, sec. 1, Public Laws 1923. That said Commission may in its discretion authorize the use of the highway right of way by telephone and telegraph companies is not seriously debated. This authority, however, is subject to the right of the owner of the servient estate to payment for the additional burden." *Grimes v. Power Co.*, 245 N.C. 583, 96 S.E. 2d 713.

The first assignment of error is overruled.

The defendant's second assignment of error challenges the correctness of the ruling of the court below to the effect that, "(t)he defendant's plea that it had permission to construct and maintain the sewer line within the highway easement from the State Highway Commission is not a bar to this action but may be properly pleaded for its bearing on the question of damages." In our opinion, this ruling was proper and we so hold. However, the damages recoverable are limited to damages flowing from the imposition of the added burden on the pre-existing easement.

The State Highway Commission had the right to grant the permit to the defendant to lay its sewer line within the Commission's easement across the property of the plaintiffs, but it did not and does not have the power to relieve the defendant from liability to compensate the plaintiffs for the added burden the State Highway Commission permitted the defendant to put upon the pre-existing easement.

The defendant is entitled to have the existence of the Highway Commission's easement considered in mitigation of damages. It is proper to show the existence of a pre-existing easement when assessing damages for an additional one in order to limit recovery only for the

difference in the fair market value of the land involved subject to the pre-existing easement immediately before and immediately after subjecting it to the added burden. *Light Co. v. Sloan,* 227 N.C. 151, 41 S.E. 2d 361, and cited cases.

Assignment of error No. 2 is overruled.

The defendant's third assignment of error is directed to the ruling of the court below to the effect that "(t)he plaintiffs have a single cause of action for trespass by the defendant in the construction and maintenance of the sewer line through their lot, for the taking of the added easement and the plaintiffs cannot split this action to recover damages for the period from the initial trespass to the time of the institution of this action and thereafter bring successive actions for the continued maintenance of the sewer line through plaintiffs' lot." The effect of this ruling was tantamount to a holding that since the additional burden resulting from the laying of the pipe line was permanent in nature, the plaintiffs would be allowed to seek permanent damages in this action. From this ruling the plaintiffs did not appeal.

On the other hand, the defendant takes the position that any claim for damages in connection with the laying of its pipe line across the premises of the plaintiffs within the boundaries of the State Highway Commission's easement across said property, had to be asserted in the original action; therefore, it contends the plaintiffs are now estopped to maintain this action and that the lower court should have so held.

A careful consideration of the pleadings in these two actions leads us to the conclusion that the plaintiff in the first action might have asserted a claim for damages. However, it is quite clear that the plaintiff in the first action sought injunctive relief only. This relief was sought upon the theory that since the defendant was a common carrier of freight by motor vehicles and did not possess the power of eminent domain, it could not construct its sewer line across his premises without his consent. Therefore, he pressed for injunctive relief at first, to prevent the construction of the sewer line, and after the line was completed, he was permitted to amend and ask for a mandatory injunction requiring the removal of the sewer line from his premises. Failing in that, the present plaintiffs instituted this action at law for the possession of their property and for damages.

The court below held that the plaintiffs were not entitled to the possession of their premises free from the burden of the defendant's sewer line, and from this ruling they did not appeal.

An examination of the pleadings in the original action reveals the fact that the defendant in its answer alleged that the plaintiff was not entitled to injunctive relief on the ground that he had an adequate

remedy at law for damages. Furthermore, the authorities in this country on the point raised are sharply conflicting. *Sanders v. R. R.*, 216 N.C. 312, 4 S.E. 2d 902; *Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630; 26 A.L.R. 2d Anno.: Injunction — Bar — Action for Damages, page 446, et seq., and A.L.R. Supplement Service 1960, Volume 2, page 2162.

We are of the opinion, in light of the pleadings filed in the former action by the respective parties, that the plaintiffs are entitled to maintain this action for nominal damages at least. Even so, such damages will be limited to compensation only for the added burden on the pre-existing easement of the State Highway Commission.

Assignment of error No. 3 is overruled.

Defendant further assigns as error the failure of the court below to hold that since the claim for punitive damages was not set up in the first action, these plaintiffs are estopped from asserting such claim in the present action. This assignment of error will not be upheld for the reason assigned. However, there is no factual basis disclosed by the pleadings in this action that would warrant the recovery of punitive damages. What the defendant did was in conformity with and pursuant to a permit granted by the State Highway Commission as authorized in G.S. 136-93.

"Punitive damages may be awarded only where the wrong is done wilfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of the litigant's rights." *Rubber Co. v. Distributors, Inc.,* 253 N.C. 459, 117 S.E. 2d 479; *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393, 62 A.L.R. 2d 806; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570; *Hayes v. Askew,* 52 N.C. 272.

The judgment entered below is

Affirmed.

EDWARD WARD MILLS, ADMINISTRATOR OF THE ESTATE OF JAMES WARD MILLS v. THE STATE LIFE AND HEALTH INSURANCE COMPANY, INC.

(Filed 8 April, 1964.)

1. Insurance § 34—

The word "accidental" in a policy of insurance which does not define the term must be interpreted in its usual, ordinary and popular sense, and an

injury is accidental if under the circumstances it is unusual and unexpected by the person to whom it happens.

2. Same—

An intentional injury inflicted by another upon insured is an accidental injury within the coverage of a policy of insurance if the assault by such other is not provoked or due to the misconduct of insured, and therefore could not have been reasonably anticipated by him.

3. Same—

Where the parties stipulate that insured died as a result of a pistol wound inflicted by another as a result of a deliberate and intentional act not due to misconduct, provocation or assault on the part of insured, such death results "directly and independently of all other causes from accidental bodily injuries" within the meaning of the policy.

4. Insurance § 3—

A rider must be construed with the policy and harmonized therewith if possible, and the rider will not be held to alter the provisions of the policy except to the extent its provisions are in substitution of those of the original policy or create a new and different contract, but in case of irreconcilable conflict the provisions of the rider prevail.

5. Insurance § 42—

An employer procured a group policy insuring all eligible employees against accidental bodily injuries sustained while engaged in their employment and purchased a rider to the policy insuring himself subject to the terms of the group policy, except that the insurance provided by the rider should be in force and effect "twenty-four hours every day while the said group policy is in force," *held*, the rider is subject to the reasonable construction that its coverage was not limited to occasions when the employer was engaged in the performance of duties pertaining to his self-employment, and such construction will be adopted by the courts.

6. Insurance § 3—

Where a policy is susceptible to two reasonable interpretations, one imposing liability and the other excluding it, the courts will adopt that construction favorable to insured.

APPEAL by plaintiff from *Clark, Special Judge,* December 1963 Civil Session of WAYNE.

Beneficiary's action to recover death benefit under Group Policy No. 80397 and attached "ACCIDENT BENEFIT RIDER" issued by defendant to James Ward Mills, plaintiff's intestate. Upon waiver of jury trial, the hearing below was on the facts established by admissions in the pleadings and by stipulations.

The determinative facts are as follows:

On June 6, 1961, and at all times thereafter until his death, Mills, self-employed, was engaged in the logging business. On June 6, 1961,

defendant issued and delivered to Mills Group Policy No. 80397 and attached "ACCIDENT BENEFIT RIDER." The policy insured all eligible employees of Mills against "(l)oss resulting directly and independently of all other causes from accidental bodily injuries (excluding suicide or any attempt thereat, while sane or insane), sustained while engaged in the discharge of any duties for the Employer during regular or overtime working hours while this Policy is in force including such a loss sustained during the time the employee is proceeding to or from the place of employment only while riding in any transportation conveyance provided by Employer for that purpose." The rider, captioned "ACCIDENT BENEFIT RIDER," was in words and figures as follows:

"THIS RIDER: (1) is issued to and insures Mr. James W. Mills.

"(2) is to be attached to and form a part of Group Policy No. 80397, issued to James W. Mills.

"(3) is subject to all the terms and conditions of said Group Policy except that: (a) insurance provided hereunder is in full force and effect twenty-four hours every day while the said Group Policy is in force, and; (b) the benefits provided hereunder shall be in the following amounts instead of the amounts stated in said Group Policy.

"Principal Sum	Weekly Benefit	Hospital
$8,000.00	$25.00	$1,000.00

"This Rider is issued with an Effective Date of June 6, 1961."

It was stipulated:

"2. That on June 9, 1962, at or about 10:00 o'clock P.M., the said James Ward Mills was at Farmer's Service Station on South George Street, Goldsboro, North Carolina, drinking beer in the company of other persons; that at or about the time and place referred to herein the said James Ward Mills was shot with a pistol by one Roland Hill; that the aforesaid shooting was a deliberate and intentional act on the part of one Roland Hill, and was not the result of misconduct, provocation or an assault by the said James Ward Mills; that as a result of the injuries inflicted upon the said James Ward Mills, at the time and place above mentioned, the said James Ward Mills died on June 23, 1962, in Wayne County Memorial Hospital, Goldsboro, N. C.; and that as a result of the shooting and subsequent death of James Ward Mills, Roland Hill was convicted of manslaughter in Wayne Superior Court.

"3. That at the time and place when the said James Ward Mills was fatally shot, he was not engaged in any of the duties pertaining to his occupation or self-employment."

It was stipulated further that Group Policy No. 80397 and attached "ACCIDENT BENEFIT RIDER" were in full force and effect on June 9, 1962, and at the time of the death of Mills; that due notice and proof of loss were filed by plaintiff with defendant; and that plaintiff, if entitled to recover, is entitled to recover $8,000.00 with interest thereon from June 23, 1962.

After hearing and consideration, the court entered judgment "that the plaintiff have and recover nothing of the defendant, and that this action be and the same is hereby dismissed, and the costs taxed against the plaintiff." Plaintiff excepted and appealed.

Dees, Dees & Smith and William L. Powell, Jr., for plaintiff appellant.

Taylor, Allen & Warren for defendant appellee.

BOBBITT, J. Two questions are presented: (1) Did the death of Mills result "directly and independently of all other causes from accidental bodily injuries (excluding suicide or any attempt thereat, while sane or insane)" within the meaning of the policy? (2) If so, did the policy and rider provide coverage for Mills when "he was not engaged in any of the duties pertaining to his occupation or self-employment?" Affirmative answers to both questions are prerequisite to recovery.

"In the absence of any policy provision on the subject, it is a well-established rule that where an insured is intentionally injured or killed by another, and such injury or death is not the result of misconduct or an assault by the insured, but is unforeseen in so far as he is concerned, the injury or death is accidental within the meaning of an accident insurance policy, and the insurer is liable." 29A Am. Jur., Insurance § 1192; 45 C.J.S., Insurance § 772; Annotations: 20 A.L.R. 1123, 57 A.L.R. 972, 116 A.L.R. 396. As noted in *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654, such injury (death) is by "accident" under our Workmen's Compensation Act. See *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668.

Decisions supporting said rule listed in 20 A.L.R. 1123 are cited with approval in *Clay v. Insurance Co.,* 174 N.C. 642, 645, 94 S.E. 289; L.R.A. 1918B 508, and later decisions listed in 57 A.L.R. 972 and in 116 A.L.R. 396 are cited with approval in *Fallins v. Insurance Co.,* 247 N.C. 72, 75, 100 S.E. 2d 214.

In *Clay v. Insurance Co., supra, Scarborough v. Insurance Co.,* 244 N.C. 502, 94 S.E. 2d 558, and *Gray v. Insurance Co.,* 254 N.C. 286, 118 S.E. 2d 909, decision was based on the legal principle stated in *Scarborough,* by Devin, formerly Chief Justice but then serving as Emergency Justice, as follows: "Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury." This excerpt from the opinion of Hoke, J. (later C.J.), in *Clay* is quoted with approval in *Scarborough* and in *Gray*: ". . . in case of death by 'external, violent, and accidental means,' without more, we hold that the true test of liability in cases of this character is whether the insured, being in the wrong, was the aggressor, under circumstances that would render a homicide likely as a result of his own misconduct."

In each of the following decisions, the policy under consideration provided insurance against loss (death) resulting from bodily injuries effected solely through "external, violent, and accidental means": *Clay v. Insurance Co., supra; Powers v. Insurance Co.,* 186 N.C. 336, 119 S.E. 481; *Warren v. Insurance Co.,* 212 N.C. 354, 193 S.E. 293; s. c., 215 N.C. 402, 2 S.E. 2d 17; s. c., 217 N.C. 705, 9 S.E. 2d 479; s. c., 219 N.C. 368, 13 S.E. 2d 609; *Whitaker v. Insurance Co.,* 213 N.C. 376, 196 S.E. 328; *Fallins v. Insurance Co.,* 247 N.C. 72, 100 S.E. 2d 214; *Goldberg v. Insurance Co.,* 248 N.C. 86, 102 S.E. 2d 521; *Slaughter v. Insurance Co.,* 250 N.C. 265, 108 S.E. 2d 438; *Gray v. Insurance Co., supra.*

In *Warren, Whitaker, Fallins, Slaughter* and *Gray,* a policy provision excluded from coverage death resulting from bodily injuries intentionally inflicted by another person. Also, see *Patrick v. Insurance Co.,* 241 N.C. 614, 86 S.E. 2d 201. In *Powers,* the policy provision excluded from coverage "death resulting wholly or partly from . . . firearms." In *Goldberg,* the policy provision excluded from coverage death resulting "from homicide." Where recovery was denied, decision was based on such exclusionary provision.

While there is a division of authority elsewhere (see 29A Am. Jur., Insurance § 1166 and Comment Note, 166 A.L.R. 469), this Court has consistently drawn a distinction between the terms "accidental death" and "death by accidental means." *Fletcher v. Trust Co.,* 220 N.C. 148, 16 S.E. 2d 687, and cases cited. For later cases, see Strong, N. C. Index, Insurance § 34.

Attention was called to this distinction in *Scarborough v. Insurance Co., supra,* where the policy insured against loss of life "resulting directly and independently of all other causes from bodily injuries sustained during any term of this policy through purely accidental means."

Here, the insurance is against "(l)oss resulting directly and independently of all other causes from accidental bodily injuries (excluding suicide or any attempt thereat, while sane or insane) . . ." Moreover, the policy contains no provision excluding from coverage death resulting from bodily injuries intentionally inflicted by another person. Nor does it contain any other exclusionary provision.

The word "accidental," in the absence of a policy definition, must be interpreted in its usual, ordinary and popular sense. *Clay v. Insurance Co., supra; Insurance Co. v. Simmons, Inc.,* 258 N.C. 69, 74, 128 S.E. 2d 19. In *Clay,* Hoke, J. (later C.J.), quotes with approval this definition of "accident": "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens." In *Fallins,* Higgins, J., states: "An injury is 'effected by accidental means' if in the line of proximate causation the act, event, or condition from the standpoint of the insured is unintended, unexpected, unusual, or unknown." Again: "Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured."

Appellee relies largely on *Slaughter v. Insurance Co., supra.* Conceding there are expressions in the opinion that are favorable to appellee's contention, the primary basis on which recovery was denied in *Slaughter* was the fact that plaintiff's evidence affirmatively established that the insured's death resulted from bodily injuries inflicted intentionally by another person and therefore by express policy provision was excluded from coverage. Too, the policy then under consideration provided coverage against loss (death) resulting from bodily injuries effected solely through "external, violent, and accidental means."

It is unnecessary to decide whether under the stipulated facts plaintiff would be entitled to recover if the policy provision were against loss (death) resulting from bodily injuries effected solely through "external, violent, and accidental means." We reserve this question for consideration and decision upon an appropriate record. Suffice to say, expressions in *Slaughter* interpreted as bearing upon this question should be considered *dicta* rather than authoritative.

On the stipulated facts, the conclusion reached is that the insured's death resulted "directly and independently of all other causes from accidental bodily injuries" within the meaning of the policy.

Even so, appellee contends the fact that Mills, when fatally shot, "was not engaged in any of the duties pertaining to his occupation or self-employment," precludes recovery by plaintiff.

"As a general rule, a lawful slip or rider which is properly attached to a policy and referred to therein is a part of the contract and should be construed in connection with the other provisions of the policy, and the entire contract should be harmonized therewith if possible. Notwithstanding the attaching of a rider, provisions in the body of the policy are still parts of the contract and are not superseded, waived, limited, or modified by the provisions of the rider, except to the extent that it is expressly stated in the rider that the provisions thereof are substituted for those appearing in the body of the policy, or that the provisions of the rider have the effect of creating a new and different contract from that of the original policy; and except where the provisions in the policy proper and those in the rider are in conflict, in which case the latter control in construing the contract, especially where the provisions of the rider are the more specific." 44 C.J.S., Insurance § 300, pp. 1206-1208. Each brief quotes *a portion* of the foregoing statement.

The rider is quoted in full in our preliminary statement. Except as otherwise provided therein, it insured Mills in accordance with all the terms and conditions of said Group Policy. Thus, the policy insured Mills as well as each employee against loss, including death, "resulting directly and independently of all other causes from accidental bodily injuries . . ." However, the policy provided coverage for employees of Mills only when engaged in the discharge of duties for their employer. As to Mills, the rider expressly provides: "(a) insurance provided hereunder is in full force and effect twenty-four hours every day while the said Group Policy is in force."

In our view, when the policy and rider are considered in the light of the general rule quoted above, the more reasonable view is that the policy and rider provided coverage for Mills twenty-four hours each day without reference to whether he was engaged in any duty pertaining to his occupation or self-employment. Ordinarily, an employer's interest in providing accident insurance for his employees would relate primarily, if not exclusively, to the period they are discharging duties of their employment. However, the interest of an employer, *e.g.*, Mills, in providing accident insurance for himself is not limited to occasions when he is engaged in the performance of a duty pertaining to his occupation or self-employment.

Appellee contends the policy and rider, when considered together, should be interpreted so as to limit the coverage provided Mills to oc-

casions when he was engaged in performing a duty pertaining to his occupation or self employment even though "beyond the working hours of his employees." The rider does not so provide. Moreover, if it be conceded that this is a permissible interpretation, the decision must be for plaintiff. "It is the general rule that where a provision in a policy of insurance is susceptible of two interpretations, when considered in the light of the facts of the case, one imposing liability, the other excluding it, the provision will be construed against the insurer." *Roach v. Insurance Co.*, 248 N.C. 699, 701, 104 S.E. 2d 823, and cases cited.

For the reasons stated, the judgment of the court below is reversed, and the cause is remanded for entry of judgment for plaintiff in accordance with the law as stated herein.

Reversed and remanded.

J. R. BRYANT, WIDOWER OF MRS. GRACE BRYANT v. GEORGE R. POOLE, T/A POOLE KNITTING COMPANY.

(Filed 8 April, 1964.)

1. Master and Servant §§ 82, 91—

The Industrial Commission is an administrative board having quasi-judicial functions with its jurisdiction limited to that conferred by statute, and its award is not a judgment within the meaning of G.S. 1-47(1).

2. Same; Judgments § 43—

The ten-year limitation of G.S. 1-47(1) must be computed on an award of the Industrial Commission from the time judgment of the Superior Court is rendered upon the certified copy of the award filed in the Superior Court in conformity with G.S. 97-87, and not from the date the award was entered by the Industrial Commission. Further, delay of less than six months in filing a certified copy of the award in the Superior Court *held* not unreasonable.

3. Statutes § 5—

While the caption of a statute may be considered in proper instances in its construction, the caption cannot control the text when the text is clear, especially when the caption is prepared by compilers rather than the person preparing the bill.

APPEAL by defendant from *Olive, Emergency Judge,* January 1964 Civil Session of DAVIDSON.

This action was instituted May 10, 1963, to recover on a judgment entered June 3, 1953, in the Superior Court of Davidson County, North

Carolina. A jury trial was waived. The determinative facts, set forth below, are not controverted.

In a proceeding under the Workmen's Compensation Act in which J. R. Bryant, plaintiff herein, as widower of Mrs. Grace Bryant, was the plaintiff, and George R. Poole, trading as Poole Knitting Company, defendant herein, designated therein as "Non-Insurer," was the defendant, the Industrial Commission, on January 12, 1953, entered an award providing:

> "1. That defendant shall pay compensation to J. R. Bryant, Widower of Mrs. Grace Bryant, deceased employee, at the rate of $14.36 per week for a period of 350 weeks.
>
> "2. Defendant shall pay the funeral expenses of the deceased employee in the sum of $200.00 to the proper person entitled to collect same.
>
> "3. Defendant shall pay all medical and hospital bills incident to the injury by accident suffered by the deceased employee when the same have been submitted to and approved by the Industrial Commission.
>
> "4. Defendant shall pay the costs of the hearing, including therein a $20.00 fee for Dr. R. L. McDonald of Thomasville, North Carolina, for testifying at the hearing.
>
> "5. That a fee of $600.00 is approved for plaintiff's attorney, Mr. J. F. Spruill of Lexington, North Carolina, said sum to be deducted from the compensation due the plaintiff and paid direct to said attorney."

There was no appeal from said award. On May 29, 1953, plaintiff filed a certified copy of said award in the office of the Clerk of the Superior Court of Davidson County. On June 3, 1953, during the May-June Civil Term of Davidson Superior Court, his Honor, William T. Hatch, the Presiding Judge, after reciting in detail the facts underlying and relating to said award, upon motion of J. F. Spruill, Attorney for plaintiff, ordered and adjudged that plaintiff have and recover of defendant substantially as provided in said award.

In compliance with G.S. 97-87, all parties were notified of said judgment of June 3, 1953. Between January 12, 1953, and June 3, 1953, five civil terms of superior court were held in Davidson County.

The said judgment of June 3, 1953, was duly entered upon the minute and judgment dockets in the office of the Clerk of the Superior Court of Davidson County. Execution issued thereon October 10, 1955, was returned by the Sheriff of Davidson County with this notation:

"After due and diligent search there cannot be found in Davidson County sufficient property belonging to the defendant to levy on."

Defendant, in his answer, pleaded the ten-year statute of limitations, specifically G.S. 1-47(1), in bar of plaintiff's right to recover in this action.

The court, upon findings of fact substantially as stated above, entered judgment that plaintiff have and recover of defendant as provided in said judgment of June 3, 1953.

Defendant excepted and appealed.

Charles F. Lambeth, Jr., for plaintiff appellee.
Wilson & Saintsing for defendant appellant.

BOBBITT, J. Defendant excepted to and assigns as error the denial of his motion for judgment of nonsuit. He asserts, as the sole basis for his position, that the uncontroverted facts show plaintiff's action is barred by the statute of limitations.

The statutory provision pleaded and relied on by defendant is G.S. 1-47(1). It provides that the period prescribed for the commencement of an action "(u)pon a judgment or decree of any court of the United States, or of any state or territory thereof," is ten years "from the date of its rendition."

Plaintiff's action, instituted May 10, 1963, is based on the judgment of the Superior Court of Davidson County rendered June 3, 1953, — not on the Industrial Commission's award of January 12, 1953. Plaintiff contends, in substance, that upon rendition thereof the judgment had the same effect and status in all respects as a judgment rendered June 3, 1953, *in a suit* duly heard and determined by the Superior Court of Davidson County.

Defendant contends, in substance, that the award of January 12, 1953, was a final determination of the rights and liabilities of plaintiff and defendant *inter se;* that it was *a judgment of a court* within the meaning of G.S. 1-47(1); and that the judgment of June 3, 1953, while necessary to establish a lien or to enforce payment by execution, constituted a recognition rather than an adjudication of defendant's obligation to plaintiff.

"The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms." *Letterlough v. Atkins,* 258 N.C. 166, 168, 128 S.E. 2d 215, and cases cited; *Clark v. Ice Cream Co.,* 261 N.C. 234, 238, 134 S.E. 2d 354, and cases cited.

Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, 58 Am. Jur., Workmen's Compensation § 484, such award, in our opinion, is not a judgment of a court within the meaning of G.S. 1-47(1). The Workmen's Compensation Act does not provide for the enforcement of an award of the Industrial Commission by execution or otherwise. *Nor does it authorize* or contemplate the institution and maintenance of *a civil action based on such award.* The exclusive remedy of plaintiff (claimant) in the proceeding under the Workmen's Compensation Act was that provided by G.S. 97-87. *Champion v. Board of Health,* 221 N.C. 96, 19 S.E. 2d 239. Procedure was provided whereby he could obtain a judgment of the superior court of the county in which the injury (death) occurred based on such award and thereafter proceed in relation to such judgment "as though said judgment had been rendered in a suit duly heard and determined by said court."

In *Champion v. Board of Health, supra,* the plaintiff, who had obtained an award in a proceeding under the Workmen's Compensation Act, instituted a civil action for a writ of *mandamus* to enforce payment thereof. It was not alleged or established that a judgment had been rendered on the award of the Industrial Commission. Relevant to this point, this Court, reversing a judgment for plaintiff, in opinion by Winborne, J. (later C.J.), said: "Whether the rendition of such judgment by the Superior Court be mandatory, as appears to be the rule in the Commonwealth of Virginia (Citations), or a judicial act, as the rule appears to be in the State of Illinois (Citation), and in the Commonwealth of Massachusetts (Citation), an award is not enforceable by execution or other process until judgment is entered thereon as provided and in the court designated in the Act. 71 C.J. 1425, Workmen's Compensation Act, sec. 1378." See 101 C.J.S., Workmen's Compensation § 846.

The relevant statute, in pertinent part, provides: "§ 97-87. (Agreements approved by Commission or awards may be filed as judgments; discharge or restoration of lien.) — Any party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon *said court shall render judgment* in accordance therewith, and notify the parties. *Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: . . .*" (Our italics). The portion enclosed in parentheses is a caption.

Defendant, stressing the words, "awards may be filed as judgments," appearing in the caption of G.S. 97-87, suggests that an award, if and when a certified copy thereof is filed as prescribed, becomes a judgment of the superior court. G.S. 97-87 is a codification of Section 61, Chapter 120, Public Laws of 1929, "The North Carolina Workmen's Compensation Act." Section 61 has no caption. Presumably, the caption now appearing in G.S. 97-87 was intended by the codifier to indicate generally the subject matter of the statutory provision. Be that as it may, as succinctly stated by *Clark, C.J.*: "Though the caption of a statute may be called in aid of construction, it cannot control the text when it is clear. (Citations). Especially is this true as to the headings of a section in the Code prepared by the compilers. (Citation)." *In re Chisholm's Will,* 176 N.C. 211, 96 S.E. 1031; *Sims v. Insurance Co.,* 257 N.C. 32, 36, 125 S.E. 2d 326. The text of G.S. 97-87 is clear. The judgment referred to therein is a judgment of the superior court, — not an award of the Industrial Commission. *Champion v. Board of Health, supra.*

Defendant suggests an analogy between an award of the Industrial Commission and a judgment of a justice of the peace. Material differences include the following: When a transcript of a judgment of a justice of the peace is filed and docketed in accordance with G.S. 7-166, the statute expressly provides that such judgment "shall be a judgment of the superior court in all respects *for the purposes of lien and execution.*" (Our italics). Too, under prescribed circumstances, execution may be issued *by a justice of the peace* on a judgment rendered in his court. G.S. 7-170 *et seq.* An action may be brought on a judgment rendered by a justice of the peace. *Oldham v. Rieger,* 148 N.C. 548, 62 S.E. 612, and cases cited. The period (now) prescribed for the commencement of an action on such judgment is ten years "from its date." Session Laws 1961, Chapter 115, Section 2, now codified as G.S. 1-47(1.1).

Defendant calls attention to the absence of a statutory provision prescribing the time within which a certified copy of the award may be filed in the superior court and judgment obtained thereon as provided in G.S. 97-87. On this appeal, we need not determine under what circumstances a claimant may be precluded from obtaining such judgment. Here plaintiff filed such certified copy on May 29, 1953, at which time only a small proportion of the (350) weekly payments had become due. This negatives any suggestion of unreasonable delay. Incidentally, it is noted that *any interested party* was at liberty to file such certified copy.

Our conclusion is that the judgment rendered by the Superior Court of Davidson County on June 3, 1953, has the same effect and status in

all respects as a judgment then rendered in a suit duly heard and determined by said court; that plaintiff's action on said judgment is a proceeding "in relation thereto" within the meaning of G.S. 97-87; and that plaintiff's action, having been instituted within ten years from June 3, 1953, is not barred by G.S. 1-47(1). Hence, the judgment of the court below is affirmed.

Apparently, the precise question is one of first impression; and counsel are to be commended for the able manner in which their briefs present their respective contentions.

Affirmed.

STATE v. JACK FERGUSON.

(Filed 8 April, 1964.)

1. Assault § 5—

"Serious injury" within the meaning of an assault with a deadly weapon with intent to kill, inflicting serious injury, G.S. 14-32, means physical or bodily injury, and when a particular injury may or may not be serious, depending upon its severity and painful effects, such as a "whiplash" injury to the neck, it is for the jury to determine whether the injury is serious in the light of the particular facts disclosed by the evidence.

2. Criminal Law § 2—

A person is presumed to intend the natural consequences of his act where a specific intent is not an element of the crime, but where a specific intent, in addition to the intent to commit the act, is required, such intent is not to be inferred as a matter of law from the commission of the act, but must ordinarily be found by the jury from the facts and circumstances of the case.

3. Assault §§ 5, 15—

Where the evidence tends to show an assault by defendant with a deadly weapon inflicting serious injury upon the victim, it is for the jury to determine from the facts and circumstances of the case whether the assault was committed with the specific intent to kill, and it is error for the court to charge that the jury might find an intent to kill if the defendant intended either to kill or inflict great bodily harm.

APPEAL by defendant from *Huskins, J.*, December Regular Criminal Session 1963 of MADISON.

The defendant was tried upon a bill of indictment charging that he did "unlawfully, wilfully and feloniously assault Grady Coward with a certain deadly weapon, to wit: a pickup truck, with the felonious in-

tent to kill and murder the said Grady Coward, inflicting serious injuries, not resulting in death * * *."

The State's evidence tends to show that the defendant, the son-in-law of Grady Coward, on 21 November 1963, while following Grady Coward, who was driving his automobile on the highway, accompanied by his wife and three-year-old stepdaughter, rammed his pickup truck into the Coward automobile three times. The first time he hit the automobile in the rear and knocked the car almost 30 feet down the road, causing Coward to suffer a "whiplash." The prosecuting witness testified that when he suffered this injury, "my neck popped like you'd slapped your hands." The second time the defendant hit the car of the prosecuting witness he knocked the car over into a ditch on the right-hand side of the road. After the prosecuting witness got his car back on the road, the defendant hit his car on the right side and almost forced the car over an embankment on the left side of the highway. Thereafter, the defendant passed the car which Coward was driving and went on down the highway and turned around. By the time the defendant came back up the highway, Coward had parked his car off the highway in front of a store and the occupants got out. The defendant tried to run down Coward, but Coward and the others got behind a parked truck that belonged to the REA. Thereupon, the defendant drove his truck into the front of Coward's car and broke down one of the front wheels and further damaged the car. The defendant then drove away.

The prosecuting witness testified that at the time of the trial he still suffered from the "whiplash" injury; that he could not turn his head without suffering pain; that his injury caused pains to run down his back into the back of his legs, which caused his legs to cramp and hurt; that he had made two visits to a doctor but had not been hospitalized.

The evidence of the State and the defendant tends to show that the defendant did not like for his wife to visit or stay in the home of her father; that while defendant and Coward's daughter had been married for eighteen years, the marriage had been a stormy one. The defendant testified that his father-in-law had threatened to kill him and that he bumped his car lightly to prove to him that he was not afraid of him. The father-in-law testified that he had not spoken to his son-in-law for two years.

The jury rendered a verdict of guilty of assault with a deadly weapon with intent to kill, inflicting serious injury. From the judgment imposed on the verdict, the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Richard T. Sanders for the State.

A. E. Leake for defendant.

DENNY, C.J. The defendant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit made at the close of all the evidence as to the felony count in the bill of indictment.

The defendant does not contend that the evidence is insufficient to support a verdict of guilty of assault with a deadly weapon. However, he does contend that the evidence is insufficient to warrant its submission to the jury on the felony count in the bill of indictment.

The indictment was drawn under G.S. 14-32, which reads as follows: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony * * *."

In the case of *S. v. Jones,* 258 N.C. 89, 128 S.E. 2d 1, this Court, speaking through *Higgins, J.,* said: "The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case."

In our opinion, a "whiplash" injury may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim. Therefore, we have concluded that the evidence bearing on the question of serious injury is sufficient to take the case to the jury, but the jury must determine whether or not the injury was serious in light of the particular facts disclosed by the evidence. *S. v. Jones, supra.* This assignment of error is overruled.

The appellant further assigns as error certain portions of the charge bearing on intent, as follows: "* * * Intent is said to be an act or motion (emotion) of the mind, but seldom, if ever, capable of direct or positive proof, but a person's intent is arrived at by such just and reasonable deductions from the acts and facts proven as the guarded judgment of a reasonably cautious and prudent person with (would) ordinary (ordinarily) regard (draw) therefrom. Intent is usually shown by the facts and circumstances known to the party charged with the intent, and it may be evidence (sic) by the acts and declarations of the party * * *.

"Every man in law, is presumed to intend any consequence, which naturally flows from an unlawful act and so an intent to kill is the intent which exists in the mind of a person at the time he commits the assault or criminal act, intentionally and without justification or excuse to kill his victim or to inflict great bodily harm upon him."

That portion of the foregoing charge contained in the first sentence of the first paragraph, set out above, except for the apparent errors of the court reporter, is identical with the challenged portion of the charge approved by this Court in *S. v. Watson,* 222 N.C. 672, 24 S.E. 2d 540.

The second paragraph of the charge, set out hereinabove, is erroneous, for it would allow the jury to find an intent to kill if the defendant intended either to kill or to inflict great bodily harm. But if the jury found only an intent to inflict great bodily harm, this would be insufficient to sustain the felony charge since the intent to kill is an essential element of such charge.

A person is presumed to intend the natural consequences of his act where a specific intent is not an element of the crime. In such cases, proof of the commission of the unlawful act is sufficient to support a verdict. *S. v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93.

"The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, * * * to establish a presumption of felonious intent, or intent to kill * * *." *S. v. Gibson,* 196 N.C. 393, 145 S.E. 772.

In *S. v. Redditt,* 189 N.C. 176, 126 S.E. 506, it is said: "The law will not ordinarily presume a murderous intent where no homicide is committed. This is a matter for the State to prove. *S. v. Allen,* 186 N.C. 302 (119 S.E. 504); *S. v. Hill,* 181 N.C. 558 (107 S.E. 140)."

A person might intentionally and without justification or excuse assault another with a deadly weapon and inflict upon him serious injury not resulting in death, but such an assault would not establish a presumption of felonious intent, or the intent to kill. Such intent must be found by the jury as a fact from the evidence. *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104.

In the case of *S. v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915, *Parker, J.,* speaking for the Court, said: "An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. An intent to kill 'may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.' *S. v. Revels,* 227 N.C. 34, 40 S.E. 2d 474."

In our opinion, the defendant is entitled to a new trial. Consequently, we deem it unnecessary to consider and discuss the remaining assignments of error; the errors complained of therein may not recur on another hearing.

New trial.

MRS. ANNA H. KING v. MRS. MARY J. SLOAN.

(Filed 8 April, 1964.)

1. Pleadings § 2—

The pleadings properly contain a plain and concise statement of the ultimate facts constituting the cause of action without alleging the evidentiary facts. G.S. 1-122(2).

2. Automobiles § 41h— Driver turning left across another's lane of traffic must ascertain that the movement may be made in safety.

Evidence tending to show that plaintiff, traveling east on a four-lane highway, came to a stop at an interspace in the median preparatory to making a left turn into a street making a "T" intersection, that a truck was stopped in the southern lane for traffic traveling west preparatory to making a "U" turn, that after plaintiff had crossed in front of this truck plaintiff's vehicle and defendant's vehicle, which was traveling at a lawful speed in the northern lane for west-bound traffic, collided, and that the view of plaintiff and defendant of the other's car was obstructed by the truck, *is held* sufficient to be submitted to the jury on defendant's counterclaim, since it is the duty of a driver making a left turn across another's lane of travel to first ascertain if the movement may be made in safety. G.S. 20-155(b), G.S. 20-154(a).

APPEAL by plaintiff from *Riddle, S.J.*, October 28, 1963 Schedule "D" Civil Term, MECKLENBURG Superior Court.

This civil action involves a claim and counterclaim for personal injuries and property damages growing out of an automobile collision between the 1957 Chrysler owned and driven by the plaintiff, and the 1960 Ford owned and driven by the defendant. Each party by appropriate pleadings alleged the injuries and damages were proximately caused by the negligence of the other.

The accident occurred March 11, 1961, at one o'clock in the daytime on Providence Road where Andover Road dead-ends into it from the north, forming a T-intersection. A grass median several feet wide in the center of Providence Road separates the two north lanes which are marked for travel west from the two south lanes, marked for travel east. A break in the grass median is surfaced as an extension of Andover. The purpose of this break is to permit travel from the west on Providence Road to turn left across the north lanes and enter Andover, and, conversely, to permit travel from Andover to cross over the north lanes and enter the two south lanes for travel east. The break in the median also permits travel in either direction to make a U-turn and reverse direction on Providence Road. Beginning about 60 feet west of the intersection, a third lane was carved out of the south side of the grass median for use by travelers intending to turn left on Andover.

According to the plaintiff's allegation and evidence, she approached the intersection driving east on Providence Road, entered this third lane for the purpose of crossing the two north lanes and entering Andover. As she entered this third lane she flashed her signal light, indicating her intention to turn left into Andover. She stopped before beginning the intended movement. At the time a large truck was parked on the inside lane for westbound traffic, apparently intending to make a U-turn and go back east on Providence Road.

As the plaintiff began her left turn, she could see approximately 175 feet to the east along the curb line of Providence. Her view otherwise in that direction was obscured by the truck. "As to how far east of the intersection Mrs. Sloan was when I looked there and saw her coming as I was turning across Providence Road, . . . she was some little distance from me. . . . I could not tell you how fast she was coming. . . . When I saw it, (the Sloan car) I turned and tried to get out of its way. That was all just about like the snap of your finger."

As the defendant approached the intersection, she was driving 30 to 35 miles per hour (in a 45-mile per hour zone). Traffic "wasn't very heavy. . . . When I observed this truck at the intersection, I took my foot off the accelerator, . . . slowed down probably about five miles per hour. . . . As I approached the intersection and had reached the truck, I saw next in the intersection Mrs. King. . . . It, (the King car) was in the lane with the truck; . . . the front end of it . . . When I first saw the vehicle it was moving . . . the front of my vehicle was about even with the cab when I first saw the King vehicle. . . . I slammed on my brakes . . . started skidding, pulled the wheel a little . . . to the right in an effort not to hit her broadside. . . . I hit her in the front like, righthand section of the car. . . . After the collision . . . the cars didn't move much."

The parties were the only eyewitnesses to the accident. Until just before it occurred, neither had observed the other's vehicle because of the truck. Mrs. Sloan had no notice of Mrs. King's intention to cross her traffic lane.

The parties introduced medical testimony showing serious injuries and evidence as to the damages to the two vehicles. The court submitted issues of negligence which the jury answered in favor of the defendant and awarded her $20,000.00 for personal injuries, and $1,500.00 for damages to her automobile. From a judgment for the defendant in accordance with the verdict, the plaintiff appealed, assigning errors.

Carpenter, Webb & Golding, by John G. Golding for plaintiff appellant.

Grier, Parker, Poe & Thompson, by William E. Poe and Gaston H. Gage; Jones, Hewson & Wollard, by Hunter M. Jones for defendant appellee.

HIGGINS, J. The pleadings in this case are somewhat unusual in that they are concise, precise, and contain allegations of ultimate facts — not evidence and not conclusions. They conform to the requirement that a complaint should contain "A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." G.S. 1-122(2). "A party to an action is entitled as a matter of right to put into his pleading a concise statement of the facts constituting his cause of action or defense, and nothing more." *Patterson v. R. R.*, 214 N.C. 38, 198 S.E. 364. Doubtful it is, whether any rule of law known to our books is more frequently violated.

As the plaintiff approached the T-intersection, she stopped, gave a mechanical signal of her intention to turn left across the two north lanes and enter Andover. Her view to her right was, at least, partially obstructed by the parked truck. As she cleared the lane occupied by the truck, the vehicles ran together. There was no evidence the defendant did, or could, see the plaintiff's turn signal in time to avoid the accident.

As the defendant approached the intersection at a lawful speed, 30 to 35 miles an hour in a 45-mile per hour zone, her view of the break in the median was partially obstructed by the parked truck. She reduced speed, intending to continue on through the intersection, when suddenly, without warning, the plaintiff drove out from behind the truck, blocking her traffic lane. She applied her brakes but was unable to stop until the vehicles collided.

The investigating officer testified the two west traffic lanes on Providence were marked by a dividing line. The debris "was just about the center of the road when I got there . . . The Ford (defendant's vehicle) was astraddle of the debris. The Chrysler (plaintiff's vehicle) was . . . six or eight feet from the Ford . . . up against the curb." Twenty feet of skid marks extended from the Ford toward the east.

Both parties offered evidence of personal injuries and property damage, and the extent thereof. To the credit of both, it may be said there is a minimum of discrepancy in the evidence they gave the court and jury as to the manner in which the injuries and damages occurred. The parked truck obstructed the view each had of the approach of the other's vehicle until both vehicles were near the point of collision. In this situation the plaintiff made the blocking movement into the defendant's travel lane at a time when it proved to be unsafe. Evidence

of unlawful or negligent speed on the part of the defendant is lacking. The plaintiff said she could not tell how fast Mrs. Sloan was driving. The skid marks extended 20 feet to the rear of her vehicle which stopped "astraddle of the debris." The Chrysler was six or eight feet distant. The physical evidence does not indicate speed.

The jury's findings are amply supported by the evidence. "A left turn across an open travel lane leaves a through traveler little time and opportunity to avoid a collision. . . . in the absence of such notice, other travelers are required to assume that he intended to continue through the intersection in his proper lane of traffic." *Harris v. Parris,* 260 N.C. 524, 133 S.E. 2d 195.

On the other hand, the evidence amply supports the finding the accident occurred and the defendant's injury and damage resulted from the plaintiff's negligence in attempting to turn to the left across defendant's travel lane without ascertaining the movement could be made in safety. "Where cars are meeting at an intersection and one intends to turn across the lane of travel of the other, G.S. 20-155(b) and G.S. 20-154(a) apply. In such case the driver making the turn is under duty to give a plainly visible signal of his intention to turn, . . . and ascertain that such movement can be made in safety. . . . This, without regard to which vehicle entered the intersection first." *Fleming v. Drye,* 253 N.C. 545, 117 S.E. 2d 416.

We have examined the plaintiff's many exceptive assignments. The 21 exceptions to the charge and the 18 exceptions to the failure to charge, present nothing requiring discussion. The charge as to the duties of each driver on approaching the intersection is sustained by our decisions. The court properly presented plaintiff's contention relating to defendant's speed. The evidence of the two principals was clear-cut, free of material conflict, presented uncomplicated issues of fact which the jury answered in favor of the defendant. In the trial, we find

No error.

IN THE MATTER OF W. H. SCARBOROUGH, ANCILLARY ADMINISTRATOR OF THE ESTATE OF VELMA Z. ROTTA, DECEASED.

(Filed 8 April, 1964.)

1. Courts § 20; Death § 3—

Liability for negligence resulting in personal injury or death is determined by the laws of the state where the tort is committed, but the action

is transitory and the situs thereof is the county of the state in which the tort-feasor may be personally served with process.

2. Executors and Administrators § 3—

Authority to appoint an administrator is vested in the clerk of the Superior Court, but such authority is limited to the instances set forth in the statute, G.S. 28-1.

3. Same—

The clerk of the Superior Court of the county in which personal service may be had upon the agent of the tort-feasor has authority to appoint an ancillary administrator to sue for wrongful death, notwithstanding deceased was a nonresident, died in another state, and that the tort resulting in death occurred in another state, the right of action for wrongful death being an asset of the estate in the county in which the tort-feasor is found.

4. Same—

The authority of the clerk of the Superior Court of a county of this State to appoint an ancillary administrator is not affected by matters relating to defense, such as settlement.

PARKER, J., concurring in result.

APPEAL by respondent, W. H. Scarborough, from *Copeland, S.J.*, December 2, 1963, Schedule "C" Non-Jury Civil Session of MECKLENBURG.

On December 18, 1961 the Clerk of the Superior Court of Mecklenburg County issued, to W. H. Scarborough, letters of ancillary administration on the estate of Velma Z. Rotta (hereafter Rotta.)

On February 19, 1962 Martin Stamping and Stove Company (hereafter Martin) filed a petition in which it alleged the court was without authority to appoint an administrator, and for that reason the letters should be canceled. The motion was denied. Martin appealed to the Superior Court. Judge Copeland found facts which so far as material are stated in the opinion. He directed the clerk to recall and cancel the letters of ancillary administration. Scarborough excepted and appealed.

Craighill, Rendleman & Clarkson for respondent appellant.
Carpenter, Webb & Golding for petitioner appellee.

RODMAN, J. This is the factual situation on which the parties relied to support their respective positions: Rotta died at a motel in Laurens, South Carolina. She was on a journey from her home in Michigan to Florida. She had never resided in North Carolina, and had no heirs or next of kin in this State. Domiciliary administration was in Michigan. Jack Long was appointed as Ancillary Administrator in South Caro-

lina. Scarborough asserts Rotta's death was the result of Martin's negligence. The asserted right of action, accruing because of Martin's tort, is the only asset with a situs in this State.

Long, the South Carolina Administrator, instituted an action in that State against John Hall, Supreme Propane Gas Company, Inc., and Federated Mutual Hardware Insurance Company, a liability insurer, to recover damages because of their alleged negligence which caused Rotta's death. Defendants Gas and Insurance Companies paid Long, as Administrator, $12,567.50. In consideration of this payment, Long executed a writing entitled, "Covenant Not to Sue."

Martin is an Alabama corporation. It has no plant or sales offices in North Carolina. It does have a salesman who lives in Charlotte. He devotes approximately 60 per cent of his time to making sales in North Carolina, and about 40 per cent of his time to making sales in South Carolina.

The authority to appoint an administrator in this State is vested in the Clerk of the Superior Court. G.S. 28-1. He cannot appoint unless the facts on which the applicant relies meet the test of one of the five subsections of the statute. The validity of Scarborough's appointment depends on the proper interpretation of G.S. 28-1(3) which reads: "Where the decedent, not being domiciled in this State, died out of the State, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk."

Does the quoted language authorize the appointment of an administrator when deceased was not a resident of this State, did not die in this State, and had no assets in this State, other than a right of action for wrongful death occurring outside the State but which can be enforced in the State because of the presence of the tort-feasor?

Liability for negligence resulting in personal injury or death is determined by the law of the state where the tort is committed. *Shaw v. Lee*, 258 N.C. 609, 129 S.E. 2d 288. Under the laws of South Carolina, one whose negligence causes the death of another is liable for the resulting damage. The action must be brought by the personal representative of the deceased. S.C. Code 10-1951, 1952; *Evans v. Morrow*, 234 N.C. 600, 68 S.E. 2d 258; *Bailes v. Southern Railway, et al.* (S.C.), 87 S.E. 2d 481.

The right of action which accrues because of injury or death resulting from the negligence of another is transitory. *Fulcher v. Smith*, 249 N.C. 645, 107 S.E. 2d 68; *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732; *Rodwell v. Coach Company*, 205 N.C. 292, 171 S.E. 100; *Ledford v. Telegraph Company*, 179 N.C. 63, 101 S.E. 533; *Harrill v. R. R.*, 132 N.C. 655, 44 S.E. 109; 14 Am. Jur. 425.

While the right of action is transitory, it can only be maintained by an administrator appointed by our courts. *Brauff v. Commissioner of Revenue,* 251 N.C. 452, 111 S.E. 2d 620; *Cannon v. Cannon,* 228 N.C. 211, 45 S.E. 2d 34; *Monfils v. Hazlewood,* 218 N.C. 215, 10 S.E. 2d 673.

This court held in *Vance v. R. R. Co.,* 138 N.C. 460, 50 S.E. 800, that where death occurred as a result of a tort committed here the cause of action given by our statutes was an asset within the meaning of G.S. 28-2. The conclusion then reached was reiterated a few years later in *Fann v. R. R.,* 155 N.C. 136, 71 S.E. 81. Hoke, J. (later C.J.) there said, "In the present case, the decedent was killed in Greensboro where he resided at the time and had his domicile. *The cause of action is of itself assets.*" (Emphasis supplied.) This statement of the law is recognized as correct elsewhere. *Van Dusen v. Sturm,* 12 N.Y.S. 2d 133; *Lund v. City of Seattle,* 1 P 2d 301; *Darrah v. Foster,* 355 S.W. 2d 24; *McCarron v. N. Y. C. R. R. Co.,* 131 N.E. 478, Annotation; Ann. Cas. 1917C 1217.

Appellee points out that our statute not only requires the existence of assets but the existence of assets in the county of the clerk making the appointment. Hence it argues that there were no assets in Mecklenburg County which would invest the clerk of that county with the authority to appoint an administrator. This contention overlooks the fact that Martin was doing business in North Carolina. Its agent resided in Mecklenburg County. *Denny, J.* (now C.J.), speaking with respect to the situs of intangible assets, said in *Cannon v. Cannon, supra,* "Even so, a simple debt due a decedent's estate, which is being administered in a foreign jurisdiction, constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator. *In re Warburg's Estate,* 223 N.Y.S., 780; *Hensley v. Rich,* 191 Ind., 294, 132 N.E., 632; *Vogel v. New York Life Ins. Co.,* 55 F(2), 205. The debt is an asset where the debtor resides, even though a note has been given therefor, without regard to the place where the note is held or where it is payable."

The asset (right of action for wrongful death) has a situs in the county in which personal service can be had on the tort-feasor. *Morefield v. Harris,* 126 N.C. 626, 36 S.E. 125; *Shields v. Insurance Company,* 119 N.C. 380, 25 S.E. 951.

The rule is aptly stated by the Court of Civil Appeals of Texas in *Lancaster & Wallace v. Sexton,* 245 S.W. 958, an action for damages for wrongful death. The Court said: "A valid claim for damages, based upon transactions of this character, is a chose in action; it is a debt resting upon an obligation which the law imposes on a wrongdoer to pay adequate compensation to an injured party, or to his representa-

tive. Like other debts not evidenced by some form of writing, it follows the person of the debtor, and its payment may be enforced in any forum where the debtor may be found. The presumption is that as long as the debt is unpaid the debtor has in his possession funds, or money, which he should deliver upon demand to his creditor. That obligation accompanies the debtor wherever he may go."

The fact that a personal representative could obtain a judgment *in personam* on the cause of action which arose in South Carolina was sufficient to authorize the Clerk of the Superior Court of Mecklenburg County to appoint an ancillary administrator. The conclusion we reach accords with the weight of authority elsewhere. *Berry v. Rutland* (Vt.), 154 Atl. 671; *State v. Probate Court* (Minn.), 184 N.W. 43; *Peterson v. Chicago B. & Q. Ry. Co.* (Minn.), 244 N.W. 823; *In re Waits' Estate,* 146 P. 2d 5; *De Valle Da Costa v. Southern Pac. Co.,* 160 Fed. 216, 33 C.J.S. 894; 21 Am. Jur. 396.

On the motion to recall for cancelation the letters of administration issued to Scarborough, the court was not required to decide whether he could succeed in his action. Questions relating to tort-feasor's negligence, proximate cause, contributory negligence of deceased, statutes of limitation, settlement, or assignment of the asserted cause of action are all properly determinable in a trial on the merits. Because the probate court cannot decide these questions, the assertion that they will prove an insurmountable barrier to a recovery does not render the court powerless to make an appointment.

Reversed.

PARKER, J., concurring in result: In my opinion, the appointment of an ancillary administrator in South Carolina and the institution of a suit in that State against John Hall, Supreme Propane Gas Company, Inc., and Federated Mutual Hardware Insurance Company, a liability insurer, to recover damages because of their alleged negligence causing Rotta's death in South Carolina, and that defendants Gas and Insurance Companies paid Long as ancillary administrator $12,567.50, and in consideration of this payment Long executed a writing entitled, "Covenant Not to Sue," does not preclude the probate court in Mecklenburg County from appointing Scarborough as ancillary administrator of the estate of Velma Z. Rotta to institute an action in this State against Martin Stamping and Stove Company for Rotta's alleged wrongful death.

It seems to me indubitable that the action for recovery in this State must be governed by the South Carolina statute on the subject, which is Chapter 23, "Death by Wrongful Act and Lynching," Art. 1, sec.

10-1951 *et seq.*, Vol. 2, Code of Laws of South Carolina, 1962. It would be absurd to say that Rotta was killed twice. *S. v. Scates,* 50 N.C. 420. Martin Stamping and Stove Company by appropriate pleadings can raise all matters of defense contended for by it, one of which is the interesting question as to whether there can be more than one recovery for an alleged wrongful death under the same South Carolina statute. Rotta died in South Carolina. *Louisville & N. R. Co. v. Jones,* 215 Ky. 774, 286 S.W. 1071, 53 A.L.R. 1255; *Chicago, R. I. & P. R. Co. v. Schendel,* 270 U.S. 611, 70 L. Ed. 757, 53 A.L.R. 1265, with annotation in A.L.R. beginning on p. 1275; *Moore v. Omaha Warehouse Co.,* 106 Neb. 116, 182 N.W. 597, 26 A.L.R. 980, and annotation in A.L.R. thereto beginning on p. 984; *State ex rel. Chicago, B. & Q. R. Co. v. Probate Court,* 149 Minn. 464, 184 N.W. 43; *McCoubrey v. Pure Oil Co.,* 179 Okla. 344, 66 P. 2d 57.

BOBBY JACK ALLEN v. JOE LYNN METCALF, EMILY ANN METCALF, AND SAMUEL JOSEPH BROWN.

(Filed 8 April, 1964.)

1. Automobiles § 49—

Ordinarily, the question of contributory negligence of a guest in an automobile involved in a collision is for the jury to determine in the light of the facts and circumstances of the particular case, but when contributory negligence is the sole reasonable conclusion that can be drawn from the evidence, nonsuit in the guest's action against the driver is proper.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when the evidence is so clear on that issue that no other conclusion is reasonably permissible.

3. Automobiles § 49— Evidence held to show contributory negligence as a matter of law on part of plaintiff passenger.

Evidence tending to show that from the inception of the trip the driver showed a propensity for speeding and recklessness, that each time he was urged to reduce speed he complied only to resume dangerous speed immediately thereafter, that the driver drank at least one can of beer to the knowledge of plaintiff passenger, that plaintiff, the only adult in the vehicle, had at least three opportunities to quit the trip, and that thereafter, while plaintiff was asleep, the driver lost control and wrecked the vehicle as the result of speed and recklessness, *is held* to disclose contributory negligence as a matter of law on the part of plaintiff. The fact that plaintiff was asleep at the time does not improve his position, since the ap-

proach of sleep is usually indicated by premonitory symptoms, and plaintiff went to sleep knowing of the impending danger, and the onset of drowsiness was a *further compelling reason* why he should have abandoned the trip.

APPEAL by plaintiff from *Huskins, J.*, October 1963 Session of MADISON.

A. E. Leake for plaintiff.
Horner and Gilbert for defendants.

MOORE, J. This is an action to recover damages for personal injuries sustained by plaintiff in a collision of automobiles. Plaintiff appeals from a judgment of involuntary nonsuit.

The collision occurred about 7:45 P.M., 14 December 1962, on U. S. Highway 64, about 2.2 miles west of Brevard. A Chevrolet Corvair, owned by Emily Ann Metcalf and operated by Joe Lynn Metcalf, collided head on with a car driven by defendant Brown. Plaintiff was a passenger in the Metcalf car. Plaintiff alleges that the collision was caused by the negligence of Joe Lynn Metcalf (hereinafter Metcalf) in that, at the time of the collision, he was under the influence of intoxicating liquor, driving recklessly, violating the speed statutes, not maintaining a proper lookout, not exercising reasonable control, and driving on his left-hand side of the highway. Defendants Metcalf, answering, allege that plaintiff was contributorily negligent in failing to keep a proper lookout, failing to warn Metcalf of traffic hazards, failing to remonstrate with Metcalf for driving negligently, and joining and continuing with the driver and other passengers in an extended trip while all were in varying degrees under the influence of intoxicating liquor.

Defendant Brown is not involved on this appeal. Plaintiff admits that the evidence is insufficient as against Brown to take the case to the jury.

C. F. Capell, State highway patrolman and witness for plaintiff, testified in substance, except as quoted verbatim, as follows: At the place of collision the highway is 20 feet wide with narrow shoulders and runs generally east and west. Metcalf was proceeding westwardly, Brown eastwardly. Tire marks indicated that the Metcalf car, over a distance of 373 feet, ran off the hardsurface on the south side, crossed the highway to the north shoulder, proceeded along the shoulder, then back to the left side and collided with the Brown car in the south lane, 5 or 6 feet south of the center line. The Brown car came to rest south of the highway, the Metcalf car on the north side of the high-

way. Both cars were heavily damaged. Plaintiff, standing beside the patrol car at the scene, said that Metcalf was driving and lost control, that Metcalf was "flying." The patrolman saw Metcalf in the emergency room of the hospital. He was belligerent and had the odor of intoxicants on his breath. When he saw the patrolman he said: "Yeah, I'm your man; I'm the one you're looking for." He said he was intoxicated. The patrolman shared that opinion. The patrolman found 4 or 5 cans of beer in the Corvair, but no whiskey or vodka bottles.

Summary of plaintiff's testimony: They left Marshall, N. C., about 5:45 P.M., to attend a basketball game at Rosman. Metcalf, age 17, was driving his sister's Corvair. Plaintiff, age 21, was riding in the front seat on the right. Two teen-age boys were in the back seat. As soon as they were in the car Metcalf started "going through the gears," and plaintiff told him to slow down. In proceeding toward Buncombe County Metcalf again was going "pretty fast," taking curves at 45 and 50; plaintiff again cautioned him to slow down. After entering Buncombe County they stopped at "Pike's Place" and Metcalf bought a case of beer (24 cans). They opened four cans and each drank one. Between Pike's Place and Asheville Metcalf got up to 70 or 75, "he might have hit 80." Plaintiff asked him to slow down "two, three or four times." At Asheville they stopped at an ABC store. Plaintiff went in and bought two pints of vodka. One of the boys furnished the money. Plaintiff gave one pint to the boys in the back seat, and put the other in his pocket and told Metcalf "it was not going to be opened until we got (sic) back." Plaintiff drank one can of beer after they left Asheville. "Between Asheville and Brevard, Joe (Metcalf) would speed up at times and get real fast," and plaintiff would ask him to slow down. Metcalf "would slow down for six or eight miles, and then he would speed up again. He would speed up to seventy, seventy-five or eighty. He did the same things the time before he got to Asheville." When they reached Brevard, they inquired where the gymnasium was, went there, bought tickets, entered and discovered they were at the wrong basketball game. They left and went back to the highway. They "circled around" a cafe and whistled at some girls or talked to them.

Plaintiff testified: "I do not remember the other boys getting out of the car (at the cafe). I'm not sure. I know I did not get out. It could have stopped but I do not remember. I was asleep. No, I did not know that Joe (Metcalf) was under the influence of beer and vodka. . . . He drank one beer. He did not drink any vodka to my knowledge. . . . I put the vodka in the lefthand pocket of my topcoat. That bottle was to be mine and Mr. Metcalf's. I did not give him any of it. It got broke in the wreck."

Plaintiff stated that he did not remember anything from the time he went to sleep until he regained consciousness at the hospital about four days later. He said that he had alleged in his complaint that Metcalf was intoxicated at the time of the collision because Metcalf told him he pleaded guilty to drunken driving on the occasion of the collision. Plaintiff explained his sudden falling asleep at an early hour (about 7:15 or 7:30 P.M.) in this wise: "I had just gotten in from working night shift in Oregon and I was trying to get changed around to sleeping nights and I was just about sleepy all the time. I got in the car where it was warm and I went to sleep on the way out there. I had been back from Oregon fourteen days when this accident happened. No sir, I had not gotten my sleep readjusted in those fourteen days. About all I had to do during that time was to sleep."

There was no further evidence for the plaintiff. Defendants offered no evidence. The court allowed defendants' motion for nonsuit.

The inquiry on this appeal is whether, when the evidence is considered in the light most favorable to plaintiff, he was guilty of contributory negligence as a matter of law.

Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision is for the jury to decide in the light of all the facts and circumstances. *Dinkins v. Carlton,* 255 N.C. 137, 120 S.E. 2d 543. A judgment of involuntary nonsuit on the ground of contributory negligence will not be sustained unless the evidence is so clear on that issue that no other conclusion is reasonably permissible. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209. The decision as to whether plaintiff is guilty of contributory negligence as a matter of law must be made in the light of the facts in each particular case. *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

One who voluntarily places himself in a position of peril known to him and voluntarily continues therein fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril. *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162. "An occupant of a motor vehicle who knows, or in the exercise of ordinary care should know, that he is being driven by a reckless, inexperienced, incompetent, or intoxicated person may be guilty of contributory negligence if he fails to take such steps to protect himself from harm as a reasonably prudent person would take under the same or similar circumstances." 61 C.J.S., Motor Vehicles, s. 492, p. 118. Conversely, "an occupant is not guilty of contributory negligence in failing to take steps to protect himself where he had no knowledge, and is not chargeable with knowledge, of the driver's recklessness or incapacity." *Ibid.*

Plaintiff's evidence shows that Metcalf persistently and repeatedly drove the Corvair, a small light-weight automobile, at excessive speeds and in a dangerous manner during the extended trip. Plaintiff contends that, notwithstanding this conduct on the part of the driver, he consistently remonstrated with the driver and each time caused him to resume safe and reasonable speeds. He points out that he restrained the driver from drinking an excessive quantity of alcohol and permitted him to drink only one can of beer, that the driver was not under the influence of intoxicants while plaintiff was awake, that falling asleep was not a voluntary act on the part of plaintiff but resulted from an unnatural sleeping routine because of previous night work, and that the collision occurred while he was asleep and could not take precautions for his own safety. He contends that his conduct was that of an ordinarily prudent man, or at most his conduct was for jury determination, and not contributory negligence as a matter of law.

In our opinion plaintiff's failure to take measures for his own safety was so palpable the only reasonable conclusion is that he has proved himself out of court. It is difficult to conceive of a situation in which peril to a passenger from the recklessness of a driver could be more manifest. From the moment the driver started the car his propensity for speeding and recklessness was indicated. He put the Corvair in motion by "going through the gears" in such manner as to bring on an immediate request to slow down. He repeatly reached speeds of seventy, seventy-five and eighty miles per hour, took curves at forty-five and fifty, and when urgently requested he reduced speed only to resume the dangerous speeds again. This process continued throughout the trip. At the very first place beer could be bought, the driver, a youth of seventeen, purchased a case of beer and he and the passengers, including the plaintiff, drank one can of beer each. At Asheville the plaintiff himself purchased two pints of vodka at the request of one of the teen-age boys. Plaintiff was the only adult on the trip. He had at least three opportunities to quit the trip without having to request that the vehicle be stopped.

"If a guest, after protesting against the negligent or reckless manner in which the motor vehicle is being operated, fails to leave the vehicle when a favorable opportunity to do so is presented, he assumes the risk of the injury from further negligent or reckless driving. . . ." 61 C.J.S., Motor Vehicles, s. 491, p. 117. That is, he is guilty of contributory negligence as a matter of law if he is injured by reason of such negligent or reckless driving. This is especially true where speeding and dangerous driving has been repeated at regular intervals during an extended trip, despite the protests of the guest.

The fact that plaintiff fell asleep does not improve his position in this case. If he was to continue in the vehicle, the necessity that he remain awake and alert was imperative. There was need that the driver be restrained from speeding, recklessness and drinking. Falling asleep may constitute contributory negligence, as where a passenger goes to sleep knowing of an impending danger or hazard in the driver's operation of the vehicle. 61 C.J.S., Motor Vehicles, s. 488, p. 106. Plaintiff insists that falling to sleep was an involuntary act. But "The approach of sleep, 'tired nature's sweet restorer,' is usually indicated by certain premonitory symptoms, and does not come upon one unheralded. His (guest's) negligence, if any, lies in the fact that he does not heed the indications of its approach or the circumstances which are likely to bring it about." *Baird v. Baird*, 223 N.C. 730, 28 S.E. 2d 225. The onset of plaintiff's drowsiness was a further compelling reason why he should have abandoned the trip.

From the circumstances of the accident itself it is clear that the hazard plaintiff should have guarded against was the cause of the accident.

Affirmed.

GERTRUDE JONES v. PINEHURST, INC., T/A CAROLINA HOTEL.

(Filed 8 April, 1964.)

1. Negligence § 37b—

The proprietor is not an insurer of the safety of his customers while on the premises but owes them the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils so far as he can ascertain them by reasonable inspection and supervision, but he is not under duty to give warning of obvious conditions.

2. Negligence § 37f—

Evidence tending to show that defendant provided a speaker's platform elevated a foot from the floor, that the platform touched the radiators at the back but left some 14 inches between it and the wall, and that plaintiff, in leaving the speaker's platform at the banquet by the same route she had used in going to her seat, fell when she stepped off or her foot slipped off the rear of the platform, that plaintiff did not look where her feet were, and without evidence of any defect in the platform or of any foreign substance or defect in the floor of the platform, *is held* insufficient to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *Clarkson, J.*, August 19, 1963 Regular Schedule "B" Session, MECKLENBURG Superior Court.

The plaintiff brought this civil action to recover damages for personal injury she sustained in a fall as she was leaving the speaker's platform at the conclusion of a banquet given by the North Carolina Dairy Products Association at the Carolina Hotel in Pinehurst.

The plaintiff alleged:

> "That said banquet room was arranged and set up by the defendant with chairs, tables, and various equipment and furnishings for approximately 200 people and at one end the defendant constructed a platform approximately one foot in height upon which were placed tables and chairs for the speaker's table; that defendant by reason of location of said tables and chairs on said platform provided a narrow walkway along the rear of said platform as the only means of ingress and egress to the place settings at the speaker's table; that the rear of said platform was located approximately 18 inches from the wall immediately to the rear of the speaker's table; that said platform was approximately forty feet in length . . .
>
> ". . . (P)laintiff was assigned a seat at said speaker's table; that the persons to be seated at the speaker's table entered along said narrow walkway from the right and plaintiff was seated approximately 15 feet from the left end of same; that at the conclusion of the meeting plaintiff . . . proceeded to her right along said narrow walkway to leave said speaker's platform; that after taking several steps plaintiff's right foot suddenly slipped off the rear of said platform throwing her off balance to her side and back against the wall and floor resulting in painful injuries to her as heretofore set forth."

The plaintiff further alleged the defendant was negligent in that it failed: (1) to provide safe means of entering and leaving the speaker's table; (2) to provide adequate lighting; (3) to mark the platform and floor in contrasting colors; (4) to place the platform against the wall.

The defendant denied all specifications of negligence and alleged the plaintiff caused or contributed to her fall and injury by her negligent failure to see the obvious and by failure to look where she was placing her feet.

The plaintiff testified she had been assigned the seat on the platform with about 20 others. She stepped up on the platform and walked behind the chairs until she found her placecard three seats beyond the podium in the center of the table. "I was looking at the table which was to my right. . . . I was not at any time directly looking at the floor where my feet were touching and moving."

"Question: And as you got up after the banquet was over . . . to leave the platform you were not looking any more than you had been when you took your seat?"

"Answer: I was looking directly at the person in front of me because I was in line to leave . . . When my turn came to leave, following the person directly in front of me, I proceeded to leave the platform. . . . I took some few steps, and the last step I took—and, of course, this platform was so arranged that we walked slowly on it—my foot slipped from the edge of the platform . . . I fell against the outer wall. . . . My foot, as I went off, struck something." (small serving stand).

The rear of the platform did not touch the wall. Five or six pilasters along the wall extended out from it a few inches and two radiators extended outward a few inches further. The rear of the platform was in contact with the radiators — almost in contact with the pilasters — but 14 to 18 inches from the wall, later corrected by one of plaintiff's own witnesses to 14 inches. There was a small serving tray stand in this space near where the plaintiff fell. The platform was constructed of plywood approximately 40 or 45 feet long, seven feet wide, and approximately 12 inches above the main floor.

The plaintiff introduced medical testimony of her injuries, including cost of hospital treatment for them.

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

Louis A. Bledsoe, Jr., Joseph A. Moretz for plaintiff appellant.

Carpenter, Webb & Golding by William B. Webb, James P. Crews for defendant appellee.

HIGGINS, J. The record fails to disclose either allegation or proof the speaker's platform was defective either in design or in construction. The rear of the platform did not extend to the wall. However, it did extend to and make contact with the radiators and almost with the pilasters. The platform was elevated above the level of the main floor in order to facilitate proceedings incident to conventions, meetings, and banquets. The plaintiff often accompanied her husband to such meetings where he was the master of ceremonies or the principal speaker. "I frequently sat with him at the head table upon a platform." This, however, was her first experience at Pinehurst.

Not only was the plaintiff familiar with elevated platforms, but on this particular occasion she fell in the simple process of retracing the steps she had taken as she entered. Her foot slipped. Why? She offers

no explanation. In so far as the evidence discloses, the platform was level and without defects. The plaintiff does not claim her foot slipped because of any foreign substance on, or defect in, the floor. Whether she slipped or stepped off the edge of the platform is not clear. But according to her own evidence, in entering and in attempting to leave, she did not look where she was placing her feet.

The allegation of insufficient lighting is not substantiated by the evidence. The plaintiff's evidence disclosed the banquet room was well lighted by a number of chandeliers, one near the podium. Moreover, any inadequacy of the lights should have increased her vigilance.

Likewise without force is the plaintiff's allegation that the platform and the floor should have been in contrasting colors. The plaintiff did not fall in attempting to step on or off the platform. Since she did not look anyway, contrast in colors probably would have escaped her attention — rather her inattention. She makes no claim of having been deceived by an optical illusion. The rear of the platform was against the radiators and near the cream-colored pilasters extending out from a light green wall, leaving an open space of about 14 inches. The plaintiff, if she had been at all attentive, could have discovered this open space. Actually there was a serving cart and tray in the space where she fell. She did not see the open space because, as she testified, she "had no reason to look." And again, "Prior to the time that my foot was injured I had not observed the rear edge of the platform."

"The proprietor of a store is not an insurer of the safety of the customers while on the premises. But he does owe to them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to 'give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision'." *Shaw v. Ward Co.*, 260 N.C. 574, 133 S.E. 2d 217; *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154; *Ross v. Drug Store*, 225 N.C. 226, 34 S.E. 2d 64. "Where a condition of the premises is obvious . . . generally there is no duty on the part of the owner . . . to warn of that condition." *Shaw v. Ward Co., supra.*

Damages resulting from a breach of duty must be proved. "The mere fact that a step up or down, or a flight of steps up or down, . . . is no evidence of negligence, if the step is in good repair and in plain view." *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461.

The plaintiff has failed to make out a case of negligence on the part of the defendant. We need not consider, therefore, the further defense of contributory negligence. The judgment of nonsuit is

Affirmed.

JAMES L. SUGG, ADMINISTRATOR OF JOHN WAYNE SUGG, DECEASED v. JAMES HART BAKER, SR.

(Filed 8 April, 1964.)

1. Trial § 22—

On motion to nonsuit, plaintiff's evidence together with evidence of defendant which is not in conflict therewith but which tends to clarify or explain plaintiff's evidence, is to be considered in the light most favorable to plaintiff.

2. Automobiles § 7—

It is the duty of a motorist to anticipate and expect the presence of others and he is under duty not merely to look but to keep a lookout in his direction of travel and will be held to the duty of seeing what he ought to see.

3. Automobiles § 41m—

Evidence tending to show that defendant was traveling some 15 to 20 miles per hour along a street, with his attention focused on a man and two youths with a homemade go-cart in a driveway to his left, and that he did not see plaintiff's intestate, a child some twenty-eight months old, until after he had struck the child, and that the child had wandered into the street from behind a hedge along a driveway on defendant's right, *is held* sufficient to be submitted to the jury on the issue of negligence, since the evidence permits an inference that had defendant kept a lookout he might have seen the child in time to have stopped or turned and avoided the injury.

APPEAL by defendant from *Cowper, J.*, October 1963 Session of GREENE.

Action by plaintiff to recover damages for the wrongful death of his intestate John Wayne Sugg, a child 2½ years of age, allegedly caused by defendant's negligent operation of an automobile.

The jury found by its verdict that the death of plaintiff's intestate was proximately caused by defendant's negligence, as alleged in the complaint, and awarded $2,500 as damages.

From a judgment on the verdict, defendant appeals.

Whitaker & Jeffress for defendant appellant.

Braswell & Strickland by Thomas E. Strickland, and Jones, Reed & Griffin for plaintiff appellee.

PARKER, J. There was a former appeal in this case, which is reported in 258 N.C. 333, 128 S.E. 2d 595. On the former appeal the plaintiff was Lester C. Sugg. At the October Session 1963, Judge Cowper entered an order in which, after finding that Lester C. Sugg was

dead and that James L. Sugg had been duly appointed as administrator of John Wayne Sugg, deceased, he substituted James L. Sugg, Administrator, as plaintiff in the action in the place of Lester C. Sugg. Whereupon, James L. Sugg as administrator filed a complaint adopting *in toto* the complaint heretofore filed in the action by Lester C. Sugg as administrator. On the first trial of this action the jury answered the negligence issue in favor of defendant, and the court entered judgment denying recovery and dismissing the action. On appeal this Court awarded a new trial for error in the charge.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. The question as to whether there was sufficient evidence of negligence on the part of the defendant to carry the case to the jury was not presented for determination on the former appeal.

"In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff." *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The evidence of plaintiff considered in the light most favorable to him, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492, and the evidence of defendant favorable to him, shows the following facts:

About 7 p.m. on 12 July 1960, defendant was driving a 1959 Chevrolet station wagon northwestwardly along Fourth Street in the town of Snow Hill on his right side of the street at a speed of about 25 miles an hour. The street here is approximately 30 feet wide; it was dry, and there was no other traffic. As he approached the Ivan Godwin house on his right side of the street, he saw ahead of him a man age 23 years and two youths age 19 years and 16 years respectively with a homemade motor go-cart in a lane or driveway about five feet off the west side of the pavement of the street to his left. Defendant testified in his behalf that when he saw them, "I slowed down, and fixed my eyes on them, but did not turn my head." He slowed down to 15 or 20 miles an hour. On the east side of the street to his right, the Godwin house was ahead of him situate on a lot 50 feet wide, and there was a hedge about one foot from and running parallel to the curb of the street, but there was no sidewalk. The hedge was three to five feet high and extended to the driveway at the south edge of the Godwin lot. As he approached the Godwin house, there were also a street sign

indicating "No Parking," a telephone pole, and a garbage can, all within a foot or two of his right-hand side of the street. Defendant was driving four to six feet from the curb of the street. He testified in his own behalf: "After I saw the boys [with the go-cart] were going to be stationary, I focused my eyes straight ahead, and then I felt a bump, right about here (indicating), which is 5 to 7 feet from the north edge of the Godwin driveway toward the stop light. * * * I saw the child after I felt the impact, but at no time before the impact. * * * The right-hand front headlight of my automobile came in contact with the child, and that headlight was broken." He testified on cross-examination: "I did not see the child at any time before it struck the car, and did not know what I had hit. * * * The first time that I knew that I had hit John Wayne Sugg was when I got out of my car and went back to see what I had hit." John Wayne Sugg, who lacked four days of being 28 months old and was about 33 inches tall, had alighted from an automobile in the Godwin driveway and had gone from there into the street. As defendant was approaching the Godwin house and about two blocks away, he testified, "I saw a car come from the opposite direction and turn into the Godwin driveway." Defendant stopped his station wagon, which was approximately 16 or 17 feet in length, about its length away from the body of John Wayne Sugg. John Wayne Sugg died a short time thereafter as a result of being struck by defendant's automobile.

Plaintiff alleges in his complaint, *inter alia*, that defendant was negligent in operating his automobile without keeping a proper lookout.

"It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330. This has been quoted with approval time and time again in our decisions as shown by Shepherd's N. C. Citations.

The operator of a motor vehicle has no right to assume that the road is clear of other travelers, but he must be reasonably vigilant in maintaining an adequate lookout, and anticipate and expect the presence of others. *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565; 7 Am. Jur. 2d, Automobiles and Highway Traffic, sec. 355.

Plaintiff's evidence, and defendant's evidence favorable to him, would permit, but not compel, a jury to find that defendant operated his station wagon an appreciable distance along Fourth Street in the town of Snow Hill with his eyes "fixed" and "focused" on a man and two youths with a homemade motor go-cart in a lane or driveway off the left side of the street he was traveling on, and that he was not main-

taining any lookout at all on the right side of the street he was traveling on. That his failure to keep any lookout at all for persons and objects on his right side of the street continued to the very moment when his right front headlight struck the child, because he testified on cross-examination, "The first time that I knew that I had hit John Wayne Sugg was when I got out of my car and went back to see what I had hit." That defendant's failure to keep a proper lookout was negligence, and that he in the exercise of the reasonable care of an ordinarily prudent person should have foreseen that some injury would result from such negligence, or that consequences of a generally injurious nature should have been expected. That defendant had slowed down to 15 to 20 miles an hour, and that his failure to keep any lookout at all to his right prevented him from seeing the child until after he had hit him, and from stopping or turning to the left to avoid striking the child, and was a proximate cause of the child's death. It is hornbook law that a 28-months-old child is incapable of contributory negligence. *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124. The trial court properly overruled defendant's motion for judgment of compulsory nonsuit made at the close of all the evidence.

The other assignments of error are formal: failure to set the verdict aside and exception to the judgment. The judgment below is

Affirmed.

STATE v. WILLIAM D. KIMBALL.

(Filed 8 April, 1964.)

1. Criminal Law § 121—

A motion in arrest of judgment must be based on defects appearing on the face of the record proper and it may not be used, after verdict, as a substitute for a motion to nonsuit for variance.

2. Escape § 1—

Where, in a prosecution under G.S. 148-45(a), all of the evidence tends to show that defendant was a work-release prisoner and that defendant, instead of reporting to the pickup point after work for return to the prison camp, voluntarily went to his home without permission, the evidence discloses a violation of G.S. 148-45(b) and will not support a conviction of the offense charged, and therefore peremptory instruction for the State upon the charge is error.

3. Criminal Law § 104—

The correct form of peremptory instructions is that if the jury should find beyond a reasonable doubt the facts to be as all of the evidence tends

to show, the jury should return a verdict of guilty, but that if the jury is not so satisfied it would be its duty to return a verdict of not guilty, since notwithstanding the evidence may be all one way the credibility of the evidence is always for the jury to determine.

APPEAL by defendant from *Martin, J.*, September 30, 1963 Special Criminal Term of MECKLENBURG.

Defendant is a prisoner in the State prison system serving a sentence of thirty-seven months imposed at the April 1963 Term of Gaston County for uttering worthless checks and forgery. He was tried upon a bill of indictment which charged that in August 1963 while lawfully confined at the Huntersville Prison Camp pursuant to this sentence, he feloniously escaped therefrom.

The State's evidence tended to show the following facts:

Defendant was assigned to the work-release program under the provisions of G.S. 148-33.1. The Huntersville Camp is "a single purpose prison camp" for work-release prisoners. A prison bus which runs on a regular schedule deposited defendant each morning and picked him up each evening at 6:30 at the Krispy Kreme Donut place located in Charlotte at the intersection of Hawthorne Lane and Independence Boulevard. The rules required that a prisoner who finished work early notify the camp so that he might be picked up immediately. On Saturday, August 17, 1963, the defendant did not report to the pickup point at 6:30 p.m. At 7:30 p.m. he called the camp and reported that he had missed the bus but was then at the Krispy Kreme Donut place. The camp sergeant told him to remain there and a car was immediately sent for him but defendant was not there when the car arrived. He did not return to the camp that night and the next day the Gaston County police reported that he was in custody in Gastonia on a charge of public drunkenness.

The defendant's evidence tended to show: On August 17th he finished work at 12:30 p.m. and immediately called the camp; in consequence of the instructions he received from Captain Freeman, he went to the corner of Elizabeth Avenue and Independence Boulevard where he remained for two or three hours waiting for someone to pick him up. At 3:00 p.m. he went into a pool room where, in conscious violation of prison rules, he consumed four king-sized beers while he watched for the prison bus. When it had not come at 4:30 p.m., he left without making any further effort to contact the prison camp and went to Gastonia where he lived. He had received no instructions or permission to go to Gastonia. At 6:45 p.m. he was arrested on a charge of public drunkenness and placed in jail in Gastonia where he remained

until Monday morning, August 19th, when he was tried and convicted of the charge. He was returned to the camp on Tuesday, August 20th.

The jury returned a verdict of guilty as charged in the bill of indictment and defendant appealed.

Attorney General Bruton and Assistant Attorney General Richard T. Sanders for the State.

Howard B. Arbuckle, Jr., for defendant appellant.

SHARP, J. G.S. 148-45(a) makes it unlawful for any prisoner serving a sentence in the State prison system to escape or attempt to escape, and provides varying penalties for misdemeanants and felons. By Chapter 681 of the Session Laws of 1963, the legislature added subsection (b) as follows:

> "(b) Any defendant convicted and in the custody of the North Carolina Prison Department and ordered or otherwise assigned to work under the work-release program, G.S. 148-33.1, or any convicted defendant in the custody of the North Carolina Prison Department and on a temporary parole by permission of the State Board of Paroles or other authority of law, who shall fail to return to the custody of the North Carolina Prison Department, shall be guilty of the crime of escape and subject to the provisions of subsection (a) of this section and shall be deemed an escapee. For the purpose of this subsection, escape is defined to include, but is not restricted to, wilful failure to return to an appointed place and at an appointed time as ordered."

This section, while providing the same penalties listed in subsection (a) creates a new and distinct offense which can only be committed by a work-release prisoner or a convicted defendant temporarily on parole. The indictment in this case follows the language of subsection (a), but the evidence discloses a violation of subsection (b). However, the defendant did not move for the nonsuit to which he was entitled for this fatal variance. *State v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497. Upon the argument here, defendant moved in arrest of judgment for that he had been indicted under G.S. 148-45(a) but tried under G.S. 148-45(b).

A motion in arrest of judgment must be based on defects appearing on the face of the record proper. It may not be used after verdict as a substitute for a motion for nonsuit to dismiss the action because of a variance between the indictment and proof or for want of sufficient evidence to support the verdict. *State v. Reel,* 254 N.C. 778, 119 S.E. 2d

876; *State v. McKnight,* 196 N.C. 259, 145 S.E. 281. Therefore, the motion in arrest of judgment is overruled.

The defendant assigns as error the following portion of his Honor's charge:

> ". . . (T)he court instructs you that if you find the facts to be in this case as all the evidence tends to show beyond a reasonable doubt, then it will be your duty, Members of the Jury, to return a verdict in this case of guilty."

By voluntarily going to Gastonia without permission defendant was, on his own statement, guilty of a violation of G.S. 148-45(b). However, he was indicted for a breach of G.S. 148-45(a). Therefore, his Honor committed error by peremptorily instructing the jury to find defendant guilty if it found the facts to be as all the evidence tended to show. The evidence, if true, did not establish his guilt *as charged.* Defendant was entitled to a directed verdict of not guilty.

Aside from the fundamental error in the quoted instruction, its form impels the following observation: Where the uncontradicted evidence, if true, establishes a defendant's guilt as a matter of law, the court may instruct the jury to return a verdict of guilty if it finds such evidence to be true beyond a reasonable doubt. *State v. Johnson,* 195 N.C. 657, 143 S.E. 185. In such instance the approved form of instruction is that it would be the jury's duty to return a verdict of guilty as charged if the State has satisfied the jury beyond a reasonable doubt that all the evidence in the case is true (or that the facts in the case are as all the evidence tends to show); otherwise, it would be its duty to return a verdict of not guilty. *State v. Baker,* 229 N.C. 73, 48 S.E. 2d 61; *State v. Taylor,* 236 N.C. 130, 71 S.E. 2d 924; *Cf. State v. Gibson,* 245 N.C. 71, 95 S.E. 2d 125; *State v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333. The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. G.S. 1-180.

For the error in the charge there must be a new trial. However, the solicitor will no doubt desire to take a *nol pros* in this case and to prosecute defendant for the offense of which the evidence tends to establish his guilt.

New trial.

BANNISTER & SONS, INC. AND MOULTRIE LIVESTOCK COMPANY v. JACOB C. WILLIAMS, D/B/A WASHINGTON HOG MARKET AND BANK OF WASHINGTON.

AND

H. F. BURCH & C. B. MAYER D/B/A MILAN STOCK YARD v. JACOB C. WILLIAMS, D/B/A WASHINGTON HOG MARKET AND BANK OF WASHINGTON.

AND

JOHN W. SALTER, JR. AND McTYIER SALTER D/B/A DAWSON LIVESTOCK CO. v. JACOB C. WILLIAMS D/B/A WASHINGTON HOG MARKET AND BANK OF WASHINGTON.

AND

TURNER COUNTY STOCK YARDS, INC. v. JACOB C. WILLIAMS, D/B/A WASHINGTON HOG MARKET AND BANK OF WASHINGTON.

AND

H. T. TROUP AND J. W. HUDSON CO., PTRS., D/B/A HUDSON-TROUP AUCTIONS v. JACOB C. WILLIAMS, D/B/A WASHINGTON HOG MARKET AND BANK OF WASHINGTON.

(Filed 8 April, 1964.)

1. Pleadings § 3—

An action against the drawer of a dishonored draft to recover the purchase price of goods for which the draft had been given may not be joined with an action against the bank for its negligent failure to follow instructions to present the draft for payment promptly and give notice of dishonor.

2. Pleadings § 2—

Where plaintiff brings suit on two causes of action, each must be separately stated. G.S. 1-123, Rule of Practice in the Supreme Court No. 20(2).

3. Pleadings § 18—

Where there is misjoinder of parties and causes of action, the action must be dismissed upon demurrer. G.S. 1-132.

4. Same—

The filing of an answer waives the right to demur for misjoinder of parties and causes of action.

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

APPEAL by plaintiffs from *Peel, J.,* September 1963 Civil Session of BEAUFORT.

These five cases were heard together in the Superior Court and consolidated for the purpose of this appeal. Each was instituted by a different plaintiff against Jacob C. Williams, doing business as Washington Hog Market, and Bank of Washington to recover on drafts drawn by plaintiff on Williams. Except as to the number of drafts,

the date and amount of each, the allegations in all complaints are identical and are as follows:

Plaintiff, a livestock dealer, sold a quantity of hogs to defendant Williams and shortly thereafter drew sight drafts on Williams for the purchase price which were sent to the Bank of Washington for collection. Williams failed to pay the drafts and the Bank, negligently and in disregard of specific instructions, held them for an unreasonable period of time, without notifying plaintiff any draft had been dishonored. As a result of this delay plaintiff lost the opportunity to collect the debts represented by the drafts from other sources. Therefore, plaintiff has been damaged in a sum equal to the face amount of said drafts plus interest. The prayer is that plaintiff have judgment against each of the defendants jointly and severally in the amount of the drafts.

Defendant Williams filed an answer to each complaint. Defendant Bank demurred to each complaint and moved that the actions be dismissed for that, *inter alia:*

> ". . . (T)here is a misjoinder of causes of action and parties defendant in that plaintiffs have attempted to unite in one action an alleged cause of action against defendant Jacob C. Williams on contract for the purchase price of the hogs alleged to have been purchased by him from plaintiffs with an alleged cause of action in tort against defendant Bank of Washington for damages on account of its alleged negligence in the handling of drafts drawn by plaintiff, . . . on Washington Hog Market for the purchase price of said hogs."

His Honor sustained the Bank's demurrer to each of the five complaints and from the judgments dismissing the actions plaintiffs appeal.

Marshall Ewing, J. C. McDonald and Bryan Grimes for plaintiff appellants.

Rodman and Rodman for Bank of Washington defendant appellee.

SHARP, J. In each complaint the plaintiff has joined a cause of action in contract for the purchase price of goods sold the defendant Williams with a cause of action against the defendant Bank for its alleged negligence in handling the draft drawn by plaintiff on Williams for the price of the goods. They have, therefore, clearly attempted to set up separate and distinct causes of action which do not affect all the defendants as contemplated by G.S. 1-123. *Williams v. Gooch,* 206 N.C. 330, 173 S.E. 342. The Bank was not a party to Williams' purchase of the hogs from plaintiffs, and upon no theory can it be held

jointly liable with plaintiff for their purchase price. On the other hand, if it be conceded that Williams owes each plaintiff the drafts in suit, their actions against the Bank for its negligence in failing to collect the drafts in no way affect him. Moreover the measure of damages in the two actions is not the same. Of course, if it should be determined that Williams never purchased any hogs from the plaintiffs and owed them nothing, plaintiffs could not recover from the Bank for its failure to collect a nonexisting obligation; but the fact that Williams might become liable to the Bank should one of the plaintiffs recover against it for its negligence in handling the draft does not affect the question here.

Furthermore, the plaintiffs have commingled their causes of action in one statement in the complaint instead of stating them separately as required by G.S. 1-123 and N.C. Sup. Ct. R. 20(2). *Tart v. Byrne,* 243 N.C. 409, 90 S.E. 2d 692; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104.

Under our practice "a misjoinder of parties and causes of action constitutes a fatal defect. A severance is not permissible." *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225. In other words, "the Court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of G.S. 1-132." The action must be dismissed. *Gaines v. Plywood Corporation,* 253 N.C. 191, 116 S.E. 2d 427; *Tart v. Byrne, supra; Sellers v. Insurance Corp.,* 233 N.C. 590, 65 S.E. 2d 21; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345.

The ruling of the court below sustaining the Bank's demurrer and dismissing the action as to the Bank of Washington must be upheld. However, the judge also dismissed the actions as to Williams and this was error. Williams elected to answer rather than to demur. By so doing he waived his right to demur for a misjoinder of parties and causes. G.S. 1-134; *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2.

The plaintiffs may move in the Superior Court to amend their repective complaints in order to eliminate the irrelevant allegations as to the Bank. In the absence of such a motion, the court can, *ex mero motu,* require the proper amendments. *Bowling v. Burton,* 101 N.C. 176, 7 S.E. 701; 41 Am. Jur., *Pleading* § 290.

As to defendant Bank of Washington

Affirmed.

As to defendant Jacob C. Williams

Reversed.

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

MAURICE AMOS SPELL v. MECHANICAL CONTRACTORS, INC.

(Filed 8 April, 1964.)

1. Negligence § 37f—

Negligence is not presumed from the mere fact of injury, and the doctrine of *res ipsa loquitur* does not apply to an action against a contractor by a pedestrian injured in a fall in a filled ditch in a driveway.

2. Negligence § 37b—

The person responsible for the condition of the premises is not under duty to give warning of obvious dangers.

3. Same— Evidence held insufficient to show hidden defect of which contractor should have given warning.

Plaintiff's evidence tended to show that when he stepped into dirt filling a ditch excavated by defendant his foot mired down ten to twelve inches, and he fell to his injury. Plaintiff's evidence further tended to show that it had rained for several days prior to the injury, that he had traversed the ditch by automobile and by foot shortly before the accident in suit and that there was nothing from the appearance of the dirt in the ditch to indicate hazard. There was no evidence that the ditch had been improperly filled. *Held:* Plaintiff's own evidence fails to show defect which defendant should have discovered by reasonable inspection, and nonsuit should have been entered.

APPEAL by defendant from *Mintz, J.*, June 1963 Session of SAMPSON.

Plaintiff instituted this action to recover for personal injuries sustained on the afternoon of January 24, 1958 when he fell while crossing a newly filled ditch which defendant contractor had constructed across the approach to the emergency entrance of the Sampson County Memorial Hospital. He alleged that his injuries were proximately caused by the negligence of the defendant in that, with full knowledge that the dirt in the ditch had become soft and insecure as a result of rain and knowing that it was necessary for the public to cross it to use the hospital emergency entrance, the defendant failed (1) to light the space; (2) to barricade the same; (3) to provide adequate and secure bridging of the ditch; or (4) to place a sign or signs warning pedestrians, including plaintiff, of the unsafe, insecure, and dangerous condition. The defendant denied any negligence and, in the alternative, plead the plaintiff's contributory negligence.

On the trial, plaintiff's evidence tended to show the following facts:

On January 24, 1958 it had been raining for three or four days. It was still raining between 3:30 and 4:00 p.m. when plaintiff drove his automobile across a four-foot wide ditch which defendant had cut through the asphalt approach to the Sampson County hospital and

then refilled with dirt, sand, and gravel. Except where ambulances and other traffic had packed it down, the top of the ditch was covered by a mound of dirt about ten inches high. There were no barricades, warning signs, or flares at the ditch and no bridge over it.

Plaintiff deposited a patient at the emergency entrance and then drove his automobile back over the ditch and left it in a parking area. He returned to the ditch, walked across it without any difficulty at the place he had crossed in the car, and entered the hospital. While there he observed two or three cars cross the filled ditch. When plaintiff was ready to leave the hospital he started across the ditch at the place where he had walked previously "in the same tracks. There were two ruts and everyone had been using the same ruts." According to plaintiff's evidence, the ditch "looked good enough for anybody to walk . . . There was nothing about the ditch to indicate that (he) might mire down in it . . . it all looked like it was safe." His left foot mired down about twelve to fifteen inches and he fell to the pavement permanently injuring his left shoulder.

Defendant's evidence tended to establish these facts:

Over a period of two weeks prior to January 24, 1958 defendant cut and filled a thirty-inch wide ditch for a water line across the approach to the emergency entrance of the hospital. The ditch was dug and filled in short sections so as never to cut off access to the emergency entrance. The defendant covered the pipe with a four or five-inch layer of dirt and tamped it. This process was repeated until a mound formed. A truck was then driven up and down the ditch at least a hundred times, further tamping the dirt until it was six to eight inches above the pavement. The ditch was plainly visible. "It was like a sore thumb sticking up." On the day plaintiff fell, the work had been finished between 2:00 and 3:00 p.m. At that time the ditch appeared to the defendant's supervisor and the hospital's engineer to be absolutely all right. Automobiles were driving over it and people were walking across it. However, because of the rain, the dirt was slick in top of the ditch.

On Saturday, the day after plaintiff fell, R. E. Adams, the paving contractor, inspected the ditch to see if it was in condition for paving. He found it to be solid. The following Tuesday he removed four inches of the dirt from the ditch and it was so solid he did not retamp the remaining dirt before pouring the asphalt. He discovered no soft spot when he removed the dirt from the place where plaintiff said he fell. In paving over the ditch Adams cut away the old asphalt on each side so that the edge of the new pavement would be resting on undisturbed

dirt. For that reason, the new pavement over the ditch was four feet wide.

Defendant's motions for nonsuit, timely made, were overruled. The court submitted issues of negligence, contributory negligence, and damages which the jury answered in favor of the plaintiff. From a judgment on the verdict the defendant appealed, assigning as error, *inter alia*, the failure of the court to allow its motion for nonsuit at the close of all the evidence.

Britt & Warren; Jones, Reed & Griffin for plaintiff appellee.
D. Stephen Jones and P. D. Herring for defendant appellant.

SHARP, J. Plaintiff bases his case upon the allegation that the defendant knew, or as a result of its experience in making excavations, should have known, that the continuous rain had made the fresh dirt in the ditch soft and unstable and that, notwithstanding such knowledge, defendant failed either to barricade or bridge the ditch or to give warning of this unsafe condition. Plaintiff has neither allegation nor proof that the initial construction of the ditch was negligently or improperly done. The sole evidence relating to that construction came from defendant's witnesses and tended to show that the ditch had been properly filled and tamped with care. Nevertheless, if the ditch later became unsafe as the result of a hidden defect, it was the defendant's duty to give warning of it and to take reasonable precautions to protect persons entering and leaving the hospital from injuries arising from the hazard if its agents knew, or in the exercise of reasonable supervision and inspection, should have discovered the peril. *Spell v. Smith-Douglas Co.*, 250 N.C. 269, 108 S.E. 2d 434.

However, in this case there is no evidence to sustain plaintiff's contention that a reasonable inspection of the ditch by defendant would have disclosed the soft spot into which he says he mired. Indeed, all the evidence is to the contrary. Defendant's superintendent had inspected the ditch within two hours of the time plaintiff fell and found it safe. One of the plaintiff's witnesses said that "he or anybody else would have thought it could be stepped on in safety." Plaintiff had twice driven his automobile across the ditch and had once walked across the same spot where he later fell. He himself testified that there was nothing to indicate any hazard whatever. By the same token, there was nothing to indicate to defendant any necessity for the barricades, bridging, and warnings which plaintiff complains should have been there but were not.

Admittedly, plaintiff knew from his own experience that rain will soften newly disturbed dirt and that wet dirt is often slick. Defendant

was not bound to warn him of an obvious danger. *Presley v. Allen & Co.*, 234 N.C. 181, 66 S.E. 2d 789.

Certainly the plaintiff's evidence that his foot mired ten or twelve inches down in the ditch tends to show that there was a soft spot in the dirt. However, the mere existence of a condition which causes an injury is not negligence *per se*, and the occurrence of the injury does not raise a presumption of negligence. *Welling v. Charlotte*, 241 N.C. 312, 85 S.E. 2d 379. The doctrine of *res ipsa loquitur* has no more application to an action against a contractor by a pedestrian who has fallen in a filled ditch in a hospital driveway than it would to an action against a municipality by reason of injuries to a person using its public street. *Smith v. Hickory*, 252 N.C. 316, 113 S.E. 2d 557.

Plaintiff's evidence is insufficient to sustain his allegation that a reasonable inspection by the defendant would have disclosed the hidden defect which he contends caused his fall. *Spell v. Smith-Douglas Co., supra.* Consequently, the motion for judgment of nonsuit should have been allowed.

Reversed.

IN THE MATTER OF THE CUSTODY OF ELIZABETH ANNE SKIPPER AND MICHAEL FREDERICK SKIPPER, MINORS.

(Filed 8 April, 1964.)

1. Abatement and Revival § 3—

A plea in abatement seeking dismissal of an action because another action is pending between the same parties on the same right of action should be sustained when, and only when, the actions are pending in different courts of the same soverign.

2. Same; Divorce and Alimony § 22; Habeas Corpus § 3—

The pendency in another state of the wife's suit for divorce and custody and support of the children of the marriage does not deprive the courts of this State of jurisdiction in *habeas corpus* proceedings to determine the right to custody, the children, constituting the *res*, being within the State. G.S. 17-39.1.

3. Parent and Child § 6—

Parents are under a legal obligation to support their children and this obligation rests primarily on the father.

4. Abatement and Revival § 3; Divorce and Alimony § 22; Habeas Corpus § 3—

The pendency in another state of the wife's action for divorce and custody and support of the children of the marriage does not deprive our

courts of jurisdiction in a *habeas corpus* proceeding brought by her in this State against the husband to compel the husband to provide reasonable support for his children then living in this State.

APPEALS by petitioner and respondent from *Mintz, J.*, in Chambers in NEW HANOVER on 1 November 1963.

This is a Habeas Corpus proceeding to determine the right to the custody of Elizabeth Anne, age 6, and Michael F. Skipper, age 5, children of petitioner Jean Skipper and respondent Frederick N. Skipper, Jr.

Petitioner and respondent were married in 1955. They separated in January 1963. When they separated, and for some time prior thereto, they were residents of South Carolina. The children, were, when the parents separated, left with the mother but were regularly visited by the father who had custody every other weekend. He, usually, at these times brought the children to Wilmington to visit his parents.

On 14 May 1963 petitioner instituted an action against her husband in the Court of Common Pleas for Florence County, South Carolina. She there asked the Court to award her custody of the children with "reasonable rights of visitation" by the father, and for an order requiring the father to pay $25.00 per week for the support of the children. She asked nothing for her own support.

Defendant, having secured an extension of time, filed his answer on 19 July 1963. He denied the mother was a fit person to have custody of the children. By counterclaim he sought a divorce charging the wife with adultery. On the day he filed his answer he took the children to Wilmington. He refused to return them to petitioner but left them in Wilmington. Petitioner gave up her job in South Carolina and came to Wilmington. She is now a resident of North Carolina. She has had custody of the children since the last of July 1963.

Respondent, in his answer to the petition for Habeas Corpus, reiterates the charges made in his answer filed in the action pending in South Carolina. He pleaded the pendency of the action instituted by petitioner in South Carolina as the basis for an order abating this action. No order has been entered in the action pending in South Carolina.

Judge Mintz, after hearing the parties, overruled the plea insofar as it related to the authority of the Superior Court to award custody. Nonetheless, he made no order fixing the right to custody. He held the plea in abatement good insofar as it related to his authority to require respondent to support his children. Petitioner and respondent appealed.

Burnett & Burnett for Applicant Appellant.

George Rountree, Jr., for Respondent Appellant.

RODMAN, J. Respondent assigns as error that portion of Judge Mintz' order holding the plea in abatement insufficient to deprive the Superior Court of this State of jurisdiction to determine the question of custody. Since this contention, if sustained, would render petitioner's appeal moot, we decide respondent's appeal first.

A plea in abatement seeking dismissal of an action, because another action is pending between the same parties on the same right of action, should be sustained when, and only when, the actions are pending in different courts of the same sovereign. If the actions are brought in courts of different states, the plea should be overruled. *Wilburn v. Wilburn,* 260 N.C. 208, 132 S.E. 2d 332; *Chicago R. I. & P. R. Co. v. Schendel,* 270 U.S. 611, 70 L. Ed. 757, 46 S. Ct. 420; *Commercial National Bank v. Continental Bank & Trust Company,* 88 F. 2d 160, *cert. den.,* 301 U.S. 692, 81 L. Ed. 1348, 57 S. Ct. 795; *Miami County National Bank of Paola, Kansas v. Bancroft,* 121 F. 2d 921; *Stanton et al. v. Embrey,* 93 U.S. 548, 23 L. Ed. 983; *Simmons v. Superior Court,* 214 P. 2d 844, 19 A.L.R. 2d 288, 1 C.J.S. 97.

Respondent did not request the Superior Court to refrain from exercising jurisdiction until the South Carolina court could act. To the contrary, he denied the authority of the courts of this State to act. In that he was mistaken. Petitioner and respondent had voluntarily submitted themselves to the jurisdiction of the courts of this State. The children, the res, were living in this State. The Superior Court of New Hanover County had the authority and duty to act. G.S. 17-39.1. *In Re Hughes,* 254 N.C. 434, 119 S.E. 2d 189; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *Jackson v. Jackson* (S.C.) 126 S.E. 2d 855.

Parents are under a legal obligation to support their children. Primarily, this obligation rests on the father. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113; *Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726; *In Re TenHoopen,* 202 N.C. 223, 162 S.E. 619.

The Statute, G.S. 17-39.1, authorizes the court to award custody "under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child." The statutory language, authorizing an award of custody, implies the power to compel the person responsible for the support of a child to perform his duty. *Bunn v. Bunn,* 258 N.C. 445, 128 S.E. 2d 792.

The court erred in concluding respondent's plea in abatement, based on the pendency of the action in South Carolina, deprived the courts of this State of the power to compel respondent to provide reasonable

support for his children, who are now living in this State. The court should make such order as will best serve the interest of the children, having regard for the affection of each parent for the children and the ability of each to provide support.

On respondent's appeal: Affirmed.

On petitioner's appeal: Reversed.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF H. C. BUCHAN, JR., DECEASED, AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF H. C. BUCHAN, JR., DECEASED v. MARY ELIZABETH BUCHAN, A MINOR; J. H. WHICKER, SR., GUARDIAN AD LITEM FOR THE POSSIBLE UNBORN ISSUE OF MARY ELIZABETH BUCHAN; J. H. WHICKER, JR., GUARDIAN AD LITEM FOR THE HEIRS OF H. C. BUCHAN, JR., DECEASED, AND RUTH LOWE BUCHAN, AND T. E. STORY, GUARDIAN AD LITEM FOR MARY ELIZABETH BUCHAN, A MINOR.

(Filed 8 April, 1964.)

Infants § 1; Compromise and Settlement—

Where a note owned by the estate is payable solely out of the proceeds of insurance on testator's life, and there is a real controversy whether insurers are liable on the policies, a court of equity has jurisdiction to approve for minor beneficiaries of the estate a compromise payment by insurers.

APPEALS by defendants, other than Ruth Lowe Buchan, from *Gambill, J.*, in Chambers in WILKES on 27 December 1963.

This is an action to obtain the advice and instructions of the Court with respect to the settlement of a claim in which a minor and contingent, unknown parties are interested.

The factual situation with respect to which plaintiff seeks advice and instructions is stated in the complaint as follows:

H. C. Buchan, Jr. died testate on 22 October 1960. (A summary of his will appears in *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489.) The will named Wachovia Bank & Trust Company (hereafter Wachovia) as executor and trustee for the two trusts set up by the will. It qualified and is now acting as authorized in the will. Testator was survived by his wife Ruth and his daughter Mary Elizabeth, primary beneficiaries of the two testamentary trusts. The daughter was fourteen years of age in September 1963. Wachovia was appointed and qualified as guardian for the minor.

Part of the assets of the Buchan Estate received by the executor were stock certificates in 16 hardware stores. These corporations bore the name Lowe's, followed by the name of the city in which the corporation had its place of business, for example, Lowe's North Wilkesboro Hardware, Inc., Lowe's Knoxville Hardware, Inc. Mr. Buchan owned 89% of the capital stock of these 16 corporations.

Shortly prior to his death, Mr. Buchan, acting for the hardware stores, applied to insurance companies for contracts of insurance on his life payable on his death to a named Lowe's hardware store. The premium was payable by the designated beneficiary. The insurance applied for totalled $2,100,000.

The insurance companies, when called upon to pay, denied liability. One denied it had issued the policy. One alleged it had written, placed the policy in the mail, but the policy was not delivered until after the death of the named insured. All asserted the applications on which they were requested to issue the policies contained false representations with respect to assured's health, doctors consulted, and hospital treatment received. All asserted the representations were material and, because false, entitled them to refund the premiums paid and void the contracts. The several beneficiaries named in the policies brought suits in the U. S. District Courts and in the Superior Courts of North Carolina to enforce the asserted contracts of insurance.

The hardware companies had, prior to Mr. Buchan's death, created a profit sharing trust under the name of "Lowe's Hardwares Employees' Profit Sharing Plan and Trust," (hereafter Trust.) After Wachovia qualified as executor, Trust asserted it had a verbal option to purchase at Buchan's death all of his stock in the 16 corporations, and had an unsigned writing prepared by Buchan containing the formula by which the price to be paid for the stock would be determined. This formula prescribed two methods, one based on book value, the other on earnings. The maximum value of the stock based on the formula was $4,831,064.23. No value was assigned to the controverted insurance claims in arriving at this figure.

Trust organized a corporation under the name of Lowe's Companies, Inc. for the purpose of acquiring all of the stock of all of the hardware companies. It notified Wachovia, as executor, of its election to purchase. Wachovia denied its testator had given an option. After negotiations between Wachovia and Trust, Wachovia agreed, subject to court approval, to a sale by which it would receive in cash $4,253,-908.88; a note, the personal obligation of maker, for $989,281.14; and a note for $700,000 payable solely from collections from the insurance companies.

Wilkes Superior Court, on 20 May 1961, in an action entitled, *"Wachovia Bank & Trust Company, Executor of the Estate of H. C. Buchan, Deceased, and Trustee under the Last Will and Testament of H. C. Buchan, Jr. v. L. G. Herring, Trustee for Lowe's Hardwares Employees' Profit Sharing Plan and Trust et al."*, authorized the sale on the terms proposed. The purchaser paid the $4,253,908.88 as agreed. It executed a note for $989,281.14. This note was paid before maturity. Wachovia was given 50,000 shares of Lowe's Companies, Inc. It promptly, as authorized by the Superior Court, exchanged these shares for that company's note for $700,000. The note, dated 21 June 1961, recites:

"This note is given pursuant to paragraph 2(c) of the letter from Womble, Carlyle, Sandridge & Rice quoted in Finding of Fact (21) in the judgment dated May 20, 1961, signed by the Honorable F. Donald Phillips in the case of *WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF H. C. BUCHAN, DECEASED, AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF H. C. BUCHAN, JR. v. L. G. HERRING, TRUSTEE FOR LOWE'S HARDWARES EMPLOYEES' PROFIT SHARING PLAN AND TRUST, et al.* This note is payable only out of the net proceeds of insurance policies on the life of H. C. Buchan, Jr., in the total face amount of $2,100,000, which policies were payable to and owned by some of the companies listed in paragraph 1 of said letter. All of said policies have been or are now in suit in the various courts, state and federal, in North Carolina.

"The undersigned agrees to apply all of the net proceeds from said policies to the payment of this note if and when said proceeds are collected except that in the case of policies owned and payable to Lowe's of Winston-Salem, Inc., and Lowe's of Raleigh, Inc. (in which said two companies the undersigned owns half of their capital stock), the undersigned agrees to apply only half of the net proceeds collected by said two companies.

"This note shall bear no interest except that if interest is collected from any insurance company separate and distinct from the insurance coverage itself, such part of the interest so collected applicable to the net recovery will be paid on this note.

"If the net proceeds from insurance collected are insufficient to pay this note in full, the holder of this note agrees, after all reasonable efforts have been exhausted to collect said insurance, to accept the net proceeds actually collected in satisfaction of this note and surrender it."

Shortly after the note was given, two of the insurance companies settled their liabality by paying $321,918. This amount was applied as a credit on the $700,000 note, leaving a balance owing of $378,081.66.

After this settlement, the remaining companies having a potential liability of $1,600,000, initiated discovery proceedings. They took depositions of doctors and other medical experts who had treated or prescribed for Mr. Buchan in 1959 and 1960. Six medical experts testified to treatment and consultations during 1959 and 1960. Many of these consultations were in New York and Baltimore. Several were in August and September 1960. These consultations and treatments were not disclosed in the applications for insurance. After the insurance companies had taken the depositions of these medical experts, and the nature and extent of the treatments were disclosed, counsel for the insured negotiated with counsel for the insurance companies in an effort to settle all of the various suits. An agreement was finally reached by which the insurance companies offered to pay in full settlement of all of their obligations the sum of $554,953.29. This amount included expenses and premiums paid by the plaintiffs, plus attorneys' fees, leaving a balance of $450,000 for distribution between Wachovia, payee and holder of the $700,000 note, and the beneficiaries named in the policies of insurance. Counsel representing plaintiffs in the suits against the insurance companies recommended acceptance of the offer. Maker of the $700,000 note conditionally rejected the offer. It offered to accept the proposed settlement on condition that Wachovia accept $225,000 in settlement of the balance then owing on the $700,000 note.

Wachovia, after consultation with its counsel, agreed to the conditions stated by the maker provided the Superior Court of Wilkes County, after appropriate investigation, approved the proposed settlement.

Ruth Lowe Buchan answered. She did not deny any of the allegations of the petition. She prayed that the court enter such order as it thought just, equitable, and proper.

Plaintiff requested the court to appoint guardians ad litem to represent Mary Elizabeth Buchan, the heirs at law of H. C. Buchan, Jr., and the unborn issue of Mary Elizabeth Buchan. T. E. Story was appointed as guardian ad litem for the minor. J. H. Whicker, Sr. was appointed as guardian ad litem for the unborn issue of Mary Elizabeth Buchan, J. H. Whicker, Jr. was appointed as guardian ad litem for the contingent heirs of H. C. Buchan, Jr. The several guardians ad litem filed answers. They admitted the facts alleged in the complaint, but averred counsel for plaintiffs in the suit against the insurance companies were unduly pessimistic with respect to their ability to recover. They prayed that the court carefully examine all of the facts and, af-

ter such examination, make such order as the court deemed for the best interest of the persons they represented.

A jury trial was waived. The court found facts and entered a judgment authorizing and directing Wachovia to accept the offer of settlement as modified by the plaintiffs in the suits against the insurance companies. The guardians ad litem excepted and appealed.

Jordan, Wright, Henson & Nichols, William D. Caffrey, and McElwee & Hall for plaintiff appellee.

Whicker & Whicker and T. E. Story for appellants.

PER CURIAM. The amount collected on the $700,000 note has a material bearing on the value of the testamentary trust set up for the minor, Mary Elizabeth Buchan. This fact is sufficient to justify Wachovia in asking the Superior Court to advise and direct it with respect to the proposed compromise. *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489.

Appellants did not except to any of the court's findings. Its findings are stated in more detail than our summary. The exception to the judgment presents the sole question: Do the facts found support the court's legal conclusion and its judgment authorizing settlement on the terms outlined? The answer is yes.

Counsel for plaintiffs in the suits against the insurance companies did not, as appellants suggest, over emphasize the difficulty confronting them. *Sims v. Insurance Company,* 257 N.C. 32, 125 S.E. 2d 326; *Rhinehardt v. Insurance Company,* 254 N.C. 671, 119 S.E. 2d 614. Even so, those named as beneficiaries in the contracts of insurance had the legal right to press the litigation until the courts finally determined the rights of the parties.

Maker of the note preferred to take its chances rather than accept the relatively small sum it would receive if Wachovia insisted on payment in full. Bad faith is not suggested. There is no evidence on which such a finding could be made. Wachovia concluded that it would be better to make some adjustment rather than to risk all in litigation. It concluded the best interest of the Buchan Estate would be served by accepting the offers on which the litigation could be disposed of. The Superior Court, after careful consideration, approved Wachovia's conclusion. We find nothing justifying a reversal. Hence the judgment is:

Affirmed.

GERALINE ROUSE v. RICHARD C. PETERSON AND LEON H. HERRING.

(Filed 8 April, 1964.)

1. Negligence § 26—

Contributory negligence is an affirmative defense upon which defendant has the burden of proof, and nonsuit for contributory negligence is not proper unless, considering the evidence in the light most favorable to plaintiff, the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom.

2. Automobiles § 10—

Where a motorist is traveling within the legal speed limit he will not be held contributorily negligent as a matter of law in hitting the rear of a vehicle stopped on the highway in his lane of travel at nighttime without lights. G.S. 20-141(e).

3. Automobiles § 42d—

The evidence in this case *is held* not to show contributory negligence as a matter of law on the part of plaintiff, driving at a lawful speed, in hitting the rear of an unlighted vehicle stopped in her lane of travel on the highway at nighttime, there being evidence that plaintiff was meeting oncoming traffic with lights which blinded her.

APPEAL by defendants from *Cowper, J.*, November 1963 Session of LENOIR.

Civil action to recover damages for personal injuries and for liabilities incurred for hospital and doctors' bills, allegedly caused by the actionable negligence of defendants.

Plaintiff alleges in her complaint, and defendants admit in their joint answer, that defendant Herring was the owner of a 1949 Ford pickup truck; that about 11 p.m. on 27 September 1963 defendant Peterson, as agent and employee of defendant Herring and within the scope and course of his employment, was driving this pickup truck westerly on U. S. Highway #70 about one-fourth of a mile west of the corporate limits of the city of Kinston; that the highway at this point is about 24 feet wide with shoulders on each side about 10 feet wide, is straight and level, at the time was dry, and there are no street lights there; and that at the same time and place plaintiff behind the pickup truck was operating her 1960 Comet automobile in a westerly direction on this highway. Plaintiff further alleges that defendants well knowing that this pickup truck had no lighting signals or lights on its rear, or if it had rear lights they were in a defective condition, negligently stopped it on the highway in front of her without any rear lights or signals showing; that she operating her automobile at a speed of 30 to

35 miles an hour was meeting oncoming automobiles whose headlights were shining toward her, and that she ran into the rear of this unlighted pickup truck stopped on the highway ahead of her; and that defendants' such negligence proximately caused the collision and her injuries. The parties stipulated that the speed limit where the collision occurred is 45 miles an hour.

Defendants in their joint answer deny negligence, conditionally plead contributory negligence of plaintiff in operating her automobile at an excessive rate of speed, to wit, in excess of 45 miles an hour, in a careless and reckless manner, without keeping a proper lookout, in failing to pass the pickup truck two feet to its left, in following too closely, and in driving at a speed that she was unable to stop her automobile within the radius of its headlights. Further, defendant Herring alleges a counterclaim against plaintiff for damage to his pickup truck.

Both parties introduced evidence. The jury found by its verdict that plaintiff was injured by the negligence of the defendants as alleged in her complaint; that she did not by her own negligence contribute to her injuries as alleged in the answer, and awarded her damages in the sum of $7,138. The issues in respect to defendant Herring's counterclaim were not answered.

From a judgment in accord with the verdict, defendants appeal.

Whitaker & Jeffress for defendant appellants.
White & Aycock by Thomas J. White for plaintiff appellee.

PER CURIAM. Defendants assign as error the denial of their motion for judgment of compulsory nonsuit made at the close of all the evidence. They contend their motion should have been allowed for the reason that plaintiff was guilty of contributory negligence as a matter of law. It is manifest that plaintiff's evidence is sufficient to show that defendants were negligent and that their negligence proximately caused plaintiff's injuries.

The term "contributory negligence" *ex vi termini* implies, or presupposes negligence on the part of the defendant. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163. Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under G.S. 1-183, when, and only when, the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360.

Defendants' contention that plaintiff was guilty of contributory negligence as a matter of law necessitates an appraisal of her evidence in the light most favorable to her. *Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Considered in such light, her evidence tends to show these facts, in addition to the admissions in defendants' answer which she introduced in evidence, and the stipulation entered into by the parties: Three nights before the collision here, Marvin Murphy, a witness for plaintiff, drove up behind defendant Herring's 1949 Ford pickup truck which was being operated on the highway, and there were no taillights burning on the truck on that occasion, though there was a reflector on the left corner of the truck body. He told defendant Herring before this occasion that no taillights were burning on his pickup truck. About 11 p.m. on 27 September 1963, plaintiff was driving her 1960 Comet automobile at a speed of 30 to 35 miles an hour in a 45 miles per hour speed zone and on her side of the road in a westerly direction on U. S. Highway #70 about one-fourth of a mile west of the corporate limits of the city of Kinston. She was meeting an automobile whose headlights were shining on her and blinded her. When this automobile passed her, she saw in front of her at a distance "as far as the width of the courtroom" defendant Herring's 1949 Ford pickup truck standing still with all four wheels on the pavement and with no lights on it and with no one standing about it. The pickup truck was dark red in color. Immediately upon seeing the truck, she applied her brakes and turned her automobile to the left, but could not avoid striking the rear end of the truck with the front part of her automobile. She sustained injuries in the collision.

Plaintiff was driving her automobile within the maximum speed limit. Therefore, she cannot be held contributorily negligent as a matter of law in outrunning her headlights, if she did, which we do not concede, and striking the rear end of the pickup truck stopped on the highway without lights. G. S. 20-141 (e); *Beasley v. Williams, supra.*

There is nothing in the evidence to indicate or suggest that there was anything which gave or should have given plaintiff notice that a motor vehicle without lights was stopped on the highway in front of her. This Court said in *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276: "The duty of the nocturnal motorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated."

In our opinion, plaintiff's own testimony does not establish the facts necessary to show contributory negligence so clearly that no other con-

clusion may be reasonably drawn therefrom, and that this case falls within the line of the following cases with facts approximately similar, in which contributory negligence has been held to be an issue of fact for the jury. *Beasley v. Williams, supra; Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *McClamrock v. Packing Co.,* 238 N.C. 648, 78 S.E. 2d 749; *Chaffin v. Brame, supra; Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197. The trial court properly overruled defendants' motion for judgment of compulsory nonsuit and correctly submitted the case to the jury.

Defendants' other assignments of error brought forward and discussed in their brief relate to the court's charge to the jury. A careful examination of these assignments of error and a reading of the charge contextually disclose no prejudicial error that would warrant a new trial. No new question is presented requiring extended discussion. All defendants' assignments of error are overruled. The verdict and judgment will be upheld.

No error.

BEULAH RUSSELL v. JONAH HAMLETT.

AND

MOSES E. RUSSELL, JR. v. JONAH HAMLETT.

(Filed 8 April, 1964.)

1. Automobiles § 44—

Evidence tending to show that the *feme* plaintiff had drunk some egg nog, and collided with a wreck on the highway which she saw or could have seen for a distance of some 500 feet, while insufficient to constitute contributory negligence as a matter of law, *is held* sufficient to be submitted to the jury on that issue.

2. Automobiles § 55.1—

Where plaintiff's family purpose automobile is being driven by his wife, the wife's contributory negligence will bar plaintiff's action against the driver of the other car involved in the collision to recover for damages to his automobile.

3. Judgments § 6—

The judgment must be supported by and conform to the verdict in all substantial particulars, and where it fails to do so the interested party may move to correct the judgment by inserting therein the verdict actually rendered in the case so as to make the judgment speak the truth.

APPEAL by plaintiffs from *Copeland, S.J.,* 30 September 1963 Civil Session of PERSON.

Two civil actions consolidated by consent for trial.

The *feme* plaintiff, who was driving the automobile of her husband, the male plaintiff, seeks to recover damages for personal injuries allegedly sustained by reason of the alleged actionable negligence of defendant in operating his automobile in a reckless and careless manner and while under the influence of intoxicating liquor. The male plaintiff seeks to recover damages for the destruction of his automobile allegedly caused by the actionable negligence of defendant in the operation of his automobile.

Defendant in his separate answer in each case denies negligence on his part, conditionally pleads contributory negligence of the *feme* plaintiff in the operation of her husband's automobile, by driving it in a careless and reckless manner, at a high and dangerous rate of speed, in following too closely defendant's automobile, and in failing to keep a proper lookout, 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 and for loss of its use allegedly caused by the 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 of defendant as a bar to defendant's counterclaim in her action.

Plaintiffs and defendant offered evidence. The parties stipulated that the automobile driven by the *feme* plaintiff was a family purpose automobile, and that she at the time of the collision was a member of her husband's family and his agent.

The jury found by its verdict in *feme* plaintiff's case that she was injured by defendant's negligence as alleged in the complaint, and that she by her own negligence contributed to her injuries. In the male plaintiff's case the jury found by its verdict that plaintiff's automobile was damaged by defendant's negligence as alleged in the complaint, and that *feme* plaintiff by her own negligence contributed to the damage of male plaintiff's automobile.

From a separate judgment in each case that each plaintiff recover nothing from defendant, each plaintiff appeals.

Charles B. Wood for plaintiff appellants.

Haywood and Denny by George W. Miller, Jr. and Egbert L. Haywood for defendant appellee.

PER CURIAM. This is the second appeal in these two cases consolidated for trial. On the first appeal each plaintiff appealed from a separate judgment of compulsory nonsuit. We reversed the judgments be-

low and remanded the consolidated cases for a jury trial. 259 N.C. 273, 130 S.E. 2d 395.

On the former appeal a summary of the evidence considered in the light most favorable to plaintiffs is set forth. The evidence in the instant case is substantially similar to the evidence introduced in the first trial, and it would be supererogatory to set it out here. On the first appeal we were solely concerned with a judgment of compulsory nonsuit, and it was not necessary to set forth a summary of plaintiffs' and defendant's evidence tending to show negligence on *feme* plaintiff's part in the operation of her husband's automobile. This evidence tends to show the following, *inter alia:* Before the collision *feme* plaintiff drank some egg nog which had "a whole lot" of Four Roses whisky poured in it; that Melvin Hamlett, a witness for plaintiff, testified, "I reckon you might say Beulah's car was about 500 feet from the wreckage when we first saw it"; that *feme* plaintiff was driving east and there was visibility about a quarter to a half mile ahead of her on the highway to the wrecked automobiles in front of her.

The evidence is sufficient to support the verdict in each case. A careful examination of the assignments of error discloses no new question requiring extended discussion, and no prejudicial error has been made to appear. *Feme* plaintiff was driving her husband's family purpose automobile and was his agent at the time of the wreck, and, consequently, her contributory negligence as found by the jury in the male plaintiff's case bars any recovery by him. *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200; 38 Am. Jur., Negligence, sec. 236. The jury under a charge without prejudicial error resolved the issues of fact against each plaintiff.

The verdict and judgment in *feme* plaintiff's case will be upheld.

In the male plaintiff's case the judgment by inadvertence sets forth the first three issues of the verdict in *feme* plaintiff's case, and not the verdict in his case, and then decrees that he shall recover nothing from defendant. It is thoroughly settled in law that in all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars. *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210. The verdict in male plaintiff's case will be upheld, and defendent, at the next ensuing session of Person Superior Court after this opinion is certified down, is authorized to make a motion to correct the judgment in his case by inserting therein the verdict rendered in his case, so as to make the judgment speak the truth. *Trust Co. v. Toms,* 244 N.C. 645, 94 S.E. 2d 806; *S. v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339; Strong's N. C. Index, Vol. 3, Judgments, sec. 6.

The result is this:

On *feme* plaintiff's appeal
No error.
On male plaintiff's appeal no error in the trial, but
Remanded for proper judgment.

STATE v. WILLIAM PLEASANT ELLIS.

(Filed 8 April, 1964.)

Automobiles § 74—

Where, in a prosecution for operating an automobile upon a public highway while under the influence of intoxicating liquor, the court correctly defines "under the influence," the fact that the court also charges that it was immaterial whether the liquor or beverage consumed was beer, wine, whiskey, or whether it was a spoonful or a quart, etc., *held* not prejudicial error. G.S. 20-138.

APPEAL by defendant from *Johnston, J.*, 4 September 1963 Criminal Session of FORSYTH.

This is a criminal action in which the defendant was tried in the Municipal Court of the City of Winston-Salem, North Carolina, upon a warrant charging that he did unlawfully and wilfully drive a motor vehicle upon the public highways of North Carolina while "under the influence of intoxicating liquors." From a verdict of guilty and the judgment imposed thereon, the defendant appealed to the Superior Court of Forsyth County where he was tried *de novo* upon the same warrant.

The jury returned a verdict of guilty. A prison term was imposed but suspended for a period of two years upon the conditions set out in the judgment.

The defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.

Deal, Hutchins & Minor for the defendant.

PER CURIAM. The defendant does not contend that the State's evidence was insufficient to carry the case to the jury. The only assignments of error are to certain portions of the charge.

The court charged the jury three times as to what constitutes being under the influence of an intoxicating liquor or beverage within

the meaning of G.S. 20-138 in substantially the following language: "The court has heretofore instructed you and again instructs you that a person is under the influence of an intoxicating liquor or beverage when that person has drunk or consumed a sufficient quantity of some intoxicating liquor or beverage, be it beer, wine or whiskey, be it a spoonful or a quart, be it a bottle of beer or a quart of liquor, to cause him to lose the normal control of either his mental or bodily faculties or both of these faculties to such an extent that there is a noticeable and appreciable impairment of either one or both of these faculties."

The defendant assigns as error the inclusion of the words, "be it beer, wine or whiskey, be it a spoonful or a quart, be it a bottle of beer or a quart of liquor," in the charge which is in other respects substantially in accord with the rule laid down in the case of *S. v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688, where the defendant had been charged, tried and convicted of a violation of G.S. 20-138.

The correct test within the meaning of the statute is not whether the party charged with the violation thereof had drunk or consumed a spoonful or a quart of intoxicating beverage, but whether a person is under the influence of an intoxicating liquor or narcotic drug by reason of his having drunk a sufficient quantity of an intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

It is common knowledge that a very small amount of an intoxicating liquor might substantially affect the mental and physical faculties of one person, while such an amount might not appreciably affect some other person.

The gravamen of the offense charged here, as in the *Carroll* case, was driving a motor vehicle upon a public highway while under the influence of an intoxicant.

The rule laid down and approved in the *Carroll* case has been cited with approval by this Court some twenty or more times, and we think the instruction approved in that case is a clear, simple and adequate guide for a jury to determine whether or not a defendant was at the time involved under the influence of an intoxicating liquor or a narcotic drug within the meaning of the statute, and any substantial deviation therefrom is not approved.

However, since in the trial below the court each time it gave the instruction complained of included the instruction approved in the *Carroll* case, we do not think the instruction with respect to the consumption "of a spoonful or a quart" of intoxicating liquor or bev-

erage was sufficiently prejudicial to justify a new trial in light of the evidence in this case.

In the trial below, we find

No error.

MATTIE BELL FORTE v. MARION COLE GOODWIN, AND JOSEPH FORTE, ADMINISTRATOR OF CLINTON FORTE, DECEASED.

(Filed 8 April, 1964.)

1. Automobiles § 41c—

Plaintiff passenger was injured in a head-on collision of two automobiles on a dirt road in the dust raised by a third car. Testimony of witnesses respectively that at least a part of each driver's vehicle was to the left of his center of the highway takes the issue as to the negligence of each driver to the jury. G.S. 20-146.

2. Trial § 33—

The fact that the statement of one witness was attributed by the court to another witness *held* not prejudicial, appellant having failed to call the court's attention to the inadvertence before the jury retired.

3. Automobiles § 40—

Testimony of the investigating officer that one of the drivers made a statement to the effect that he was on the left of his center of the highway *held* competent as a declaration against interest in an action against such driver's administrator.

APPEALS by defendants from *Cowper, J.*, August-September 1963 Civil Session of WAYNE.

Plaintiff, a passenger in a Chevrolet owned and operated by her husband, Clinton Forte, was injured when it collided with a Ford owned and operated by defendant Goodwin. The collision occurred about 6:30 p.m. on September 9, 1961. The Chevrolet was going west on a dirt road. The Ford was traveling east. A westbound automobile was ahead of the Chevrolet. It created a cloud of dust. The Chevrolet and Ford collided head-on in the dust cloud. Plaintiff alleged the collision was caused by the joint and concurring negligence of Goodwin and her husband in that each was driving with at least a portion of his vehicle to his left of the center of the highway.

Each defendant denied the allegations of negligence. Each alleged he was on his proper side of the road, and the other driver was on the wrong side of the road. The road was 28 feet wide. The driver of the Chevrolet died a few days after, and as a result of, the collision.

Issues arising on the pleadings were submitted to the jury. It found plaintiff was injured by the negligence of each driver. It awarded damages. Judgment was entered on the verdict. Each defendant appealed.

Dees, Dees & Smith for plaintiff appellee.

Braswell & Strickland for Marion Cole Goodwin, defendant appellant.

Taylor, Allen & Warren by John H. Kerr, III, for the Estate of Clinton Forte, defendant appellant.

PER CURIAM.

GOODWIN'S APPEAL

Defendant Goodwin assigns as error the court's refusal to allow his motion to nonsuit. He argues all of the credible evidence shows he was at all times on his right side of the highway and the sole cause of the collision was the negligence of plaintiff's husband who was operating the Chevrolet entirely to the south of the center of the highway.

All of the evidence tends to show the collision occurred near the center of the highway. Almira Forte, an occupant of the Chevrolet, testified she saw the Ford as it approached, "It was in the middle of the road." Henrietta McNair, standing in her yard adjacent to the scene of the collision, said, "I saw the collision. The Forte car was, at the time of the collision, on the right hand side of the road."

The evidence was sufficient to permit a jury to find Goodwin was violating the provisions of G.S. 20-146. The credibility of the evidence was for the jury, not the court.

In stating plaintiff's contentions, the court told the jury the witness, Henrietta McNair, testified "she saw this white car (Ford) meeting them and that this white car was in the middle of the road." Henrietta did not so testify. The quoted testimony came from witness Almira Forte. If defendant deemed it prejudicial that the court attributed the testimony to the wrong witness, he should have called the court's attention to the inadvertent error before the jury retired. We are not impressed with the argument that defendant was prejudiced by the fact that the court mistakenly attributed the testimony to the wrong witness.

FORTE'S APPEAL

The administrator assigns as error the court's refusal to allow his motion to nonsuit. In addition to the evidence offered by plaintiff, each defendant offered evidence. Goodwin testified he saw the Forte car coming. He (Goodwin) was then as far to his right as he could get. The collision occurred on his right side of the road.

A highway patrolman made an investigation 45 minutes after the collision occurred. He testified to the location of the vehicles and the apparent condition of the occupants. He talked with the drivers at the scene of the wreck. He was asked to relate his conversation with the driver of the Chevrolet. Over the administrator's objection, the witness was permitted to testify. He quoted Forte as saying: "I was following another car. * * * there was a lot of dust * * * I pulled to the left side of the road to get out of the dust and we had a wreck, collided, the vehicles collided."

Defendant administrator assigns the admission of this testimony as error. He relies on *Holmes v. Wharton,* 194 N.C. 470, 146 S.E. 93; and *Dowell v. Raleigh,* 173 N.C. 197, 91 S.E. 849.

The rule announced in those cases is not applicable to the facts of this case. Forte's statement to the highway patrolman was competent as a declaration against his interest. *Smith v. Perdue,* 258 N.C. 686, 129 S.E. 2d 293; *Smith v. Moore,* 142 N.C. 277, 55 S.E. 275.

When all of the evidence, rather than the testimony of a single witness is considered, it is sufficient to permit a finding that the driver of the Chevrolet was negligent, and his negligence was a proximate cause of plaintiff's injuries.

On Goodwin's appeal: No error.

On Forte's appeal: No error.

WILLIE MAE GIBBS v. LILLIAN JONES, ADMINISTRATRIX OF THE ESTATE OF PENNIE EDWARDS, DECEASED.

(Filed 8 April, 1964.)

Executors and Administrators § 24a—

In this action to recover for personal services rendered decedent the evidence *is held* sufficient to be submitted to the jury under authority of *Johnson v. Sanders,* 260 N.C. 291.

APPEAL by plaintiff from *Cowper, J.,* October Civil Session of GREENE.

Civil action to recover for personal services rendered a decedent. Plaintiff was the illegitimate daughter of Joe Edwards. When she was less than a year old her mother "gave her" to Joe and his wife, Pennie Edwards, the defendant's intestate. Joe and Pennie never had any children and they reared plaintiff as if she were their own. After her marriage in 1954, plaintiff and her husband lived intermittently with Joe and Pennie. In the fall of 1956 they moved into a house owned by Joe just across the highway from his residence. Joe died on May 7, 1958.

The small farm which he and Pennie had owned as tenants by the entireties then became hers by survivorship. Pennie died on January 8, 1960 at the age of fifty-four.

Plaintiff alleged that for five years prior to the death of Pennie Edwards she rendered valuable services both to Pennie and Joe upon their promise to will all of their real and personal property to her and her infant son; that each failed to execute a will; and that she is entitled to compensation in the principal sum of $7,480.00 from the estate of Pennie Edwards.

On the trial, plaintiff sought to recover only for services rendered Pennie after the death of Joe. Her evidence tended to establish the following facts: Plaintiff performed services for Pennie before and after the death of Joe. On numerous occasions after his death, Pennie told plaintiff in the presence of others that she wanted her to have the house and lot on which she was then living and that she wanted plaintiff's son to have another house. After Joe died, Pennie usually came across the road to have breakfast with plaintiff who, as soon as she had finished her own, would go over and do Pennie's housework. Each day plaintiff cooked, cleaned, washed and ironed for Pennie, fed her pigs, and chased them when they got out. On clear days, she swept her yard. She also worked for her in the field and in the garden and "pulled wood out of the woods to cook with." The services which plaintiff rendered to Pennie Edwards after the death of Joe were reasonably worth fifteen to twenty dollars a week. Pennie's nearest relatives were brothers and sisters whom she seldom, if ever, saw.

At the close of plaintiff's evidence, defendant's motion for nonsuit was allowed. From a judgment dismissing the action plaintiff appealed.

Fred W. Harrison for plaintiff appellant.
Walter G. Sheppard for defendant appellee.

PER CURIAM. Plaintiff's evidence, viewed in the light most favorable to her, was sufficient to take this case to the jury under the rules set out in *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 620.

Reversed.

WILLIAM WAYNE JONES v. JOSEPHINE TYNDALL JONES.

(Filed 8 April, 1964.)

1. Divorce and Alimony § 13—

A deed of separation legalizes the separation, and neither party may attack its legality on account of the prior misconduct of the other.

2. Husband and Wife § 12; Cancellation and Rescission of Instruments § 2—

Allegations and evidence that the wife signed the deed of separation providing for the support of the children of the marriage in desperation because of her destitution *held* insufficient for the cancellation of the agreement, since a threat to withhold that which a party has an adequate remedy to enforce cannot constitute duress.

APPEAL by defendant from *Cowper, J.*, October 14, 1963 Session of LENOIR.

On June 6, 1962 plaintiff instituted this action against his wife for an absolute divorce alleging that they had lived separate and apart since on or about April 9, 1955. Answering, the defendant alleged that on June 27, 1954 plaintiff, by threats against their physical safety, had forced her and their two children to leave the home which they had shared with him; that on April 9, 1955 plaintiff procured her signature to a separation agreement "partly through the threats of the plaintiff and partly through the utter privation and destitution to which defendant and her children had been reduced by the abandonment and neglect of the plaintiff . . ." She prayed that the deed of separation be set aside; that she be awarded permanent alimony, and that plaintiff be denied a divorce. By reply, plaintiff alleged the validity of the deed of separation and plead the three-year statute of limitations as a bar to any cause of action to rescind it.

Upon the trial, plaintiff offered evidence tending to establish the allegations of his complaint and, in support thereof, introduced the deed of separation duly executed by the parties on April 9, 1955. By its terms each spouse released any claim to the property of the other and, in consideration of five hundred dollars, defendant relieved plaintiff from all his marital obligations to her. Plaintiff agreed to support each of their two children until the child became eighteen years of age. Plaintiff also introduced a "reciprocal bill of sale" executed on April 11, 1955 by the parties whereby they divided their household goods. Plaintiff has made all of the payments required by the deed of separation.

Defendant offered evidence tending to show (1) that the original separation on June 27, 1954 occurred because plaintiff threatened to

shoot her if she did not leave, and (2) that plaintiff told her she would get no help from him unless she signed the deed of separation and that she did so in desperation. The court sustained plaintiff's objection to this evidence and defendant assigns its exclusion as error.

The jury answered the usual three issues with reference to marriage, residence, and separation in favor of the plaintiff under a peremptory instruction by the court. From a judgment granting the plaintiff an absolute divorce the defendant appealed.

Jones, Reed & Griffin for plaintiff appellee.
Herbert B. Hulse for defendant appellant.

PER CURIAM. When a husband and wife execute a valid deed of separation and thereafter live apart, such separation exists by mutual consent from the date of the execution of the instrument. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E. 2d 525. As long as the deed stands unimpeached, neither party can attack the legality of the separation on account of the misconduct of the other prior to its execution. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235.

Recognizing this rule, defendant attempted to avoid the deed of separation on the ground that it was obtained by duress. However, neither the facts alleged nor the proffered proof are sufficient to invalidate the contract which was not executed until nine months after the parties had separated. Plaintiff's duty to support his children was an obligation which defendant could have forced him to perform under both the criminal and the civil law. "A threat to withhold from a party a legal right which he has an adequate remedy to enforce will not constitute duress . . ." 17 C.J.S. *Contracts* § 172. Defendant has acquiesced for over seven years in the deed of separation which she would now avoid. She has shown no ground for rescission.

In the trial below we find

No error.

STATE v. ROBAH LEE SMITH.

(Filed 8 April, 1964.)

Indictment and Warrant § 5—

The failure of the indictment to show by check marks or endorsement on its back that witnesses appeared before the grand jury is not grounds for quashal.

STATE *v.* HINSON.

APPEAL by defendant from *Gambill, J.*, September, 1963 Session, YADKIN Superior Court.

Criminal prosecution upon a bill of indictment charging that the defendant on April 28, 1962, did operate a motor vehicle upon the public highways while under the influence of intoxicating liquors. Upon arraignment, and before plea, the defendant moved to quash upon the ground the indictment did not by check mark or otherwise indicate that any witness was sworn and examined by the grand jury. On the back of the indictment appeared this legend:

> "Witnesses: J. R. Roupe, Harold Shore, W. E. Wishon. Those marked — sworn by the undersigned Foreman, and examined before the Grand Jury; and this bill found (x) A True Bill. /s/ H. B. Shore, Foreman Grand Jury."

A check mark did not appear opposite the name of either witness.

The Solicitor for the State offered the evidence of J. R. Roupe who testified he was called as a witness and testified before the Grand Jury at the September Term, 1962, "in the case of *State v. Robah Lee Smith,* on a charge of operating a motor vehicle upon the public highways while under the influence of some intoxicating liquors . . ."

The court overruled the motion to quash. A jury trial resulted in a verdict of guilty. From the judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General for the State.

Scott, Folger, Ellington & Webster by Alfred J. Ellington for defendant appellant.

PER CURIAM. The order of the Superior Court holding the indictment valid and overruling the motion to quash is fully sustained by many decisions of this Court, among them, *State v. Lancaster,* 210 N.C. 584, 187 S.E. 802.

No error.

STATE v. PAUL HINSON.

(Filed 8 April, 1964.)

APPEAL by defendant from *Hobgood, J.*, October 1963 Criminal Session of PERSON.

Criminal prosecution on indictment based on G.S. 14-100 charging that defendant falsely, fraudulently and feloniously represented to one Lonzy Dixon that he (defendant) "was a field representative of the Prudential Life Insurance Co. with authority to make loans for said company" and by means of said false pretense obtained from Dixon the sum of $2,397.20. The jury returned a verdict of guilty. Judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

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

Melvin H. Burke for defendant appellant.

PER CURIAM. We find no evidence sufficient to support a finding that defendant obtained money from Dixon by means of a representation that he (defendant) "was a field representative of the Prudential Life Insurance Co. with authority to make loans for said company." Indeed, the evidence was not sufficient to support a finding that defendant made such representation to Dixon. Moreover, if such representation were made, the evidence was insufficient to support a finding that it was false. The Attorney General concedes, and we agree, that the evidence does not support the indictment and that defendant's motion to dismiss as of nonsuit should have been allowed.

Reversed.

CYNTHIA LUCILLE HAYNES v. JOHN PALMER HORTON, JR., WILLIAM DONALD HORTON, AND MRS. J. P. HORTON, SR.

(Filed 8 April, 1964.)

APPEAL by plaintiff from *McLaughlin, J.*, Regular January, 1964, Session of WILKES.

Moore & Rousseau for plaintiff.

McElwee & Hall for defendants.

PER CURIAM. This is an action to recover damages for personal injuries allegedly suffered by plaintiff as a result of a fall in defendant's drugstore about 9:30 A.M. on 20 February 1962. It is alleged that plaintiff slipped and fell while walking to a table to be served with a

soft drink, there was a wet and slippery substance on the floor where she fell, the substance was placed there by an employee of defendants who was engaged in mopping the floor, the substance created a hazardous condition, it was invisible to plaintiff, and defendants failed to warn of the condition.

At the close of plaintiff's evidence the court allowed defendants' motion for nonsuit. In this we find no error. Plaintiff's evidence does not support her pleadings and is insufficient to make out a *prima facie* case of actionable negligence. The mere fact that one slips and falls on a floor does not constitute evidence of negligence. The doctrine of *res ipsa loquitur* does not apply. *Bowen v. Anchor Enterprises, Inc.*, 255 N.C. 359, 121 S.E. 2d 546; *Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717; *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180.

Affirmed.

IN THE MATTER OF APPLICATION FOR REASSIGNMENT OF SUZANNE PERRY HAYES FROM FREMONT HIGH SCHOOL TO CHARLES B. AYCOCK HIGH SCHOOL.

(Filed 15 April, 1964.)

1. Schools § 10—

The Pupil Assignment Law provides for the assignment *en masse* of pupils without a hearing, based upon residence, by the respective administrative units, with provision for reassignment in proper instances upon an individual basis on application in writing by the parents of a pupil, and the law places all emphasis on the welfare of the child and the effect upon the school to which reassignment is requested. G.S. 115-176, G.S. 115-178.

2. Same; Administrative Law § 4; Courts § 7—

The hearing in the Superior Court upon appeal by parents from the refusal of their request for reassignment of a pupil is *de novo*, G.S. 115-179, and a *de novo* hearing is a new hearing as though no action whatever had been taken in an inferior court or administrative agency.

3. Reference § 2—

Even though a statute provides for a jury trial in the Superior Court the parties may, by consent, waive jury trial and substitute therefor a hearing before a referee.

4. Reference § 8—

The trial court has the power, upon exceptions to the referee's findings, to affirm in whole or in part, modify, or set aside or make additional findings in passing upon the exceptions.

5. Appeal and Error § 49—

The findings of fact of the referee, approved by the trial court, are conclusive in the Supreme Court upon further appeal.

6. Schools § 10—

Where, on appeal in the Superior Court from the refusal of the administrative unit to reassign a pupil, the cause is referred by consent and the referee concludes, upon supporting findings, that the reassignment of the pupil would be to her best interest and would not interfer with the proper administration of said school, order of the court that the pupil be reassigned to the school of her choice, even though it be in a different administrative unit, will be upheld, such reassignment being entirely satisfactory to the authorities of the unit to which the reassignment is ordered.

PARKER, J., concurring.

RODMAN, J., concurring in result.

MOORE, J., dissenting.

BOBBITT, J., joins in dissenting opinion.

APPEAL by Fremont City Board of Education from *Cowper, J.*, WAYNE County Superior Court.

On June 5, 1963, Mr. and Mrs. B. S. Hayes filed with the Fremont City Board of Education a formal application for the reassignment of their daughter, Suzanne Perry Hayes, age 15, from the Fremont High School to the Charles B. Aycock High School for the school year 1963-64. The reasons for the requested reassignment appear in the judgment, hereafter quoted in full.

On July 22, 1963, the Fremont City Board of Education entered its decision denying the application. On July 31, 1963, the parents served notice of appeal from the decision of the Board to the Superior Court of Wayne County. When the appeal came on to be heard at the August, 1963 Civil Session, Judge Cowper, by consent, appointed Julian T. Gaskill referee to hear evidence, make findings of fact, state his conclusions of law arising thereon, and report to the court. The referee, after an extensive hearing, filed his report on October 10, 1963. The Fremont City Board of Education filed detailed exceptions to the referee's findings of fact and conclusions of law upon the ground the evidence and law did not warrant them. After hearing on the referee's report, the court entered this judgment:

"This cause coming on to be heard before Albert W. Cowper, Resident Judge of the Eighth Judicial District holding the courts of the Eighth Judicial District, and it appearing to the Court that a consent order of reference was entered in this cause on the 26th day

of August 1963, in which said order Julian T. Gaskill was named Referee to hear the evidence of both the appellant and appellee and report his findings of fact and conclusions of law to this Court in the manner provided by law not later than the 26th day of September 1963;

"It further appearing to the Court that Julian T. Gaskill, Referee, held a hearing in which both the appellant and appellee were represented by counsel and presented evidence on September 16th and 17th, 1963, and that said Referee duly filed a report including findings of fact and conclusions of law, together with a transcript of the testimony and all exhibits, on the 27th day of September, 1963, the report of the Referee being as follows:

" 'THE REFEREE FINDS THE FOLLOWING FACTS:

" '1. That the applicant, Suzanne Perry Hayes, in enrolled as a student in the Fremont High School and is a sophomore in said school; that during the school year of 1962-63 she attended Charles B. Aycock High School as a member of the Freshman class; that during the school year 1962-63 while a student at Charles B. Aycock High School, she took among other courses Latin I, and that she wishes to continue her work in Latin and take Latin II during the present school year of 1963-64; that no course in Latin is available to students of Fremont High School; that she was also a member of the school band which is likewise not available at the Fremont High School.

" 'The Referee finds that Suzanne Perry Hayes is an outstanding student having made grades on her courses at Charles B. Aycock High School ranging from 96 to 99; that her I. Q. tests place her in the 80th percentile; that her parents and she desire that she have the competition and challenge offered to her by the Charles B. Aycock High School with its expanded curriculum particularly in the field of foreign languages.

" 'The Referee further finds that it is the desire of this student and of her parents for her to complete at least three and possibly four units of foreign language which are not available to her in the said Fremont High School; that it is her desire and the desire of her parents that after necessary preparatory schooling she enter the field of medicine at either Duke University or the University of North Carolina, and that additional foreign language and particularly Latin would be helpful to her in this field; that she would expect to enter St. Mary's College for preparatory work

leading to entrance to medical school, and that presently this college requires a minimum of two units each of two foreign language or three units of Latin. The Referee also finds that because of her prior attendance at Charles B. Aycock High School and because of the courses, associations, and facilities in said school, she would be happier with the work and would tend to be a better and more satisfied student.

"'2. The Referee further finds as a fact that reassignment of Suzanne Perry Hayes to the Charles B. Aycock High School will be for her best interest and such reassignment will in nowise interfere with the proper administration of said school; neither will her reassignment interfere with the proper instruction of the pupils enrolled therein, and it will not endanger the health or safety of the children therein enrolled.

"'THE REFEREE SUBMITS TO THE COURT HIS CONCLUSIONS OF LAW AS FOLLOWS:

"'1. The Referee is of the opinion that the intent of the North Carolina Legislature in enacting the Assignment and Enrollment of Pupils Act (Article 21, G.S. 115-176 through and including 115-179) was to give to local school boards wide authority in the reassignment of pupils to the schools. This is indicated in the reports of the Study Committees, and an analysis of the statutes by the North Carolina Supreme Court: IN RE APPLICATION FOR REASSIGNMENT, 247 N.C. 413. Nevertheless, the Referee is of the opinion and so concludes as a matter of law that in the instant case, the preponderance of the evidence compels a finding that, as to Suzanne Perry Hayes the exception as referred to in G.S. 115-176 applies.

"'2. The Referee further concludes as a matter of law that the reassignment of Suzanne Perry Hayes to the Charles B. Aycock High School would be for her best interest, and that her reassignment would in nowise interfere with the proper administration of said school; neither would her reassignment interfere with the proper instruction of the pupils therein enrolled nor would it endanger the health or safety of the children therein enrolled.

"'3. The Referee further concludes as a matter of law that the action of the Fremont City Board of Education should be set aside, and that Suzanne Perry Hayes should be reassigned to the Charles B. Aycock High School.

" 'Therefore, the Referee enters his decision as follows:

" '1. That the action of the Fremont City Board of Education denying the reassignment of Suzanne Perry Hayes be set aside.

" '2. It is adjudged that it is for the best interest of Suzanne Perry Hayes to attend the Charles B. Aycock High School, and she is entitled to attend said school.

" '3. That it is directed and ordered that Suzanne Perry Hayes be forthwith reassigned to the Charles B. Aycock High School under the Wayne County Board of Education.'

"It further appearing to the Court that the Fremont City Board of Education filed exceptions to the Report of the Referee, that all parties waived further time and agreed that the Court should hear the cause out of term and out of the County, and that this cause came on to be heard before the Court on October 11, 1963, in Greene County, North Carolina, that all parties were represented by counsel and each party presented oral arguments as to findings of fact and conclusions of law, and that the appellant and appellee each filed a brief with the Court.

"And it appearing to the Court after having considered the transcript of evidence presented before the Referee and the exceptions of the appellee to the findings of fact and conclusions of law contained in the Report of the Referee and having considered the oral arguments and briefs made and filed by each of the parties, that the findings of fact and conclusions of law found by the referee are correct and based upon competent evidence and the law applicable thereto.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Report of the Referee be, and the same is hereby in all respects approved and confirmed, and it is FURTHER ORDERED, ADJUDGED AND DECREED:

"1. That the action of the Fremont City Board of Education denying the reassignment of Suzanne Perry Hayes be set aside.

"2. It is adjudged that it is for the best interest of Suzanne Perry Hayes to attend the Charles B. Aycock High School and she is entitled to attend said school.

"3. It is ordered that Suzanne Perry Hayes be reassigned to the Wayne County Board of Education for enrollment in the Charles B. Aycock High School effective immediately, said assignment

and enrollment not be be affected by any entry of notice of appeal upon this judgment . . .

"/s/ ALBERT W. COWPER, Judge of the Superior Court, Resident Judge of the Eighth Judicial District, Holding the Courts of the Eighth Judicial District."

From the foregoing judgment, the Fremont City Board of Education appealed.

James N. Smith for Fremont City Board of Education, appellant.
Bland & Freeman by W. Powell Bland, George K. Freeman, Jr., for Suzanne Perry Hayes, appellee.

HIGGINS, J. This controversy arises under the Pupil Assignment Law now codified as Article 21, General Statutes of North Carolina. Section 115-176 requires each county and city board of education "to provide for the assignment to a public school of each child residing within the administrative unit who is qualified . . . for admission to a public school. Except as otherwise provided in this article, the authority of each board in the matter of assignment . . . shall be final. A child residing in one administrative unit may be assigned . . . to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of the administrative units involved . . ." This section provides for assignment *en masse* upon the basis of residence and without hearing. Assignment may be made to a school outside the administrative unit if the boards agree in writing. The section authorizes assignment without notice, or the approval of the child, or its parents, and without hearing. No child shall be enrolled in or permitted to attend any other public school.

The foregoing is the rule for assignment in the first instance. The Legislature, however, recognized that the exact enforcement of any hard and fast rule may work hardship in individual cases. Hence, Section 115-178 provides that any parent who is dissatisfied with the assignment of his child may apply to the board in writing for a hearing "on the question of reassignment of such child to a different school." . . . "If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled,

the board shall direct that the child be reassigned to and admitted to such school."

It is worthy of note that the statute places all emphasis on the welfare of the child and the effect upon the school to which reassignment is requested.

When the Fremont City Board refused to make the requested reassignment to the Aycock High School, the parents appealed to the Superior Court as authorized by G.S. 115-179. "Upon such appeal, the matter shall be heard *de novo* in the superior court before a jury in the same manner as civil actions are tried and disposed of therein." The appeal in this *de novo* hearing vests the superior court with full power to make the requested reassignment if permitted by law. "The word *'de novo'* means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial had as if no action whatever had been instituted in the court below." *In Re Farlin,* 350 Ill. App. 328, 112 N.E. 2d 736. "Power to try a case *de novo* vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." *Lone Star Gas Co. v. State,* 137 Tex. 279, 153 S.W. 2d 681. "The language of the statute is mandatory. It provides that on appeal from the action of the Board the circuit court *'shall hear* the matter *de novo.'* This means that the court must hear or try the case on its merits from beginning to end as if no trial or hearing had been held by the Board and without any presumption in favor of the Board's decision." *Hiner v. Wenger,* 197 Va. 869, 91 S.E. 2d 637. "The provision that on appeal the trial shall be 'under the same rules and regulations as are prescribed for the trial of other civil causes,' has been interpreted to mean that the trial shall be *de novo." Utilities Comm. v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201. "A trial *de novo* in an appellate tribunal commonly designates a trial had as though no action whatever had been instituted in the court below." 5 C.J.S., Appeal and Error, § 1524.

While the statute provides for the *de novo* hearing before a jury, nevertheless, the parties by consenting to the reference waived the jury trial and substituted therefor the hearing before the referee. *In Re Parker,* 209 N.C. 693, 184 S.E. 532. However, upon exceptions to the referee's findings, the trial judge had power to affirm in whole or in part, modify, set aside, make additional findings, etc. This he may do only in passing on exceptions. *Coburn v. Land & Timber Corp.,* 257 N.C. 222, 125 S.E. 2d 593. However, when the record comes here, we are bound by the findings if they are supported by competent evidence. *Anderson v. McRae,* 211 N.C. 197, 189 S.E. 639. The referee found facts and Judge Cowper approved and affirmed them.

Inasmuch as reassignment is in the nature of a special case and to be made on an individual student basis, upon the request of the parent, the referee properly excluded evidence relating to other applicants for transfer. The assignment of error based on the exclusion is not sustained. The inquiry was limited to the question whether Suzanne Perry Hayes was entitled to reassignment to the school she had attended the previous year and which was only three miles from her home, though in a different administrative unit. The reassignment was entirely satisfactory to the authorities of the Aycock High School. It was admitted on the argument that the parents would take care of her transportation to that school.

A careful review of the record convinces us the findings made by the Referee and reviewed by the Court on exception, are fully supported by competent and substantial evidence. Likewise, the conclusions of law and order based thereon are in accordance with the provisions made by the Legislature; and that the reassignment should be sustained.

The judgment of the Superior Court of Wayne County is

Affirmed.

PARKER, J., concurring: In my opinion, the interpretation in the majority opinion of the relevant parts here of the Pupil Assignment Law as enacted by the General Assembly is correct. The expediency of enacting such a statute, and all the parts thereof, is a matter of which the General Assembly is the proper judge, and not this Court. Should one or more provisions of this statute prove in practice not desirable or ill-advised, the General Assembly has plenary power, unless prohibited by some provision of the Federal or State Constitution, to alter or amend the statute, as they in their sound judgment and discretion deem proper in the best interest of the education of the children of the State.

RODMAN, J., concurring in result:

Each school board is authorized to determine the school which the children within its boundaries shall attend. Such determination is an assignment. G.S. 115-176. If a parent is dissatisfied with the assignment so made, he may apply to the board for reassignment—that is, assignment to a different school. It is the duty of the board to reassign if "the reassignment of the child to such school will be for the best interest of the child, and will not interfere with the proper administration of the school." The board finding these facts directs "that the child be reassigned to and admitted to such school." G.S. 115-178.

If the parent is not satisfied with the findings and conclusion made by the school board in which the child resides, the parent may appeal to the Superior Court. Upon such appeal, there is a hearing *de novo.* If the facts be there established as plaintiff contends, it becomes the duty of the Court to make an order fixing the school which the child shall attend. G.S. 115-179.

Ordinarily, a school board can only assign or reassign children to the schools of the unit in which they reside, but pupils residing in one administrative unit may be assigned to a school located in another administrative unit upon such terms and conditions as the respective boards may agree upon. G.S. 115-163.

There is no evidence in this record of any written contract between the Wayne County and Fremont City School Boards. But it is established by Fremont Board's evidence that it had a contractual arrangement with Wayne County Board by which Fremont could, and did, reassign children to Wayne County schools. In fact, some were reassigned to the Aycock School.

Fremont does not contend that the applicant is not within the class covered by the contract between the two boards. It denies applicant's right to transfer on the theory that such transfer is not to the best interest of the Fremont school.

So long as Fremont has a contractual right to assign children to the Aycock School, it has, in my opinion, the duty to reassign, if applicant establishes facts requisite for reassignment. Fremont cannot pick and choose between qualified applicants. It is at liberty to make a contract with the Wayne County Board describing with particularity classes or groups which may be reassigned. Only those within the described class may be assigned, or reassigned, to the contracting school; *Board of Education v. Board of Education,* 259 N.C. 280, 130 S.E. 2d 408; but anyone within the described class may apply for reassignment. If he establishes the facts required by the statute, he must be reassigned.

MOORE, J., dissenting:

My interpretation of the Pupil Assignment Law, G.S. 115-176 to G.S. 115-179, differs from that of a majority of the Court. To me the conclusion seems inescapable that a child has no such vested legal right to attend a school, outside the administrative unit in which he or she resides, as will permit him or her to appeal from a denial of permission therefor by the board of education of the home unit.

It is provided that "Each county and city board of education *is . . . authorized and directed* to provide for the assignment to a public

school of each child residing within the administrative unit who is qualified under the public laws of this State for admission to a public school." G.S. 115-176. This imposes a positive duty on each board of education. It is contemplated that the assignments will be to schools in and maintained by the administrative unit. The board of education has the corellative duty to provide and maintain schools for the pupils to attend.

Obviously emergencies may arise or unusual circumstances exist which would require or make advisable the assignment of children or a child to a school or schools outside the unit. To provide for such contingency it is written: "A child residing in one administrative unit *may be assigned* . . . to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official record of such boards." G.S. 115-176. This provision is permissive (". . . may be . . .") and not mandatory, and presupposes consent and agreement in writing between the boards of education of the affected units. It confers no right upon a child in the absence of the affirmative consent of both boards involved. In the instant case there is no writing and the Fremont Board has not consented.

Ordinary general assignments are made summarily by boards of education. Parents or guardians desiring their children to be reassigned may request such in writing and if the request is denied may obtain a hearing. "If, at the hearing, the board shall find that the child is entitled to be reassigned to such school (to which assignment is desired), or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children, the board shall direct that the child be reassigned to and admitted to such school." G.S. 115-178. Patently "such school" referred to in this provision is not a school of an outside administrative unit. Certainly it was not contemplated by the General Assembly that the board of education of Unit A should pass upon and make a determination of what will interfere with the proper administration, interfere with the proper instruction of pupils, and will endanger the health or safety of students, of a school of Unit B. A board is in a position to determine the conditions in one of its own schools, but not in a school under the jurisdiction of another board. The hearing and appeal provisions of the law do not logically apply to a proceeding such as that attempted in the case at bar.

It was not intended that upon a showing that a child will receive better advantages in another administrative unit, and the unit can receive the child without injury, such child thereby becomes legally entitled to transfer to that unit if the "welcome mat" is out. Carried to its extreme but logical conclusion this theory could depopulate the schools of a small county, having small schools. Weaker administrative units will be helpless to prevent their desiccation.

BOBBITT, J., joins in this dissenting opinion.

LISTON B. FRANKLIN v. STANDARD CELLULOSE PRODUCTS, INC., UNIVERSAL TRUCKING LEASING, INC., AND WILLIS S. GOGGANS, ADMINISTRATOR OF THE ESTATE OF CLARENCE WILLIS GOGGANS, DECEASED.

(Filed 15 April, 1964.)

Process § 15—

The 1953 Amendment to G.S. 1-105 authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident.

HIGGINS, J., dissenting.

APPEAL by defendant administrator from *Phillips, E.J.*, November 1963 Session of RICHMOND.

This action grows out of a collision of two tractor-trailers. The collision occurred February 21, 1962, in Lee County, North Carolina, on U. S. Highway No. 1. One tractor-trailer (southbound) was operated by plaintiff. The other (northbound) was operated by Clarence Willis Goggans, referred to hereafter as Goggans. The collision caused plaintiff's injury and Goggans' death.

On November 13, 1962, plaintiff instituted this action against the corporate defendants to recover damages for personal injuries. He alleged, in substance, that the collision and his injuries were proximately caused by the negligence of Goggans and that Goggans was operating the northbound tractor-trailer as agent for the corporate defendants.

Goggans died intestate on or about February 21, 1962, in Lee County. He was a resident of Lamar County, Georgia. On May 6, 1963, in

Lamar County, Georgia, Willis S. Goggans, referred to hereafter as appellant, was duly appointed and qualified as administrator of the estate of Goggans and is now acting in that capacity.

At May Session, 1963, an order was entered making appellant a party defendant and allowing plaintiff to file an amended complaint. Plaintiff filed amended complaint and caused summons for appellant to be issued to the Sheriff of Wake County. This summons and the amended complaint were served on the Commissioner of Motor Vehicles, who forwarded them to appellant, all in strict compliance with the procedural requirements of G.S. 1-105.

On July 17, 1963, appellant moved that the court "dismiss the amended complaint or in lieu thereof . . . quash the return of service of summons . . ." The court, being of opinion "that the 1953 Amendment to G.S. 1-105 subjects non-resident personal representatives of non-resident motorists to suit in North Carolina in actions arising out of the operation by non-resident motorists, since deceased, of automobiles upon the highways of this State and to service of process in such actions as provided in G.S. 1-105," held that "the defendant administrator" had been properly served with summons in this action and had the legal capacity to be sued herein and denied appellant's motion. Appellant excepted and appealed.

Pittman, Pittman & Pittman for plaintiff appellee.

Dupree, Weaver, Horton & Cockman for defendant administrator appellant.

BOBBITT, J. Appellant contends "he is not a party against whom such an action may be prosecuted in the State of North Carolina and is not subject to service of process under G.S. 1-105" and therefore the action as to him should be dismissed for lack of jurisdiction. He cites G.S. 28-176 and *Cannon v. Cannon,* 228 N.C. 211, 45 S.E. 2d 34, as authority for the proposition that an action may not be prosecuted in this State against a foreign administrator.

G.S. 28-176 provides that "(a)ll actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity."

In plaintiff's alleged cause of action against appellant, the estate of Goggans is the real party in interest. G.S. 28-176 requires that such an action against the administrator of Goggans be brought against him in his representative capacity. However, this statute *is silent* as to any distinction between a resident and a foreign personal representative.

In *Cannon,* Denny, J. (now C.J.), after quoting G.S. 28-176, indicates the basis of decision in these words: "But we have no statutory authority which authorizes a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity." See *Brauff v. Commissioner of Revenue,* 251 N.C. 452, 456, 111 S.E. 2d 620.

The question for decision on this appeal is whether G.S. 1-105 as amended in 1953 authorizes plaintiff's action against appellant and service of process in the manner prescribed therein.

Prior to the 1953 amendment, the statute (Chapter 75, Public Laws of 1929, later codified as G.S. 1-105) made no provision for service of process upon the executor, administrator or personal representative of the nonresident motorist, who, if living, might have been served. Hence, this Court held in *Dowling v. Winters,* 208 N.C. 521, 181 S.E. 751, decided in 1935, that service on the nonresident executor of a nonresident decedent was invalid and did not confer jurisdiction. As early as 1936, an amendment to the 1929 Act so as "to make it apply to executors and administrators of deceased nonresident motorists" was advocated. 14 N.C.L.R. 368 *et seq.*

G.S. 1-105, as codified in the 1963 Cumulative Supplement to G.S. Vol. 1A, recompiled, in pertinent part provides:

"§ 1-105. Service upon nonresident drivers of motor vehicles *and upon the personal representatives of deceased nonresident drivers of motor vehicles.* — The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney *and the attorney of his executor or administrator,* upon whom may be served all summonses or other lawful process in any action or proceeding against him *or his executor or administrator,* growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him *or his executor or ad-*

ministrator shall be of the same legal force and validity as if served on him personally, *or on his executor or administrator.*

"Service of such process shall be made in the following manner:

"(1) . . .

"(2) . . .

"(3) . . .

"Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as if (sic) provided in the case of a nonresident motorist. (Our italics).

"The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

G.S. 1-105, as appeared in the 1951 Cumulative Supplement to G.S. Vol. 1, was amended and rewritten by Chapter 796, Session Laws of 1953, so as to insert and include therein the italicized words in the portion quoted above. The 1953 Act is entitled "AN ACT TO PROVIDE FOR SERVICE UPON NONRESIDENT DRIVERS OF MOTOR VEHICLES AND UPON THE PERSONAL REPRESENTATIVES OF DECEASED NONRESIDENT DRIVERS OF MOTOR VEHICLES."

In accord with the views expressed in the order of Judge Phillips, we are of opinion and hold that G.S. 1-105 as amended in 1953 authorizes plaintiff's action against appellant and service of process in the manner prescribed therein. Except for changes in respect of *the manner of service,* it seems clear that the authorization of such an action and service of process therein was the only purpose and significant effect of the 1953 amendment. See 31 N.C.L.R. 395 *et seq.* An action authorized by G.S. 1-105 as amended in 1953 is an exception to the general rule stated in *Cannon v. Cannon, supra.*

It is noted that appellant makes no contention that any provision of G.S. 1-105 is unconstitutional.

Affirmed.

HIGGINS, J. dissenting: I agree with so much of the Court's opinion as holds a nonresident motor vehicle driver by using the public highways of North Carolina thereby constitutes the Commissioner of Motor Vehicles *a process agent for himself and his personal representative.* The statute relates solely to service of process. It does not create or en-

large any cause of action. It does not modify or remove any defense. Neither a cause of action nor a defense is determined by the method by which the parties come into court. It is immaterial whether they come by personal service, service by publication, or by service on a process agent. The legal rights of all parties in either instance are determined by the showing they make, or fail to make, in court. I do not agree, therefore, that the Legislature intended to authorize an executor or administrator appointed by a foreign probate court to sue or be sued in his representative capacity here merely because his testator or intestate in his lifetime drove a motor vehicle over North Carolina highways, thereby appointing the Motor Vehicles Commissioner his process agent. "It is provided in G.S. 28-176: That 'All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity.' But we have no statutory authority which authorizes a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. *Bank v. Pancake,* 172 N.C. 513, 90 S.E. 515; *Glascock v. Gray,* 148 N.C. 346, 62 S.E. 433; *Scott v. Lumber Co.*, 144 N.C. 44, 56 S.E. 548 . . . And in the absence of statutory authority, an administrator or executor cannot maintain an action in his representative capacity in the courts of any State other than the one from which he derived his appointment. 108 A.L.R., Anno. 1282; 34 C.J.S. 1259; 21 Am. Jur., 857; McIntosh, N.C. Practice and Procedure, 234; Restatement of the Conflict of Laws, Ch. 11, § 507; Woerner on American Law of Administration, Vol. 1, 558; Schouler on Wills, Executors and Administrators, Vol. IV, § 3501." *Cannon v. Cannon,* 228 N.C. 211, 45 S.E. 2d 34.

A foreign representative brought in to defend must necessarily have the right to counterclaim. Thus the vicarious method of service on the Commissioner of Motor Vehicles permits the parties to litigate in a manner not open to them otherwise. Surely such can not be sound law.

MINNIE B. CLODFELTER v. JOHN B. CARROLL.

(Filed 15 April, 1964.)

1. Automobiles § 19; Negligence § 10—

The doctrine of last clear chance or discovered peril presupposes antecedent negligence on the part of the defendant and antecedent contributory

negligence on the part of the plaintiff, and is applicable only if defendant saw or, in the exercise of ordinary care, should have discovered plaintiff's position of peril subsequent the negligence and contributory negligence in time to have avoided the injury in the exercise of due care.

2. Automobiles § 45—

Evidence tending to show that plaintiff pedestrian was walking on her left side of the highway, facing traffic, near the edge of the hard surface, that the highway had a four foot shoulder, that plaintiff saw the lights of defendant's car approaching, that the right fender struck her before she got off the hard surface, and that when defendant stopped his car plaintiff was lying on the shoulder almost opposite the rear of the vehicle, without any evidence that defendant saw anything that should have put him on notice that plaintiff would not step off the hard surface and avoid injury, *is held* insufficient to raise the issue of last clear chance.

APPEAL by defendant from *McLaughlin, J.*, September 1963 Civil Session of DAVIDSON.

Civil action to recover damages for personal injuries allegedly caused by defendant's negligently striking plaintiff, a pedestrian, with his automobile.

Defendant in his answer denied negligence and conditionally pleaded plaintiff's contributory negligence as a bar to any recovery by her. Plaintiff, by reply, denied any contributory negligence on her part, but pleaded that if she were guilty of contributory negligence, then defendant by the exercise of reasonable care had the last clear chance to avoid injuring her after he discovered, or should have discovered, her perilous position and her incapacity to escape therefrom.

Both parties introduced evidence. The court submitted issues of (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages. The jury answered the first three issues in the affirmative and awarded damages in the sum of $5,000. From a judgment in accord with the verdict, defendant appeals.

Walser and Brinkley by Walter F. Brinkley for defendant appellant.
W. H. Steed for plaintiff appellee.

PARKER, J. Defendant assigns as error the submission to the jury of the third issue of last clear chance. This presents for determination the question as to whether there was sufficient evidence, considered in the light most favorable to plaintiff, to require submission of the issue of last clear chance to the jury. *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150.

The allegations of fact in the complaint, which are admitted in the answer to be true, and plaintiff's evidence show the following facts:

On 7 October 1961 plaintiff, a woman 75 years of age, attended the evening services conducted by Rev. L. W. Hill in a tent on the west side of Highway 109 about four miles south of the town of Thomasville. In the area where plaintiff was injured Highway 109 runs north and south and is a black-top, tar and gravel highway, the hard-surfaced part being about 21 feet wide with dirt shoulders on each side four to five feet wide. She lived on the Sullivan Road, which leads off Highway 109 to the west about 300 or 400 yards north of the revival tent. The highway between the revival tent and Sullivan Road is straight and practically level, and the view between these points is unobstructed.

When the religious services ended about 9 p.m., plaintiff went to Highway 109 to return to her home, and began walking north on its western side, which was its left side in the direction she was walking. She was walking with one foot on the pavement and one foot on the dirt shoulder. At the same time, defendant was driving his 1953 Chevrolet automobile south on Highway 109.

She testified on direct examination: "I saw a car coming after I got about 100 yards. I saw the lights of the car. I watched up and down both ways. The lights of the car were about 100 yards away when I first saw it. When I saw the lights on the car 100 yards away, I stepped off about two steps further so I was sure to be out of the way — short steps — I take short steps. At the time when I first saw it, the lights of the car, I was off then one foot just touching even with the edge of the pavement. As to how the car was coming toward me, from where I saw the car lights 100 yards away, in about two seconds they got there and got me. When I first saw the lights, I tried to move and I didn't get a step. I tried to move south. I tried to move off of the pavement. It was just a twinkling of an eye from the time I saw the lights until the car hit me. It was about two seconds. It hit me in the hip * * *. I never did hear its horn. There was nothing behind me at all at the time I was hit. There were not any lights of another car behind me and there wasn't no cars, only that truck on the other side of the road. It passed on a little piece on the other side when this car come along. In other words, this truck had passed me before I saw the headlights on the other car. The truck had come up from towards Denton and went towards Thomasville."

She testified on cross-examination: "At the time I first saw those lights I had both feet right on the edge of the pavement. I stepped over, was getting away. As soon as I saw the car coming with me standing there with both feet on the pavement, I stepped off right quickly. I was in a hurry to get away from there. I dodge automobiles if they ain't going too fast. * * * The right wheel hit me in the hip. It was

about two seconds from the time I saw the car first until it hit me. In that two seconds I was stepping off of the road." On cross-examination she testified to the effect that her testimony that the car was 100 yards away when she first saw it was based on what people who measured it told her.

After she was struck by the automobile, her body came to rest 18 inches to two feet off the hard-surfaced part of the highway on the left or western dirt shoulder, with her head to the south and her feet to the north.

Roy Byerly, a witness for plaintiff, testified in substance: He was standing in the yard of his home on Sullivan Road. He heard tires squalling down Highway 109. He got in his car, drove down the highway, and saw plaintiff lying on the shoulder of the highway about two feet off the hard-surfaced part of the road. He saw defendant standing there by his car. He testified, "His car was sitting there right beside of Mrs. Clodfelter as well as I remember." All four wheels of defendant's car were on the pavement. Behind his car and leading up to it he saw two unbroken skid marks. The westermost skid mark was at least two feet on the hard surface of the highway at all points he could see it.

Plaintiff's husband saw defendant at the door of the hospital in Thomasville. He testified in substance: Defendant talked to him a few words. He said he saw something from off a distance up the road at the Sullivan Road intersection, but he could not tell what it was. He could not tell what it was until he got closer. He said he was going tolerably fast, about 60 to 65 miles an hour. He said he was up the road a good distance when he first saw Mrs. Clodfelter. He said he did not know what it was until he got pretty close, and he threw on his brakes.

A few days after the collision, defendant saw plaintiff in the hospital in High Point. Plaintiff testified, "He [defendant] said he didn't see me."

Defendant's evidence is to this effect: He, with his wife as a passenger in the car, was driving his automobile in a southern direction on Highway 109 at a speed of 40 to 45 miles an hour from Thomasville toward his home in Denton. His car was in good working order. It was a fair night. In the area of the highway between Sullivan Road and the revival tent the highway is straight with "one dip." As he approached the place where the accident occurred, he met an automobile approaching him. He dimmed his lights. Just after the glare of the lights got off when the cars passed each other, he saw plaintiff standing 30 to 36 inches on the hard-surfaced part of the road facing him,

about 125 feet ahead of him. His lights on dim gave him a vision of 250 feet ahead. At that time another car was meeting him on the highway. When he saw plaintiff, he applied his brakes as quickly as he could and got as close to the center of the road as he could. His car slid forward and struck plaintiff standing on the pavement, where she was when he first saw her. When his car came to a stop, plaintiff was lying just a little ways behind his rear bumper. He had no chance to get out of the right lane of the highway to his left because of the approaching car, and if he had turned right on the shoulder he would have hit her, and also there was a slight fill there. He had no conversation with plaintiff's husband at the door of the hospital in Thomasville about the accident.

Defendant states in his brief that from plaintiff's evidence that he told her husband he was driving 60 or 65 miles an hour, an inference may be reasonably drawn that he was exceeding the maximum speed limit, and, therefore, he "will forego any contention that there is an absence of evidence of negligence on his part." There is ample evidence tending to show plaintiff was guilty of contributory negligence, and the jury by its answer to the second issue so found.

The doctrine of last clear chance presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, such as would, but for the application of this doctrine, defeat recovery. *McMillan v. Horne,* 259 N.C. 159, 130 S.E. 2d 52; *Barnes v. Horney,* 247 N.C. 495, 101 S.E. 2d 315; *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337; 65 C.J.S., Negligence, sec. 137, b.

The elements of the doctrine of last clear chance have been defined countless times by this and other courts and text writers, since its origin in the famous hobbled ass case of *Davies v. Mann,* 10 M. & W. 546, 152 Eng. Rep. 588 (1842). Unless all the necessary elements of the doctrine of last clear chance are present in order to bring the doctrine into play, the case is governed by the ordinary rules of negligence and contributory negligence. 65 C.J.S., Negligence, sec. 137, a. All the necessary elements of the doctrine are lucidly stated by Ervin, J., in *Wade v. Sausage Co., supra,* as follows: "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.]"

Mathis v. Marlow, filed contemporaneously with this opinion, *post,* 636, 135 S.E. 2d 633, quotes from 65 C.J.S., Negligence, sec. 137, e, p. 775, as follows: "The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively."

Plaintiff, according to her testimony, was walking north on the western side of the highway, with one foot on the hard-surfaced part and one foot on the western shoulder, or with both feet on the hard-surfaced part, facing defendant's approaching automobile. She saw its approaching lights when it was, if not 100 yards away, at least some appreciable distance away from her. The road was straight and level, and there was no obstruction to her view ahead. According to defendant's testimony, when he first saw her about 125 feet ahead of him she was standing 30 to 36 inches on the hard-surfaced part of the road facing him. Considering the evidence in the light most favorable to plaintiff, there was, in our opinion, nothing in the situation to indicate to an ordinarily prudent person that plaintiff in the exercise of ordinary care for her own safety could not reasonably escape from the position of danger by stepping off the hard-surfaced part of the road onto the four or five foot dirt shoulder to her left so as to avoid being struck by his approaching car, or that she was oblivious of peril and apparently would not avail herself of the opportunity open to her for doing so before she suffered injury at his hands. Viewed in the light most favorable to plaintiff, the evidence fails to establish that at any time immediately prior to the accident she was helpless or unconscious of the impending danger, or incapable to escape from it. It is true she said, "I tried to move and I didn't get a step," but she also testified she had walked immediately prior to the accident 100 yards, and that "I stepped off right quickly. * * * I dodge automobiles if they ain't going too fast." If she tried to move and did not get a step, there is nothing in the evidence to indicate that defendant knew it, or by the exercise of ordinary care should have discovered it. Plaintiff in the full possession of her faculties merely unwittingly, carelessly, and in

disregard of her own safety failed to remove herself from the path of defendant's oncoming car, when she had full time and opportunity to do so and so avoid an obvious danger and the injuries she sustained. Under such circumstances, the doctrine of last clear chance is wholly inapplicable.

The trial court committed error in submitting the third issue to the jury. This issue will be stricken, which leaves the damage issue without support. The answer to the damage issue will be stricken.

In view of the disposition we have made of this appeal, we refrain from discussing or deciding the merits of defendant's assignment of error for failure to dismiss as in case of nonsuit. *Ingram v. Smoky Mountain Stages, Inc., supra.*

The case is remanded to the superior court of Davidson County to the end that judgment shall be entered on the jury's answers to the issues of negligence and contributory negligence denying recovery and dismissing the action. *Mathis v. Marlow, supra; McMillan v. Horne, supra; Ingram v. Smoky Mountain Stages, Inc., supra.*

Error and remanded.

JOHN SHERMAN MATHIS v. WALTER GASTON MARLOW.

(Filed 15 April, 1964.)

1. Automobiles § 19; Negligence § 10—

Defendant's original negligence, relied on as the basis for recovery, is barred by contributory negligence and cannot be relied on as the basis of the doctrine of last clear chance, and the doctrine of last clear chance applies only if defendant has a sufficient interval of time to avoid injury after the acts or omissions constituting negligence and contributory negligence have transpired and defendant saw or should have seen plaintiff's position of peril.

2. Automobiles § 45—

Evidence tending to show that plaintiff stepped into the street between intersections where there was no marked crosswalk while vehicles were stopped in response to a traffic control light, that the light changed while plaintiff was crossing the street, and that he was struck by defendant's car as he stepped from behind a parked car immediately in front of defendant's car, and that defendant stopped immediately upon seeing plaintiff in front of him, *is held* insufficient predicate for the submission of the issue of last clear chance, since the evidence does not place plaintiff in a position of peril until it was too late for the doctrine to be invoked.

APPEAL by defendant from *Gambill, J.,* Regular September Civil Session 1963 of WILKES.

This is a civil action to recover for personal injuries received by the plaintiff about 3:30 p.m. on Saturday, 3 March 1962, when the traffic was heavy on Tenth Street in the Town of North Wilkesboro.

Tenth Street is a one-way street with traffic moving from the south toward the north, with two lanes for travel and lanes for parking on the east side and west side. The accident complained of occurred between C Street and B Street, both of which run east and west intersecting Tenth Street. At both ends of the block in which the accident occurred traffic was controlled by electric traffic signal lights. There were no crosswalks in said block except at the traffic lights.

The defendant's car, which was being driven at the time by his son, Jerry Lee Marlow, accompanied by his mother, Mrs. Doris Marlow, and his sister, Oleen Marlow, had stopped for a red light at the intersection of Tenth and C Streets. The defendant's car was the second or third car from the traffic light. The car was stopped, waiting for the traffic light to change from red to green.

The plaintiff, according to his testimony, was about 90 feet south of the intersection of Tenth and C Streets when he stepped from the sidewalk on the east side of Tenth Street while the light was red, and passed between two parked vehicles. "I started to the west side 'twixt them and I got about the second lane and this car struck me. * * * It knocked me down, partly down." The automobile of the defendant was standing still when plaintiff started across the street. Plaintiff further testified, "I was in about the third lane from the east side of the street. He was close on me when he struck me. It was the left front fender of the car that struck me. * * * I didn't see the light change. I looked at the light just before he struck me. I guess I had went five or ten steps or something out there after I went off the sidewalk. * * * I was in the second lane after you pass the parking lane. * * * It was the left front fender of the Marlow car that struck me. I went back to the east side of the street after I was hit. My feet was closer to the west side of the street but my head was closer to the east side. I went down when I was hit."

Jerry Lee Marlow, the driver of the defendant's car, testified that he had stopped the car behind another car in front of him waiting for the light to change, "and when it changed, I started to move on just as the man stepped in front of the car. I was headed for Winn-Dixie and was in the right-hand lane. I hit the man just as I saw him. He come around the car and asked me couldn't I see as big a thing as a man and I told him, 'No, I couldn't see him in time.' I stopped when I hit him. The traffic was heavy at the time. * * * The right front fender hit Mr. Mathis."

The other two occupants of the Marlow car testified that the Marlow car was in the right-hand traffic lane when the accident occurred; that the plaintiff stepped directly out in front of the car and that is when the accident occurred. These witnesses testified that the right side of the vehicle struck Mr. Mathis.

The only eyewitness to testify for the plaintiff testified, "Mr. Mathis was sorta more or less in a crouched position when I saw him pulling himself up, and he was on his feet when I saw him. He walked on to the west side of the car and then walked down on the west side * * *. The Buick automobile that Jerry Marlow was driving was in the right lane, the right side."

The defendant tendered issues of negligence, contributory negligence and damages. The court refused to submit these issues and the defendant excepted.

The court submitted issues of negligence, contributory negligence, last clear chance, and damages.

The jury answered the issues of negligence and contributory negligence in the affirmative. The issue of last clear chance was answered by the jury in favor of the plaintiff and the jury assessed damages.

The defendant appeals from the judgment entered on the verdict and assigns error.

T. R. Bryan and Ferree & Brewer for appellee.
Hayes & Hayes for appellant.

DENNY, C.J. The decisive question on this appeal is whether or not the evidence was sufficient to take the case to the jury on the third issue.

There is nothing in the evidence which tends to show that the defendant's automobile moved more than a few feet after the traffic signal changed before it came in contact with the plaintiff. Likewise, the evidence is clearly to the effect that the driver of the defendant's car stopped the car immediately upon seeing the plaintiff in front of him. The plaintiff testified that the Marlow car was still when he stepped into the street. The driver of defendant's car was not guilty of negligence by stopping in a line of vehicular traffic at a red traffic signal. It would seem that the only negligence, if any, on the part of the driver of the defendant's car was in starting the car after the light changed without ascertaining that the movement could be made in safety. If negligence in this respect be conceded, it would necessarily have to be the negligence upon which the jury answered the first issue in the affirmative.

We do not think the evidence before us places the plaintiff in a perilous position until it was too late for the doctrine of last clear chance to be invoked. "The doctrine is clearly inapplicable where the peril and defendant's discovery of the peril or his duty to discover it arose so shortly before the accident as to afford him no opportunity by the exercise of the greatest possible diligence, to avoid the injury. The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." 65 C.J.S., Negligence, section 137 (2) e., page 774, *et seq.*

The original or primary negligence of a defendant, which would warrant answering the first issue in the affirmative, cannot be relied upon by the plaintiff to recover under the last clear chance doctrine. A recovery on the original negligence is barred in such cases by the plaintiff's contributory negligence. The plaintiff's right to recover, notwithstanding his own negligence, must arise out of a factual situation which gave the defendant an opportunity, through the exercise of reasonable care, to have avoided the injury to him but failed to do so. *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109; *Manufacturing Co. v. R. R.,* 233 N.C. 661, 65 S.E. 2d 379; *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150; *Irby v. R.R.,* 246 N.C. 384, 98 S.E. 2d 349; *Gunter v. Winders,* 256 N.C. 263, 123 S.E. 2d 475; *McMillan v. Horne,* 259 N.C. 159, 130 S.E. 2d 52.

In *McMillan v. Horne, supra, Higgins, J.,* speaking for the Court, said: "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 the case of *Ingram v. Smoky Mountain Stages,* 225 N.C. 444, 35 S.E. 2d 337, Barnhill, J., later C.J., said: "Its application (the 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. (Citations omitted.)

"Plaintiff may not recover on the original negligence of defendant for such recovery is barred by his own negligence. The duty resting on the defendant, the breach of which imposes liability under the doctrine, arises after the plaintiff has placed himself in a perilous position and (it) is the duty (of the defendant), after notice express or implied, of plaintiff's situation, to exercise reasonable care to avoid the impending

injury. It is what defendant negligently did or failed to do after plaintiff put himself in peril that constitutes the breach of duty for which defendant is held liable."

In our opinion, the trial court committed error in submitting the third issue and we so hold. This issue 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 Wilkes County where judgment will be entered on the issues of negligence and contributory negligence, denying recovery and dismissing the action.

Error and remanded.

LILLIAN SHACKLEFORD v. ROBERT E. TAYLOR.

(Filed 15 April, 1964.)

1. Judgments § 13—

An unverified complaint is insufficient basis for a default judgment, either final or upon inquiry.

2. Judgments § 22—

The lower court entered an order setting aside default judgment against defendant on the ground of excusable neglect upon findings that the complaint was not verified and that defendant, without experience in such matters, believed it to be nothing more than a notice that suit would be instituted against him if settlement were not made. *Held:* The order setting aside the default judgment is affirmed under the presumption in favor of the order.

3. Appeal and Error § 39—

The presumption is in favor of the regularity of the order or judgment of the lower court.

APPEAL by plaintiff from *McLaughlin, J.*, September 9, 1963 Regular Civil Session, DAVIDSON Superior Court.

This appeal is from an order setting aside two judgments entered in favor of the plaintiff and against the defendant for failure to answer. The Assistant Clerk Superior Court entered judgment by default and inquiry on February 2, 1963. At the March Term following, the jury fixed plaintiff's damages at $20,000.00. The court signed judgment in accordance with the verdict.

On July 30, 1963, the defendant filed a verified motion in the cause, alleging his failure to answer the complaint and to appear in court

which entered the judgments against him was through his mistake, inadvertance, surprise, and excusable neglect; and that he had a meritorious defense to the cause of action alleged against him.

After a full hearing, Judge McLaughlin made detailed findings of fact, the essentials of which are summarized in the opinion, and upon these findings concluded the defendant's failure to answer, appear, and defend the action was excusable; and, further, that he had a meritorious defense. The motion was lodged within the time permitted by G.S. 1-220. Judge McLaughlin's order setting aside the judgments allowed the defendant time to answer. The plaintiff appealed.

W. H. Steed, for plaintiff appellant.
DeLapp & Ward for defendant appellee.

HIGGINS, J. The evidence before Judge McLaughlin, in short summary, disclosed the following: On the afternoon of August 5, 1962, the plaintiff was riding beside her husband in the front seat of a Plymouth automobile as he drove slowly along Highway No. 220 in the Town of Candor in Montgomery County. Traffic was heavy. The defendant, a State Highway Patrolman, undertook to back the patrol car into the highway from its parked position between two other vehicles, all parked at an angle to the curb. The Plymouth approached from the rear. The two vehicles came in contact. The rear bumper of the patrol car creased the body of the Plymouth, bending the right rear fender. Both vehicles stopped almost instantly. The plaintiff and her husband, and their children also riding in the car, said they were uninjured.

On August 27, 1962, the defendant notified his superior officer, Corporal Mount, that he had been involved in an accident in which some slight damage had been done to the Shackleford vehicle. The following day Corporal Mount interviewed the plaintiff's husband with respect to repairing the damage to the automobile which they estimated as $60.00 to $90.00.

On December 17, 1962, the plaintiff instituted suit in the Superior Court of Davidson County for $25,000.00 damages for personal injuries alleged to have resulted from the accident in Candor. Summons under seal of the court was issued, directed to the Sheriff of Montgomery County. A copy was delivered to the defendant with a copy of the complaint signed by plaintiff's attorney. The copy of the summons with seal attached did not contain the signature or name of the clerk. The verification on the copy of the complaint was blank — unsigned either by plaintiff or any official.

The defendant testified he was new on the Highway Patrol; that he had never testified as a witness in the superior court; that he had never

seen a civil summons and considered the papers, unsigned except by the plaintiff's attorney, as nothing more than a notice that unless he made settlement, a suit would be instituted against him for damages; that he was certain he had sufficient evidence to show that the contact between the two vehicles was too slight to have caused any physical injury to the plaintiff. After he received the papers he notified Corporal Mount that he was threatened with a suit for damages. Corporal Mount advised him not to employ counsel, that the insurance company had been notified of the accident and would take over.

The defendant had no actual notice of any hearing or judgment, either by default or final, until March 20, 1963. On that day plaintiff's counsel made demand for the payment of $20,000.00 due by judgment. Immediately after this notice and well within the time limit, the defendant moved to set aside the judgments. The court sustained the motion and entered an order permitting the defendant to answer, all upon a finding that the failure to answer was excusable and that he had a meritorious defense.

The decisions of this Court are not altogether in harmony with respect to what constitutes excusable neglect. For a list and digest of the cases involving the power of the court to grant relief from a judgment, order, verdict, or other proceeding because of failure to appear, plead, or defend (G.S. 1-220), see Strong's North Carolina Index, Vol. 3, Judgments, § 22; N. C. Law Review, Vol. 31, p. 324, Vol. 37, p. 472, Vol. 41, p. 267. In certain cases the facts clearly indicate the failure to appear, plead, or defend was excusable, and others the failure was inexcusable. "The decisions on the subject . . . 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." *Greitzer v. Eastham*, 254 N.C. 752, 119 S.E. 2d 884. The difficulty arises in those cases which do not fall clearly in either category. This is such a case.

In so far as basis for the cause of action is concerned, the copy of the complaint served on the defendant gave him notice of nothing more than was contained in his copy. Thus the record presents a serious question whether the defendant was given any notice of a pleading which would support a default judgment because of failure to answer. Technically, at least, the plaintiff failed to deliver a copy of such complaint. An unverified complaint is an insufficient basis for a default judgment, either final or upon inquiry. *Pruitt v. Taylor*, 247 N.C. 380, 100 S.E. 2d 841. If the plaintiff insists the defendant was guilty of inexcusable neglect in treating the complaint as a mere demand for the settlement of damages out of court, then she should not insist too vigor-

ously on the validity of a default judgment based upon a complaint which she permitted him to believe was unverified.

The trial court heard the evidence, made the findings of fact, and ordered the judgments set aside. In a case so close, the presumption of regularity in favor of the order below may be upheld upon the ground error is not made to appear. The plaintiff will have full opportunity to try her case before a jury in her own county. *Finance Co. v. McDonald,* 249 N.C. 72, 105 S.E. 2d 193; *Nicholson v. Cox,* 83 N.C. 48.

The judgment of the Superior Court of Davidson County is

Affirmed.

FREDA P. WOODS v. DAVID YOUNG TURNER.

(Filed 15 April, 1964.)

1. Pleadings § 7—

A defendant may set up and rely upon contradictory defenses.

2. Same; Pleadings § 19; Torts § 4—

In an action by a passenger against the driver of the other car involved in the collision the defendant may deny negligence on his part and conditionally plead negligence on the part of the driver of the car in which plaintiff was riding, that such driver was plaintiff's agent and assert such negligence in bar of recovery and, in the alternative, allege that if such driver was not plaintiff's agent such driver should be joined as a joint tortfeasor for contribution, and demurrer on the ground that the defenses were inconsistent should have been overruled.

APPEAL by original defendant David Young Turner, from an order sustaining a demurrer to a cross action for contribution entered by *Stevens, E.J.,* December Assigned Civil Session, WAKE Superior Court.

The plaintiff alleged that on December 21, 1962, she was injured while riding as a guest passenger in a 1959 DeSoto automobile operated by her husband, William S. Woods. At the time the road was "icy." She alleged further, that the defendant negligently and carelessly operated his automobile on the wrong side of the road and negligently collided with the DeSoto in which she was riding, causing her serious and permanent injuries.

The defendant filed answer in which he denied negligence and asserted a counterclaim and five other further defenses in which he alleged in substance that the plaintiff was the owner of the vehicle, or the co-owner with her husband, and that his negligence was the sole, or one

of, the causes of the accident; and that his negligence was imputable to the plaintiff. The defendant conditionally pleaded contributory negligence in bar. He also alleged that his vehicle skidded out of control on the slick road, stopped on the wrong side, and before he could move it the plaintiff and her husband came over the hill, saw, or should have seen, his helpless situation, had the last clear chance to avoid striking his vehicle, and failed to avail themselves of that opportunity. As a sixth further defense and cross action, the defendant, in the alternative, alleged that if he should be found to be negligent and his negligence should be found to be one of the proximate causes of the plaintiff's injuries, and if it be found that the plaintiff was not the owner of the DeSoto, or that the negligence of the driver was not imputable to her, then and in that event the negligence of William S. Woods was also one of the proximate causes of the accident and the plaintiff's resulting injury; and that William S. Woods should be brought in as a joint tort-feasor for contribution.

Judge Stevens sustained the demurrer to the defendant's cross action for contribution against William S. Woods, entered an order to that effect allowing the defendant to file an amended answer, "provided said amended answer does not contain both a cross action and an allegation that William S. Woods was acting as the agent of the plaintiff." The defendant excepted and appealed.

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for defendant Turner, appellant.

Young, Moore & Henderson by J. Allen Adams and Carter G. Mackie for additional defendant William S. Woods, appellee.

HIGGINS, J. The trial judge apparently sustained the demurrer to the defendant's cross action against William S. Woods for contribution upon the ground the defendant, in another further defense, had alleged that William S. Woods was driving the plaintiff's vehicle as her agent; and that his negligence was imputable to her and thus barred her right to recover. The plaintiff cites as authority *Bass v. Ingold,* 232 N.C. 295, 60 S.E. 2d 114; and *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73.

The plaintiff and the court overlooked the fact the defendant's cross action against the additional defendant was alleged in the alternative. The cross action was asserted on condition that the further defenses of agency and ownership, etc., should be found against the original defendant. The rule approved in *Bass* and *Evans* does not apply in the present situation. The applicable rule is stated by Johnson, J., in *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673: "As to this contention, it

is enough to say that a defendant who elects to plead a joint tort-feasor into his case is not required to surrender other defenses available to him. Nor may an additional defendant who is brought in as a joint tort-feasor on cross complaint of an original defendant escape the plea against him by borrowing from contradictory allegations made by the cross-complaining defendant by way of defense against the plaintiff or by way of separate pleas over against other defendants. It is elementary that a defendant may set up and rely upon contradictory defenses." See also, *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434.

The rule is stated by *Bobbitt, J.*, in *Jones v. Aircraft Co.*, 253 N.C. 482, 117 S.E. 2d 496: "The fact that an original defendant denies negligence and otherwise asserts defenses in bar of the plaintiff's right to recover does not preclude him from alleging, conditionally or in the alternative, that *if he were negligent* a third party was also negligent, and that the negligence of such third party concurred with the negligence of the original defendant in causing the injury or death." The ultimate result is this: If the original defendant fails to make good on his defenses and is found to be liable, his conditionally asserted cross action for contribution is available to him.

The trial court committed error in sustaining the demurrer to the cross action merely upon the basis of contradictory allegations in the other defenses. After the evidence is in, the court will have opportunity to make appropriate rulings in the light of the evidence. The pleadings alone do not furnish enough light for that purpose.

Reversed.

CYNTHIA JEANNE RAMSEY, BY AND THROUGH HER NEXT FRIEND, EARLE GENE RAMSEY, PETITIONER v. NORTH CAROLINA VETERANS COMMISSION, RESPONDENT.

(Filed 15 April, 1964.)

1. Constitutional Law § 20—

The constitutional proscription against discrimination does not preclude the General assembly from selecting and classifying objects of legislation and thus create inequality provided the classifications are reasonable and just and apply uniformly to all persons of the affected class.

2. Constitutional Law § 10—

The presumption is in favor of the constitutionality of a statute, and a statute will not be declared void if it can be upheld on any reasonable ground.

3. Constitutional Law § 20—

The provisions of G.S. 116-149(b) defining those eligible for scholarships as children of veterans resident of North Carolina at the time of induction or a veteran's child who was born in North Carolina and has lived here continuously since birth, *is held* not unconstitutional as discriminating against children of disabled veterans who have moved their residence to this State after birth of the children.

4. Constitutional Law § 4—

A person seeking the benefit of a statute may not attack its constitutionality.

5. Constitutional Law § 10—

Only the General Assembly may amend or rewrite a statute, and therefore if that part of a statute excluding plaintiff from benefits is declared unconstitutional the courts may not rewrite the statute so as to specify qualifications which plaintiff may meet.

APPEAL by petitioner from *Hobgood, J.*, February 25, 1964 Session of WAKE.

On July 18, 1963 petitioner filed with the North Carolina Veterans Commission an application for a scholarship under Article 15, Chapter 116 of the General Statutes of North Carolina. At the same time she applied for admission to the University of North Carolina School of Nursing. Petitioner was born in Portland, Maine, on September 15, 1946. She has lived in North Carolina continuously since June 1, 1951 when she and her parents came to this State for the first time. Her father, Earle Gene Ramsey, is a one-hundred percent disabled World War II veteran receiving compensation from the Veterans Administration for service-connected injuries. Mr. Ramsey was a legal resident of the State of Indiana at the time he entered the armed forces on January 17, 1941.

The Commission denied petitioner's application on October 19, 1963 because she was not an "eligible child" as defined by G.S. 116-149(b). By her next friend, she then petitioned the Superior Court of Wake County to review this administrative decision and to order the Commission to grant her a scholarship pursuant to the statute. Upon review, the Superior Court affirmed the decision of the Commission and petitioner appealed.

Hamlin & Ramsey; Potts & Hudson for petitioner appellant.

Attorney General Bruton, Deputy Attorney General Ralph Moody for respondent, North Carolina Veterans Commission.

PER CURIAM. Article 15 of Chapter 116 of the General Statutes authorizes a scholarship at any State educational institution for an

"eligible child" of a World War veteran as defined by G.S. 116-149 and classified by G.S. 116-151. It is conceded that petitioner's father is a veteran as defined by G.S. 116-149(a). It is also conceded that petitioner does not meet the requirements of G.S. 116-149(b) which defines an "eligible child" as:

> "(1) A child of a veteran who was a legal resident of North Carolina at the time of said veteran's entrance into the armed forces, or
>
> "(2) A veteran's child who was born in North Carolina and has lived in North Carolina continuously since birth."

The statute authorizes the Commission to waive requirement No. 2 under certain circumstances which have no application to this case.

It is petitioner's contention that in thus limiting eligibility for scholarships, G.S. 116-149(b) unlawfully discriminates against her and other children of veterans who have acquired residence in North Carolina since their discharge from service. She alleges in her petition that the legislature has created an arbitrary and unreasonable classification which violates article I, § 17 of the North Carolina Constitution as well as the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

It is a well understood rule of constitutional law that the General Assembly may distinguish, select and classify objects of legislation provided such classifications are reasonable and just and apply uniformly to all members of the affected class. Inequality does not render a statute unconstitutional if the selections are not arbitrary and capricious. The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground. *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316; 1 Strong, N. C. Index, *Constitutional Law* §§ 10, 20.

By the challenged statute, North Carolina has attempted to provide for the education of children *of her quota* of one-hundred percent disabled veterans, that is, those veterans who were residents of this State at the time they were inducted or whose children were born and remained in the State. *Prima facie,* this is a reasonable distinction. *Gianatasio v. Kaplan,* 255 N.Y.S. 102. One who assails the classification in a statute has the burden of showing that it is essentially arbitrary and without any reasonable basis. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61. Neither North Carolina nor any other single State would

be expected to underwrite the education of children of all disabled veterans who might acquire residence in the state after discharge from service. Such an unrestricted program would no doubt bring many veterans to the State for the sole purpose of taking advantage of it. The extent of the obligation which this State will assume for the education of veterans' children is a matter exclusively for the legislature. Article 15, *supra,* discloses that it was not the purpose of the General Assembly to impose the burden of another state's quota upon the taxpayers of North Carolina.

However, in no event is petitioner entitled to obtain from the court the scholarship she seeks. First, she may not question the constitutionality of the Act upon which she bases her claim. *Convent v. Winston-Salem,* 243 N.C. 316, 90 S.E. 2d 879; 11 Am. Jur., *Constitutional Law* § 123. Secondly, even should the legislative designation of beneficiaries of scholarships contained in G.S. 116-149(b) be held unconstitutional, the court would remain without authority to specify a residence requirement and legislate petitioner into the classification of an "eligible child." Only the General Assembly may amend or rewrite a statute. N. C. Const. art. II, § 1.

The judgment of the Superior Court is

Affirmed.

STATE OF NORTH CAROLINA, RESPONDENT v. ALTON HAYES, PETITIONER.

(Filed 15 April, 1964.)

1. Criminal Law § 173—

A delay of some two years in the hearing of a petition for a post-conviction review would seem inexcusable. G.S. 15-217, *et. seq.*

2. Constitutional Law § 32—

A defendant charged with a felony, or with a misdemeanor of such gravity that the judge in the exercise of sound discretion deems that justice so requires, is entitled to employ counsel of his own choosing or have the court appoint counsel for him, or appear *in propria persona,* and the appointment of counsel by the prosecuting attorney violates fundamental principles of fair trial.

3. Constitutional Law § 28—

Waiver of indictment must be made in writing by defendant and his counsel, which presupposes counsel selected and employed by defendant himself or assigned to him by the judge, and does not include counsel appointed by the prosecuting attorney, and waiver of indictment signed by counsel so appointed is ineffective.

STATE *v.* HAYES.

ON *certiorari* from *Bickett, J.*, October 1963 Regular Civil Session of WAKE.

Attorney General Bruton and Staff Attorney Theodore C. Brown, Jr., for the State.

Robert L. McMillan, Jr., for Petitioner Appellant.

PER CURIAM. The petitioner, Alton Hayes, was tried at the March 1959 Criminal Term of Wake Superior Court on the charge of crime against nature. The offense was allegedly committed on 10 March 1959 while petitioner was incarcerated at Central Prison in consequence of a conviction for larceny of an automobile. On 18 March 1959 petitioner was brought from prison directly into superior court. Solicitor Lester V. Chalmers, Jr., prepared in writing an information charging crime against nature, and the accused and attorney George M. Anderson signed a writing whereby the accused waived "the finding and return into court of a bill of indictment" (G.S. 15-140.1) and pleaded guilty to the charge. After hearing the evidence, Williams, Judge Presiding, imposed a prison sentence of eighteen years to run concurrently with the sentence the accused was serving for larceny.

In October 1961 Alton Hayes filed in the superior court of Wake County a petition for a post-conviction review (G.S. 15-217 to G.S. 15-219) alleging that in his trial on the charge of crime against nature he was denied certain constitutional rights — among others, denial of counsel. On 14 February 1962 the solicitor filed an answer denying the material allegations of the petition. G.S. 15-220. Attorney Robert L. McMillan, Jr., was appointed to represent petitioner. The matter came on for hearing at the October 1963 Civil Session before Bickett, J. After a full hearing (G.S. 15-221) the judge found facts; one of the findings is that "Alton Hayes was represented by counsel in the complained of case." The judge concluded that petitioner had been denied no substantial constitutional right and ordered the petition dismissed. Petitioner applied to this Court for *certiorari*. G.S. 15-222. The petition was allowed 17 January 1964.

Incidentally, there is no explanation of the delay of two years in granting a hearing on the petition. The fact that the dockets are crowded and the courts are hard pressed in attempting to keep court calendars current is well known to us. Yet, it seems inexcusable that a prisoner should be required to wait two years for a hearing on his complaint that his fundamental rights have been denied.

Mr. Anderson, petitioner's counsel of record at the criminal trial, was not selected or employed by the prisoner. He (Anderson) testified

before Judge Bickett: "I don't recall that I was actually appointed by the Presiding Judge, but I was asked by the Solicitor to consult with Alton Hayes, as I recall it . . ." He advised the prisoner of the seriousness of the charge, the penalty involved, and that he could plead not guilty and be tried by a jury. Anderson testified further: "He (Hayes) wanted to get rid of the case, wanted it disposed of . . . He told me . . . that he was guilty of it and he seemed somewhat unconcerned about it . . ."

It is established law that a person charged with a criminal offense is entitled (1) to select, employ and be represented by counsel, or (2) to have the court appoint counsel to represent him if he is without means to employ one of his own choosing (when he is charged with a felony, or when he is charged with a misdemeanor of such gravity that the judge in the exercise of sound discretion deems that justice so requires), or (3) to waive representation by counsel and conduct his own defense. At the time of petitioner's trial in 1959 this right was not so extensively and affirmatively enforced as it is at the present time. But disregarding the recent developments in this area of constitutional rights, the purported assignment of counsel for petitioner on the occasion in question would not have complied with the constitutional guaranty and the statutory requirements as they have been understood and applied at any past era in this jurisdiction. Under G.S. 15-140.1 a defendant can waive a bill of indictment in a felony case only "when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment." This presupposes counsel selected and employed by the defendant himself or assigned to him by the judge. It certainly does not include counsel assigned by the prosecuting attorney. Fundamental fairness requires that assignment of counsel be made by one in a position of impartiality — the judge. A defendant is entitled to a fair trial, and this means fairness in each and every phase of the trial process and preparation therefor. A defendant is entitled to be advised in the matter of waiving indictment by counsel who has no obligation other than his (the accused's) best interests and proper defense.

We hasten to explain that the good faith and motives of the Solicitor and Mr. Anderson are not questioned. Both are eminent members of the bar and they had no thought of unfairness and no intention to deny defendant any right. Defendant insisted that he was guilty and wanted the matter disposed of. He probably would have fared no better had he been represented by an attorney of his own choosing. Yet, a procedure was followed which we have no choice but to condemn, however innocently and inadvertently employed.

The waiver of the bill of indictment is set aside, petitioner's plea of guilty and the judgment pronounced thereon are vacated. The State

may, if it so elects, prosecute petitioner on the said charge of crime against nature upon a proper bill of indictment or a proper waiver thereof, provided such action is taken within a reasonable time. Otherwise petitioner will be discharged. The cause is remanded to the superior court for proper orders and procedures in compliance herewith.

Error and remanded.

STATE v. FED EUGENE WHEELER.

(Filed 15 April, 1964.)

Criminal Law § 97—

The act of the court in permitting the solicitor to insistently question defendant as to a collateral matter denied by defendant and in repeating questions relating to incompetent matter after the court had sustained a prior objection to the question, *held* to require a new trial.

CERTIORARI to review defendant's trial and conviction before *Froneberger, J.*, December, 1963 Criminal Session, GASTON Superior Court.

The defendant was arraigned on six bills of indictment, in each of which he and James Ray Bynum were charged with the larceny of cased orlon yarn valued at more than $200.00, the property of Pharr Yarn Mills. The defendant entered a plea of not guilty. The charges were consolidated for trial. The jury returned a verdict of guilty on all charges. The court imposed active prison sentences of six years.

What, if anything, happened to the charges against the defendant James Ray Bynum, is left to conjecture. He appeared and testified as a witness for the State. He admitted his active participation in the theft and in the disposition of the stolen yarn. He testified that the defendant was involved with him in the perpetration of the offenses and shared in the $3,900.00 received from the sales which he made.

The defendant testified as a witness in his own defense, denying that he had anything to do with, or any knowledge of, the offenses charged. From the verdict and judgment, the defendant appealed.

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

Mullen, Holland & Cooke by Frank P. Cooke for defendant appellant.

PER CURIAM. Since the Court has decided the cause must go back for new trial, we refrain from discussing the evidence further than to

say the guilt of the defendant rested entirely on the uncorroborated evidence of the codefendant who testified as a witness for the State. The trial from the beginning developed into a controversy between the Solicitor and the Attorney for the defendant. Lack of firmness on the part of the presiding judge permitted the trial to get out of hand.

Obviously, the outcome of the contest depended on which the jury believed — the accomplice who testified for the State or the defendant who testified for himself. The accomplice being without support for his story, the State's hope for conviction depended on discrediting the defendant's testimony. The Solicitor, for the purpose of impeaching the defendant, made repeated and insistent inquiries about domestic difficulties. These the defendant denied. Nevertheless, the Solicitor continued to return to the subject. Perhaps more damaging than the questions with respect to the domestic difficulties were the Solicitor's questions of the State's witness concerning a conversation which the witness had with the defendant. The defendant denied any knowledge of the offenses charged. The witness advised him to go to the officers and request a lie detector test. The Solicitor asked what was the defendant's reply. The court sustained the objection. However, the Solicitor kept discussing the admissibility of the evidence and thereafter three different times repeated the inquiry; and, though each time the court sustained the objection, the persistence of the State's prosecuting officer may have induced the jury to believe the defendant was covering up. The bickering which the court permitted to go on at least created an atmosphere not conducive to a fair and impartial trial. The defendant is the one who came out with the smell of smoke on his clothes. We conclude there should be a

New trial.

STATE v. KENNETH GRANT.

(Filed 15 April, 1964.)

1. Criminal Law §§ 3, 4, 131—

An attempt to break and enter is a misdemeanor for which the maximum punishment is two years imprisonment.

2. Criminal Law § 130—

The indictment and not the commitment of the clerk controls, and the punishment may not exceed that for the offense charged in the indictment.

3. Criminal Law § 169—

Ordinarily, when the judgment imposed is excessive the cause will be remanded for proper judgment, but when the maximum legal sentence has already been served remand for proper judgment would be vain, so in such instance the cause will be remanded for correction of the judgment, with consecutive sentences subsequently imposed to fall into place on the basis of the correction.

ON March 10, 1964, the defendant filed an application for *certiorari* to review a judgment of imprisonment imposed on him by the Superior Court of GREENE County at its October, 1960 Term. We treat this application as for *habeas corpus* involving the legality of his imprisonment. All pertinent court records, duly certified, are attached to the petition.

The Attorney General has filed an answer, admitting as excessive the sentence of seven to nine years imposed in case No. 1377 upon a charge of "Attempt to break and enter a certain storehouse . . . occupied by J. Exum Co., Inc., . . . with intent to steal . . . merchandise." The Attorney General concedes that the maximum imprisonment for such offense can not exceed two years. The record discloses certain additional prison sentences were subsequently imposed in Pitt and Halifax Counties to begin at the expiration of the sentence imposed in Greene.

T. W. Bruton, Attorney General, Theodore C. Brown, Jr., Staff Attorney for the State.

Turner and Harrison for petitioner.

PER CURIAM. The question presented by the writ is one of law. A sentence of seven to nine years upon a bill of indictment for an attempt to break and enter is not authorized. The crime charged is a misdemeanor. The maximum punishment for the offense is imprisonment for two years. The commitment issued by the Assistant Clerk of the Greene County Superior Court states, "The commitment was for breaking and entering." The commitment must give way to the basic document — the indictment — which charges only an attempt to break and enter.

Ordinarily, when a judgment is imposed in excess of that permitted by law, the cause is remanded for a proper judgment. In this case the maximum sentence allowed has already been served. To send the case back for entry of a proper judgment would serve no useful purpose. The judgment in case No. 1377 entered in Greene County should be corrected by striking the term of imprisonment, "seven to nine years," and substituting, "two years."

The consecutive sentences subsequently imposed will fall into place on the basis of this correction. The cause is remanded to the Superior Court of Greene County for the correction of its record as here indicated. Certificate of the correction will be sent to the Prison Department.

Remanded.

FAYE S. HARRINGTON, ADMINISTRATRIX OF THE ESTATE OF WALTER FRANKLIN "JACK" HARRINGTON, DECEASED v. JOHNNY DAVID NANCE.

(Filed 15 April, 1964.)

Automobiles § 41c—

Evidence tending to show that intestate's car was standing about the middle of the highway with its lights on and that defendant approached from the opposite direction, slowed to some 30 miles an hour and had his right wheels in the ditch on defendant's right side of the highway when defendant's car struck intestate and the open door of intestate's car at approximately the same time, *held* insufficient to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *McConnell, J.*, September Civil Session 1963 of ANSON.

This is an action for the wrongful death of plaintiff's intestate, Walter Franklin "Jack" Harrington, allegedly caused by the negligence of defendant Johnny David Nance.

About 12:30 a.m. on 2 June 1962 the defendant and his brother were returning from a hunting trip and were traveling east on rural paved road No. 1240 which leads from the Town of Peachland, North Carolina, to White Store, and is known as the Lower White Store Road.

The plaintiff's evidence tends to show that the paved portion of public highway No. 1240 was from 16 to 18 feet wide, with shoulders between three and four feet on each side and ditches from one to two feet deep. Plaintiff's intestate's car, a 1960 four-door cream colored Ford, according to plaintiff's allegation in the complaint, was stopped in the middle of the paved portion of the highway with its headlights on and shining in the direction from which the defendant was approaching. The evidence further tends to show that the left side of the intestate's car was within four or five feet of the southern edge of the pavement and that the defendant was driving in an easterly direction.

The plaintiff introduced in evidence the adverse examination of the defendant which tends to show that the defendant saw the plaintiff's intestate's automobile in the highway a distance of about one-fourth of

a mile before reaching it; that there were four lights on the car, shining brightly; that the defendant signalled several times in an effort to get the lights dimmed but got no response; that he reduced his speed from about 45 to 30 miles an hour and undertook to pass the car on his right side of the road. The left front door of intestate's car was open. The defendant testified, "My front bumper and above the headlight of my car struck the door of that other car. My car was in the ditch and traveling about 30 miles an hour when it hit Jack Harrington. * * * My right front wheel was in the ditch when I hit the door of the other car. * * * My car struck the door of the other car and him both at one time, both together."

The evidence further tends to show that the defendant's car skidded about ten feet after hitting plaintiff's intestate who was lying about two feet to the rear of the rear bumper of defendant's car when it stopped. Defendant never saw the open door of the intestate's car or the intestate until he hit them. No one was in the intestate's car at the time of the collision and the motor was not running.

The physician who examined plaintiff's intestate shortly after the accident testified, "I observed the odor of alcohol about Mr. Harrington. I could not determine how much or tell how much alcohol he had had. The odor of alcohol was coming from his lungs." Plaintiff's intestate died on 23 June 1962 as the result of the injuries he sustained in the accident.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit and the motion was sustained. Plaintiff appeals, assigning error.

E. A. Hightower for plaintiff appellant.
Taylor, Kitchin & Taylor for defendant appellee.

PER CURIAM. In our opinion, plaintiff failed to establish actionable negligence on the part of the defendant and we so hold.

Affirmed.

STATE v. BENNIE B. DAVIS.

(Filed 15 April, 1964.)

1. Automobiles § 70; Indictment and Warrant § 12—

A warrant charging that defendant, while under the influence of intoxicating liquor, operated a motor vehicle on a public highway or street cannot be

amended so as to charge that defendant so operated the vehicle while on the premises of a business in the parking space provided for customers thereof, since the two offenses are separate and distinct. G.S. 20-138, G.S. 20-139.

2. Criminal Law § 121—

On appeal from an inferior court the Superior Court must try defendant upon the original warrant in the absence of an indictment, and when defendant is tried under an unauthorized amendment to the original warrant motion in arrest of judgment must be allowed.

APPEAL by defendant from *Hobgood, J.*, February 1964 Criminal Session of WAKE.

Defendant was tried in the City Court of Raleigh on a warrant charging that defendant on September 7, 1963, "did willfully, maliciously and unlawfully drive an automobile *on the public highways* of Raleigh Township and *on the public streets* of the City while under the influence of intoxicating liquor at the Windmill Drive-In parking lot . . ." (Our italics). From conviction and judgment, defendant appealed to the Superior Court of Wake County.

When the case was called for trial in the superior court, the court allowed the solicitor's motion for leave to amend the original warrant so as to charge that defendant on September 7, 1963, "did unlawfully, willfully and maliciously drive an automobile *upon the grounds and premises of a store, restaurant, and other business providing parking space for customers, patrons and the public* while under the influence of intoxicating liquor . . ." (Our italics). Defendant excepted.

The jury returned a verdict of guilty as charged in the warrant as amended. Thereupon, defendant moved in arrest of judgment and excepted to the denial of his motion. The court pronounced judgment. Defendant excepted and appealed.

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

Earle R. Purser for defendant appellant.

PER CURIAM. The original warrant charges a violation of G.S. 20-138. The warrant as amended charges a violation of G.S. 20-139. Each of these statutes creates and defines a separate criminal offense. Hence, the court had no power to permit the original warrant "to be amended so as to charge an entirely different crime from the one on which defendant was convicted in the lower court." *S. v. Cooke*, 246 N.C. 518, 521, 98 S.E. 2d 885, and cases cited; *S. v. Cofield*, 247 N.C. 185, 188, 100 S.E. 2d 355. Defendant's exception to the amendment to the original warrant is well taken.

Absent a bill of indictment (see G.S. 7-64), the only jurisdiction of the superior court on appeal was to try defendant for the specific misdemeanor for which he had been tried and convicted in the City Court of Raleigh, to wit, a violation of G.S. 20-138 as charged in the original warrant. *S. v. Hall,* 240 N.C. 109, 111, 81 S.E. 2d 189; *S. v. Mills,* 246 N.C. 237, 246, 98 S.E. 2d 329. Hence, defendant's motion in arrest of judgment should have been and is now allowed.

Judgment arrested.

STATE OF NORTH CAROLINA v. WILLIAM P. HOWELL.

(Filed 15 April, 1964.)

1. Criminal Law § 100—

Where defendant does not renew his motion for nonsuit at the close of all the evidence he waives his motion made at the close of the State's evidence, and the matter is not subject to review in the Supreme Court.

2. Indictment and Warrant § 10—

The fact that defendant's name does not appear in the affidavit upon which the warrant in arrest was issued is not fatal when the warrant itself identifies defendant by name.

APPEAL by defendant from *Bickett, J.,* October Criminal Session 1963 of WAKE.

The defendant was tried in the Municipal Court of the City of Raleigh upon a warrant charging that he did wilfully and unlawfully drive an automobile on the public highways of Raleigh Township and upon the public streets of the City of Raleigh while under the influence of liquor, this being a second offense, *et cetera.*

The defendant was adjudged guilty and from the judgment imposed he appealed to the Superior Court of Wake County where he was tried *de novo* on the same warrant.

The jury returned a verdict of guilty as charged. The court imposed a prison sentence of eighteen months which was suspended upon condition that the defendant pay a fine of $300.00 and costs and that he not operate a motor vehicle on the highways of the State of North Carolina for a period of three years.

The defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.

Earle H. Purser for defendant.

PER CURIAM. The defendant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit made at the close of the State's evidence and not renewed at the close of all the evidence.

The defendant testified in his own behalf and introduced other evidence.

The failure of the defendant to renew his motion at the close of all the evidence constituted a waiver of his right to insist upon his first motion and it is not subject to review in this Court. G.S. 15-173; *S. v. Hayes,* 187 N.C. 490, 122 S.E. 13; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Epps,* 223 N.C. 741, 28 S.E. 2d 219; *S. v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533. However, the State's evidence adduced in the trial below was sufficient to carry the case to the jury. Furthermore, the defendant's own testimony was sufficient to support the verdict.

The defendant assigns as error the refusal of the court below to sustain his motion in arrest of judgment on the ground that the name of the defendant did not appear in the affidavit upon which the warrant of arrest was issued and which is partly in these words: "These are therefore to command you forthwith to apprehend the said William P. Howell * * * to answer the above charge set forth in the affidavit, and be dealt with according to law." This assignment of error is overruled on authority of *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919, and *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

The rulings of the court below from which appeal was taken are

Affirmed.

STATE v. HENRY CLAY CRAWFORD.

(Filed 15 April, 1964.)

Criminal Law § 108—

Where the court states fully the State's contentions but fails to state the contention of the defendant that the evidence completely failed to show the intent constituting an essential element of the offense charged, a new trial must be ordered.

APPEAL by defendant from *Bickett, J.,* 1 September 1963 Criminal Session of WAKE.

STATE *v.* CRAWFORD.

Criminal prosecution on an indictment charging defendant with a felonious breaking and entry with intent to commit larceny, a violation of G.S. 14-54.

Plea: Not guilty. Verdict: Guilty of the felony of breaking and entry.

From a judgment of imprisonment for ten years, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Jacob W. Todd for defendant appellant.

PER CURIAM. Defendant assigns as error the failure of the trial judge to comply with the provisions of G.S. 1-180, in that after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant, and particularly to his contention that the State's evidence did not show any felonious intent to commit larceny.

The State introduced evidence; defendant introduced no evidence. This is a brief summary of plaintiff's evidence: Mr. and Mrs. Harold Duke own and operate in Raleigh a combination service station, grocery store, and residence. They live in the residence section. Between 10:00 and 10:30 p.m. on 6 July 1963 defendant was seen in the store and residence. Defendant was also seen hanging on a fence on or near the premises as though he were sick or drunk, and a witness called the police. Mrs. Duke testified on cross-examination she thought defendant was a drunken person who got in the house. Panes of glass on the premises 10 by 13 inches in size were broken. Defendant stated to a police officer that someone let him in; later he said he knew nothing about being at the Dukes' home. On cross-examination the officer testified defendant might have been drinking, and that he was crying. Defendant had no property of the Dukes in his possession when arrested at the scene.

The court stated fully the contentions of the State; the court stated no contentions of defendant. Such a charge does not meet the requirement of G.S. 1-180 as interpreted and applied in our decisions. *S. v. King,* 256 N.C. 236, 123 S.E. 2d 486. Certainly, the failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. The Attorney General, with his usual fairness, concedes error.

The indictment charges the building was occupied by Harold Duke and the contents therein were his. The evidence seems to show that the building was occupied by Mr. and Mrs. Harold Duke, and that they

owned the contents therein. Defendant's counsel made no motion for judgment of involuntary nonsuit.

For error in the charge, defendant is entitled to a

New trial.

PERFECTING SERVICE COMPANY, A CORPORATION v. PRODUCT DEVELOPMENT AND SALES CO., A CORPORATION, AND RADIATOR SPECIALTY COMPANY, A CORPORATION.

(Filed 29 April, 1964.)

1. Sales § 8—

A warranty, express or implied, is contractual and extends ordinarily only to the parties to the contract of sale.

2. Same; Sales § 14; Pleadings § 8— In an action by the original seller, the subpurchaser may not maintain counterclaim against purchaser for breach of warranty.

In an action by the original seller against the purchaser and subpurchaser who guaranteed payment by the purchaser, it *is held* the subpurchaser is not entitled to maintain a counterclaim against the seller for breach of the original seller's warranties, the subpurchaser not being a party thereto, nor is the subpurchaser entitled to maintain in the original seller's action a counterclaim against the purchaser for breach of the purchaser's warranties to the subpurchaser, since only matters relevant to the original seller's action in which all three of the parties have a community of interest may be litigated. The holding that the consumer may maintain an action against the manufacturer is an exception to the rule of privity which applies only to sales of articles for human consumption sold in sealed packages prepared by the manufacturer.

3. Engineering § 2—

Engineering is a profession, and when an engineer undertakes to design and fabricate a mechanical model of a piece of machinery, the engineer implies that he possesses that degree of professional learning, skill and ability which others of that profession ordinarily possess, and that he will exercise reasonable care in the use of such skill and will exercise his best judgment in his performance of the undertaking, and he may incur liability in tort for negligent performance or in contract for breach of express warranty of quality.

4. Sales § 14a; Pleadings § 8—

In an action by the seller against the purchaser and the guarantor of payment, the guarantor is entitled to set up a counterclaim against the seller for the amount the guarantor paid the seller under a separate contract for engineering, designing, and fabricating a mechanical model upon allegations that the model was totally worthless for the purpose for which constructed, since both causes arise out of contract. G.S. 1-137(2).

5. Sales § 14a—

Where the article purchased is worthless for the purpose for which it was bought and sold, the purchaser, in the seller's action *ex contractu*, may maintain a counterclaim against the seller upon the theory of failure of consideration.

6. Pleadings §§ 2, 19—

Where one defendant attempts to allege a cross-action against his co-defendant and also a counterclaim against the plaintiff, but does not distinguish between the allegations relating to the cross-action and the allegations relating to the counterclaim, demurrer to the counterclaim must be sustained, even though the counterclaim, if properly alleged, is maintainable. G.S. 1-127.

7. Pleadings § 34—

Allegations which are evidentiary or redundant or which relate to a cause of action which the pleader is not entitled to set up in the action, are properly stricken on motion.

APPEAL by defendants from *Walker, S.J.*, January 6, 1964, "D" Non-Jury Civil Session of MECKLENBURG.

Pierce, Wardlow, Knox and Caudle, and Stuart R. Childs for plaintiff.

Weinstein, Waggoner and Sturges, and T. LaFontine Odom for defendants.

MOORE, J. This is an action to recover damages for an alleged breach of a contract for the manufacture, sale and delivery of merchandise.

A former appeal in this cause was heard by us at the Spring Term 1963. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9. A new trial was ordered. The Court's opinion on that appeal sets out a comprehensive summary of the pleadings as they were then cast. Thereafter, on 14 November 1963, the superior court entered an order permitting defendants to amend their answers. The answers were amended so as to change somewhat the bases and nature of defendants' affirmative defenses. The questions posed by the present appeal relate only to the pleadings. It is therefore necessary that we summarize the pleadings as they now are.

The complaint alleges in substance: Defendant, Radiator Specialty Company (hereinafter Radiator), obtained license to manufacture and sell a patented device, a free-wheeling fan unit for automobiles, later called "Fan-O-Matic." 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 at Radiator's request plaintiff made drawings and designs and fabricated a model unit, for which service Radiator paid plaintiff $1700. Revisions in the design were made and Radiator authorized plaintiff, by purchase order dated 13 June 1956, to procure dies and molds for the manufacture of Fan-O-Matic parts, for which tools Radiator agreed to pay $8750. At the same time, by another purchase order, plaintiff was directed to manufacture and deliver parts for 10,000 units, Radiator to pay $6.86 per unit therefor. Thereafter, defendant Product Development and Sales Company (Product Development) was organized and incorporated, and with the consent of plaintiff assumed all liabilities of Radiator under the purchase orders of 13 June 1956. Radiator guaranteed to plaintiff in writing the payment of the obligations assumed by Product Development. On 4 February 1957 Product Development paid plaintiff $8750 pursuant to the purchase order for dies and molds. Plaintiff purchased materials and manufactured 300 units and delivered them for testing and approval. Plaintiff was then requested to proceed with dispatch in manufacturing and delivering the remaining 9700 units. After a considerable number had been manufactured and delivered, Product Development, in breach of its contract, directed plaintiff to cease manufacturing operations, asked that the contract be rescinded, refused to accept further deliveries, and declined to make any further payments on account. Plaintiff is entitled to $58,126.61 damages from Product Development for breach of the purchase order, and Radiator is liable therefor under its guaranty.

Radiator and Product Development, in separate answers, deny that they are obligated to plaintiff in any amount, and allege in almost identical language facts, in substance except where set out verbatim, as follows (paragraphing and numbering ours):

(1). Radiator acquired license for the manufacture and sale of Fan-O-Matic, exhibited a model thereof to plaintiff, and plaintiff agreed to engineer and design "a new and improved model" and construct a sample unit. On 10 April 1956 Radiator submitted to plaintiff purchase order No. 14888, agreeing to pay plaintiff $1700 for

> "Necessary services and materials to engineer and design our 'Fan-O-Matic' unit. Drawing for dimensions furnished by you. Necessary dimensions furnished by us. Drawing and sample of the finished unit to be furnished by you and will be our property. Quotation on production unit. In quantities of 5,000 and 1,000 over 1 year period to be furnished with drawing and sample."

(2). In submitting the foregoing purchase order Radiator "completely relied on the skill and judgment of plaintiff in engineering and

designing the new Fan-O-Matic unit; plaintiff knew this; Radiator had advised plaintiff that it would sell the units to jobbers and dealers for resale to car owners; and Radiator paid plaintiff $1700 for the engineering and designing service and the making of the sample model.

(3). Later, plaintiff advised that, in preparation for manufacture of the units, tools, dies and molds would have to be acquired at a cost of $8750, and on 13 June 1956 Radiator delivered to plaintiff purchase order No. 15067, as follows:

> "Necessary services and materials for the making of tools covering various dies and molds for the manufacture of our Fan-O-Matic Unit.
>
> $8,750.00
>
> The above due and payable immediately upon approval by us of sample units made from the dies and molds."

(4). On 13 June 1956 Radiator also delivered to plaintiff purchase order No. 15068 (accepted and approved by plaintiff) whereby Radiator ordered 10,000 units at the price of $6.86 per unit. The order contained the following provisions:

> "10M Fan-O-Matic Units, completely assembled, ready for shipment, packed bulk. Units to be made in accordance with drawing 1222-100-RS with proposed and discussed changes per your letter June 8, 1956. Drive plate aluminum metallized, cast iron free-wheeling hub covered with a light coat of blue rust-preventive paint.
>
> Deliveries as follows:
>
> 300 on or before Sep. 10, 1956.
>
> 2M per month thereafter.
>
> Perfecting Service Co. 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 Specialty Company. . . .
>
> All material and workmanship shall be guaranteed for a period of 18 months after shipment of first production lot."

(5). Radiator proceeded to advertise Fan-O-Matic nationally, and printed circulars for distribution by its salesmen and outlets. In due time Radiator received 4000 orders and others were coming in.

(6). Product Development was chartered for the purpose of purchasing the units from plaintiff. With the consent of plaintiff, Radia-

tor "cancelled its purchase orders, Nos. 15067 and 15068, . . . and . . . Product Development . . . issued its purchase orders numbered 101 and 102, both dated November 30, 1956." Radiator thereafter guaranteed the Credit of Product Development. It was "with the understanding of all parties concerned" that Product Development would purchase the units from plaintiff and sell and deliver them to Radiator for resale to the trade. Product Development agreed to sell the units to Radiator at the price of $8.58 per unit, and plaintiff knew this; Product Development "agreed to sell such units to . . . Radiator . . . with all express and implied warranties theretofore made by plaintiff."

(7). The first deliveries were made after 1 January 1957 and as soon as they were received by the trade complaints began to come in "that the units were flying apart and that the bolt on the center bearing seat was breaking off; the defendants immediately complained to plaintiff." Plaintiff made certain changes and assured defendants the units were in perfect operating order and would cause no more trouble. In reliance upon these assurances, defendants accepted further deliveries.

(8). On 1 February 1957 Product Development paid plaintiff $8750 on account of purchase order No. 102 (for tools, dies and molds), and in the letter of transmittal of payment said, ". . . we want it understood this payment does not constitute an acceptance or approval of the performance of the Fan-O-Matic unit in accordance with your guarantee . . ."

(9). Plaintiff actually delivered 2877 units to Product Development; it delivered 2334 units to Radiator, which in turn shipped them to their customers; "that within due time thereafter, the defendant Radiator Specialty Company began receiving complaints from all over the United States from jobbers, dealers, and customers, to the effect that the Fan-O-Matic unit, upon installation upon various models of automobiles, was flying apart, and that the parts of the Fan-O-Matic were striking fans, motors, radiators, batteries, and causing all kinds of damage to the motor vehicles upon which they were installed; that the defendant Radiator Specialty Company was called upon to pay damages to owners of motor vehicles for damage caused to such motor vehicles by the Fan-O-Matic unit; that because of the mounting complaints and inherent dangers involved, it became necessary for the defendant Radiator Specialty Company to advise all of its jobbers to return all of the Fan-O-Matic units theretofore shipped out; that, accord-

ingly, 2,161 Fan-O-Matic units were returned to the defendant Radiator Specialty Company by the purchasers thereof, many of same being in broken condition resulting from failure to properly operate."

(10). Immediately thereafter Radiator refused to accept any further deliveries from Product Development, and the latter advised plaintiff it would refuse to accept any more units because of defective engineering, designing, materials and workmanship, and demanded that the purchase order be rescinded.

(11). In addition to the express warranties, plaintiff impliedly warranted that the units were fit for the purposes for which they were sold; all warranties were breached. The units were not merchantable "in that they were improperly designed and engineered by plaintiff," and materials and workmanship were defective. Defects could not be detected by inspection and became apparent only in use. The units were worthless and there was a complete failure of consideration.

(12). "That if the said fan units had been properly designed by the plaintiff and properly manufactured by the plaintiff, all in accordance with express warranties and implied warranties as mentioned above, each unit would have had a value to the defendant Product Development and Sales Co. of Six & 86/100 ($6.86) Dollars each; however, the units as received by the defendant Product Development and Sales Co. and as delivered to the defendant Radiator Specialty Company were worthless."

Based on the alleged facts, summarized in the numbered paragraphs above, Radiator pleads a "First Further Answer and Defense" and a cross-action against Product Development and a counterclaim against plaintiff. (1) In the "First Further Answer and Defense" Radiator pleads the "breach of both express and implied warranties . . . in complete bar of any recovery by plaintiff herein." (2) In the cross-action and counterclaim Radiator alleges it has suffered damages in the amount of $53,707.92, it is entitled to recover of Product Development this sum by reason of the express and implied warranties, and it is entitled to recover of plaintiff this sum for breach of the "undertaking and implied warranty of plaintiff that it would design a unit that would function adequately for the intended purpose." The items making up the damages claimed by Radiator are: $31,970 for loss of profits, $965 freight on units returned, $1910.47 for boxes and cartons, $497.03 packing, $633.42 billing and shipping, $13,941 advertising, $2091 damages paid to customers, and $1700 paid plaintiff for drawings.

Based on the same allegations of fact, set out in the numbered paragraphs above, Product Development pleads (1) the "breach of both

express and implied warranties . . . in complete bar of any recovery by plaintiff herein," and (2) that it is entitled to recover of plaintiff, by reason of plaintiff's breach of warranties, damages, including $8074 payments made to plaintiff for Fan-O-Matic units, $6020 for loss of profits, and $9450 paid plaintiff for tools, dies and molds. As a further element of damages, it alleges: "That the defendant Product Development and Sales Co. admits the allegations contained in the cross action and counterclaim of the defendant Radiator Product Development Sales Company. If the defendant Product Development Sales Co. is indebted to the defendant Radiator Specialty Company for all or any part of the Fifty-three Thousand Seven Hundred Seven and 92/100 ($53,707.92) Dollars alleged in the cross action and counterclaim of Radiator Specialty Company, then the defendant Product Development and Sales Co. is entitled to recover same amount from the plaintiff Perfecting Service Company."

Plaintiff demurred to and moved to strike Radiator's cross-action and counterclaim. It demurred to Radiator's cross-action against Product Development on the ground that if a cause of action exists in behalf of Radiator against Product Development for breach of warranty it cannot be asserted and maintained in the present action, and demurred to Radiator's counterclaim against plaintiff on the ground that the facts alleged do not constitute any basis for relief by way of counterclaim or otherwise. Plaintiff also moved to strike from Radiator's "First Further Answer and Defense" all of paragraph 21 (our paragraph numbered 12 above) and part of paragraph 6 (that part of our paragraph numbered 9 above which is in quotation marks). Plaintiff moved to strike from Product Development's counterclaim all of paragraph 25 (the allegations set out in the last two sentences in the next preceding paragraph of this opinion) and paragraph 3 of the prayer for relief, asking recovery of $53,707.92 from plaintiff.

The court below sustained the demurrer and the motions to strike. Defendants contend that this was error.

Plaintiff's suit against Product Development is to recover for Fan-O-Matic parts manufactured, sold and delivered to the latter under contract, and for refusal of Product Development to accept delivery of a quantity of the parts contracted for. Radiator was made a party defendant because of its agreement to guarantee Product Development's indebtedness to plaintiff. *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413.

In order to make clear the relationship of the parties to this action, we point out that Radiator in its pleadings takes the position that Product Development is an entirely separate corporate entity from

Radiator, the operations and obligations of the former are independent of those of the latter, Product Development is not a subsidiary of Radiator, the relationship of principal and agent does not exist between them, Radiator guaranteed Product Development's indebtedness to plaintiff, and as between Radiator and Product Development there are only the relationships of buyer and seller and guarantor and principal debtor. Indeed the pleadings of plaintiff and Product Development are to the same effect. Therefore, the questions on this appeal must be considered in the light of these relationships.

Radiator contends (1) its purchase of Fan-O-Matic units from Product Development gave rise to warranties of quality and merchantability which were breached, and it is entitled to maintain a cross-action against Product Development in this cause for breach of the warranties, and (2) it consummated separate dealings with plaintiff, preliminary to plaintiff's contract with Product Development, and these dealings give rise to a counterclaim against plaintiff for breach of warranty. Plaintiff contends to the contrary. These points of controversy are the principal matters for decision.

We first consider the cross-action.

As elements in the contract of sale between plaintiff and Product Development, plaintiff expressly warranted that the Fan-O-Matic units would be manufactured "in accordance with the approved design" and would be functioning correctly "in accordance with the data supplied," and that all materials and workmanship was guaranteed for a period of 18 months after shipment of the first production lot. In the contract of sale between Product Development and Radiator, "Product Development . . . agreed to sell such units to . . . Radiator . . . with all express and implied warranties theretofore made by the plaintiff."

Whether there were any implied warranties in the sale from plaintiff to Product Development is a question which does not arise on this appeal, but may arise upon the trial. Ordinarily there can be no implied warranty of quality in the sale of personal property where there is an express warranty on the subject, and where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them. *Guano Co. v. Live Stock Co.*, 168 N.C. 442, 84 S.E. 774; 46 Am. Jur., § 334, pp. 516-518; 77 C.J.S., Sales, § 316, pp. 1161-1164. But a vendee may recover against the vendor, irrespective of the terms of the warranty, if there is a failure of consideration. If an article is of no value to either party, it cannot be the basis of a sale. *Williams v. Chevrolet Co.*, 209 N.C. 29, 182 S.E. 719. We express no opinion on these matters, but point out that they may be of importance at the trial stage.

A warranty is an element in a contract of sale and, whether express or implied, is contractual in nature. Only a person in privity with the warrantor may recover on the warranty; the warranty extends only to parties to the contract of sale. *Murray v. Aircraft Corporation,* 259 N.C. 638, 131 S.E. 2d 367; *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. A manufacturer is not liable to an ultimate consumer or subvendee upon a warranty of quality or merchantability of goods which the ultimate consumer or subvendee has purchased from a retailer or dealer to whom the manufacturer has sold, for there is no contractual relation between the manufacturer and such consumer or subvendee. *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30. There is an exception to this rule where the warranty is addressed to the ultimate consumer, and this exception has been limited to cases involving sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon. *Simpson v. Oil Company,* 217 N.C. 542, 8 S.E. 2d 813.

Where goods are sold with a warranty to a dealer, and the dealer resells them with a similar warranty to a subpurchaser and the subpurchaser recovers damages for breach of warranty from the dealer, the dealer has a *prima facie* right to recover such damages against the seller who originally sold him the goods. *Aldridge Motors, Inc. v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469; *Ashford v. Shrader,* 167 N.C. 45, 83 S.E. 29. "Where goods are sold with a warranty and the vendee resells them with a similar warranty, which is broken, the first purchaser may, in a proper case, recover the amount of his *probable liability* to his vendee, when such damages may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made as the probable result of a breach of warranty, such damages not being too remote" (emphasis added). 77 C.J.S., Sales, § 384, p. 1338.

The contract for the manufacture and sale of Fan-O-Matic units was between plaintiff and Product Development. Radiator is not privy to that contract; it withdrew its purchase orders and requested that the sale be made to Product Development, and plaintiff and Product Development agreed. The warranty incident to that sale runs to Product Development. Therefore, Radiator has no cause of action against plaintiff for breach of that warranty. Radiator bought from Product Development. The question for decision is whether *in this action* by plaintiff against Product Development on the contract of manufacture and sale Radiator, having been made a party because of its guaranty

contract with plaintiff, may maintain a cross-action for affirmative relief against Product Development for breach of the latter's warranty. Radiator, as guarantor, has pleaded plaintiff's alleged breach of warranty as a bar to and set-off against plaintiff's claim, and plaintiff has not challenged this pleading. But plaintiff contends that Radiator may not maintain the cross-action for affirmative relief against Product Development in this suit.

"The obligation arising upon a warranty is that of an undertaking or promise that the goods shall be as represented or, more specifically, a *contract of indemnity* against loss by reason of defects therein." (Italics ours). *Wyatt v. Equipment Co., supra.* A contract of indemnity between defendants concerns only the contracting parties. Plaintiff is not privy thereto. It is not ordinarily germane to plaintiff's cause of action, and the determination of the rights and liabilities of such defendants with respect to their contract of indemnity is not necessary to a conclusion of plaintiff's cause of action. Only matters relevant to the original or primary action in which all three of the parties have a community of interest may be litigated. *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82; *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659; *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118; *Eledge v. Light Co.,* 230 N.C. 584, 55 S.E. 2d 179; *Board of Education v. Deitrick,* 221 N.C. 38, 18 S.E. 2d 704; *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397. Strict application of this principle would bar the maintenance of the cross-action. The warranty of Product Development to Radiator is express; Radiator alleges "that Product Development . . . *agreed* to sell such units to . . . Radiator . . ., with all the express and implied warranties theretofore made by the plaintiff."

However, in connection with this question it is necessary that we examine our decision in *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822. Davis bought from Radford Drug Store (Radford) an article for human consumption known as "Westsal," a salt substitute, which, it was alleged, contained poisonous ingredients causing injury and death to Davis. Plaintiff, administrator of Davis' estate, sued Radford for breach of implied warranty. Answering, Radford alleged that he purchased the article from Smith Company (Smith), wholesaler, with the implied warranty from Smith that it was fit for human consumption, and that Smith was primarily liable for any damages plaintiff might recover from Radford. On motion of Radford the court made Smith an additional party defendant. Smith demurred on the ground that there was a misjoinder of parties and causes. The demurrer was overruled and this Court affirmed. The rationale of the opinion of this Court is

that it was a matter of primary and secondary liability — a holding more appropriate in a case sounding in tort rather than contract. The opinion emphasizes that the article was intended for human consumption, was prepared and placed in a sealed package by the original seller, and the package reached the consumer in the identical form in which it was prepared by the original seller. The opinion suggests that the same results might have been reached had plaintiff sued Smith directly under authority of *Simpson v. Oil Company, supra.* In any event the decision constitutes an abandonment of the privity rule for the purposes of that case. 30 N.C.L. Rev., 191-197. But it seems clear from the discussion that it was not intended to abandon the privity rule in all warranty cases, but the procedure approved therein was to apply only to sales of articles for human consumption sold in sealed packages prepared by the manufacturer. This case must be considered an exception to the privity rule.

To permit Radiator to maintain the cross-action in the instant case would effect a more complete abandonment of the privity requirement than the ruling in the *Davis* case. Here Radiator sets up its cross-action against Product Development specifying damages amounting to $53,-707.92. Product Development cooperatively acknowledges its liability to Radiator in this exact amount, and counterclaims against plaintiff therefor. By this procedure Radiator and Product Development seek to go into trial contending that the liability between them is fixed, and Product Development's recoverable damages are $53,707.92 plus any additional damages Product Development may be able to show. If allowed, such procedure would as effectively avoid the privity rule as a direct counterclaim by Radiator against plaintiff. Radiator, by its own choice and management, is not privity to the contract of sale between plaintiff and Product Development. Having made its choice, it must abide by it. We hold that Radiator may not maintain the cross-action in this suit, and it was properly stricken. It follows that the court below was correct in striking all of paragraph 25 of Product Development's counterclaim, and paragraph 3 of its prayer for relief.

This brings us to a consideration of Radiator's counterclaim against plaintiff. Radiator contends, and its pleadings permit the inference, that it had and consummated certain dealings with plaintiff before Product Development relieved Radiator and assumed the obligations and benefits of the contract with plaintiff for the manufacture, sale and delivery of Fan-O-Matic parts. On the other hand plaintiff contends that its activities relate to a single indivisible transaction as far as the manufacture, sale and delivery of products are concerned. However, we ignore here plaintiff's theory of the case since the controversies for determination arise upon the answers and not the complaint.

The factual basis of the counterclaim, stated briefly, is as follows: Radiator exhibited the inventor's model of Fan-O-Matic to the engineers and executives of plaintiff and it was "agreed that plaintiff corporation would engineer and design a new and improved model . . . including construction of a sample unit." Radiator submitted and plaintiff accepted a purchase order by which plaintiff agreed to furnish "necessary services and materials to engineer and design" the unit, plaintiff to furnish drawings for dimensions, Radiator to furnish dimensions, "drawing and sample of the finished unit" to be the property of Radiator, and Radiator to pay $1700 for the services, drawing and sample unit. In submitting the purchase order Radiator "completely relied on the skill and judgment of the plaintiff," and plaintiff knew this. Plaintiff understood the purpose of the instrument. Radiator paid the $1700 promised. Plaintiff made drawings and a sample. Plaintiff's contract with Product Development for manufacture and sale of Fan-O-Matic came later. Because of defects in designing and engineering, the drawing and sample model were worthless and there was a complete failure of consideration, and therefore plaintiff breached its express and implied warranties of quality.

G.S. 1-137 provides that a defendant may set up as a counterclaim (1) "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action," and (2) "In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." The foundation of plaintiff's claim against Radiator is the guaranty contract. Radiator's counterclaim does not arise out of and is not connected with the guaranty contract, nor does it arise out of or have connection with plaintiff's contract with Product Development; the counterclaim is not authorized under (1) above. It arises upon a separate contract and is authorized under (2) above, if a cause of action is stated. *Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 111 S.E. 2d 614; *Credit Corporation v. Motors*, 243 N.C. 326, 90 S.E. 2d 886; *Bourne v. Board of Financial Control*, 207 N.C. 170, 176 S.E. 306.

By any fair construction of the facts alleged by Radiator, plaintiff contracted to furnish Radiator professional services—engineering, designing and fabricating a mechanical model. The term "professional" is commonly used to distinguish those highly proficient in many endeavors from mere amateurs. *State v. Leeth*, 67 S. 2d 46, 48 (Ala. 1952). The vocation of industrial designing is a profession rather than a trade or business. *Teague v. Graves*, 27 N.Y.S. 2d 762, 765 (1941). Under statutes relating to the licensing of professional engineers, the field of

engineering involves the making of plans and designs and the supervision of construction. *Smith v. American Packing & Provision Co.,* 130 P. 2d 951, 957 (Utah 1942). When one undertakes a professional assignment, the engagement implies that he possesses the degree of professional learning, skill and ability which others of that profession ordinarily possess, he will exercise reasonable care in the use of his skill and application of his knowledge to the assignment undertaken, and will exercise his best judgment in the performance of the undertaking. He is not a warrantor or insurer of results (unless he expressly so contracts). *Hawkins v. McCain,* 239 N.C. 160, 168, 79 S.E. 2d 493. That is, no implied warranties arise by reason of the engagement. He may incur liability in tort by reason of negligent performance. And he must answer for breach of his express contracts.

According to Radiator's answer, plaintiff agreed to engineer, design and fabricate "a new and improved model." It did furnish a design and model and was paid for the services. The answer fails to give any specific information as to whether plaintiff's model was an improvement over the inventor's model, what material plaintiff's model was made of, or the manner and proficiency of its operation. The defects in the Fan-O-Matic units manufactured, sold and delivered to Product Development are listed with particularity, but this is a matter between plaintiff and Product Development. There is no allegation as to whether the model was altered in any respect before units were manufactured, or as to whether the units were manufactured of the same material as plaintiff's original model. There is a general allegation that the design and model were worthless and there was a complete failure of consideration. Assuming the truth of the allegations, as we must do upon demurrer and motion to strike, a counterclaim may be maintained upon the theory of failure of consideration. *Edgerton v. Johnson,* 217 N.C. 314, 7 S.E. 2d 535; *Pool v. Pinehurst, Inc.,* 215 N.C. 667, 2 S.E. 2d 871; *Williams v. Chevrolet Co.,* 209 N.C. 29, 182 S.E. 719; *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141; *Hyman v. Broughton,* 197 N.C. 1, 147 S.E. 434; *Johnston v. Smith,* 86 N.C. 498. The items of special damages—loss of profits, freight, boxes and cartons, packing, billing and shipping, advertising, and damages to customers—cannot be said to have been within the contemplation of the parties in making the contract for professional services. These grew out of the sale transaction between Product Development and Radiator. If, as alleged, the services of plaintiff in engineering, designing and fabricating the model were worthless and there was a failure of consideration, Radiator would be entitled to recover on its counterclaim the $1700 paid for such services.

Radiator has commingled its counterclaim against plaintiff and its cross-action against Product Development, making it difficult to separate the allegations pertaining to each. They are not separately stated. "Demurrer is proper when it appears upon the face of the complaint (pleading) that '. . . several causes of action have been improperly united.' G.S. 1-127. The quoted provision has been considered frequently when demurrer has been interposed on the ground that two or more *separately stated* causes of action have been improperly united in the same complaint. It is equally applicable when a complaint alleges facts sufficient to constitute two or more causes of action but fails to state separately facts sufficient to constitute each cause of action. G.S. 1-123; Rule 20(2), Rules of Practice in the Supreme Court, 221 N.C. 557 (254 N.C. 802) . . ." *Heath v. Kirkman,* 240 N.C. 303, 306, 82 S.E. 2d 104.

Radiator's counterclaim and purported cross-action are not separately stated as required by G.S. 1-138; Rule 20(2), Rules of Practice in the Supreme Court, 254 N.C. 802. Facts are alleged in a series of paragraphs without any satisfactory attempt to distinguish between those relating to the cross-action and those relating to the counterclaim. The demurrer is sustained. The cross-action is not maintainable in any event in this action. But a counterclaim as hereinbefore indicated may be maintained. The court below was correct in striking from Radiator's Third Amended Answer all of Paragraphs 1 to 25, inclusive, of the counterclaim and cross-action, and paragraph 2 of the prayer for relief. Radiator, if so advised, may move to amend its answer so as to set out separately in clear and unambiguous terms the facts upon which it relies for a counterclaim against plaintiff for breach of *express* contract for engineering, designing and fabricating a model.

The court below did not err in striking from Radiator's Third Amended Answer all of paragraph 21 and the challenged portion of paragraph 16 of the First Further Answer and Defense. The matters therein alleged are either evidentiary or redundant. Furthermore, they are not stricken from Product Development's pleadings, and if they are of any value it accrues to Radiator as well as to Product Development.

The judgment below is

Affirmed.

THURMAN SHORT v. JOYCE IVA CHAPMAN, A MINOR, BY HER GUARDIAN AD LITEM, VELMA W. RHONEY.

(Filed 29 April, 1964.)

1. Pleadings § 8—

A counterclaim is substantially the allegation of a cause of action on the part of defendant against plaintiff.

2. Negligence § 26—

Nonsuit of a cross-action on the ground of contributory negligence of defendant is proper when and only when defendant's own evidence, considered in the light most favorable to her, establishes contributory negligence on her part so clearly that no other conclusion can be reasonably drawn therefrom.

3. Automobiles § 11—

G.S. 20-131, defining a motorist's duties as to the lighting equipment of his head lamps, refers to visibility "under normal atmospheric conditions," and therefore it may be permissible for a motorist to deflect his headlights when driving in fog or other atmospheric conditions in which deflected headlights afford better visibility.

4. Automobiles § 10—

When a motorist is traveling within the maximum speed limit, his inability to stop his vehicle within the radius of his headlights will not be held negligence or contributory negligence *per se.* G.S. 20-141(e).

5. Negligence § 11—

Only contributory negligence which proximately causes or contributes to the injury under judicial investigation is of legal import.

6. Negligence §§ 7, 26—

The question of proximate cause is ordinarily a question of fact for the determination of the jury from the attendant circumstances, and it cannot be a question of law when conflicting inferences of causation arise upon the evidence.

7. Automobiles § 42d— Evidence held not to warrant nonsuit for contributory negligence, the question of proximate cause being for the jury.

The evidence favorable to defendant tended to show that plaintiff drove his vehicle, without lights, from a building on the south side of the highway across three lanes of traffic and turned left onto the northern lane for westbound traffic, that defendant, traveling west in fog and light rain within the legal speed limit and with her lights dimmed or deflected, did not see plaintiff's car until it was crossing the centerline dividing the four lanes of traffic, and that defendant then applied her brakes, causing her car to skid and resulting in the injuries in suit. *Held:* Plaintiff's motion to nonsuit defendant's counterclaim on the ground of defendant's contributory negligence was properly denied, since whether defendant could have seen plaintiff's vehicle in time to have avoided the accident had defendant been traveling at a slower speed with her lights on "high beam" is for the jury.

SHORT *v.* CHAPMAN.

8. Damages § 3—

In order to support recovery of permanent damages plaintiff must show with reasonable certainty that the injury proximately resulted from the wrongful act of plaintiff and that such injury is permanent, and while absolute certainty is not required, evidence which leaves the matters in mere speculation or conjecture is insufficient.

9. Same—

Testimony of plaintiff at the time of the trial that her head and neck and left leg still hurt and that she had numbness in her left leg, without evidence that these complaints resulted from the injury in suit rather than from other causes, and without expert testimony that such injuries would be permanent, *is held* insufficient to sustain an instruction that the jury might award damages for permanent disability.

APPEAL by plaintiff from *Froneberger, J.,* 3 September 1963 Civil Session of GASTON.

Civil action to recover damages for personal injuries and for $200 damage to an automobile. Defendant, a minor, by her guardian *ad litem* filed an answer in which she denied any negligence on her part, conditionally pleaded contributory negligence of plaintiff as a bar to any recovery on his part, and alleged a counterclaim for personal injuries caused by the actionable negligence of plaintiff in the operation of his automobile. Plaintiff filed a reply to defendant's counterclaim in which he avers that if he was negligent, then defendant by her own negligence contributed to her injuries.

The court submitted five issues to the jury: (1) Was plaintiff injured by defendant's negligence? (2) Did plaintiff by his own negligence contribute to his injuries? (3) What amount is plaintiff entitled to recover from defendant for personal injuries and automobile damage? (4) Was defendant injured by plaintiff's negligence? (5) What amount is defendant entitled to recover from plaintiff for personal injuries? The jury answered the first issue No, did not answer the second and third issues, answered the fourth issue Yes, and awarded defendant damages in the amount of $13,500.

From a judgment that defendant recover $13,500 from plaintiff, together with the costs, plaintiff appeals.

Carpenter, Webb & Golding by John G. Golding for plaintiff appellant.

Hollowell & Stott by Grady B. Stott, and Mullen, Holland & Cooke by Frank P. Cooke for defendant appellee.

PARKER, J. Both plaintiff and defendant offered evidence. Plaintiff assigns as error the denial of his motion for judgment of compulsory

nonsuit of defendant's counterclaim made at the close of all the evidence. Plaintiff contends that defendant's own evidence shows as a matter of law that she was guilty of legal contributory negligence, in that she was driving an automobile with its headlights on low beam, and she failed to keep a proper lookout without regard to the sufficiency of her headlights.

Defendant's counterclaim or cross-action is substantially the allegation of a cause of action on the part of defendant against plaintiff arising out of the automobile collision that is the basis of plaintiff's action. *Perkins v. Perkins,* 249 N.C. 152, 105 S.E. 2d 663; Strong's N.C. Index, Vol. 3, Pleadings, § 8.

In respect to defendant's counterclaim or cross-action, the plaintiff may successfully avail himself of his plea of contributory negligence of defendant by a motion for a compulsory judgment of nonsuit if, and only if, the facts necessary to show contributory negligence of defendant are established so clearly by her own evidence that no other conclusion can be reasonably drawn therefrom. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Hayes v. Telegraph Co.,* 211 N.C. 192, 189 S.E. 499.

Plaintiff's contention that defendant was guilty of contributory negligence as a matter of law, thereby barring any recovery by her on her counterclaim or cross-action, necessitates an appraisal of her evidence in the light most favorable to her. *Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The allegations of fact in the complaint, which are admitted to be true in the answer, show these facts: On 26 May 1960 the Gaston County Moose Lodge was situate on the south side of Wilkinson Boulevard about two miles east of the city of Gastonia. Wilkinson Boulevard is a four-lane highway, 44 feet wide with wide shoulders on each side, and runs in a general east and west direction. It is divided into four lanes for traffic — two lanes for eastern traffic and two lanes for western traffic. These lanes are divided by painted stripes on the highway. About 10 p.m. on 26 May 1960 plaintiff drove his 1960 Dodge automobile from the parking lot of Gaston County Moose Lodge across Wilkinson Boulevard and into the northernmost lane of traffic adjacent to the shoulder of the highway and proceeded to drive his automobile in a western direction toward Gastonia. The minor defendant was driving a Renault automobile in a western direction on Wilkinson Boulevard at the same time. The parties stipulated that the posted maximum speed limit on the Boulevard in the area of the collision is 55 miles an hour.

Defendant's evidence, considered in the light most favorable to her, shows these facts: She was driving the Renault automobile in the north-

ernmost lane of Wilkinson Boulevard next to the shoulder at a speed of 45 miles an hour. She was alone in the automobile. It was drizzling rain, there was fog, and it was hard to see. The road was slick. The headlights on her automobile were burning on "low beam" and her windshield wiper was working. Her car lights were illuminating the highway for two car lengths ahead of her. As to whether they were illuminating it further she does not know. She was meeting no approaching traffic. She was watching the road ahead of her. When she approached the area adjacent to the Gaston County Moose Lodge, an automobile without any lights shining and traveling not over ten miles an hour "pulled out" on the Boulevard not over two car lengths, or about 25 feet, ahead of her. When she first saw this automobile, it had reached the center line dividing eastbound and westbound traffic and had not straightened up in the northernmost lane. Immediately upon seeing this automobile, she "slammed on" her brakes and "cut her wheel" to the left in an endeavor to get around it. Her automobile started "to spin," turned completely around on the road, slid about 15 or 20 feet with the rear part going in a westerly direction, and the rear end of her automobile hit the bank. All the damage to her automobile was to its rear end; there was no damage to its front. If her automobile touched the automobile in front of her, it was very light. When her automobile hit the bank, she was thrown out of it and knocked unconscious. There was nothing to obscure her vision of the parking lot of the Gaston County Moose Lodge. The area of the parking lot and of the Gaston County Moose Lodge was "lighted some."

Plaintiff's evidence shows these facts: When he and his wife came out of the Moose Lodge, it was drizzling rain. They went to his automobile, which was parked in the parking lot facing the highway. He turned on his lights and rolled the glass of the window down on his side; his wife rolled down the glass of the window on her side. He looked west toward Gastonia, and the road was clear. He then looked east toward Charlotte and saw an automobile "approximately almost two blocks away" to his right that had just come over the crest of a hill and started down it. This automobile was traveling 60 miles an hour or better. He then drove almost straight into the Boulevard, proceeded to its northernmost lane of traffic, and had traveled in this lane at a speed of about 40 miles an hour about 200 yards when he heard tires squealing. His wife looked back and "yelled." He turned and looked back and saw a Renault automobile coming toward him in a spin sideways. He stepped on the gas, and the Renault hit the left rear end of his automobile and went straight into the bank near the highway. When his automobile was hit, it swerved to the right throwing him

against his wife and then back, hitting his hip on the armrest. He stopped a short distance down the road and came back to where his automobile was struck. When he got back, defendant was lying down crying with her head in some man's lap; she was not unconscious. The taillight assembly on the model Dodge plaintiff was driving lights up real bright.

In respect to defendant's counterclaim or cross-action, considering defendant's evidence in the light most favorable to her, there is plenary evidence tending to show that plaintiff was guilty of negligence in operating his automobile, and that such negligence was a proximate cause of defendant's injuries. Plaintiff's contention that defendant's counterclaim or cross-action should be nonsuited on the ground that defendant was guilty of contributory negligence as a matter of law presupposes negligence on his part. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163.

Plaintiff makes this contention in respect to defendant's testimony that she was operating her automobile on low beam: "The only occasion when it is permissible to dim one's lights is when one meets another vehicle on a highway. G.S. 20-131(b). Even then it is required that the dimmed headlights render clearly discernible a person 75 feet ahead. When there is no oncoming traffic, one's headlights must render clearly discernible a person 200 feet ahead. G.S. 20-131(a). Where a person operates an automobile on the highway at night with headlights on low beam when nothing exists to require this, he is negligent as a matter of law. *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884."

It would seem that plaintiff's reference to G.S. 20-131(b) is erroneous, and that he means to cite G.S. 20-131(d). G.S. 20-131(d) reads in part: "Whenever a motor vehicle meets another vehicle on any highway *it shall be permissible* to tilt the beams of the head lamps downward * * * subject to the requirement that the tilted head lamps * * * shall give sufficient illumination *under normal atmospheric conditions* and on a level road to render clearly discernible a person seventy-five feet ahead * * *." (Italics ours.) G.S. 20-131(a) provides: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section [a subsection in reference to a motor vehicle being operated upon a highway or portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of 200 feet ahead of the vehicle], they will at all times mentioned in § 20-129, and *under normal atmospheric conditions* and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but any

person operating a motor vehicle upon the highways, when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting, depressing, deflecting, tilting, or dimming the headlight beams * * *." (Italics ours.)

Defendant's evidence shows that it was drizzling rain and there was fog. Certainly, this was not operating a motor vehicle *"under normal atmospheric conditions."* It would seem that driving an automobile at night with its head lamps on bright might prove to be deficient in drizzling rain and fog, and that driving under such conditions with the head lamps on dim might be more effective to see ahead. However that may be—there is no evidence in the record on this point—the General Assembly in defining a motorist's duties as to the lighting equipment of his head lamps refers, in G.S. 20-131, to visibility *"under normal atmospheric conditions."* See *Cheatham v. Chabal*, 301 Ky. 616, 192 S.W. 2d 812, for a like construction of quite similar Kentucky statutes. Certainly, no provision of G.S. 20-131 states that it is permissible to dim one's head lamps *only* when one meets another motor vehicle on a highway, and we know of no statute or decision of this State that states or holds that it is permissible for a motorist to dim his headlights *only* when he meets another vehicle on the highway.

Plaintiff states in his brief: "Where a person operates an automobile on the highway at night with headlights on low beam when nothing exists to require this, he is negligent as a matter of law. *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884." This case does not support the sentence for which it is cited as authority, and we know of no case in our Reports or any statute of this State that supports such a statement as made by plaintiff in his brief. The *Pike* case holds that under the statute in force in 1941 plaintiff Pierce who outran his headlights was guilty of contributory negligence as a matter of law.

G.S. 20-141 prescribes speeds at which motor vehicles may be lawfully operated on the highways of the State. The 1953 General Assembly amended this statute by a provision which reads: "(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident: Provided, that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

Defendant, according to her testimony, was operating her automobile at a speed of 45 miles in a 55-mile speed zone. Therefore, under the provisions of G.S. 20-141(e) in force on 26 May 1960, she cannot be held guilty of contributory negligence *per se* merely because she was operating her automobile on "low beam" and was unable to stop her automobile within the radius of her lights or the range of her vision. *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232; *Beasley v. Williams, supra.*

It is a fundamental principle that the only contributory negligence of legal importance is contributory negligence which proximately causes or contributes to the injury under judicial investigation. *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904; *Elder v. R. R.*, 194 N.C. 617, 140 S.E. 298; *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776; 65 C.J.S., Negligence, sec. 129.

What is the proximate or a proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Pruett v. Inman, supra.*

Cookson v. Humphrey, 355 Mich. 296, 93 N.W. 2d 903, is a case with a factual situation in many ways similar to the instant case. In the *Cookson* case the Court said: "That plaintiff was guilty of negligence as a matter of law cannot be doubted. Was his negligence a proximate cause of the accident?" The Court held that it was improper to nonsuit plaintiff where the evidence raised an issue as to whether the deficiency of his lights or his excessive speed contributed to causing the collision with defendant's truck, which had negligently entered a four-lane intersection across the path of plaintiff, who was traveling on a favored street, since it could have been found that under the circumstances plaintiff would not have been able to avoid the collision even if he had been driving at a proper speed with adequate lights.

In 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 707, and in Annotation, 67 A.L.R. 2d 141, § 7(a), there are set forth a number of cases which hold that the plaintiff was contributorily negligent, or a finding that he was contributorily negligent was justified or required where it appeared that he was driving his vehicle with inadequate, dim, or deflected headlights and was involved in a collision with a vehicle proceeding in the opposite direction, or the same direction, or at an intersection, and also a number of cases which hold that under such circumstances the plaintiff was not negligent or that, if he was negligent, it was not a contributing cause of the collision. A study of a number of these cases, which have reached divergent results, shows that each case was controlled by its attendant facts and circumstances.

That defendant was guilty of negligence in operating her automobile on "low beam" at a speed of 45 miles an hour in drizzling rain and fog, when her head lamps were illuminating the highway only two car lengths ahead, is manifest. However, if more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601. Defendant's evidence would permit a jury to find that she was driving her automobile at night with her headlights on low beam and her windshield wiper working, under prevailing conditions of drizzling rain and fog, at a speed of 45 miles an hour in a 55-mile speed zone in her extreme right lane of traffic on a four-lane highway, when her head lamps were illuminating the highway only two car lengths ahead; that she was watching the road ahead of her; that under such conditions it would have been hazardous for her to have been watching a parking lot off the four-lane highway to her left; that plaintiff drove his automobile with no lights burning into the highway about two car lengths, or about 25 feet, ahead of her and in the path of her lane of traffic; that with plaintiff's automobile coming into the highway from her left, it would not have come within the ambit or spread of the rays of her head lamps if they had been on bright and had complied strictly with the provisions of G.S. 20-131(a), in time to have permitted defendant to see it and to avert a collision; and that even though defendant was negligent in the operation of her automobile, it did not contribute to her injuries as a proximate cause thereof. The trial court properly denied plaintiff's motion for judgment of compulsory nonsuit of defendant's counterclaim or cross-action.

In its charge on the fifth issue, the court instructed the jury, *inter alia*, that if defendant was entitled to recover at all, she was entitled to recover for future suffering of body and mind, and that if by such injury she has been to any extent permanently disabled, then the jury should take such fact into consideration in determining her damage. Plaintiff assigns this part of the charge as error, on the ground that defendant has offered no evidence tending to show that she sustained any permanent injury in the collision, which will result in future suffering.

The amount of pecuniary damages is not presumed. The burden of proving such damages is upon the party claiming them to establish by evidence, (1) such facts as will furnish a basis for their assessment according to some definite and legal rule, and (2) that they proximately resulted from the wrongful act. If there is no evidence as to the extent of the pecuniary damage, there can be no recovery of substantial damages, where the elements of damage are susceptible of pecuniary ad-

measurement. *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658; 25 C.J.S., Damages, § 144.

Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should charge the jury so as to permit its inclusion in an award of damages. On the other hand, where there is not sufficient evidence of the permanency of an injury proximately resulting from the wrongful act, the court should not give an instruction allowing the jury to assess damages for permanent injuries. To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural. *Hermilla v. Peterson,* 171 Neb. 365, 106 N.W. 2d 507; *Diemel v. Weirich,* 264 Wis. 265, 58 N.W. 2d 651; *MacDonald v. Firth,* 202 Va. 900, 121 S.E. 2d 369; 25 C.J.S., Damages, § 185, d; 15 Am. Jur., Damages, § 377.

Defendant testified as to the injuries she sustained in the collision substantially as follows: As a result of the collision, she was thrown from her automobile and knocked unconscious. When she recovered consciousness in a hospital the next morning, she had some pulled muscles in her neck and could not raise her head off the bed, and her head and left leg were bruised. During her stay in the hospital, she could not lift her head up because of these muscles, her head and leg hurt her, and she could hardly move her leg for a while. She had had no prior injury to her head and leg. Her physician in the hospital was Dr. Morgan. While she was in the hospital, he performed a rectal operation upon her, which had no connection with the collision. On 2 June 1960 she was discharged from the hospital and removed to her home. She was confined there for some time. About a month later she returned to work as a looper at Vision Hosiery in Belmont. She was out of work about a month. Her head and neck still hurt. Her left leg still hurts; it has never gotten better; it has a numbness. She can sit a while and it goes to sleep and gets real numb, and she can hardly walk. She has been to see Dr. Morgan several times about her leg. He sent her to see Dr. Miller, an orthopedic doctor. She saw him twice in August 1962. He prescribed exercises for her leg. Dr. Morgan's bill for attending her for her injuries sustained in the collision was $25.

Dr. Charles Morgan, a witness for plaintiff, testified in substance except when quoted: He saw defendant on the night of 26 May 1960 in

the emergency room at Gaston Memorial Hospital. She was complaining of headaches and of bruises on her leg and body. She was quite dazed. She had amnesia as to the circumstances immediately preceding the accident. Her amnesia cleared up after 12 to 14 hours. He saw her during her stay in the hospital. In the hospital she had some bruised areas on her left hip, left thigh, and tenderness over the area. Subsequently he saw her at his office. The tenderness had disappeared, but she had some numbness to pin-pricks or touching of the left thigh area. Because of pain in her left hip and numbness to pin-pricks, he referred her for an orthopedic consultation. When he examined her at the hospital, no bleeding was apparent, and there was no rigidity or stiffness of the neck. In the hospital he took X-rays of her skull and of her neck, and they were normal. "I had noted in the hospital records no indication of bruising to the left leg or scratches or cuts. The only specific statement with regard to this was in the emergency room, at which time nothing was apparent at that time on admission. In the discharge notes I've noted no complaints about the left leg or any injury to it. * * * The appearance of the area as far as the left leg and thigh are concerned here, or what you might want to term the hip area, seemed at the time to be of relatively trivial or slight nature. There was nothing apparent in the emergency room, and, of course, it takes some time usually for a relatively moderate bruise to develop when you see something like this. It remained in my opinion relatively trivial at least 'til I discharged her from the hospital. I made no notes of that. It was something which in this sense we expected to clear itself without any specific treatment, as we would expect a contused area that might develop to do. * * * Well, the patient's had continuing complaints." Dr. Morgan expressed no opinion that any of defendant's injuries were permanent, and no opinion as to the cause of the pain and numbness in defendant's left leg.

Dr. Miller was not called as a witness. We have summarized all the evidence in the record as to defendant's injuries.

Defendant's testimony is to the effect that at the time of the trial her head and neck and left leg still hurt, and that she still has numbness in her left leg. Is this condition permanent, and was it proximately caused by the wrongful act of plaintiff? Is this numbness in her left leg caused or contributed to by the injuries she sustained in the collision, or is it caused or contributed to by poor circulation or arthritis? Defendant's evidence gives no answer; it is left in the realm of conjecture and speculation. The record has no evidence that would permit a jury to find with reasonable certainty that she sustained any permanent injury as a proximate result of the collision. The instruction per-

mitting the jury to award damages for permanent injury was highly prejudicial to plaintiff, because it is apparent from the evidence in the record of defendant's injuries, and of her continuing complaints of pain, which complaints of pain are subjective in character, and from the size of the verdict that the jury awarded defendant damages on the theory she had sustained permanent injuries proximately resulting from the collision.

In *Diemel v. Weirich, supra,* the Court said: "It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain will continue in the future, and fix damages therefor accordingly."

Plaintiff has numerous other assignments of error to the charge in respect to the first, second, and fourth issues, which present serious questions as to whether the trial judge complied with the provisions of G.S. 1-180 requiring him to declare and explain the law arising on the evidence given in the case. We refrain from a discussion of these other assignments of error, for the questions presented thereby may not recur when the case is tried again. In our opinion, and we so hold, plaintiff is entitled to a new trial, and it is so ordered.

New trial.

CHARLES DAVIS, BY HIS NEXT FRIEND, ROBERT ALLEN v. WILLIAM RIGSBY.

(Filed 29 April, 1964.)

1. Pleadings § 29; Evidence § 20—

A party is bound by an allegation contained in his own pleading and he cannot subsequently take a position contrary thereto.

2. Trial § 21—

On motion to nonsuit, plaintiff may not avail himself of evidence contrary to a positive allegation in his complaint.

3. Automobiles § 49—

A passenger who enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him is guilty of contributory negligence *per se* barring recovery as a matter of law

for injury resulting from the driver's negligent operation of the car. He cannot avoid the consequences of his contributory negligence by testifying that the driver was not "drunk" but only "under the influence of an intoxicant."

APPEAL by defendant from *Huskins, J.*, August 1963 Session of MADISON.

Action for personal injuries growing out of an automobile upset. In his complaint plaintiff alleges:

About 10:30 p.m. on December 22, 1961, plaintiff was a guest passenger in defendant's automobile which he was negligently operating on a public highway at an unlawful rate of speed, without keeping it under proper control, and while under the influence of some intoxicating beverage. As a result, the vehicle overturned and plaintiff was injured.

Defendant denied all allegations of actionable negligence but, in the alternative and in bar of plaintiff's right to recover, averred that if he were operating the automobile while under the influence of some intoxicating beverage, plaintiff knew his condition at the time he became an occupant of the vehicle and voluntarily remained in it without protesting his speed or manner of operating the car.

Plaintiff's evidence tended to show the following facts:

At the time of the accident plaintiff was sixteen years old; at the time of the trial he was eighteen. He spent the evening of December 22, 1961 at the Marshall Skating Rink on Corkscrew Road. The defendant and Ed Rice (the plaintiff in a companion case) were also there and he observed them both drinking beer. At 10:00 p.m. plaintiff and Ronnie Johnson asked defendant for a ride home and the four left in defendant's 1957 Plymouth. Defendant proceeded from Corkscrew Road to the Walnut Creek Road where he overtook and passed another automobile. As he did so Ronnie Johnson informed defendant that they were meeting a highway patrol car and after it had passed he said to the defendant, "He's turning around." Defendant immediately increased his speed, ignored a stop sign when he entered the Marshall Bypass on a left turn, and went off the road on the right shoulder while "he was moving pretty fast." When he turned the car back on the pavement it upset at a point two hundred and forty-four feet south of the place where it had left the road.

On cross-examination plaintiff testified: "And I knew that William Rigsby was under the influence of beer or intoxicating beverages at the time I got into the car . . . He wasn't drunk. I still say he was operating the car while under the influence of intoxicating beverage. I do

say he wasn't so drunk that he couldn't drive. He was so drunk that he was affected and was under the influence. What I am telling the jury this morning is that he wasn't so drunk that he didn't know what he was doing. I saw him drinking beer and that is what I testified to, and that is the truth." Plaintiff also testified that he had no conversation whatever with defendant between the time they left the skating rink and the time the accident occurred.

The defendant, called as a witness by the plaintiff, testified that he had consumed no wine, beer, whiskey, or other intoxicating beverages that evening; that he ran off the road because an approaching car with very bright lights came over into his lane of travel.

At the close of plaintiff's evidence the defendant also rested and moved for judgment as of nonsuit. The motion was overruled. Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment entered on the verdict defendant appealed, assigning as error the failure of the court to allow his motion for judgment as of nonsuit.

A. E. Leake for plaintiff.
Williams, Williams and Morris for defendant.

SHARP, J. The basis of defendant's appeal is his contention that plaintiff's evidence establishes his contributory negligence as a matter of law. Plaintiff's argument is that, notwithstanding his own testimony to the contrary, he offered defendant's testimony that he had drunk no intoxicants that night and that this conflict in the evidence was for the jury to resolve. Ordinarily this would be true, but plaintiff overlooks the positive allegation in his complaint that at the time of the accident defendant was operating his automobile while under the influence of an intoxicating beverage thereby proximately causing the upset. A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings. *Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E. 2d 176; 71 C.J.S., *Pleading* § 59. Therefore, so far as plaintiff's right of action is concerned, his allegation that defendant was under the influence of an intoxicant at the time of the accident is conclusive and any evidence to the contrary must be disregarded in passing on the motion for nonsuit.

It is negligence *per se* for one to operate an automobile while under the influence of an intoxicant within the meaning of G.S. 20-138. *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1. If one enters an automo-

bile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*. *Tew v. Runnels*, 249 N.C. 1, 105 S.E. 2d 108; *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543.

Plaintiff's own testimony established his knowledge that defendant *was under the influence of an intoxicant* at the time he entered his automobile. He cannot avoid the consequences of his lack of prudence by saying that the defendant was not *drunk*. The two terms are not necessarily synonymous. *State v. Painter*, 261 N.C. 332, 134 S.E. 2d 638. Defendant's motion for a judgment as of nonsuit should have been allowed.

Reversed.

ED RICE, PLAINTIFF v. WILLIAM RIGSBY, DEFENDANT.

(Filed 29 April, 1964.)

APPEAL by defendant from *Huskins, J.*, August 1963 Session of MADISON.

This case is the companion to *Davis v. Rigsby*, *ante* 684. The allegations in the two complaints, except as to the damages, are identical. The two cases were consolidated for trial below but, on appeal, two substantially identical transcripts were filed and each was docketed as a separate case. Reference is made to the opinion in *Davis v. Rigsby*, *supra*, for the details of pleadings and evidence omitted herein.

Upon the trial, plaintiff Rice testified that he was sixty-eight years old and a second cousin of the twenty-four year old defendant. Before going to the Marshall Skating Rink the two had gone to Pike's place just across the Buncombe County line and purchased "two six-packs of small cans of beer." At the skating rink each drank three cans during the evening. Plaintiff insisted that he himself drank only three cans. He said he did not actually know how many defendant had consumed but he did not act drunk and "was not too far along" when they left with Davis and Johnson at 10:00 p.m. All the beer had been consumed by someone though plaintiff insisted that defendant was neither drunk nor under the influence of an intoxicant. On an adverse examination conducted prior to the trial, plaintiff had testified that he and the defendant together drank twelve cans of beer prior to the accident; that he himself felt the beer he had consumed; and that he knew the defendant was under the influence.

Plaintiff's version of events immediately preceding the upset was that defendant entered the Marshall Bypass from the Walnut Creek Road, an intersection controlled by a stop sign, at a speed of from sixty to sixty-five miles an hour. Then, for the first time, he said, "Bill you had better slow down, you are going to kill us." This was "a thought or two" before the car turned over. Defendant was called as a witness by plaintiff and, after testifying that he had had nothing at all to drink that night, said that at the time he ran off the road "Ed Rice was cutting up in my car. He was punching at me, hitting me on the shoulder and ribs, and I reckon he was having fun."

At the conclusion of plaintiff's evidence, which was all the evidence, defendant's motion for nonsuit was overruled. The jury answered the issues of negligence, contributory negligence, and damages in favor of the plaintiff. From judgment entered on the verdict defendant appealed assigning as error the denial of his motion for judgment as of nonsuit.

A. E. Leake for plaintiff.
Williams, Williams & Morris for defendant.

PER CURIAM. The testimony of both plaintiff and defendant that defendant was neither drunk nor under the influence of any intoxicant at the time his automobile overturned and injured plaintiff is set at naught by the allegation in plaintiff's complaint that defendant was operating his motor vehicle while under the influence of an intoxicating beverage and that such operation was the proximate cause of his injuries. The opinion in *Davis v. Rigsby, supra,* is controlling here. The motion for nonsuit should have been allowed.

Reversed.

MARY RUTH HORNE AND HUSBAND, JAMES D. HORNE v. HETTIE GRIFFIN HORNE, WIDOW; AND JESSE BRADY HORNE AND WIFE, ELIZABETH ARNEY HORNE.

(Filed 29 April, 1964.)

1. Appeal and Error § 3—

Ordinarily, order of the judge affirming the clerk in ordering actual partition is an interlocutory order and not appealable, but a decree denying the right to actual partition and ordering a sale is appealable. In the instant case order of sale might have ensued sequent the order appealed from, and the appeal is allowed.

2. Partition § 1—

A tenant in common has the right to insist that the entire lands owned by them be partitioned in the one proceeding even though it is necessary to allot the widow's dower and partition the lands subject to the dower estate. G.S. 46-15.

APPEAL by respondents from *Brock, Special Judge,* at Chambers in Wadesboro, North Carolina, 19 October 1963. From ANSON.

This is a special proceeding brought by the petitioners for the allotment of dower and partition of land between the two tenants in common.

Petitioners allege and respondents admit that Brady B. Horne, late of Anson County, North Carolina, died intestate in 1958, leaving him surviving his widow, Hettie Griffin Horne, and two children, Mary Ruth Horne Horne (whose spouse is James D. Horne), and Jesse Brady Horne (whose spouse is Elizabeth Arney Horne); that at the time of his death he owned 46 acres of land as described in the petition; that said tract of land is now owned by Mary Ruth H. Horne and Jesse B. Horne, subject only to the dower interest of their mother, Hettie Griffin Horne.

Petitioners allege and respondents admit that "the nature and size of said land is such that an actual division thereof can be made among the said tenants in common without injury to any of the parties in interest."

The Assistant Clerk of the Superior Court of Anson County ordered the allotment of dower, that only the remaining portion of the said 46 acre tract, after allotment of dower, be partitioned between the tenants in common, and that "any of the parties hereto shall be allowed ten days within which to file supplemental pleadings as they so desire on the question of whether actual partition of the remainder interest in the dower land can be made without injury to some or all of the parties interested."

The respondents appealed to the judge of the Superior Court who heard the matter by consent at Chambers.

The judge ordered (1) that the widow's dower be allotted; (2) "(t)hat the remainder of said forty-six acre tract (excluding that part allotted as dower) be partitioned between the two tenants in common, Mary Ruth Horne and Jesse Brady Horne, in two equal shares in point of value as near as possible * * *"; (3) that, "(e)xcept as modified herein, the order of the Assistant Clerk of the Superior Court of Anson County is affirmed"; and (4) that "(t)his cause is remanded to the Clerk of the Superior Court of Anson County for further proceedings herein not inconsistent with this order; and for the adjudica-

tion, upon the further application of either party, as to the susceptibility of the dower to an actual partition between the two tenants in common, subject to the life estate of the widow."

From the foregoing order the respondents appeal, assigning error.

Taylor, Kitchen & Taylor for petitioner appellees.
E. A. Hightower for respondent appellants.

DENNY, C.J. The question posed for determination on this appeal is whether or not the respondent Jesse Brady Horne is entitled to have the entire 46 acre tract of land partitioned between the two tenants in common, subject to the dower of Hettie Griffin Horne.

It is provided in pertinent part by G.S. 46-15: "When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. *The land to be divided in severalty shall be allotted to the tenants in common * * * subject to the dower right or dower,* and either may be asked and assigned at the same time that partition thereof is made and by same commissioners * * *." (Emphasis added.)

Dower may be allotted and the lands partitioned among the tenants in common in the same proceeding. *Vannoy v. Green,* 206 N.C. 77, 173 S.E. 277; *Baggett v. Jackson,* 160 N.C. 26, 76 S.E. 86; McIntosh, North Carolina Practice & Procedure, Partition, section 2402, at page 502.

Ordinarily the order of a judge affirming the clerk in ordering actual partition is an interlocutory order and is not *res judicata* and therefore not appealable. *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700; *Navigation Co. v. Worrell,* 133 N.C. 93, 45 S.E. 466.

On the other hand, a decree denying the right to actual partition and ordering a sale, affects a substantial right from which an appeal may be taken. *Hyman v. Edwards, supra.*

In the instant case, it may be that the order entered below, if no appeal had been taken therefrom, would result eventually in the necessity for a sale of that portion of the 46 acre tract allotted as dower. The respondent Hettie Griffin Horne, widow of Brady B. Horne, in her answer requested the appointment of commissioners to allot to her one-third in value of said tract of land, including the dwelling house and outbuildings and improvements appurtenant thereto, for the term of her natural life.

In the case of *Luther v. Luther,* 157 N.C. 499, 73 S.E. 102, it is said: "The authorities seem to agree that tenants in common cannot, *as a matter of right,* have partial partition of the lands owned by them, and

that when only a part of the land is described in the petition the defendant may allege that there are other lands owned in common and have them included in the order of partition. 30 Cyc., 177; *Brown v. Lynch,* 21 Am. St., 473; *Bigelow v. Littlefield,* 83 Am. Dec., 484.

"In the last case cited, the Court says: 'One tenant in common cannot enforce partition of part only of the common estate. * * * Such a course would lead to fraud and oppression * * *.'

"If a different rule should be adopted and three or four small tracts of land were owned in common, separate petitions could be filed for each, costs would be increased, and frequently sales for division would be necessary, when if all were included in one petition an actual partition would be practicable."

In 40 Am. Jur., Partition, section 32, page 27, it is said: "It is a well-established rule that a suit for partition should include all the lands of the original cotenancy, and if it does not, any party, whether his interest extends through all such lands or is restricted to some specific part, may insist that the omitted land or lands be included in the suit, and that all persons be made parties whose presence is necessary to a partition with such lands included * * *. Where two or more persons become cotenants either of a single or of several distinct tracts of land, each of them is entitled to partition of all their common property, within the jurisdiction of the court, by a single proceeding, and cannot be deprived of this right by any act or conveyance of any of his cotenants. * * * The fact that one cotenant has mortgaged a part of the lands of the cotenancy does not entitle the others to partition of that part of the land only not covered by the mortgage * * *.

"If cotenants own two tracts, they may voluntarily divide one of them, or they may ask the court to divide one of them, without depriving themselves of the right or the court of jurisdiction subsequently to apportion the other. * * *"

The case of *Seaman v. Seaman,* 129 N.C. 293, 40 S.E. 41, holds that where a petitioner petitions the court for sale of land for partition, and one of the respondents is a widow entitled to dower, the dower should be allotted before the land is sold.

Likewise, in *Baggett v. Jackson, supra,* it was held that, although M. A. Baggett might be the owner of a life estate, the petitioning cotenants could have actual partition of the remainder. The Court said: "The law was otherwise prior to chapter 214 of Laws 1887, section 2 of which is copied in section 2508 of the Revisal (now codified as G.S. 46-23), which reads as follows: 'The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and *for the purposes of partition the tenants in common shall*

be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate'." (Emphasis added.)

In the instant case, all parties agree that the entire 46 acre tract can be partitioned without injury to any of the parties in interest, consequently, the provisions of G.S. 46-16 and G.S. 46-22 are not applicable to this proceeding.

Where there is no allegation, proof, or finding that an actual partition cannot be made without injury to some or all of the parties, the court is without jurisdiction to order a sale. *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369.

In the absence of any allegation, proof, or finding that the entire tract owned by the tenants in common herein cannot be partitioned without injury to any of the parties in interest, the tenants in common are entitled to have the entire 46 acre tract allotted in severalty to the tenants in common, subject to the dower of Hettie Griffin Horne, as authorized by G.S. 46-15.

This cause is remanded for further proceeding not inconsistent with this opinion.

Error.

LILLIE L. COATS, WIDOW; CHARLIE WINSTON LANGDON AND WIFE, SHIRLEY S. LANGDON; THOMAS H. LANGDON AND WIFE, VIRGINIA N. LANGDON; MARY FRANCES L. FINCH AND HUSBAND, TRAVIS FINCH; VICTOR LLOYD LANGDON AND WIFE, GENEVA W. LANGDON; ROSCOE H. LANGDON v. PEGGY L. WILLIAMS, MINOR; AND HUSBAND, MARVIN WILLIAMS; CHRISTINE L. BYRD, MINOR, AND HUSBAND, BOBBY BYRD; DAVID BRUCE LANGDON, A MINOR, AND BOBBY RAY LANGDON, MINOR.

(Filed 29 April, 1964.)

1. Partition § 3—

A petition for partition is subject to demurrer under the ordinary rules governing pleadings.

2. Dower § 3—

Nothing else appearing, a widow is entitled to dower in each tract of land of which her husband died seized. G.S. 30-5.

3. Partition § 1—

The existence of the widow's dower right does not preclude partition, and the widow may join in the petition and have her dower allotted or the present cash value of her dower paid her. G.S. 46-15.

4. Same—

A tenant in common has the right to insist that each tract owned by them be partitioned in one transaction, either by actual partition or by partition sale if actual partition cannot be had without injury to some of the tenants.

5. Partition § 3—

The petition alleged that the widow had agreed that she would renounce her dower right in one tract of land in consideration of the conveyance by some of the tenants of their interest in another tract, and prayed for sale for partition of the first tract. The petition failed to allege clearly the respective interests of each party in each tract or the extent to which the agreement between the widow and some of the tenants had been executed. *Held:* Order sustaining demurrer of the guardian *ad litem* for a minor tenant for failure of the petition to allege that actual partition could not be fairly made if both tracts were sold, is upheld.

APPEAL by petitioners from *Phillips, E.J.,* November 1963 Session of JOHNSTON.

This is a special proceeding for a partition sale of a tract of land in Elevation Township, Johnston County, containing 18 acres. The hearing below was on the demurrer of respondents Williams to the petition.

Petitioners' allegations, summarized except when quoted, are as follows:

Charles V. Langdon died intestate April 2, 1953, seized and possessed of said 18-acre tract and of a tract in Cleveland Township, Johnston County, containing 33.2 acres.

He was survived by his wife, Lillie L. Coats, and nine children. The widow and five of the children, to wit, Charles Winston Langdon, Mary Frances L. Finch, Thomas H. Langdon, Victor Lloyd Langdon and Roscoe H. Langdon, all of age, are petitioners. Four of the children, to wit, Peggy L. Williams, Christine L. Byrd, David Bruce Langdon and Bobby Ray Langdon, are respondents. Peggy L. Williams is twenty years of age. Her husband, Marvin Williams, is twenty-one. Christine L. Byrd is eighteen years of age. Her husband, Bobby Byrd, is twenty. David Bruce Langdon is sixteen years of age. Bobby Ray Langdon is thirteen.

The widow and nine children own said 18-acre tract as tenants in common. Each child owns an undivided one-ninth interest subject to the widow's dower.

The petition alleges "the said Lillie L. Coats, widow, does hereby agree with the parties to this petition that in lieu of her dower in the tract of land described in Paragraph 1 above (the 18-acre tract), that she will and does renounce her right to dower" in said 18-acre tract

"provided that the children of Charles V. Langdon, who are of age, will convey to her their respective interests in the 33.2 acre tract"; that "the parties to this petition who are *sui juris* have done so"; and that, simultaneously with the execution and delivery of the commissioner's deed, she will execute a quitclaim deed to the purchaser.

The nature and size *of the 18-acre tract* "is such that an actual partition thereof cannot be made without injury to the several persons interested therein."

Petitioners pray that the 18-acre tract be sold and the net proceeds "divided among the said tenants in common in the proportions of their several interests therein."

The record does not show the appointment of a guardian *ad litem* for respondent Peggy L. Williams. The record shows attorneys for respondents Williams filed a demurrer to the petition. The demurrer asserts the petition does not allege facts sufficient to constitute a cause of action in that the petition does not allege that an actual partition may not be fairly made if *all* the lands owned by the tenants in common are taken into consideration.

The clerk of the superior court overruled said demurrer. Upon appeal by respondents Williams, Judge Phillips "set aside, vacated and reversed" the order of the clerk and sustained the demurrer of respondents Williams. However, his judgment sustaining the demurrer did not dismiss the proceeding. It was ordered that "the petitioners may amend their petition within 30 days if they are so advised."

By order dated October 19, 1963, the clerk appointed L. Austin Stevens guardian *ad litem* for respondents Christine L. Byrd and husband, Bobby Byrd, David Bruce Langdon and Bobby Ray Langdon. No answer, demurrer or other pleading has been filed in behalf of said minors by their guardian *ad litem*. An order was entered by Judge Phillips, simultaneously with the entry of his judgment sustaining the demurrer of respondents Williams, providing: "Now, therefore, for cause shown above, the respondent, L. Austin Stevens, Guardian Ad Litem, is hereby given 30 days after the certification of the judgment of the Supreme Court to the Superior Court of Johnston County in which to file answer, if the same is necessary."

Petitioners excepted to said judgment of Judge Phillips sustaining the demurrer of respondents Williams and appealed.

E. V. Wilkins for petitioner appellants.
Lyon & Lyon for respondent appellees.

BOBBITT, J. "General rules of pleading as to demurrers ordinarily apply as to the grounds for demurrer to a bill, complaint, or petition for

partition." 68 C.J.S., Partition § 97(b); 40 Am. Jur., Partition § 71; McIntosh, N. C. Practice and Procedure, § 910(2).

The facts alleged in the petition disclose: Subject to the widow's *right of dower,* each of the nine children acquired an undivided one-ninth interest in the 18-acre and in the 33.2-acre tracts.

The widow's right of dower is "a fixed and vested right of property in the nature of a chose in action—the right to demand an assignment of dower." *Trust Co. v. Watkins,* 215 N.C. 292, 294, 1 S.E. 2d 853. Here there has been no assignment of dower to the widow. Unless and until dower is assigned, both tracts, nothing else appearing, are subject to the widow's right of dower. G.S. 30-5; *Harrington v. Harrington,* 142 N.C. 517, 55 S.E. 409.

Tenants in common are entitled as a matter of right to partition or to a partition sale if actual partition cannot be made without injury to some of the tenants. *Batts v. Gaylord,* 253 N.C. 181, 116 S.E. 2d 424, and cases cited. Too, a widow, in respect of her right of dower, may join in the petition. G.S. 46-15; *Baggett v. Jackson,* 160 N.C. 26, 76 S.E. 86.

The purport of petitioners' allegations seems to be that the widow, on the one hand, and the five children who are petitioners, on the other hand, have entered into an agreement whereby the widow renounces her right of dower *in the 18-acre tract* in consideration of their conveyance to her of their respective interests in the 33.2-acre tract. The allegations are indefinite, indeed somewhat contradictory, as to the extent, if any, the alleged agreement has been executed. Too, the petition is silent as to the widow's claim and right of dower in respect of the 33.2-acre tract.

The four children who are respondents are not parties to the alleged agreement. Consequently, petitioners may assert against said respondents only rights to which they are entitled under the law.

The petition discloses affirmatively that the sole purpose of the special proceeding is to sell the 18-acre tract and divide the proceeds equally among the nine children. The petition and prayer contemplate no action whatever with reference to the 33.2-acre tract.

"The authorities seem to agree that tenants in common cannot, *as a matter of right,* have partial partition of the lands owned by them, and that when only a part of the land is described in the petition the defendant may allege that there are other lands owned in common and have them included in the order of partition. 30 Cyc., 177; *Brown v. Lynch,* 21 Am. St., 473; *Bigelow v. Littlefield,* 83 Am. Dec., 484." *Luther v. Luther,* 157 N.C. 499, 73 S.E. 102; see also, 40 Am. Jur., Partition § 32; 68 C.J.S., Partition § 55(b)(1).

Here, the petition discloses that parties to this proceeding are the owners of the two tracts. Even so, under petitioners' allegations the facts as to the respective interests of the parties in each tract are unclear. Suffice to say, the facts alleged are insufficient to show that petitioners are entitled to a partition sale of the 18-acre tract. In the absence of all relevant facts, we deem it inappropriate to discuss the extent, if any, ultimate decision may be based upon *Luther v. Luther, supra.*

The judgment of Judge Phillips sustained the demurrer of respondents Williams but did not dismiss the proceeding. Petitioners were granted leave to amend. In our view, this judgment was correct and is affirmed.

Since the record does not show the appointment of a guardian *ad litem* for respondent Peggy L. Williams, we assume she was of age when the demurrer was filed.

Affirmed.

ALYCE McDERMOTT QUICKEL AND CITIZENS NATIONAL BANK IN GASTONIA, NORTH CAROLINA, ADMINISTRATOR C.T.A. AND TRUSTEE OF THE ESTATE OF JOHN C. QUICKEL v. JOHN C. QUICKEL, JR. AND TOM C. QUICKEL.

(Filed 29 April, 1964.)

1. Wills § 39—

A general devise to testator's wife to have and hold or dispose of as she desires with following provision that "in case of survival of any heir it shall be his and if he does not survive it is my desire that" it go to testator's brother, *is held* to take the fee to the widow under the rule that a general devise with unlimited power of disposition transmits the fee and that a subsequent clause in conflict therewith will be disregarded. G.S. 31-38.

2. Wills §§ 31, 37—

In a will, precatory expressions carry their ordinary connotation and do not engraft a trust upon an absolute gift unless it clearly appears from the will and the surrounding circumstances that the words were used imperatively with the intent to create a trust.

3. Wills § 27—

The object of testamentary construction is to effectuate the intent of testator as ascertained from the language of the instrument.

4. Wills § 37 —

When property is given absolutely a trust will not ordinarily be imposed by later precatory expressions, and if the instrument does not provide

a complete plan for the disposition of the property. it is strong evidence that the words are precatory.

5. Wills § 29—

It will be presumed that testator did not intend to die intestate as to any part of his estate.

6. Wills § 27—

When a word is used in one part of the will in a certain sense, the same meaning will ordinarily be given the word in construing other parts of the instrument.

7. Wills §§ 31, 37—

Testator left certain stock to his wife without reservation but a subsequent sentence stated that it was his desire that the stock be held by a trustee with the income to be paid his wife and at her death to a son so long as he continued his college education and to be the property of the son when he obtained his college degree. *Held:* It being apparant that in another part of the will testator used the words "I desire" solely in a precatory sense and that to construe the bequest as creating a trust might result in partial intestacy, it was the intention of testator to make an absolute gift of the stock to his wife.

APPEAL by the plaintiff Alyce McDermott Quickel and defendant John C. Quickel, Jr. from *Martin, S. J.*, November 1963 Civil Term of GASTON.

Action by the administrator c. t. a. and the widow of John C. Quickel for a declaratory judgment to determine the ownership of certain land and corporate stocks devised and bequeathed by his will. John C. Quickel executed a holographic will on January 3, 1960 and died on May 16, 1960. The beneficiaries interested in the interpretation of this will are his widow, the plaintiff Alyce McDermott Quickel; their son and only child, John C. Quickel, Jr.; and one brother, Tom C. Quickel. All are *sui juris* and parties to the action. A jury trial was waived; the judge heard the evidence, found the facts, and rendered the declaratory judgment prayed in the complaint.

This appeal involves only the construction of paragraph 2 of the will which is as follows:

"2. To my wife Alyce McDermott Quickel the home we have lived in together at 1140 Edgemont Ave. in Gastonia, all of its contents and adjoining real estate. Also I will each piece of real estate recorded in my name in Gaston County to her to have and to hold or dispose of as she desires. In case of survival of any heir it shall be his and if he does not survive it is my desire that my only brother Tom C. Quickel have the above said property. I also will to my wife stocks held in The Waggoner Electric Co.,

The Citizens National Bank, The Drexel Furniture Co., The Carolina Power and Light Co., Iveys Inc., and the Public Service Co. of Gastonia. It is my desire that these be held by The Trust Department of the Citizens National Bank in the form of a Living Trust the income from them to be paid to her as she so desires and at her death to continue in the name of John C. Quickel, Jr. so long as he continues his education and to be his to control at the time of obtaining a college degree."

The residence at 1140 Edgemont Avenue in Gastonia was held by the testator and his wife, Alyce McDermott Quickel, as tenants by the entireties. At his death she became the owner of this property in fee simple as the surviving tenant. The judge held that under the terms of the will she also acquired a fee in the other Gaston County realty of which testator was the record owner at his death. From this ruling John C. Quickel, Jr. appealed contending that the testator had devised the widow a life estate with remainder to him in fee.

Prior to his death, testator had disposed of his stock in Iveys, Inc. His Honor decreed that the plaintiff Citizens National Bank held title to the other stocks listed in paragraph two of the will in trust to pay the income therefrom to the widow during her lifetime. He further held that the question of the disposition of the stocks and the income therefrom following her death was not properly before the court while she lived. The widow appealed from this ruling contending that she acquired these stocks absolutely and free of any trust.

Garland and Alala by Robert L. Bradley for Alyce McDermott Quickel, plaintiff.

J. Samuel Groves for John D. Quickel, Jr., defendant.

SHARP, J. Testator devised his realty to his wife "to have and to hold or dispose of as she desires." Thereafter he appended the provision that if any heir survive "it shall be his"; if no heir survive, he desired that his brother Tom have the property.

The ruling of the Superior Court that the wife acquired a fee simple estate in the testator's land is in accord with the decisions of this Court. This devise comes within the oft-stated general rule of testamentary construction that an unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause in the will purporting to dispose of what remains at his death is not allowed to defeat the devise nor limit it to a life estate. G.S. 31-38; *Walters v. Children's Home,* 251 N.C. 369, 111 S.E. 2d

707; *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368; *Burgess v. Simpson,* 224 N.C. 102, 29 S.E. 2d 38; *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506; *Peyton v. Smith,* 213 N.C. 155, 195 S.E. 379; *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817; *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626; *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Griffin v. Commander,* 163 N.C. 230, 79 S.E. 499; *Cf. Andrews v. Andrews,* 253 N.C. 139, 116 S.E. 2d 436. Of course, as Stacy, C.J., pointed out in *Taylor v. Taylor, supra,* "this rule, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will."

We sustain the trial judge's ruling that plaintiff Alyce McDermott Quickel is the owner in fee simple of the Gaston County realty of which testator was the record owner at the time of his death.

However, his ruling that Citizens National Bank holds title to those stocks listed in paragraph 2 of the will as trustee to pay the income therefrom to Alyce McDermott Quickel for life, leaving the ultimate taker to be determined at her death, presents greater difficulty. The reports contain myriad cases in which ill-advised testators, after giving property to a designated beneficiary, have expressed a desire that it should be handled or disposed of in a particular manner. So, in this case, testator first gives the stocks to his wife unconditionally. In the following sentence he expresses his *desire* that the Bank hold them in trust to pay her the income for life. Is this latter phraseology precatory or imperative?

In a will, precatory expressions carry their ordinary connotation and do not engraft a trust upon an absolute gift unless it clearly appears from the will and the surrounding circumstances that the words were used imperatively with the intent to create a trust. *Rouse v. Kennedy,* 260 N.C. 152, 132 S.E. 2d 308; *In re Estate of Bulis,* 240 N.C. 529, 82 S.E. 2d 750; *Carter v. Strickland,* 165 N.C. 69, 80 S.E. 961. See also *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *Dixon v. Hooker,* 199 N.C. 673, 155 S.E. 567.

The object of all testamentary construction is to effectuate the intent of the testator; so with "apprehension and misgivings," we face the task of divining what the testator meant by the words he himself penned in attempting to dispose of an estate in excess of $300,000.00, excluding over $45,000.00 in insurance proceeds payable to his wife and son in approximately equal amounts. *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Finke v. Trust Co.,* 248 N.C. 370, 103 S.E. 2d 466.

Many indicia, none alone conclusive, have been suggested and collected to aid the court in determining whether a testator intended to create a binding trust when he used precatory words. *Laws v. Christ-*

mas, 178 N.C. 359, 100 S.E. 587; *St. James v. Bagley,* 138 N.C. 384, 50 S.E. 841; 1 Bogert, *Trusts & Trustees,* § 48; Restatement (Second), *Trusts,* § 25. See 54 Am. Jur., *Trusts* § 57; Annot., Precatory Trusts, 107 A.L.R. 896, 70 A.L.R. 326, 49 A.L.R. 10. However, since "no will has a brother," in each case the court must look for help primarily in other parts of the will and in the circumstances attendant upon its execution. *Bank v. Phillips,* 235 N.C. 494, 70 S.E. 2d 509; *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. Nevertheless, these guides, culled from the tabulations, seem applicable to the instant case:

1. When property is given absolutely and without restriction, a trust is not to be lightly imposed by later precatory expressions, especially if they are of doubtful meaning.

2. If a gift is bestowed with a suggestion, desire or recommendation of a vague and incomplete plan for the disposition of the property, it is strong evidence that the words were precatory.

Here, if we assume testator's words to be imperative, taken literally, they indicate that he assumed his wife would die before his son (now twenty-two years old) finished his college education for, after providing that she should receive the income for life, he said that the stocks were to become his son's "to control at the time of obtaining a college degree." If the son should predecease the wife or abandon his education without receiving a college degree, testator would have died intestate as to these stocks. The will makes no provision whatever for these contingencies and contains no residuary clause. The presumption is that a testator did not intend to die intestate as to any part of his property. *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651.

The testator was a doctor who accumulated a substantial estate. Most certainly he was an intelligent man. However, in writing his own will, he stepped outside his specialty. Rationally, he could not have acted on the *positive* assumption that his wife would die before his son finished his education and that his son would eventually get a college degree. His wife is still alive and there is no suggestion that she is not in good health. The will indicates that the testator thought his son could finish college and, with enough incentive, would do so within a reasonable time and at the usual age. The court below made no finding with reference to the son's intentions in this regard. It held that such a determination was unnecessary in this action and delayed any ruling on the ultimate disposition of the stocks and the income therefrom until the death of the widow.

Adverting to other parts of the will, we note that in paragraph 3, testator bequeathed and devised certain realty and stocks valued at

$43,350.00, in addition to his automobiles and office equipment, to his son outright. Following this bequest he said:

> "The United Fund shares in his name the Investors Syndicate investment, the Insurance Annuity with Pilot Life Insurance Co. I desire to be placed in Trust by my Administrator, The Citizens National Bank and the income be paid to John C. Quickel, Jr. so long as he continues his education and to be given to him on the date he receives a college degree."

The testator was powerless to create a trust in the United Fund shares and the proceeds of the insurance policy; so this expression was without legal effect. It comes within the rule that "the testator will not be deemed to have intended a trust as to property which he did not own." 1 Bogert, *Trusts & Trustees* § 48; Restatement (Second), *Trusts* § 25, Illustration 4. It was, therefore, necessarily a suggestion and recommendation only. The testator used the same words, "I desire," in both paragraphs 2 and 3 of his will. We cannot assume that he intended one result in paragraph 2 and another in paragraph 3. "When a word is used in one part of the will in a certain sense, the same meaning, ordinarily, will be given the word in construing other parts of the instrument." 4 Strong, N. C. Index, *Wills* § 27; *Andrews v. Andrews,* 253 N.C. 139, 116 S.E. 2d 436.

It is our opinion that in paragraph 2 the testator most likely used the word *desire* as a suggestion to his wife that she create an *inter vivos* trust to take care of the contingency of her death before their son completed his education. See *Whitley v. McIver,* 220 N.C. 435, 17 S.E. 2d 457.

We hold, therefore, that the words in question were precatory and that plaintiff Alyce McDermott Quickel owns the stocks enumerated in paragraph 2 of the will which testator held at the time of his death, free of any trust whatsoever.

The case is remanded to the Superior Court for judgment in accordance with this opinion.

Error and remanded.

FOLGER L. CARTER, PETITIONER v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, RESPONDENT.

(Filed 29 April, 1964.)

1. Automobiles § 2—

Upon petition of a motorist for the reversal of an order of the Commissioner of Motor Vehicles suspending his driver's license, G.S. 20-279.2(b) places the duty upon the Commissioner or his representative to answer the essential elements of the petition and be present and participate in the hearing before the judge, but the Commissioner's failure to so answer and be present at the hearing cannot be prejudicial to petitioner.

2. Same—

Persons who may recover damages in connection with a collision upon which the Commissioner of Motor Vehicles has suspended an automobile driver's license have no standing as a matter of right at the hearing of the driver's petition for reversal of the Commissioner's order, but the court may permit such persons to file a statement relevant to the facts and participate in the hearing. Their statement is not competent evidence, but in the instant case it appears that the court did not consider the statement as evidence, and therefore reference in the order to the "answer of the intervening party" was not prejudicial.

3. Same—

On the hearing of a petition to reverse the order of the Commissioner of Motor Vehicles suspending petitioner's driver's license, the burden is upon petitioner to show that he was probably not negligent or that the negligence of the other party was probably the sole proximate cause of the collision, and where there is evidence before the court that the collision with a cyclist crossing the highway occurred as petitioner was overtaking and passing another vehicle at a street or highway intersection, the evidence is sufficient to support the court's finding that petitioner was "probably guilty of negligence."

APPEAL by petitioner from *Armstrong, J.*, November 4, 1963, Civil Session of RANDOLPH.

Petitioner (Folger L. Carter), aggrieved by an order of the Commissioner of Motor Vehicles dated April 18, 1963, filed a petition September 30, 1963, in accordance with the procedure prescribed by G.S. 20-279.2(b); and, upon allegations to the effect that the sole proximate cause of the collision referred to below was the negligence of Jack James Hout (Hout), prayed that the court reverse the Commissioner's order.

On February 22, 1963, on U. S. Highway No. 220, petitioner, driving his 1953 Plymouth, collided with Hout, a thirteen-year old boy, who was riding a bicycle. As a result Hout was fatally injured.

Petitioner's automobile liability insurance policy had expired at 12:00 midnight on February 21, 1963.

Answering the petition, the Commissioner averred, in part, that his order of April 18, 1963, suspending petitioner's operator's license, was issued on account of petitioner's failure to comply with the Commissioner's prior order requiring that petitioner deposit security in the amount of $5,000.00 to satisfy any judgment or judgments against petitioner for damages resulting from said collision; that petitioner "was not exempt from the provisions of G.S. 20-279.5 of the Motor Vehicle Safety and Financial Responsibility Act of 1953 by virtue of the petitioner's maintaining automobile liability insurance or otherwise"; that he had notified the other party (the administrator of Hout) of the petition; and that he presented to the court for determination the questions raised by the petition. The Commissioner attached to his answer a copy of the accident report filed with the Department of Motor Vehicles pursuant to G.S. 20-166.1.

On October 15, 1963, the administrator of Hout filed an answer to the petition in which he alleged that his intestate's death was proximately caused by the negligence of petitioner. (Note: It appears from the petition that the administrator of Hout had instituted a civil action against petitioner on March 27, 1963, to recover damages for the alleged wrongful death of his intestate.)

As indicated, the allegations of the petition and of the administrator's answer are in sharp and irreconcilable conflict.

At the hearing before Judge Armstrong, the only evidence was that offered by petitioner. Petitioner did not testify but offered the testimony of John Henry Armstrong and of Ray Robert Skelton. At the conclusion of their testimony, Judge Armstrong stated: "I could not hold that he was not guilty of negligence. I will affirm the order of the Commissioner." Thereupon, Judge Armstrong entered judgment as follows:

> "This cause coming on to be heard, and being heard . . . upon the petition filed by the petitioner, answer of the respondent, and answer of the intervening party, Aubrey I. Hout, Administrator of the Estate of Jack James Hout;
>
> "The petitioner prays that the Court reverse the order of the Commissioner of the North Carolina Department of Motor Vehicles suspending the North Carolina operator's license of the petitioner as provided for under the provisions of G.S. 20-279.2;
>
> "That this matter was heard in open Court, at which time the petitioner was present, together with his attorney, and presented evidence; such evidence being as set forth in the transcript of the record and made a part thereof;

"It appearing to the Court and the Court finding as a fact from the evidence presented that the petitioner was probably guilty of negligence in the accident referred to in the petition and answers filed herein;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the said order or acts of the Commissioner of the North Carolina Department of Motor Vehicles issued on April 18, 1963, directing the suspension of the driver's license of the petitioner be, and the same is hereby sustained.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petitioner, Folger L. Carter, surrender and deliver his North Carolina operator's license to the Commissioner of the North Carolina Department of Motor Vehicles as required by law."

Petitioner excepted and appealed.

L. T. Hammond, Sr. and L. T. Hammond, Jr., for petitioner appellant.

Attorney General Bruton and Assistant Attorney General Brady for respondent appellee.

BOBBITT, J. Following provisions with reference to the aggrieved party's petition and the Commissioner's answer, G.S. 20-279.2(b), in pertinent part, provides:

"(b) . . . At the hearing upon the petition the judge shall sit without the intervention of a jury and shall receive such evidence as shall be deemed by the judge to be relevant and proper. Except as otherwise provided in this section, upon the filing of the petition herein provided for, the procedure shall be the same as in civil actions.

"The matter shall be heard *de novo* and the judge shall enter his order affirming the act or order of the Commissioner, or modifying same, including the amount of bond or security to be given by the petitioner. If the court is of the opinion that the petitioner was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, the judge shall reverse the act or order of the Commissioner. Either party may appeal . . .

"No act, or order given or rendered in any proceeding hereunder shall be admitted or used in any other civil or criminal action."

No question as to the validity of the Commissioner's order of April 18, 1963, when issued, is presented. The questions presented relate to whether petitioner is entitled to a reversal of said order on the ground that the negligence of Hout was the sole proximate cause of his death.

In his answer to the petition, the Commissioner asserts he "has no authority of investigation or determination" with reference to whether petitioner "was probably not guilty of negligence" or with reference to whether the negligence of Hout "was probably the sole proximate cause of the accident." Adverting to the fact that any determination he might make would have no bearing upon his mandatory duty under G.S. 20-279.5 to suspend petitioner's operator's license, the Commissioner takes no position with reference to these questions. He prays that said questions be determined "without the presence of the Commissioner" and that the court "enter such order affirming, modifying, or reversing the order of the Commissioner as it deems required by the evidence."

In our view, G.S. 20-279.2(b) imposes upon the Commissioner (or his representative) the duty to answer all essential allegations of the petition and to be present and participate in the hearing before the judge. Otherwise, since *the commencement* of the proceeding suspends the Commissioner's order "pending the final determination of the review," the proceeding might lie dormant indefinitely for lack of activity on the part of the petitioner. While the statute provides that the court shall make the crucial determinations, in our opinion the statute contemplates that the Commissioner shall bring forward for the court's consideration all evidence in his possession pertinent to decision. Even so, the Commissioner's failure to so answer or be present at the hearing before Judge Armstrong was not prejudicial to petitioner.

When notified the petition had been filed, the administrator of Hout, without first obtaining an order permitting him to intervene, filed an answer to the petition. The statute makes no provision for intervention by persons who might recover damages from petitioner based on his actionable negligence in connection with such accident. They have no standing in such proceeding *as a matter of right.* Even so, it is appropriate that the Commissioner notify such persons of the petition and of the hearing to the end that all competent and relevant evidence may be brought forward. In *Johnson v. Scheidt, Comr. of Motor Vehicles,* 246 N.C. 452, 98 S.E. 2d 451, such persons were made parties by consent. While such persons may not be considered proper parties to the proceeding in a technical sense, the court, in its discretion, *may permit* such persons to file a statement relevant to the facts alleged in the petition and *may permit* them to participate in the hearing. However, such statement, whether denominated an answer, affidavit or otherwise, may not be considered competent evidence in the hearing.

Petitioner assigns as error that portion of the judgment reading, ". . . and answer of the intervening party, Aubrey I. Hout, Administrator of the Estate of Jack James Hout." However, it does not appear that the filing of an answer by the administrator of Hout prejudiced petitioner. It is clear that Judge Armstrong did not consider either the petition or the answers as evidence. It is expressly provided that the finding of fact that petitioner "was probably guilty of negligence" was based on "the evidence presented," "such evidence being as set forth in the transcript of the record and made a part thereof." Petitioner's said assignment of error is overruled.

The burden of proof was on petitioner to show he "was probably not guilty of negligence" or "that the negligence of the other party was probably the sole proximate cause of the collision." The court made a positive finding that petitioner "was probably guilty of negligence." Petitioner assigns as error this finding.

There was *testimony* before Judge Armstrong tending to show: Where the accident occurred, U. S. Highway No. 220 (also referred to as Fayetteville Street) was a three-lane highway. Petitioner was traveling south in the center lane "in the process of passing this other car." Hout, riding his bicycle, was crossing from the west toward the east side of the highway. When struck by petitioner, Hout was in the center lane at a point four feet and three inches west of the east lane. Brittain Street extended west from No. 220 (Fayetteville Street). The impact "was in the center lane of the highway just about directly across from Brittain Street"—"just about in front of Brittain Street." It is noted that petitioner alleged the collision occurred when he was "in the process of passing another automobile headed in the same direction" in which he was traveling.

While the evidence offered by petitioner tended to show negligence on the part of Hout, it also tended to show that petitioner at the time of the collision was overtaking and passing another automobile proceeding in the same direction at a street or highway intersection. Irrespective of whether this evidence is considered sufficient to show a violation of G.S. 20-150(c) and therefore negligence *per se*, see *Adams v. Godwin*, 252 N.C. 471, 114 S.E. 2d 76, it was sufficient, in our opinion, to support the court's finding that petitioner "was probably guilty of negligence." Hence, the assignment of error directed to this finding is overruled.

By express provision of G.S. 20-279.2 (b), said finding may not be admitted or used in the pending civil action for alleged wrongful death.

For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

STATE v. JOE GOINS, JR., DOCKET NO. 9003.
AND
STATE v. JESSE JAMES MARTIN, DOCKET NO. 9020.

(Filed 29 April, 1964.)

1. Criminal Law § 101—

The evidence, whether direct, circumstantial, or a combination of both, must amount to substantial proof of every essential element of the offense charged in order to warrant the submission of the issue to the jury, it being for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt.

2. Robbery § 4—

Evidence tending to show that defendants are brothers-in-law and lived together, that one of them had in his possession at the time of the robbery a gun which was positively identified by the victim of the robbery as the one used in the perpetration of the offense, that the other defendant borrowed two stockings shortly before the offense was committed, and on the day after the robbery had in his possession approximately one-half of the money stolen and admitted his participation in the robbery, and that the perpetrators while committing the offense wore stockings over their heads, *is held* sufficient to be submitted to the jury as to each defendant on the charge of armed robbery.

3. Criminal Law § 99—

Evidence favorable to defendant, in conflict with that offered by the State, is not considered on motion to dismiss.

APPEAL by defendants from *Williams, J.*, September, 1963 Session, LEE Superior Court.

The defendants were separately indicted but jointly tried for the robbery of Wilford Harrison on June 28, 1963, by the use of a firearm, to-wit: a shotgun. At the conclusion of the State's evidence the defendant Martin testified for the defense. Goins did not offer evidence. The jury returned a verdict of guilty as charged as to both defendants. From the prison sentences imposed, the defendants appealed, assigning errors.

T. W. Bruton, Attorney General, Richard T. Sanders, Assistant Attorney General for the State.

J. W. Hoyle for defendant Joe Goins, Jr., appellant.

H. M. Jackson for defendant Jesse James Martin, appellant.

HIGGINS, J. Each defendant contended the evidence as to him, being in large measure circumstantial, was insufficient to go to the jury, and, for that reason, the court committed error in denying the motions to dismiss. "When a motion is made for a . . . directed verdict of not guilty, the

trial judge must determine whether there is substantial evidence of every essential element of the offense. In so far as the duty of the judge is concerned, it is immaterial whether the evidence is direct, circumstantial, or a combination of both. If it is substantial as to all essential elements of the offense, it is the duty of the judge to submit the case to the jury . . . Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict." *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444.

The State's evidence, briefly summarized, disclosed that Wilford Harrison, while at work at a filling station in Sanford about two o'clock on the morning of June 28, 1963, was robbed by two colored men who had dark stockings over their faces. One of the men struck him twice on the head with a single barrel shotgun. They took about $75.00 in bills from his pocket and in change from a coin container on his belt. The men were in the station for only about two minutes. During that time one called the other "James."

State's Exhibit A, a single barrel shotgun, was identified by the witness Harrison as the gun the colored boy used in the assault and robbery. "I identify the gun from the single 'trick' (disassembly screw with a spur) on the side of the gun. . . . I had never seen one like it before. I have seen it since then . . . when it was brought to the station by a policeman."

Nancy Mae Johnson testified she saw the defendant Jesse James Martin in Sanford about 8:00 o'clock p.m. (on June 27, 1963) at her house. At his request she gave him a colored stocking which he put over his face and asked whether she could recognize him. When she gave a negative answer he requested a second stocking which she also gave him. At about 5:00 o'clock on the next morning (28th) he came back to her house and said, "I came into a lot of money last night. . . . We robbed a station." He had 29 one-dollar bills which he asked her to keep for him. She refused. "(He) said he hit him in the head twice with the shotgun and would have shot him but he knew the gun would sound so loud . . . somebody would probably get there before they could get away." She further testified that Jesse James Martin and Joe Goins were brothers-in-law and lived together.

Floyd Council testified that State's Exhibit "A" is his gun; that the defendant Joe Goins borrowed it to kill a dog. "I came in from work . . . he . . . told me he would get it when it got a little darker. . . . He came back about 9:30 at night . . . came to the back door . . . asked for the gun and I gave it to him. . . . (next day) I found him coming down the street, he did not have my gun . . . I asked him for my gun . . . and he said he would bring it back . . . I went back and got it myself." The

witness kept the gun in his possession until the police made inquiry about it and he turned it over to the officer who produced it in court.

Jesse James Martin testified that he had nothing whatever to do with the robbery; denied much of Nancy Mae Johnson's testimony. He did admit, "I got the $30.00 in one-dollar bills that I left with my brother-in-law by saving it up. I had been saving it up to go to Durham on." He also admitted being at the house of Nancy Mae Johnson on the evening of June 27, 1963, and on the morning of the 28th. He admitted having been convicted of larceny for which he served a term on the roads.

When viewed in the light most favorable to the State, the evidence permits these inferences: The defendants are brothers-in-law. They room together. Martin procured two colored stockings for disguises about eight o'clock on the night of June 27. Near the same time Goins procured Council's single barrel shotgun. At two o'clock in the morning two men with disguises and the shotgun robbed Harrison. When Goins failed to return the gun, Council went to the place where the defendants lived and repossessed it. The police, after inquiry, obtained the gun from Council, produced it in court where the victim identified it as the weapon used in the robbery. The means of identifying the weapon was a spur on the bolt joining the forearm and barrel to the action and the stock. The victim had never seen another like it. The defendant Martin admitted his part in the holdup and requested Nancy Mae Johnson to keep $29.00 in bills for him—approximately half the currency taken from Harrison. That the other participant in the robbery received the other half is not a violent presumption. The uncontradicted evidence that Goins procured the weapon used in the robbery and still had it in his possession the day after the holdup, together with the relationship and association of the defendants, while not compelling as to Goins, nevertheless, is sufficient to go to the jury and to support the verdict as to both Martin and Goins.

The court properly submitted the case to the jury. *State v. Thompson*, 256 N.C. 593, 124 S.E. 2d 728; *State v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411; *State v. Davis, supra;* and *State v. Stephens*, 244 N.C. 380, 90 S.E. 2d 431.

Evidence favorable to the defendant in conflict with that offered by the State is not considered on a motion to dismiss. *State v. Gay*, 251 N.C. 78, 110 S.E. 2d 458; *State v. Troutman*, 249 N.C. 395, 106 S.E. 2d 569. The assignments of error involving the admission of evidence and the judge's charge are not sustained.

In the trial and judgment in the Superior Court, we find

No error.

CAROLINA POWER & LIGHT COMPANY v. ROBERT MASTON PAUL.

(Filed 29 April, 1964.)

1. Damages § 4—

The measure of damages for injury to personal property in this State is ordinarily the difference between the fair market value of the property immediately before and immediately after the injury, but when the property has no market there can be no market value, and in such instances the measure of damages may properly be gauged by the cost of repairs.

2. Same—

In this action to recover for tortious destruction of a power pole, the transformer attached to it, and a part of the transmission line and guy wire, it *is held* the court properly instructed the jury that the measure of damages was the out-of-pocket expenses of repair and replacement of the damaged facilities, less salvage value of the replaced parts.

APPEAL by defendant from *McConnell, J.*, in Chambers, February 28, 1964, RICHMOND Superior Court.

The facts are stipulated. The defendant lost control of his automobile while driving on the public highways, crashed into the defendant's power pole, destroying the pole, the transformer attached to it, a part of the transmission line, and guy wire. In order to restore its disrupted service, the plaintiff made all necessary repairs at a cost of $182.65.

The only difference in the contention of the parties involves the proper measure of damages. The plaintiff contends it is entitled to recover the cost of repairs, less the salvage value of the replaced parts. The defendant claims the plaintiff installed a new pole and a new transformer more valuable than the old ones and that the proper measure of damages should be the difference in the market value of the damaged property immediately before and immediately after the damage.

Judge McConnell held: ". . . (T)he measure of damages recoverable by plaintiff is the actual, out-of-pocket expenses of repairs and replacement of its damaged facilities, provided such expenses are reasonable," and awarded damages in the amount claimed by the plaintiff. The defendant excepted and appealed.

Leath, Blount & Hinson by Robin L. Hinson for defendant appellant.

Bynum & Bynum by Fred W. Bynum, Jr. and J. A. Weeks for plaintiff appellee.

HIGGINS, J. North Carolina is committed to the general rule that the measure of damages for injury to personal property is the differ-

ence between the market value of the damaged property immediately before and immediately after the injury. The purpose of the rule is to pay the owner for his loss. If the damaged article has market value, the application of the before and after rule is relatively simple. Even in that case, however, the cost of repairs is some evidence of the extent of the damage. *Simrel v. Meeler,* 238 N.C. 668, 78 S.E. 2d 766. However, if there is no market, there can be no market value. The foundation for the before and after rule is lacking. Cost of repairs is then about the only available evidence of the extent of the loss. Ordinarily, power systems are not on the market. Less so are small component parts of the system.

The authorities on damage recognize the difficulty of fixing damages for the type of injury here involved. The following appears in McCormick, Damages, p. 166, § 44, 3rd ed.: "The expression 'market value' in this latter instance becomes a vague ideal rather than a reasonably definite standard. The notion that there is a 'market' for such a unique property stretches the metaphor almost to the breaking point."

This Court held in *Phillips v. Chesson,* 231 N.C. 566, 58 S.E. 2d 343: "The courts, always moving toward rules of general application to frequently recurring situations, have evolved many rules which achieve the merit of convenient application and easy provability at the expense of a nearer approach to reality in the particular case. Amongst them is the rule, sometimes called ordinary, that the measure of damages recoverable for injury to property is the difference between the market value immediately before the injury and the market value immediately afterwards. This rule, which can be an approximation to truth in a limited number of cases, is often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case."

In *Waters v. Lumber Co.,* 115 N.C. 649, 20 S.E. 718, the Court said: "He (plaintiff) could recover for unlawful obstruction of the ditches the cost of removing the obstruction, and for destroying fences the cost of replacing them."

The Court of Appeals of Louisiana, in *Southwestern Electric Power Co. v. Canal Ins. Co.,* 121 So. 2d 769, had before it a question similar to that presented here: "The total expenses incurred by plaintiff were actual, direct out-of-pocket expenses incurred by reason of the tortious act. The plaintiff is, in our opinion, entitled to recover its actual loss in wages and material and is entitled to be restored in the same position it was in prior to the accident."

The Supreme Court of New Jersey, in *New Jersey Power & Light Co. v. Mabee,* 197 A. 2d 194, in a *per curiam* opinion, passed on substantially the question before us. In answering the argument that damages should be reduced by the amount of difference in the value of the old pole destroyed and the new one replacing it, the Court said: "It seems to us that the true issue is whether the replacement of the pole did more than make plaintiff whole and whether, if it did, it would be just to make the victim of the wrong contribute so much of the cost as would reflect that further benefit. . . . In short, at least upon the record before us, we cannot say with reasonable assurance that the installation of a new pole did more than remedy the wrong done. An injured party should not be required to lay out money, as defendants' approach would require, upon a questionable assumption that one day its worth will be recaptured."

The Third District Appellate Court of Illinois, in *Central Illinois Light Co. v. Stenzel,* 195 N.E. 2d 207, held: "Where property had been damaged and can be repaired, true measure of damages is reasonable cost of repairs, providing that such is less than value of property before damage." The purpose of the proviso is to prevent the owner of property from profiting by the injury.

As authority for its claim of credit for the difference in value between the new pole and the old one, the defendant cites a memorandum opinion by New York Supreme Court, Appellate Division, Fourth Department, in the case of *Niagara-Mohawk Power Corp. v. Smith,* 11 A.D. 2d 905, 202 N.Y.S. 2d 794. The memorandum does not appear to support the defendant's position; but if it does, the other cases appear to be based on sounder reasoning.

The cost of repairs furnishes the more satisfactory test by which to determine the plaintiff's damages; however, the defendant was properly given credit for the salvage value of the replaced parts. The record fails to show the repairs perceptibly increased the value of the plaintiff's property.

In this case a rule more satisfactory than that applied by Judge McConnell does not occur to us. The judgment of the Superior Court is

Affirmed.

SKIDMORE *v.* AUSTIN.

ELEANOR POPLIN SKIDMORE AND HUSBAND, HARRY P. SKIDMORE, AND LESSIE POPLIN CARPENTER, WIDOW, PETITIONERS v. FLORA POPLIN AUSTIN AND HUSBAND, CRAWFORD AUSTIN; M. T. POPLIN AND WIFE, BEULAH POPLIN; L. ODELL POPLIN AND WIFE, DONNIE POPLIN; MARY DOCIE POPLIN BURLESON AND HUSBAND, ED BURLESON; ODESSA POPLIN LAMBERT AND HUSBAND, CLETUS LAMBERT; RAYMOND POPLIN AND WIFE, ROSA POPLIN; ANNIE POPLIN AUSTIN AND HUSBAND, ROSCOE AUSTIN, AND F. LOUISA POPLIN, DEFENDANTS.

(Filed 29 April, 1964.)

1. Judgments § 5—

Judgments are either interlocutory or final, and a judgment is interlocutory when it is subject to change by the court during the pendency of the action to meet the exigencies of the case.

2. Partition § 9—

All orders in partition proceedings are interlocutory until final confirmation of the report, and if the life tenant dies prior to the sale her death terminates her estate and there can be no sale thereof, and therefore her heirs are not entitled to any part of the proceeds of sale notwithstanding the order of sale directs that the lands be sold and the cash value of her life estate be paid to her or her general guardian.

APPEAL by intervenor, Edward E. Crutchfield, Administrator of the Estate of F. Louisa Poplin, from *McConnell, J.*, October 14, 1963 Civil Session of STANLY.

This proceeding was begun in November 1961. Petitioners allege: M. M. Poplin, in 1918, conveyed 91 acres in Stanly County to F. Louisa Poplin and twelve other named individuals. The grantees were the widow and children of J. W. Poplin, Jr. The widow, F. Louisa Poplin, was granted an estate for her natural life. The fee in remainder was conveyed to the twelve children. The land, producing no income, was owned by petitioners and defendants, the interest of F. Louisa Poplin being an estate for her natural life. The owners of the estate in remainder wished to sell for partition. A sale was for the best interest of the tenant for life. She was, because of age and disease, unable to manage her affairs and for this reason a guardian should be appointed to represent her.

The Clerk, finding F. Louisa Poplin incompetent, appointed Edward E. Crutchfield as guardian *ad litem* to represent her. He filed an answer admitting all of the facts alleged in the petition. He concluded his answer in this manner: "Having fully answered the petition, the guardian *ad litem* submits the interest of his ward to the Court, and prays that the interest of the ward in said lands be computed based on the present age of the ward which is 88 years." The other defendants answered, all admitted the allegations of the petition.

On 1 February 1962 the Clerk signed a writing captioned "Judgment and Order of Sale." The Clerk there finds the facts to be as alleged in the petition and admitted by the answers. He specifically finds, "(h) That it is for the best interest of the said F. Louisa Poplin that her interest in said lands be computed on a cash value basis upon her attained age, and the amount thereof be paid to someone as guardian for her." Following the findings is an order appointing a commissioner, who was authorized to sub-divide and sell the land. The fifth paragraph of the order reads: "That said lands shall be sold free of the life estate of the defendant, F. Louisa Poplin, and the cash value of her interest in said lands shall be determined upon her attained age and paid to her general guardian and if she has no general guardian, into this Court." The commissioner was directed to report any sales he made for confirmation.

Mrs. Poplin, life tenant, died 8 February 1962. In July 1962 the Clerk again ordered the commissioner to sell the lands and to hold the proceeds subject to further orders of the court. Several sales were made and resales ordered because of increased bids. A sale was made 4 February 1963. This sale was confirmed 25 February 1963. The commissioner was directed to pay the expenses of making the sales and to hold the balance of the purchase money subject to further orders of the court.

In September 1963 E. E. Crutchfield qualified as administrator of the estate of F. Louisa Poplin. He was permitted to intervene and assert a claim for that portion of the proceeds of sale representing the value of Mrs. Poplin's life estate on 1 February 1962, the day the commissioner was authorized to sell. He asserted that the value should be ascertained by using Mrs. Poplin's completed age, 88, and her expectancy as fixed by the tabulation appearing in G.S. 8-46.

The Clerk denied intervenor's right to participate in the proceeds of the sale. He directed distribution, after payment of costs, among the co-tenants in accordance with their respective shares. Intervenor appealed. Judge McConnell affirmed the order of the Clerk. Intervenor appealed to this Court.

Ernest H. Morton, Jr., for appellant.

Childers & Fowler and Richard L. Brown, Jr., for defendant appellees.

RODMAN, J. Appellant contends the order of 1 February 1962 entered while Mrs. Poplin was alive, is a final judgment fixing the portion of the purchase money each of the parties should receive. Based

on that premise he makes the further contention that the judgment, if wrong, is only erroneous; and if wrong can only be corrected by appeal.

The fact that the order signed by the Clerk on 1 February 1962 is entitled "Judgment and Order of Sale" is unimportant. A judgment may be either interlocutory or a final determination of the rights of the parties. G.S. 1-280. It is interlocutory when subject to change by the court during the pendency of the action to meet the exigencies of the case. *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351. Speaking with reference to the finality of orders in partition proceedings, Barnhill, J. said in *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700:

> "All orders in a proceeding for the partition of land other than the decree of confirmation are interlocutory. (Citations.)
>
> "Until the confirmation of the report in a special proceeding for partition the whole matter rests in the judgment of the clerk, subject to review by the judge, whose action is binding on us unless an error of law has been committed. (Citation.) An order appointing commissioners is preliminary and interlocutory and the judgment of the judge affirming the clerk in ordering actual partition is not *res judicata* and is not appealable. (Citations.)
>
> "It is the decree of confirmation which is the final judgment."

The order of 1 February 1962 directed the sale of both the life interest and the interest in remainder because such sale was seemingly in the best interest of the parties. If it developed before the sale, made pursuant to such order, was confirmed that the best interest of the parties would not be served by such sale, the Clerk, in the exercise of his discretion, could have then ordered an actual partition among the remaindermen. The life tenant could, if competent, have sold her interest; if incompetent and for her best interest, the court could have ordered her life estate sold. The life tenant would only be entitled to the proceeds of the sale of *her* estate.

Mulford v. Hiers, 13 N.J. Eq. 13, well illustrates and explains the reason for the conclusion here reached: There, one Garrett Hiers, died intestate leaving a widow and six children, four by the widow and two by a prior marriage. Petition for partition was filed. The court found that an actual partition could not be had without prejudice to the rights of the parties. It ordered a sale including the widow's right of dower. The widow consented to the sale. Part of the properties were sold in March. Those sales were confirmed in April. The residue of the lands was sold in November after the death of the widow in October. The children of the widow insisted that their mother was entitled to

have the value of her dower rights computed and paid from the proceeds of the sale of all of the properties. The children of the first marriage insisted that, as the widow died prior to the order of distribution, no payment could be made from the proceeds of the sale of any parts of the properties because of her dower interest. The court, in response to the divergent contentions of the heirs at law, said:

> "So far as relates to the proceeds of the sale of that portion of the land which was sold after the death of the widow, it is clear that her children can have no claim in virtue of her right of dower. It is true that the estate in dower of the widow was, by decree of the court, ordered to be sold, but in point of fact the estate was determined by the death of the widow before the sale. No sale of the dower right was ever made, and consequently there are no proceeds of the sale which the widow could be entitled to have invested for her benefit, or in lieu of which she could receive a sum in gross.
>
> "But in regard to the sales which were made and confirmed in the lifetime of the widow, her children are entitled to receive out of the proceeds of the sale a just and reasonable satisfaction for their mother's interest."

See also 33 Am. Jur. 771; Annotation: 102 A.L.R. 969.

To hold that the quoted language required payment for an estate which terminated several months prior to the sale would do violence to the manifest intent of the order.

Affirmed.

PITT AND GREENE ELECTRIC MEMBERSHIP CORPORATION v. CAROLINA POWER & LIGHT COMPANY AND RICHARD PATRICK WARREN AND WIFE, PARKER NORMAN WARREN.

(Filed 29 April, 1964.)

1. Electricity § 2—

In an action by a membership corporation to have the court declare that the extension of a power company's lines and sale of current to customers of the membership corporation within territory annexed by a municipality violated the contract between the membership corporation and the power company, demurrer on the ground that the municipality was not a party and that the action required a determination of the validity of the municipality's franchise to the power company, is untenable, there being no at-

tack on the validity of the franchise and it being admitted that the rights of the parties under the contract were subject to orders of lawfully constituted authorities.

2. Same—

Where an electric membership corporation is serving an area prior to the annexation of the area by a municipality of less than 1500 inhabitants, the membership corporation may continue to serve such area and may accept a customer within the area even after its annexation, and therefore in its suit to have the action of a power company in extending its lines over three hundred feet to serve such customers declared a violation of the contract between the membership corporation and the power company, the power company's demurrer on the ground that the customers were not eligible to become members in the membership corporation is untenable.

PLAINTIFF appeals from *Cowper, J.*, October 7, 1963 Civil Session of GREENE.

Plaintiff seeking a declaratory judgment alleged: It was created in 1937, as authorized by Art. 2, C. 117 of the General Statutes. It has since 1948 owned and operated, on the Greene Ridge Road, a line from which it distributes electric current.

On 1 July 1960 Snow Hill, a town having a population of less than 1,500, enlarged its corporate boundaries, thereby bringing within its boundaries a portion of plaintiff's electric line, property of defendants Warren and four other customer-members of plaintiff.

In March 1960 Snow Hill applied for, and was granted, membership in plaintiff. Snow Hill has, since March 1960, purchased current from plaintiff. The current purchased is used by the town to light some of its streets. Snow Hill is served from the line on what was, prior to the annexation, called Greene Ridge Road. It is the same line used to serve plaintiff's customer-members made citizens of Snow Hill on 1 July 1960.

On 22 May 1962 defendants Warren applied to plaintiff for membership. The application was approved. A service line less than 300 feet in length was constructed from which current was delivered to defendants Warren.

In 1931 Tidewater Power Company was granted a franchise by Snow Hill, for a period of 60 years, to construct, operate and maintain in the town "at such points as the Tidewater Power Company, its successors and assigns may elect," a power plant to sell and distribute electric current. In 1951 defendant Power Company merged with Tidewater, thereby acquiring all of Tidewater's franchise rights.

Prior to August 1962, it was 950 feet from the property of defendants Warren to the nearest line of defendant Power Company. In August 1962 defendant Power Company extended its line 2,037 feet to

the property of the defendants Warren. This was done for the purpose of furnishing electricity to defendants Warren, who are now receiving current from defendant Power Company. Defendants Warren have notified plaintiff to cease serving them.

In 1951 plaintiff and defendant Power Company entered into a contract pursuant to which plaintiff purchased a large portion of the electricity which it distributed to its members. That contract, approved by the North Carolina Utilities Commission, provided in part:

> "(a) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall distribute or furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by construction of lines not exceeding three hundred feet in length.
>
> "(b) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall duplicate the other's facilities, except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines, but no service shall be rendered from such interconnecting facilities in competition with the other party."

On 5 January 1956 plaintiff and defendant Power Company executed a new contract for the purchase and sale of electricity. That contract superseded the contract of 1951. This contract was not expressly approved by the Utilities Commission. It contained the provisions quoted above.

Defendant Power Company has not been ordered by "any duly constituted authority" to furnish electricity to defendants Warren.

Plaintiff contends the extension of Power Company's line and the sale of current to defendants Warren violate its contract with defendant Power Company. It prays the Court so declare.

Defendants Power Company and Warren demurred. Each avers: (1) The action requires a determination of the validity of the ordinance of Snow Hill authorizing Power Company, assignee of Tidewater, to sell and distribute electricity. This question cannot be answered because Snow Hill is not a party. (2) The complaint fails to state a cause of action because the individual defendants are not eligible to become members of plaintiff. Hence the contract did not prohibit defendant Power Company from extending its line more than 300 feet to serve defendants Warren.

The court sustained the demurrer for each reason assigned. It dismissed the action. Plaintiff appealed.

Lewis and Rouse for plaintiff appellant.

A. Y. Arledge, W. Reid Thompson, White & Aycock for defendant appellee Power Company.

I. Joseph Horton for defendants Warren.

Crisp & Wells by William T. Crisp, Amicus Curiae.

RODMAN, J. Does a determination of the contractual rights of plaintiff and Power Company depend on the validity of the Power Company's franchise? If the answer must be yes, the court correctly sustained the demurrer. G.S. 1-260. If, however, the question calls for a negative answer, the demurrer should not have been sustained for the reason first assigned.

In answering the question, these facts are decisive: Power Company does not have an exclusive franchise to serve the inhabitants of Snow Hill. (We need not now decide whether it could grant such a right, G.S. 160-2(6); *Thrift v. Elizabeth City,* 122 N.C. 31, 30 S.E. 349; 38 Am. Jur. 222-223; 64 C.J.S. 141.) Snow Hill does not contest the right of plaintiffs to sell electricity within its bounds. Plaintiff alleges, and the demurrers admit, Snow Hill is lighting its streets in the area involved in this controversy with electricity purchased from plaintiff. Plaintiff, in its brief filed here, expressly declares that it does not challenge the validity of the ordinance constituting Power Company's franchise.

The question of whether Snow Hill is "a properly constituted authority" within the meaning of the contract between plaintiff and Power Company, so that it could issue a lawful order compelling Power Company to serve particular properties, even though its lines were more than 300 feet from such properties, is not here presented. Plaintiff concedes that the limitation on the right to serve contained in the contract has no force, when an order requiring service has been issued by a properly constituted authority.

We are of the opinion, and hold, that the action as presently constituted is not a challenge to the validity of the ordinances of Snow Hill. Its rights will not be prejudiced by a judgment determining the rights of the parties to this action.

The second ground for demurrer is equally untenable. Snow Hill is a municipality with a population of less than 1,500. When plaintiff's lines were constructed, the area served was outside of the corporate limits of Snow Hill. Snow Hill is purchasing current from plaintiff. It is not

seeking to withhold from plaintiff the right to serve its inhabitants. Unless we overrule *Power Company v. Membership Corporation,* 253 N.C. 596, 117 S.E. 2d 812, and *Membership Corporation v. Light Company,* 253 N.C. 610, 117 S.E. 2d 764, we think it necessarily follows that plaintiff, under the facts here presented, had the right to offer its services to the inhabitants of Snow Hill. Defendants do not suggest the contract between plaintiff and Power Company is contrary to public policy or that it impairs the rights of any citizen of the state.

If a citizen desires service from one of the contracting parties, even though its lines may be more than 300 feet distant, he may apply to the properly constituted authority for such order as may be proper. He is entitled to a hearing and an appropriate order.

The judgment sustaining the demurrer is

Reversed.

ALTON P. WALL AND NELL R. WALL v. WILLIE RUFFIN AND ALTA RUFFIN.

(Filed 29 April, 1964.)

1. Trial § 31—

Even in those instances in which a peremptory instruction in favor of the party having the burden of proof is permissible, it is required that the court leave it to the jury to determine the credibility of the testimony, and the instruction must be in such form as to clearly permit a verdict unfavorable to such party in the event the jury finds that the evidence is not of sufficient weight and credibility to carry the burden.

2. Fraud § 11—

Inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on the issue of fraud, and when it is so gross that it shows practically nothing was paid, it may be sufficient to be submitted to the jury without other evidence.

APPEAL by defendants from *Brock, Special Judge,* 2 December 1963 Civil Session of RANDOLPH.

This is an action instituted on 19 January 1962 for the possession of a 30-acre tract of land described by metes and bounds in the complaint, which land the plaintiffs allege they own and that they have demanded possession of the defendants who are in the wrongful possession thereof and who refuse to vacate the premises.

The defendants filed answer denying the plaintiffs are the owners of the property. They admit that they have refused to vacate the premises and allege that the defendants are the owners thereof.

As a further answer and defense, the defendants allege that on 14 February 1961 they executed to Vernie R. Pickett and Kermit Codell Joyce an instrument securing the sum of $650.00; that they were advised they were signing a mortgage on their property and did not at any time agree or intend to sign a deed thereto.

The evidence discloses that on 9 October 1957, Grant Parks conveyed to his daughter, Alta P. Ruffin, the 30-acre tract of land involved herein and that the warranty deed therefor was duly filed for registration in the office of the Register of Deeds of Randolph County on 31 October 1957.

The evidence further discloses that on 5 February 1961 the defendants in consideration of $10.00 and other good and valuable considerations, executed a warranty deed to Vernie R. Pickett and Kermit Codell Joyce for the premises involved, which instrument was duly recorded on 17 February 1961.

On 14 February 1961, Kermit Codell Joyce and wife conveyed a one-half interest in the tract of land involved to Vernie R. Pickett and wife. This instrument was duly recorded on 17 February 1961.

On 11 September 1961, Vernie R. Pickett and wife for a consideration of $3,500 conveyed the premises to the plaintiffs by warranty deed which was duly recorded on 16 September 1961.

Plaintiff Alton P. Wall testified that he owns and lives on a 166 acre farm adjoining the 30 acre tract of land involved in this controversy and had been living there since 1952; that the 30 acre tract of land had a two-story brick house thereon; that "(t)here are several small buildings there, a crib, a smoke-house, a meat house, one or two other little buildings"; that between 700 and 800 feet bordered on the hard surface road. The property is located about 11½ miles from Asheboro, on a rural paved road about two miles from Highway No. 49.

Clotus Craven, a registered surveyor, who made a survey of the property, in testifying for the plaintiff, testified on cross examination that the 30 acre tract of land fronts on the 18-foot hard surface road for a distance of between 1600 and 1700 feet; that Mr. Wall's land bordered this tract on two sides. This witness further testified that in February 1961 the land involved was worth from $150.00 to $175.00 per acre.

The defendants offered evidence tending to show that in February 1961 the land was worth $8,000 to $10,000.

The evidence also tends to show that the defendants never received directly any consideration for the execution of the deed from them to

Pickett and Joyce on 5 February 1961. However, we think the evidence is sufficient to support the inference that the grantees promised to pay an obligation of the defendants in the sum of $650.00 due the Graham Production Credit Corporation. Defendants' evidence tends to show this fact and that the defendants had agreed to sign a mortgage on their farm to secure the above sum.

The court submitted the following issue to the jury which was answered as indicated:

"Are the plaintiffs bona fide purchasers for value and the present owners in fee simple entitled to immediate possession of the premises described in the complaint? Answer: Yes."

From the judgment entered on the verdict, the defendants appeal, assigning error.

Deane F. Bell for plaintiff appellees.

Ottway Burton for defendant appellants.

DENNY, C.J. The defendants assign as error the following portion of the charge: "So, under all of the evidence, members of the jury, the court instructs you that if you find the facts to be as all of the evidence in this case, both from the plaintiff and from the defendant, if you find all of the facts to be as all of the evidence tends to show that the facts are, then it would be your duty to answer this one question 'Yes.' In other words, if you believe everything that you have heard in this case and the court instructs you as a matter of law that the plaintiffs are the bona fide purchasers for value and the present owners in fee simple entitled to immediate possession of the premises described in the complaint, and so if you believe all of the evidence, it would be your duty to answer this one issue 'Yes'."

When a peremptory instruction is permissible, conditioned upon the jury finding the facts to be as all the evidence tends to show, the court must leave it to the jury to determine the credibility of the testimony. McIntosh, North Carolina Practice & Procedure, Volume 2, section 1516, page 52, *et seq.; Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757; *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904; *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265; *Hunnicutt v. Insurance Co.,* 255 N.C. 515, 122 S.E. 2d 74; *Crisp v. Insurance Co.,* 256 N.C. 408, 124 S.E. 2d 149.

In the last cited case, *Moore, J.,* speaking for the Court, said: "Where the peremptory instruction is favorable to the party having the burden of proof, it must be in such form as to clearly permit a verdict unfavorable to such party in the event the jury finds that the evidence is not of sufficient weight and credibility to carry the burden."

This assignment of error will be sustained.

We concur in the view of the trial judge that the defendants neither pleaded nor proved fraud on the part of the plaintiffs herein. Even so, since there must be a new trial, the defendants may desire to recast their pleadings and make Pickett and Joyce parties to the action and show, if they can, that the deed to them, executed by these defendants, was procured by fraud and that the plaintiffs took their deed with knowledge of the existence of such fraud. There is no evidence tending to show that Pickett and Joyce were ever in possession of the premises or that they ever requested the defendants to vacate the premises.

Be that as it may, the record discloses that this case has been tried three times in the court below. On the first trial, the jury returned a verdict in favor of the defendants and the trial judge set the verdict aside. The second trial ended in a mistrial, and the third in a verdict for the plaintiffs upon erroneous instructions to the jury.

In the case of *Garris v. Scott,* 246 N.C. 568, 99 S.E. 2d 750, *Parker, J.*, speaking for the Court, said: "The controlling principle established by our decisions is that inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on an issue of fraud, but inadequacy of consideration standing alone will not justify setting aside a deed on the ground of fraud. However, if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence. *Leonard v. Power Co.,* 155 N.C. 10, 70 S.E. 1061; *Knight v. Bridge Co.,* 172 N.C. 393, 90 S.E. 412; *Butler v. Fertilizer Works,* 195 N.C. 409, 142 S.E. 483; *Hill v. Ins. Co.,* 200 N.C. 502, 157 S.E. 599; *Hinton v. West,* 207 N.C. 708, 178 S.E. 356. See 24 Am. Jur., Fraud and Deceit, secs. 266 and 284."

The defendants are entitled to a new trial and it is so ordered.

New trial.

ALEXANDER FUNERAL HOME, INC., A CORPORATION v. HAROLD S. PRIDE AND CITY CHEVROLET COMPANY, INC.

(Filed 29 April, 1964.)

1. Evidence § 54—

While a party may not impeach his own witness and is bound by the testimony which he himself elicits, he is not precluded from showing the facts to be otherwise than as testified to by the witness.

2. Automobiles § 39—

The physical facts at the scene of the accident may speak louder than the testimony of witnesses, and may in themselves be sufficiently strong to merit the inference of negligence with respect to speed.

3. Automobiles § 41b—

Evidence tending to show that a motorist made a right turn into a dominant street, discovered he could not straighten the car and continued in an arc, hit the curb, lost control, ran through a yard, knocked down an 8-inch thick concrete wall, and struck brick pillows supporting a porch, causing the porch to collapse, *is held* sufficient to be submitted to the jury on the issue of negligence, since it permits an inference of excessive speed or of failure to maintain reasonable control of the vehicle and apply the brakes after the driver realized the vehicle was continuing to turn to the right because of the defective steering mechanism.

4. Automobiles § 41a; Negligence § 24d—

The fact that plaintiff alleges negligence in respects not substantiated by proof does not warrant nonsuit for variance when in other respects there is both allegation and evidence, since proof of negligence in any one of the respects alleged is sufficient if it proximately causes injury.

5. Automobiles § 5—

The person who suffers damage to property as a result of defective steering mechanism of an automobile may not recover of the company which repaired the steering mechanism under contract with the owner-driver, since the person damaged is not privy to any contract of warranty between the company and the owner-driver.

6. Same—

Evidence of damage to property resulting from defective steering mechanism of an automobile does not warrant recovery against the company that had three times repaired the steering mechanism for the owner-driver when the evidence discloses that the owner-driver had different complaints with respect to the steering on each occasion and there is no evidence as to what caused the defect, that the cause could have been discovered by the repairmen in the exercise of reasonable care, or that the repairmen had not been diligent in making the repairs, or that they did not find and correct the causes on each occasion.

7. Trial § 22—

To support a verdict there must be evidence of every fact essential and material to the cause of action, and a verdict may not rest upon mere guess or upon possibilities.

APPEAL by plaintiffs from *Riddle, S. J.*, October 28, 1963, Civil Session of MECKLENBURG.

This is an action for damages to a house resulting from alleged negligence of defendant Pride and defendant City Chevrolet Company.

Peter H. Gerns for plaintiff.

Carpenter, Webb & Golding and John A. Mraz for defendant Pride.

Fairley, Hamrick, Hamilton & Monteith for defendant Chevrolet Company.

MOORE, J. The court below, at the close of plaintiff's evidence, allowed defendants' motions for nonsuit. Plaintiff contends this was error.

Considered in the light most favorable to plaintiff, the evidence tends to show: Defendant Pride resides in Charlotte and is a physician. He purchased a Chevrolet automobile from defendant City Chevrolet Company, of Charlotte, about June 1961. Mechanical difficulties developed in the steering mechanism, and Dr. Pride on three occasions took the car to the City Chevrolet Company for repairs. On the first occasion, 10 July 1961, the automobile had been driven 1273 miles; he told repairmen it would not "return to straight" on turns and asked that the steering mechanism be checked; when the car was returned to him he was told that the steering had been checked and was in good order. On 6 September 1961, when the car had been driven 4717 miles, it was again taken in for steering repair; on this occasion Dr. Pride complained of "a noise that always threw the steering out of control when it struck an uneven area of the road"; the car was returned to him with assurances that the mechanism was correct. Finally, the car was taken to the Chevrolet Company on 29 September 1961, after it had been driven 6127 miles; Dr. Pride complained that it had too much "play" in the steering mechanism; when it was returned to him he was told that it had been examined and nothing wrong had been found. About 10:00 P.M., 3 October 1961, while Dr. Pride was driving on West Fifth Street in Charlotte, the car ran to his right off the street, crossed the curbing, knocked down an 8-inch thick concrete block wall, and ran into the front of plaintiff's house at 904 West Fifth Street, uprooting shrubbery, knocking back brick pillars supporting the porch, collapsing the porch roof and damaging gas and water lines as it went. Dr. Pride had been drinking but, according to the investigating officer, was not "under the influence." Dr. Pride, being called as a witness by plaintiff, testified that he travelled south on North Clarkson Street, stopped at a stop sign at the intersection of North Clarkson and West Fifth, then proceeded to make a right turn into West Fifth, pulled into the inside lane of the two lanes for west-bound traffic (it was a four lane street) and while still in his turn and after he had gone 10 feet into West Fifth Street he discovered he could not straighten his car and continued in an arc across the outside traffic lane, lost control when he hit the curb and did not recall applying his brakes at all. He was

travelling at the rate of 20 miles per hour. The damaged house was the second from the corner and the lot on which it was located had a 44-foot frontage. The corner lot fronts 50 feet on West Fifth. The car came to rest 65 feet from the corner.

In our opinion the evidence makes out a *prima facie* case of actionable negligence against defendant Pride. Plaintiff alleges that defendant Pride was negligent in that, *inter alia,* he failed to stop at the stop sign at the intersection of Clarkson and Fifth Streets, operated his automobile at a speed greater than was reasonable and prudent under the circumstances, failed to maintain reasonable control of the vehicle and failed to apply brakes and stop the car, and that such negligence was a proximate cause of the damage to plaintiff's property. Defendant Pride testified that his speed was 15 miles per hour; he told the investigating officer it was 20. Both are within the limits fixed by law. Pride was plaintiff's witness. There was no other eyewitness. Plaintiff may not impeach his own witness and is bound by his testimony when it is uncontradicted. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. But plaintiff may show the facts to be otherwise than as testified to by his witness. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Ross v. Tel. Co.,* 219 N.C. 324, 13 S.E. 2d 571. The physical evidence of damage at the scene permits the inference of negligence on the part of defendant Pride with respect to speed. Physical facts at the scene of an accident may speak louder than the testimony of witnesses. *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Chesson v. Teer Co.,* 236 N.C. 203, 72 S.E. 2d 407. They may be sufficiently strong within themselves, or in combination with other evidence, to infer negligence and make the issue one for the jury. *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33. The interpretation of the physical facts is ordinarily the province of the jury. *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912. From the extensive damage to plaintiff's property the jury may infer that defendant Pride failed to stop at the intersection and turned the corner at a speed which would not permit him to control his car, or that if he did stop at the intersection he started and made the turn at a speed greater than was reasonable and prudent. Furthermore, the evidence permits the inference that he did not maintain reasonable control of the vehicle and neglected to apply brakes and made no effort to stop the car when he realized it was continuing to turn to the right because of defective steering mechanism. Defendant Pride's contention that there is a fatal variance between allegation and proof is untenable. Plaintiff is not required to prove all of the acts and omissions which it alleges constitutes negligence; proof of negligence in one of the respects alleged is sufficient if it proximately caused the injury.

In our opinion plaintiff's action against City Chevrolet Company was properly nonsuited. Plaintiff is not privy to any contract of warranty from Chevrolet Company to defendant Pride, and may not recover for breach of such warranty if one exists. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21. Moreover, this action is based on negligence, not breach of warranty. The mere fact that Chevrolet Company had repaired the steering mechanism on several occasions and on this particular occasion the car continued to circle to the right and could not be "straightened up" by turning the steering wheel, does not impose liability on the Chevrolet Company. To maintain the action plaintiff must show want of reasonable care in making repairs and a causal connection between such want of care and the injury to plaintiff's property. *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855; *Broughton v. Oil Co.*, 201 N.C. 282, 159 S.E. 321. The car was returned to the Chevrolet Company three times within a period of three months for repairs to the steering mechanism. The complaint was on the first occasion that the car would not "return to straight" on turns, on the second occasion that a noise "always threw the steering out of control when it struck an uneven area of the road," and on the last occasion that there was too much "play" in the steering. There is no evidence tending to show what caused the defects, whether they resulted from the same cause, that the cause could have been discovered by the repairmen in the exercise of reasonable care, that the repairmen had not been diligent in making the repairs, or that the repairmen did not find and correct the causes on each occasion. Whether there is any fault on the part of the City Chevrolet Company rests in speculation and conjecture. To support a verdict there must be legal evidence of every material fact; a verdict may not rest upon a mere guess or on possibilities. *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661.

The judgment below is

As to the action against Harold S. Pride, Reversed.

As to the action against City Chevrolet Company, Affirmed.

STATE v. KATIE MITCHELL DEESE JOHNSON.

(Filed 29 April, 1964.)

1. Criminal Law § 85—

The State is bound by exculpatory statements of defendant introduced in evidence by it when such statements are not contradicted or shown to be false by any other evidence.

2. Criminal Law § 101—

When the State's evidence and that of defendant are to the same effect and tend to exculpate defendant, motion for nonsuit should be allowed.

3. Homicide § 13—

While the intentional killing of a human being with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State.

4. Homicide § 20—

Where defendant's evidence as well as the State's evidence upon the point disclosed that defendant was in her home with the screen door hooked, that deceased was drunk and had theretofore assaulted defendant, and after being told to leave began arguing and cursing, that defendant went to the kitchen and procured a knife and when deceased broke open the door and attempted to grab her, stabbed him with the knife, inflicting fatal wounds, *is held* to warrant nonsuit, since the evidence affirmatively establishes self-defense.

5. Homicide § 9—

A person in his own home who is free from fault in bringing on the difficulty is not required to retreat in the face of an assault, regardless of its character, but is entitled to stand his ground and repel force with force so as to overcome the assault and secure himself from harm, provided excessive force is not used.

APPEAL by defendant from *Armstrong, J.*, October 1963 Session of CABARRUS.

Criminal prosecution upon a bill of indictment charging defendant with the murder of one Charles Walker. Defendant pleaded not guilty. The jury found defendant guilty of manslaughter and judgment was entered imposing an active prison sentence.

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

B. W. Blackwelder for defendant.

PER CURIAM. Defendant assigns as error the denial of her motion for nonsuit.

For evidence of the *corpus delicti* the State relies entirely upon a statement made by defendant to a police officer shortly after the occurrence, in substance as follows: Defendant was at her home about 9:00 o'clock Saturday night, 27 July 1963. With her at the time were Dot Sims and six small children. Her mother was on the porch. A 10-year old boy was the only male person present. There was a knock at the door. Defendant told Dot to go to the door and if it was Charlie

Walker to tell him she was not at home and to go away. Defendant was lying on the bed. Dot opened the door and, seeing that it was Charlie, did as defendant had instructed her. Charlie called Dot a G . . D . . . liar and began to argue with her. Defendant got up, went to the door and asked Charlie to leave. He was on the porch and the screen door was hooked. He continued to argue and began jerking the door; he was drinking. Defendant went to the kitchen and got a butcher knife, returned to the door and started talking to him; he continued to argue and curse. He succeeded in snatching the door open and stepped inside. He grabbed at her and she stabbed him once. Charlie "keeps a knife" but she did not see a weapon at the time. He went outside and fell in the yard. An ambulance was called. Defendant was at home when the police came a few minutes later. Charlie had been there once before on that night.

The door had been fastened with a hook and "keeper" or "eye." When the police came they found that the "keeper" was not "ringed" but was straightened out.

Defendant's testimony, corroborated by the testimony of others, tends to show: Deceased was about 48 years old; defendant was 36. He did not live at defendant's home; he had been her boy friend and on occasions she had cooked for him. She had been married and had borne 14 children, one was dead. Charlie was not the father of any of her children, though 6 were illegitimate. On the night in question defendant's mother had come to the house while Charlie was attempting to break open the door and tried to keep him from entering. Defendant had no intention of killing him, but was trying to "keep him off of" her because she was afraid of him. He had come to her house earlier that night and asked her to go off with him. He was drinking. When she refused to go he slapped her and she hit him, he grabbed her and told her he was going to break her G . . D . . . neck. Her son parted them, and she told Charlie to leave and not come back. Charlie left, and a little later defendant's son also left. Charlie returned about 9:00 P.M. when the incident occurred which resulted in his death. Three or four months before, Charlie had assaulted defendant with an ax and fractured three of her ribs. She did not prosecute him for it because he threatened to kill her if she took out a warrant. Her daughter, who was assaulted by him on the same occasion, did indict him and the case was pending at the time of his death.

Ordinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to

stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary. *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756; *State v. Frizzelle,* 243 N.C. 49, 89 S.E. 2d 725.

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed. *State v. Carter,* 254 N.C. 475, 119 S.E. 2d 461.

Defendant's motion for nonsuit should have been allowed in the instant case. She was in her home with the screen door hooked. Deceased had no right to be there; he had been told to stay away and when he came was told to leave, his response was argument and cursing. He had been drinking. Twice before he had assaulted her, once with an ax and once by choking; he had threatened her. He broke open the door and attempted to grab her. She had the right to stand her ground, protect her person, prevent the invasion of her home and remove him from the premises. She was not required to engage him with her bare hands or wait until he seized her before taking action. Under the circumstances she did not, as a matter of law, use excessive force, but acted in the proper defense of her person and habitation.

The judgment below is

Reversed.

DAVID BETHEA v. TOWN OF KENLY, CARL DURHAM, RALPH DAVIS, AND EULA MAE STANCIL AND KENNETH H. STANCIL.

(Filed 29 April, 1964.)

1. Trial § 45—

The judgment must follow the verdict, and while the trial court has the discretionary power to set the verdict aside as being against the weight of the evidence, it is error for the court to change the verdict by diminishing the award over the objection of plaintiff.

2. Same; Trial § 20—

The trial court may not, after verdict, dismiss the action as of nonsuit for insufficiency of the evidence.

3. Appeal and Error § 4—

Where the trial court enters judgment that plaintiff recover nothing of certain defendants, such defendants may not, upon plaintiff's appeal from the refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since until a judgment is entered against them they are not parties aggrieved. G.S. 1-271.

APPEAL by plaintiff and defendants Town of Kenly and Carl Durham from *Burgwyn, E. J.*, November 1963 Session of JOHNSTON.

This action for personal injuries emanates from a collision between an automobile owned by the non-appealing defendant Eula Mae Stancil and operated by her son, Kenneth Stancil, and a police car of the Town of Kenly operated by defendant Carl Durham, an officer on duty. The defendant Town of Kenly has waived its governmental immunity by securing liability insurance. Plaintiff alleged that he was seriously injured by the joint and concurring negligence of Kenneth Stancil and Carl Durham and demanded judgment against all the defendants jointly and severally in the sum of $50,000. Upon the trial the jury found, by its answer to the first issue, that the plaintiff was injured as a result of the negligence of defendants Carl Durham and the Town of Kenly; by its answer to the second, that the plaintiff was also "injured as a result of the negligence of the defendants Kenneth and Eula Mae Stancil as alleged in the complaint." By the third issue, the jury assessed plaintiff's damages at $55,000.

It is noted that although no summons was ever served on Kenneth H. Stancil, and he is not named as a defendant in the complaint, he filed an answer denying any liability to the plaintiff.

Plaintiff moved for judgment against all defendants, but he tendered judgment for only $50,000 in order to come within Article 15A of Chapter 160 of the General Statutes. The defendants Town of Kenly and Carl Durham first moved the court to set aside the verdict for errors committed in the trial. This motion was denied. They next moved to set aside the verdict on the third issue as being excessive. This motion was likewise denied but the court, *in its discretion,* reduced the verdict to $40,000. Plaintiff excepted. The same defendants then "moved that the verdict as to the first issue be set aside" and that judgment be entered in their favor because "said verdict was not supported by the evidence in the case." This motion was allowed "as a matter of law" and plaintiff again excepted. The defendants Stancil then moved

that the answer to the second issue be set aside "as being against the greater weight of the evidence and contrary to law." Their motion was denied.

The court rendered judgment that plaintiff recover the sum of $40,000 against defendants Eula Mae Stancil and Kenneth H. Stancil and that the action against defendants Town of Kenly and Carl Durham be dismissed. The defendants Stancil gave notice of appeal but did not perfect it. Defendants Town of Kenly and Carl Durham excepted and appealed from the refusal of the court to set aside the verdict for errors committed during the trial. Plaintiff appealed assigning as error the failure of the court to enter judgment on the verdict.

Shepard, Spence and Mast for plaintiff.

Smith, Leach, Anderson & Dorsett and William R. Britt for defendants Town of Kenly and Carl Durham.

PER CURIAM. *Plaintiff's appeal.* "It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where is is allowed by law and has not been included in the findings of the jury." 2 McIntosh, North Carolina Practice and Procedure § 1691 (2d ed. 1956); *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433. In this case, the judge should have set aside the verdict in his discretion if he deemed it against the weight of the evidence or considered the damages excessive. Instead of doing so, he attempted to change the verdict as to the defendants Stancil, and this he could not do. *Winn v. Finch,* 171 N.C. 272, 88 S.E. 332. As to the defendants Town of Kenly and Carl Durham, the judge dismissed the action after verdict by a judgment as of nonsuit for insufficiency of the evidence. This also he had no authority to do. *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314; *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257.

Defendants' appeal. No judgment has yet been entered against the defendants Town of Kenly and Carl Durham. The judgment from which these defendants appealed is that the plaintiff recover nothing of them. Until a judgment is entered against them they are not parties aggrieved and may not appeal. G.S. 1-271; *Gold v. Insurance Co.,* 255 N.C. 145, 120 S.E. 2d 452; *Starnes v. Tyson,* 226 N.C. 395, 38 S.E. 2d 211. Error having been made to appear on plaintiff's appeal, when the Superior Court enters a judgment on the verdict against defendants as directed by this opinion they may then appeal and assign the errors of which they now complain. *Williams v. Bus. Ins.,* 210 N.C. 400, 186 S.E. 482; *Trust Co. v. Greyhound Lines,* 210 N.C. 293, 186 S.E. 320; *Ander-*

son v. Morris, 203 N.C. 577, 166 S.E. 527. To hold otherwise would be to disregard a long-established rule of procedure. "An important part of every code of laws is that settling and defining the methods of legal procedure. In this rests the life, vigor and efficiency of the law. It is, therefore, unwise to underrate its importance." *McLaurin v. Cronly,* 90 N.C. 50.

Defendants' appeal —
Dismissed.
Plaintiff's appeal —
Error and remanded.

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

FRED H. WHITAKER v. FISHER J. BEASLEY, JR., AND THOMAS A. SIMPSON, EXECUTORS OF THE ESTATE OF FISHER J. BEASLEY, SR., AND D. S. CROSS, A PARTNERSHIP, T/A BEASLEY-CROSS MOTOR COMPANY, AND GENERAL MOTORS CORPORATION, INCORPORATED.

(Filed 29 April, 1964.)

Trial § 7—

The purpose of a pre-trial conference is to narrow the controversy to matters actually controverted, and the court's orders thereat are interlocutory, and the court exceeds its authority in finding controverted facts and entering a final judgment.

APPEAL by plaintiff from *Walker, S. J.,* November, 1963 Session, CABARRUS Superior Court.

The plaintiff, purchaser, instituted this civil action on November 3, 1961, against General Motors Corporation, manufacturer, and Beasley-Cross Chevrolet Company, distributor-seller, for breach of warranty of a new Chevrolet automobile. The plaintiff purchased the vehicle from the distributor on February 2, 1959, in factory condition. The plaintiff alleged the vehicle was defective both in material and workmanship in specified particulars which were in breach of the defendants' warranty. On February 5, 1963, the plaintiff took a voluntary nonsuit and the same day instituted another action and filed a new complaint, alleging the defendants warranted the vehicle, including all equipment and accessories (except tires) to be free from defects both in manufacture and workmanship, when, in fact, it was seriously defective in both particulars.

Defendants, successors to Beasley-Cross Motor Company, filed answer denying all material allegations of the new complaint and by way of further defense averred the action was instituted more than three years from the date the cause accrued and thus barred by the lapse of time.

General Motors Corporation filed answer alleging it had repaired the automobile by replacing all defective parts and in making adjustments sufficient to place it in new condition. As a further defense, it pleaded the lapse of three years in bar of plaintiff's right to recover. As a second further defense, it set up the manufacturer's warranty to the dealer and its covenant to make good any defects in workmanship and material only on condition the vehicle is returned to the factory within 90 days of delivery to the original purchaser.

At a pre-trial conference on November 4, 1963, "the court does find as a fact and as a matter of law," that plaintiff failed to state a cause of action against General Motors in the first complaint; that the second complaint was a new cause of action and was barred by the statute of limitations; and, further, that G.S. 1-25 is not applicable. The court found that the other defendants were not served in the first action and the action was barred as to them. The court at this pre-trial conference, over plaintiff's objection, entered judgment of nonsuit dismissing the action. The plaintiff appealed.

Llewellyn, MacKenzie & Llewellyn by Robert C. Llewellyn for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., for defendant General Motors Corporation, appellee.

Hartsell, Hartsell & Mills by Harold H. Smith, for defendants Fisher J. Beasley, Jr., and Thomas A. Simpson, Executors of Fisher J. Beasley, Sr., and D. S. Cross, a partnership, Trading as Beasley-Cross Motor Company, appellees.

PER CURIAM. A pre-trial conference under G.S. 1-169.1 is just what the name implies. Its purpose is to *consider* specifics mentioned in the statute; among them, motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. "7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term." No. 7, above quoted, fits into the framework of the pre-trial procedure. It is not a grant of authority to hear and determine disputed facts. Its order is interlocutory in nature.

Green v. Ins. Co., 250 N.C. 730, 110 S.E. 2d 321. "Following the hearing the judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case *unless in the discretion of the trial judge* the ends of justice require its modification. After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same . . . or at a subsequent term, as ordered by the judge." (emphasis added).

In many cases, certain facts necessary to be shown to make out a complete case are actually not in dispute. These may be stipulated, narrowing the controversy to the matters actually controverted. The facts stipulated are available for inclusion in the record in case of appellate review.

From the foregoing, it is apparent the judge at the pre-trial exceeded his authority in finding facts, establishing defenses pleaded but not admitted, and in entering a final judgment in the case. That judgment is

Reversed.

KING ROBERTS, T/A PIERCE WAREHOUSE; JOE T. ROBERTS AND EARL C. ROBERTS, T/A ROBERTS WAREHOUSE; J. KIRK ADAMS AND CLARENCE KNOTT v. SHERRILL AKINS, JOHN W. SMITH, DAN BRISSON, ARTHUR TALLEY, ROY TALLEY, BILLY TALLEY, DAN TALLEY AND J. W. DALE, AND THE FUQUAY-VARINA TOBACCO BOARD OF TRADE, INC.

(Filed 29 April, 1964.)

Appeal and Error § 4; Injunctions § 13—

Where the court disolves the temporary restraining order, defendants may not appeal from provision of the order stating that plaintiffs were not bound by judgment asserted by defendants as a bar, since such statement is not binding upon the hearing on the merits and therefore cannot prejudice defendants.

APPEAL by defendants from *Nimocks, E. J.*, October 1963 Civil Session of HARNETT.

Plaintiffs instituted this action September 20, 1963, to enjoin defendants "from using the floor space contained in Varina Brick Warehouse, Talley Bros. Warehouse and Planters Warehouse in computing the selling time allotted to the warehouse firms operating on the Fuquay-Varina Tobacco Market until such time as said warehouses are made suitable and available for the auction sale of tobacco."

The hearing was on return of an order to show cause why plaintiffs' motion for temporary injunctive relief "for the year 1963" should not be granted.

After hearing the evidence, Judge Nimocks entered an order in which, after findings of fact relating to particular matters, the following finding was made: "In seeking to take away from the three warehouses in question the selling time allotted to them for the year 1963, the plaintiffs are not seeking to preserve the status quo pending the trial of this action. They are asserting rights which they have not previously exercised. The relief they seek is mandatory injunction." Immediately thereafter, the order provides:

"The Court being of the opinion that this case is controlled by the decision of the Supreme Court of North Carolina in the case of *CARROLL v. BOARD OF TRADE,* 259 N.C. 692, the motion for preliminary restraining order and for temporary mandatory injunction is denied and the rule upon the defendants to show cause is discharged."

However, the order, following said provision expressly denying plaintiffs' motion, contains additional matter, *viz.*: Reference is made to the fact that defendants, in their response to the order to show cause, asserted that plaintiffs are estopped by certain judgments entered in the United States District Court for the Eastern District of North Carolina, Raleigh Division, in a civil action in which Joe T. Roberts, *et al.,* are plaintiffs and Fuquay-Varina Tobacco Board of Trade, Inc., and others, are defendants. The order then provides: "The court being of the opinion that the plaintiffs in this case are not bound in any respect by the judgment of the United States District Court, the said plea is overruled. To this finding and ruling in this judgment the defendants object and except."

Based upon their exception to said ruling, defendants gave notice of appeal to the Supreme Court.

Wilson & Bain and Morgan & Williams for plaintiff appellees.

F. E. Winslow, A. W. Gholson, Jr., and Thomas A. Banks for defendant appellants.

PER CURIAM. The only question before Judge Nimocks was whether plaintiffs should be granted temporary injunctive relief "for the year 1963." It was decided in favor of defendants. Hence, defendants were not aggrieved by Judge Nimock's order and their purported appeal must be dismissed. G.S. 1-271; *Buick Co. v. General Motors Corp.,* 251 N.C. 201, 205, 110 S.E. 2d 870.

With reference to defendants' exception to the court's expression of opinion and ruling with reference to defendants' plea of estoppel, it

seems appropriate to say: Judge Nimocks' *decision* was not based on this ruling. Moreover, any ruling by Judge Nimocks with reference to defendants' plea of estoppel would have significance only for the purpose of resolving the question then before him. The judge presiding at the final hearing is not bound by said ruling but will decide *de novo* all questions with reference to defendants' said plea. Hence, it does not appear defendants are prejudiced by the portion of Judge Nimocks' order to which they excepted.

Appeal dismissed.

EARL BRANDON MARLIN v. ROBERT FRANK MOSS AND HOMER E. ARNOLD.

(Filed 29 April, 1964.)

Automobiles § 41f—

In this action by a motorist to recover for a collision with a car which was parked on its left side of the highway, partly on the hard surface and partly on the shoulder, resulting when plaintiff mistook two small lights on the vehicle to be tail lights of a car traveling in the same direction as plaintiff, and crashed into the car when blinded by bright lights suddenly turned on in his face, the evidence *is held* sufficient to be submitted to the jury on the issue of negligence and not to show contributory negligence as a matter of law.

APPEAL by defendants from *Armstrong, J.*, August 1963 Civil Session of CABARRUS.

On January 11, 1961, about 10:15 p.m., there was a collision on Lane Street (Jackson Park section of Kannapolis) between an Oldsmobile owned and operated by plaintiff and a Ford (taxicab) owned by defendant Arnold and operated by defendant Moss as Arnold's agent. As a result, plaintiff sustained personal injuries and his car was damaged.

Plaintiff alleged the collision was proximately caused by the negligence of defendants. In plaintiff's action, the pleadings raised issues of negligence, contributory negligence and damages. Arnold alleged a counterclaim for the damage to his taxicab.

The only evidence was that offered by plaintiff. Defendants' motion for judgment of nonsuit was denied. Arnold took a voluntary nonsuit as to his counterclaim.

In plaintiff's action, the jury answered the negligence issue, "Yes," the contributory negligence issue, "No," and awarded damages. Judg-

ment for plaintiff in accordance with the verdict was entered. Defendants excepted and appealed.

Williams, Willeford & Boger for plaintiff appellee.

Hartsell, Hartsell & Mills and Harold H. Smith for defendant appellants.

PER CURIAM. The only question presented by defendants' appeal is whether the court erred in denying defendants' motion for judgment of nonsuit.

There was evidence tending to show the following:

Lane Street, a two-lane street with marked center line, ran generally east and west. The paved portion thereof (tar and gravel) was approximately 18 feet wide. On each side of the pavement, there was a dirt shoulder 3-4 feet wide.

Plaintiff was proceeding west in his right (the north) traffic lane. The taxicab, proceeding east, had crossed to its left of the center line and was parked (headed east) in front of the house at 2137 Lane Street. While so parked, it was partly in its left (the north) traffic lane—the lane for westbound traffic—and partly on the north shoulder.

Plaintiff, traveling upgrade and coming out of a curve, noticed "two small lights" in his traffic lane some 150-200 feet ahead. They appeared to be the taillights of a westbound car. Plaintiff reduced his speed to approximately 25-30 miles per hour. When he got about 50-60 feet from these lights, "there came a sudden glare of bright lights in (his) face." Blinded and confused by these bright lights, he undertook to stop by putting on brakes and turning his car toward his right but collided with the front of the taxicab. Two-thirds or three-fourths of the taxicab was on the pavement.

While all the evidence has been closely examined and considered, further discussion thereof would serve no useful purpose. Suffice to say, in our opinion the evidence, when considered in the light most favorable to plaintiff, was sufficient to require that the issues of negligence and contributory negligence be submitted to and determined by the jury. Hence the court's denial of defendants' motion for judgment of nonsuit was correct.

No error.

ALEXANDER BROWN v. J. C. BASS, WELTON McRAY CREECH T/A RIVERSIDE CAB COMPANY, INC.

(Filed 29 April, 1964.)

Negligence § 30—

A verdict finding that defendants were negligent, that plaintiff by his own negligence contributed to his injury, and awarding damages, will not be set aside for inconsistency, and the court correctly sets aside the award of damages and enters judgment that plaintiff recover nothing.

APPEAL by plaintiff from *Walker, S. J.*, October 1963 Civil Session of JOHNSTON.

Plaintiff instituted this action to recover compensation for injuries sustained when struck by an automobile allegedly negligently operated by defendant Bass as the agent of defendant Creech.

Defendants denied the alleged negligence. As an additional defense, they pleaded plaintiff's negligence as a contributing cause of the collision and resulting injuries.

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

"1. Was the plaintiff injured as a result of the negligence of the defendants?

ANSWER: Yes.

"2. If so, did the plaintiff by his own negligence contribute to his injury?

ANSWER: Yes.

"3. What amount of damages, if any, is plaintiff entitled to recover of the defendants?

ANSWER: $5,000.00."

When the verdict was returned, plaintiff requested the court to poll the jury. Whereupon the court inquired of each juror as to his answer to the first and second issues. Each juror stated he answered each of these issues in the affirmative and adhered to the answer given. The court thereupon set aside the answer to the third issue and entered judgment that plaintiff recover nothing. Plaintiff excepted and appealed.

Elam Reamuel Temple and J. Roscoe Barefoot for plaintiff appellant.

Shepard, Spence and Mast for defendants, appellees.

PER CURIAM. Plaintiff's assertion of error is based on the contention that the answers given by the jury to the second and third issues

are so inconsistent that no judgment could be entered thereon and, because of the inconsistency, the verdict should have been set aside in *toto* and a new trial ordered.

The argument made for plaintiff has been made on several occasions in the past and rejected. *Sasser v. Lumber Company,* 165 N.C. 242, 81 S.E. 320; *Holton v. Moore,* 165 N.C. 549, 81 S.E. 779; *Oates v. Herrin,* 197 N.C. 171, 148 S.E. 30; *McKoy v. Craven,* 198 N.C. 780, 153 S.E. 412; *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833; *Crane v. Carswell,* 203 N.C. 555, 166 S.E. 746; *Bullard v. Ross,* 205 N.C. 495, 171 S.E. 789; *Butler v. Gantt,* 220 N.C. 711, 18 S.E. 2d 119; *Swann v. Bigelow,* 243 N.C. 285, 90 S.E. 2d 396. The latest application of the rule will be found in *Clodfelter v. Carroll, ante* 630.

No error.

CHARLES B. SMITH v. JOYCE LEE HARRIS.

(Filed 29 April, 1964.)

APPEAL by defendant from *Nimocks, E. J.,* October 1963 Civil Session of HARNETT.

Civil action to recover damages to an automobile arising out of a collision of two automobiles in a street intersection in the town of Dunn.

Defendant in his answer denied negligence and conditionally pleaded contributory negligence of plaintiff as a bar to recovery.

The case was first heard at the October Term 1961 of Harnett County recorder's court and resulted in a judgment of compulsory nonsuit. Plaintiff appealed from the judgment to the superior court. In the superior court the case was heard *de novo.* Issues of (1) negligence, of (2) contributory negligence, and of (3) damages were submitted to the jury. The jury answered the first issue Yes, the second issue No, and awarded plaintiff damages in the sum of $250. From a judgment on the verdict, defendant appeals.

Morgan and Williams for defendant appellant.

Wilson & Bain by Edgar R. Bain and E. Marshall Woodall for plaintiff appellee.

PER CURIAM. Plaintiff offered evidence; defendant offered none. Defendant's sole assignment of error is to the denial of his motion for

judgment of compulsory nonsuit. This action arose out of two automobiles colliding in a street intersection. Since the advent of automobiles in large numbers, our Reports have been filled with such cases, and the applicable rules of law have been stated and repeated and repeated time after time. A study of the evidence in the instant case shows that the plaintiff has sufficient evidence to carry the case to the jury, that defendant was negligent in the operation of his automobile, and that such negligence was a proximate cause of the damage to plaintiff's automobile, and further that plaintiff has not proved himself out of court so as to be nonsuited on the ground of contributory negligence.

The verdict and judgment below will not be disturbed.

Affirmed.

DOROTHY S. LOOMIS, ADMINISTRATRIX OF THE ESTATE OF CECIL LEROY LOOMIS v. JOE ELMER TORRENCE.

(Filed 29 April, 1964.)

APPEAL by defendant from *Brock, S. J.*, January 1964 Session of ROWAN.

Civil action to recover damages for the alleged wrongful death of her intestate, resulting from a collision between two automobiles in a street intersection in the city of Salisbury. The jury answered issues of negligence and contributory negligence in plaintiff's favor, and awarded damages in the amount of $27,000. From a judgment on the verdict, defendant appeals.

Kesler & Seay for defendant appellant.

Clarence Kluttz and Lewis P. Hamlin, Jr., for plaintiff appellee.

PER CURIAM. This is the second trial of this case. In the first trial the jury answered the issues of negligence and contributory negligence in plaintiff's favor, and awarded her damages. On appeal by defendant, this Court awarded a new trial for error in excluding defendant's testimony of speed. *Loomis v. Torrence,* 259 N.C. 381, 130 S.E. 2d 540. In both trials the plaintiff and the defendant introduced evidence. On the former appeal and on this appeal, defendant assigns as error the denial of his motion for judgment of nonsuit made at the close of all

the evidence. A careful study of the evidence in the instant case shows that the court properly submitted the instant case to the jury.

The jury, under application of settled principles of law stated by us in case after case involving actions for damages resulting from automobile collisions in street intersections, resolved the issues of fact in the instant case against defendant. A careful examination of defendant's assignments of error in the instant case discloses no new question requiring extended discussion. Neither reversible nor prejudicial error in the instant case has been made to appear. The verdict and judgment in the instant case will not be disturbed.

No error.

NOEL DWIGHT BULLOCK v. THOMAS RICHARD McFERRAN.

(Filed 29 April, 1964.)

APPEAL by plaintiff from *Clark, Special Judge,* January Civil Session 1964 of HARNETT.

This is an action to recover for personal injuries sustained by the plaintiff about 10:00 p.m. on 9 November 1962, while attempting to cross Highway No. 55, approximately one mile north of Angier, North Carolina, when he was hit and injured by defendant's automobile.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiff appeals, assigning error.

Wilson & Bain for plaintiff appellant.

Dupree, Weaver, Horton & Cockman for defendant appellee.

PER CURIAM. A careful examination of the plaintiff's evidence leads us to the conclusion that it is insufficient to establish actionable negligence on the part of the defendant. Therefore, the ruling of the court below in sustaining defendant's motion for judgment as of nonsuit is affirmed.

Affirmed.

ELLA GADSDEN v. CATHERINE R. JOHNSON AND HUSBAND, GLENWOOD G. JOHNSON.

(Filed 6 May, 1964.)

1. Deeds § 8—

While the consideration named in a deed is presumed correct, the matter is not contractual and may be inquired into by parol, but partial or even total failure of consideration will not alone render the deed invalid and the inquiry in regard thereto will not be allowed to alter or contradict the conveyance itself, although it may be a competent circumstance in an action to set aside the conveyance for fraud.

2. Fraud § 3; Cancellation and Rescission of Instruments § 2—

While a mere promissory representation is not ground for cancellation and rescission of an instrument, if a promise is not honestly made and the promisor at the time of making it has no intention to perform, and such promise is reasonably relied upon and induces the other party to enter into the contract, it is a fraudulent representation of a subsisting intent and may be ground for rescission.

3. Fraud § 8; Cancellation and Rescission of Instruments § 8— Complaint held insufficient to state cause of action to cancel deed for fraud.

A complaint alleging that plaintiff conveyed her property to defendants in reliance upon their representation that defendants would not sell the property but would care for plaintiff's needs and wants and provide her with a home for life, that immediately after the execution of the deed defendants became abusive, rendered no services to plaintiff and listed the property for sale, and praying for cancellation of the deed, attempts to state a cause of action for cancellation and rescission and not for damages for breach of the agreement, but is defective in failing to allege that the promissory representations were made fraudulently with no intention of carrying them out, were reasonably relied upon by plaintiff and induced her to execute the instrument.

4. Appeal and Error § 7; Pleadings § 19—

Where the complaint contains a defective statement of a good cause of action, defendants' demurrer will be allowed, even in the Supreme Court, but the action will not be dismissed until plaintiff is given opportunity to amend. G.S. 1-131.

APPEAL by defendants from *Hobgood, J.*, January 1964 Civil Session of WAKE.

Civil action to annul and cancel of record a recorded deed conveying in fee plaintiff's home and the lot on which it is situate to defendants.

One issue was submitted to the jury: "Was the deed executed on May 20, 1959 by plaintiff to the defendants recorded in Book 1365 at page 37, Wake County Registry, null and void for failure of consideration?" The jury answered the issue, Yes.

From a judgment that defendants have no interest in the house and lot, and that the deed conveying it to them be cancelled of record, defendants appeal.

Samuel S. Mitchell and Earl Whitted, Jr., for defendant appellants.
Allen Langston for plaintiff appellee.

PARKER, J. This is a summary of the crucial allegations of fact of the complaint, which was filed on 6 December 1961: In 1921 there was conveyed in fee to plaintiff by deed a house and lot at 504 Smithfield Street in the city of Raleigh. Since then she has lived in it as her home. In recent years defendants, who are married to each other, have lived in her house with her. During the two years prior to 20 May 1959 defendants were friendly and courteous to her, expressing love and respect for her, and made repeated suggestions to her that she, because of advancing years and the possibility of becoming disabled, needed some younger person or persons to care for her, and that they were suitable persons for such purpose. Plaintiff having faith in their honesty and in their apparent love and respect for her began seriously to consider their suggestions. Finally, on 20 May 1959 she conveyed in fee by deed to defendants her house and lot at 504 Smithfield Street in Raleigh in accordance with a promise and agreement by defendants that they would care for her needs and wants, that they would provide a home for her at 504 Smithfield Street, and would not convey it during the remainder of her life given in consideration of the deed. This deed, which is recorded in the public registry of Wake County and incorporated in the complaint, recites merely a consideration of "ten dollars and other valuable considerations"; it has no recital as to any promise or agreement.

For some time after the delivery of the deed defendants were friendly to her, stating they would care for her and give her a good home, but in August 1961, when she refused to give them any more funds, they became abusive, calling her a nasty, selfish old woman, and threatening her with bodily harm. During October 1961 she learned defendants had listed her home with real estate brokers for sale. Defendants have rendered no services to her as they promised. She has requested them to reconvey her home to her and leave her home, which they refuse to do.

Wherefore, she prays that her deed for her home to defendants be annulled and cancelled of record.

Defendants by answer denied the crucial allegations of fact in the complaint, and alleged that the conveyance of plaintiff's home to them was "for valuable monetary considerations and not for any considerations of services, kindness, or agreement to provide care."

This is a brief summary of plaintiff's evidence, except when quoted: Plaintiff was born in 1881, she is a widow, and is now too old and feeble to work. She has worked hard during her life and saved her money. She has only a foster child living in Charleston, South Carolina. Defendants never paid her anything for the deed to her home. She gave defendants a deed for her home because of their promises to her that they would take care of her the balance of her days and do everything for her when she was sick, and that they would keep her clean and give her good food. She had the deed to her home made to defendants on the strength of their promises. She knew she could have a life estate reserved in her deed, "but she [the *feme* defendant] told me, 'Mama, you know I won't go back on my word and you don't have to put that in there,' and I didn't have it put in there. She said, 'You know I will do my best for you,' and I believed her." Defendants kept none of their promises to her. They got all her little savings from her, about $900, and now she has none. Defendants have offered her home for sale. They drove her from her home. Since the institution of this action they have left her home, and she is living there.

She and the *feme* defendant on 14 May 1959 went to the office of I. Weisner Farmer, an attorney at law in Raleigh, to get him to prepare a deed conveying her home to defendants. He inquired of plaintiff if she was to retain a life estate in the property. Plaintiff said that she was conveying her home to defendants on their promise that they would continue to live in the home and take care of her, and she believed what they said. The *feme* defendant said, "Yes, that is it." As plaintiff was not retaining a life estate in her home, Mr. Farmer refused to draft a deed for her, telling her she did not know what she was doing. Plaintiff and the *feme* defendant came back to Mr. Farmer's office on 20 May 1959. He again asked plaintiff if she wanted to reserve a life estate. The promises were again stated, and plaintiff said she had confidence in Catherine and their promises. Plaintiff said she was going to have a deed written without a life estate reserved to her, and he then drew the deed conveying her home to the defendants. Plaintiff was paid nothing in his office.

Prior to the introduction of evidence, defendants filed a demurrer *ore tenus* to the complaint on the ground, *inter alia*, that the complaint shows on its face that it is an action to cancel and annul a fee simple warranty deed reciting a consideration of ten dollars and other valuable considerations, merely because of the grantees' failure or refusal to furnish care and a home for plaintiff and not to convey the home during her lifetime in accordance with an oral promise given in consideration for the deed, without any allegation that the deed was procur-

ed by fraud, mistake, duress, or undue influence. The trial court reserved its ruling upon the demurrer until after the introduction of evidence. Plaintiff introduced evidence; defendants offered none. After the introduction of evidence, and before the submission of the case to the jury, the trial court overruled the demurrer, and to this ruling defendants excepted and assign this as error.

Defendants also assign as error the denial of their motion for judgment of compulsory nonsuit. They contend that the consideration for plaintiff's deed, according to her allegation and proof, was their promises to support and care for plaintiff. That the consideration being promissory, any breach of their promises, if such there was, would merely be grounds for damages for breach of their promises and would not be a ground for annulment and cancellation of the deed.

Defendants have misconceived the nature of plaintiff's action. Plaintiff's action is not, as they contend, an action to recover damages for breach of promises or an agreement for services to be rendered as a consideration for conveyance of her home and the lot on which it is situate. Indubitably, a deed based upon a promise or agreement of the grantee to maintain and care for and support the grantor is a valuable consideration for the transfer of property. *Minor v. Minor,* 232 N.C. 669, 62 S.E. 2d 60; *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *Salms v. Martin,* 63 N.C. 608. If plaintiff's action were such, as defendants erroneously conceive it to be, the proper measure of damages would be, as defendants contend, "the value of the promised support lost by the grantor," *Norwood v. Carter,* 242 N.C. 152, 87 S.E. 2d 2, and a verdict in plaintiff's favor for such breach would not support a judgment in her favor annulling her deed and ordering it cancelled of record. *Minor v. Minor, supra.*

In *Higgins v. Higgins,* 223 N.C. 453, 27 S.E. 2d 128 it is said: "Courts will guard with jealous care the rights of the aged and infirm who have conveyed their land in the belief that they were making provision for support and maintenance in their declining years."

This is said in 26 C.J.S., Deeds, § 21, b: "Courts of equity have a marked tendency to afford the grantor relief because of the grantee's failure or refusal to furnish support in accordance with a promise given in consideration of the deed, and will frequently decree cancellation or rescission in such cases."

Plaintiff's action is between the grantor and grantees of a deed. No rights of third parties are involved. From a study of plaintiff's complaint and evidence, and heedful of the admonition stated in the *Higgins'* case, it seems apparent to us that plaintiff's action, though defectively stated in her complaint, is to annul and have cancelled of record

her deed to the grantees for her home for the reason that she conveyed in fee by deed to defendants her home in accordance with promises and an agreement by defendants that they would care for her needs and wants, that they would provide a home for her in her home at 504 Smithfield Street, and would not convey it during her lifetime, that they have completely or to a very substantial degree breached their promises and agreement, that such promises and agreement were made fraudulently by defendants with no intention on their part to carry them out, and that such promises and agreement constituted misrepresentations of material facts, which she relied upon and which induced her to act upon them to her injury.

Plaintiff's deed to defendants, which is recorded in the public registry of Wake County and is incorporated in the complaint, recites merely a consideration of "ten dollars and other valuable considerations;" it has no recital as to any promises. The consideration named in a deed is presumed to be correct. *Hinson v. Morgan*, 225 N.C. 740, 36 S.E. 2d 266. Not being contractual it may be inquired into by parol evidence and shown to have been otherwise than as recited in the deed. *Willis v. Willis*, 242 N.C. 597, 89 S.E. 2d 152; *Ex parte Barefoot*, 201 N.C. 393, 160 S.E. 365; Stansbury, N. C. Evidence, 2d Ed., § 259. "* * * such testimony may not be used, however, to alter or contradict the conveyance itself, in the absence of fraud, mistake or undue influence." *Schmidt v. Bryant*, 251 N.C. 838, 112 S.E. 2d 262.

"As a general rule a deed which is otherwise valid will not be invalidated by reason of a total or partial failure of consideration, and will nevertheless operate to convey title. * * * The failure of consideration may, however, be accompanied by other circumstances which will justify setting aside the deed, as where the circumstances are such that other remedies are inadequate." 26 C.J.S., Deeds, § 21, a. See *Futrill v. Futrill*, 58 N.C. 61; same case, 59 N.C. 337. In the *Futrill* case the bill of plaintiff alleged undue influence.

In *Davis v. Davis*, 236 N.C. 208, 72 S.E. 2d 414, it is said: "It is the general rule that an unfulfilled promise cannot be made the basis for an action for fraud. [Citing authority.] The rule, of course, is otherwise where the promise is made fraudulently with no intention to carry it out, and such promise constitutes a misrepresentation of a material fact which induces the promisee to act upon it to his injury."

In *Hinsdale v. Phillips*, 199 N.C. 563, 155 S.E. 238, the Court said:

> "As a general rule, fraud as a ground for the rescission of contracts, cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in the legal

> sense a representation. Fraud, however, may be predicated upon the nonperformance of a promise, when it is shown that the promise was merely a device to accomplish the fraud. A promise not honestly made, because the promisor at the time had no intent to perform it, where the promisee rightfully relied upon the promise, and was induced thereby to enter into the contract, is not only a false, but also a fraudulent representation, for which the promisee, upon its nonperformance, is ordinarily entitled to a rescission of the contract. These principles have been recognized and applied by this Court in * * * [and many cases are cited]."

Plaintiff's complaint alleges as the ground for annulling her deed and having it cancelled of record *merely* a failure and refusal by defendants to carry out their promissory representations to her given in consideration of her deed. The complaint does not even allege her age. It does not allege that such promissory representations were made by defendants with no intention of carrying them out. It does not allege the essential elements of fraudulent promissory representations. The allegations of her complaint will not warrant the annulling and cancelling of record her recorded deed, because her recorded deed "in proper form is good and will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value." *Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530; *Edwards v. Batts*, 245 N.C. 693, 97 S.E. 2d 101; *Ivey v. Granberry*, 66 N.C. 223. The verdict that there was a failure of consideration for plaintiff's deed does not support the judgment that defendants, the grantees in the deed, have no interest in the house and lot conveyed, and decreeing that the deed be cancelled of record. *Minor v. Minor, supra; Smith v. Smith, supra; Edwards v. Batts, supra; Ivey v. Granberry, supra.*

The rule in respect to pleading fraud is set forth in Strong's N. C. Index, Vol. 2, Fraud, Pleadings, § 8, where many of our cases are cited, and also in 37 C.J.S., Fraud, § 78 *et seq.*

The verdict and judgment are set aside, and as plaintiff's complaint contains a defective statement of a good cause of action, the demurrer *ore tenus* to the complaint is sustained, but the action is not dismissed and upon motion of plaintiff the superior court will enter an order permitting her to amend her complaint so as to state the essential elements of fraud in respect to promissory representations as a ground for annulling her deed and having it cancelled of record. G.S. 1-131; *Walker v. Nicholson*, 257 N.C. 744, 127 S.E. 2d 564; *Stamey v. Membership Corp.*, 247 N.C. 640, 101 S.E. 2d 814; *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337.

Demurrer *ore tenus* sustained.

IN THE MATTER OF JOHN S. PEACOCK, ADMINISTRATOR OF THE ESTATE OF LESLIE WARREN, JR., DECEASED.

(Filed 6 May, 1964.)

1. Abatement and Revival § 10; Death § 3—

Where a person fatally injured as a result of negligence lives for a while after the injury, his personal representative has two causes of action, the first an asset of the estate for damages for pain and suffering and hospital and medical expenses consequent the wrongful injury, and the second an action for wrongful death for the benefit of the next of kin to recover for the pecuniary injuries resulting from death and also, under the amendment to G.S. 28-173, for hospital and medical expenses not exceeding $500.00, although such hospital and medical expenses should be submitted under the single issue in the first cause of action.

2. Infants § 2—

An infant is liable for necessaries, including medical services rendered in an emergency to save his life, as an exception to the general rule that an infant is not liable on contract.

3. Death § 8; Executors and Administrators § 24a— Allocation of funds received in single settlement for wrongful death and for suffering prior to death.

Under the facts of this case it *is held* that equity and justice require that the settlement for the wrongful death of a minor be divided between the cause of action for pain and suffering prior to death, against which are chargeable one-half of the cost of administration, including one-half attorneys' fees, court costs, etc., and hospital and medical expenses, and the cause of action for wrongful death, against which are chargeable one-half the cost of administration, hospital and medical expenses not exceeding $500.00, with the balance to be paid the deceased's mother unless it be determined that she had abandoned him prior to his injury and death. G.S. 31A-2.

APPEAL by the administrator and certain claimants from *Cowper, J.*, September-October Civil Session 1963 of WAYNE.

Leslie Warren, Jr., a 15 year old boy, was injured in an automobile accident in Wayne County on 30 July 1961. He died 71 days later, on 9 October 1961, as a result of his injuries. Claims for hospital services and medical aid rendered to the deceased during the aforesaid 71 day period have been filed with his administrator as follows: Wayne Hospital, $1,479.45; Duke University Hospital, $111.71; Scott B. Berkeley, Jr., M.D., $526.00; Guy L. Odom, Jr., M.D., $125.00, a total of $2,-242.16.

The only asset of his estate was the cause of action for personal injuries and medical expenses. In addition to this claim, his administrator had the right to bring an action for wrongful death pursuant to the

provisions of G.S. 28-173. Without instituting any action, the administrator, on 23 August 1962, entered into a compromise settlement with the insurance carrier of Clarence Edward Newkirk, the driver of the automobile involved in the accident. The amount of the settlement was $4,150.00; a release was executed by the administrator, in pertinent part as follows: In consideration of the payment of $4,150.00, the receipt of which is hereby acknowledged, the administrator does "hereby release, acquit, and forever discharge Clarence Edward Newkirk, his, her, their, or its agents and servants, successors and assigns, heirs, executors and administrators, and all other persons, firms and corporations, of and from any and all actions, causes of action, claims, demands, damages, costs, loss of service, expenses and compensation * * * arising out of * * * the accident, casualty, or event, which occurred on or about the 30th day of July 1961, at or near Dudley Colored Elementary School, Wayne County, N. C."

After the payment of funeral expenses, fee of the administrator's attorney, and the premium on a fidelity bond, there remains in the hands of the administrator the sum of $2,605.50.

The decedent was an illegitimate child of Sylvia Brown, who, for many years prior to his injury and death, had been living in New York. She had ten illegitimate children by one Leslie Warren, to whom she has never been married.

On 12 September 1962, five of the nine surviving brothers and sisters of the decedent instituted an action against the administrator and the decedent's mother, seeking a declaration that the decedent's mother had abandoned him and asking recovery of the balance in the hands of the administrator.

The administrator brings this proceeding for advice and direction of the court as to the proper distribution of the remainder of this fund.

The trial judge found as a fact that all interested parties have been duly and properly served with notice of this proceeding, and that each one of them is now properly before the court including the administrator and claimants.

The Clerk of the Superior Court of Wayne County ordered the hospital and medical bills paid, subject to the payment of the administrator's fees and costs of administration. The decedent's mother appealed to the Superior Court of Wayne County on the ground that, under the provisions of G.S. 28-173, as amended by Chapter 1136 of the 1959 Session Laws of North Carolina, the administrator is not authorized to pay more than $500.00 for hospital and medical expenses out of funds recovered for wrongful death.

The court below held that the administrator does not have the right to pay out more than $500.00 for hospital and medical expenses inci-

dent to injury resulting in death, and entered an order directing the administrator herein to pay $500.00 for the hospital and medical expenses incident to the injury resulting in the death of Leslie Warren, Jr., to be opportioned among the claimants as hereinabove set out.

The claimants and the administrator appeal, assigning error.

John S. Peacock, Admr. of Estate of Leslie Warren, Jr.
Scott B. Berkeley; Dees, Dees & Smith for respondent appellants.
Hugh Dortch, Henson P. Barnes for respondent appellees.

DENNY, C.J. In this jurisdiction, where a person is injured by the negligence of another, lives for a period of time and thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate, damages sustained by the injured person during his lifetime, including hospital and medical expenses, and (2) for the benefit of the next of kin, the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues. *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585. However, damages resulting from pain and suffering and for hospital and medical expenses consequent to wrongful injury, relate to the same cause of action and should be submitted upon a single issue of damages. *Hoke v. Greyhound Corp., supra.*

The administrator in his petition states that had he been forced to bring an action he would have sued to recover consequential damages proximately caused by the personal injuries sustained by Leslie Warren, Jr., and in proof thereof would have offered evidence that the hospital and medical services rendered were necessary in an effort to save the life of his intestate and were reasonably worth the amounts claimed.

Moreover, G.S. 44-49 in pertinent part provides: "* * * (T)here is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons *non compos mentis,* such liens shall attach to the sum recovered as fully and effectively as if the said person were *sui juris.*"

The foregoing statute further requires that claimant shall file claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action. However, in the instant case, no action was ever instituted. Therefore, the claimants never had an opportunity to perfect a lien under the provisions of the statute.

There was no provision in our wrongful death statute, G.S. 28-173, for payment of hospital and medical expenses out of such recovery until the statute was amended by Chapter 1136 of the 1959 Session Laws of North Carolina. The statute, as amended, authorizes payment for such expenses not exceeding $500.00 out of such recovery. Therefore, in a case where an action has been brought for wrongful death and the jury has awarded an amount for such death, the limitation fixed in the statute for payment of hospital and medical expenses would control. However, the factual situation before us on this record is not such a case. We think there is more indication on this record that the compromise settlement included consequential damages, hospital and medical expenses, than there is that it was for wrongful death.

We concede that we have found no case in this jurisdiction dealing with the allocation of funds received in settlement of two existing causes of action by the payment of a single sum. Several cases from other jurisdictions have been found, primarily Surrogate Court cases from New York. The New York wrongful death statute, as amended, now provides for recovery of the medical expenses in a wrongful death action. Laws of New York, 1935, Chapter 224.

In *In re Bruno's Estate,* 36 Misc. 2d 909, 233 N.Y.S. 2d 913, there was a lien for $1,612.00 for medical expenses against the personal injuries recovery. The Court said: "The court finds that the total amount of the proposed settlement is fair and reasonable, but that the administrator has improperly allocated the proceeds between the personal injuries action and the death action. The second objection of each objectant is sustained. In view of the very advanced age of the decedent, her lack of earning capacity, *the lack of dependence upon her by her statutory distributees,* the extent of her injuries and the damages resulting therefrom, the court holds that $5,000 should be allocated to the personal injuries action and $1,500 to the death action. The attorney's fees should be prorated against the two funds." (Emphasis ours.)

In the case of *In re Payne's Estate,* 12 A.D. 2d 940, 210 N.Y.S. 2d 925, the decedent was a bachelor with six brothers and sisters as his statutory distributees. He died shortly after the accident, without having regained consciousness. The claims had been compromised for $4,-156. The Court held that only funeral expenses could have been recovered in the wrongful death action (the brothers and sisters being

nondependent and showing no pecuniary injury), and nothing at all in the personal injury action since the decedent was never conscious after the accident. As there was a creditor with a claim of $2,420, one half of the remaining fund was allocated to each cause of action. This was an Appellate Division case and leave to appeal to the Court of Appeals was denied. 215 N.Y.S. 2d 714.

In *In re Procopio's Estate,* 149 Misc. 347, 267 N.Y.S. 908, the case was decided before the amendment to section 132 of the Decedent Estate Law was passed, allowing medical expenses to be recovered in a wrongful death action. The decedent lived for five days after the fatal accident, and incurred medical expenses. The statutory distributees (all residents of Italy), objected to the allowance of these claims on the ground that section 133 did not authorize such payments. In rejecting this contention, the Court said: "* * * While it is true that the recovery is not subject to the payments of the debts of the deceased, and that the damages are exclusively for the benefit of the next of kin * * *, the application here of such rule would be both harsh and unjust.

"I do not think that the statute intended to penalize a physician who in emergency gives his services and talents in an effort to save life. If the decedent had survived, there is no question that he would be liable for his medical bills. To exclude the physician because the patient dies forces the conclusion that the statute contemplated either the instantaneous death of the victim, thus making unnecessary the services of a doctor, or intended to visit a penalty upon those who perform acts of mercy. * * * (A) distinction should be made between self-created debts and those incurred for medical expenses in one's last illness."

It will be noted that an infant is liable for medical services rendered in an emergency to save his life, even though his father may also be liable. *Bitting v. Goss,* 203 N.C. 424, 166 S.E. 302; *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339, 71 A.L.R. 220. To the well recognized rule that an infant is not liable on contract is the well recognized exception that he is liable for necessaries. Certainly, when a minor has no parent, as in the instant case, who is able to provide medical services necessary to be rendered in an effort to save his life, such services will be classed as necessaries. *Cole v. Wagner, supra;* 29 Am. Jur., Infants, section 20, page 762, *et seq.*

In light of the facts revealed on this record, in our opinion, the ends of justice and equity require that the recovery should be divided equally between the two causes of action involved in the settlement. That the fee of the administrator's attorney, the costs paid to the Clerk of the Superior Court of Wayne County, and the premium paid

for the administrator's bond, as well as other administrative costs, should be prorated equally between the two funds. That from the remainder of the wrongful death fund, the funeral expenses should be charged and $500.00 paid on the hospital and medical expenses, which would result as follows: From each fund of $2,075.00 there should be deducted one half of the attorney's fee, court costs, *et cetera,* to date, in the sum of $523.75, which would leave $1,551.25 in each fund. The funeral expenses in the sum of $497.00 and the $500.00 payable on the hospital and medical expenses, chargeable under G.S. 28-173 to the wrongful death fund, leaves a balance therein of $554.25. The balance of the estate portion of the recovery in the sum of $1,551.25, combined with the $500.00 from the wrongful death fund, will make available $2,051.25, less any further administrative costs, for the prorata payment of claims for hospital and medical expenses. The $554.25, less its prorata part of any additional administrative costs, will be paid to the mother of the deceased as provided in our Intestate's Succession Act, Chapter 29 of our General Statutes of North Carolina, unless it is determined that she abandoned the deceased prior to his injury and death in the manner set out in G.S. 31A-2.

The decree of the court below is modified to the extent hereinbefore set out.

Modified and affirmed.

CLIFFORD J. LOCKWOOD v. EARL McCASKILL; AND CHARLES ALBERT MACON D/B/A C. A. M. MACHINE COMPANY.

(Filed 6 May, 1964.)

1. Appeal and Error § 3—

An appeal will lie from an interlocutory order when substantial rights would be lost if the matter were not determined prior to final judgment.

2. Statutes § 5—

A statute must be construed to effectuate the legislative intent.

3. Same—

A proviso should be construed with the act with a view to giving effect to each, and a proviso takes out of the enacting clause only those cases which fall fairly within its terms.

4. Bill of Discovery § 1; Evidence § 14— Physician may not be required to disclose confidential information by deposition prior to trial.

The proviso of G.S. 8-53 authorizing "the presiding judge of a Superior Court" to compel a physician to disclose confidential matters is limited to

the judge presiding at the trial on the occasion when the physician is called upon to testify in order that the judge may ascertain the nature of the evidence involved and determine the extent disclosure is necessary to the proper administration of justice, and therefore even the judge holding a term of court in the county in which the action is pending may not grant defendants' motion to take the deposition of the physician who attended plaintiff to ascertain the extent of plaintiff's injuries for the purpose of formulating a defense upon the issue of damages. G.S. 8-71.

APPEAL by plaintiff from *McConnell, J.*, October 21, 1963, Regular Schedule "C" Session of MECKLENBURG.

Plaintiff's action is to recover damages for personal injuries and property damage he sustained as a result of a collision that occurred February 11, 1963, at a street intersection in Charlotte, North Carolina, between a Chevrolet car owned and operated by plaintiff and a Chevrolet truck owned by defendant Macon and then operated by Earl McCaskill as Macon's agent. Plaintiff alleged the collision and his injuries and damage were proximately caused by the negligent manner in which McCaskill operated the truck.

McCaskill, although named as a defendant, was not served with process.

Summons and complaint were served on Macon on May 14, 1963. On account of his failure to answer or otherwise plead, judgment by default and inquiry was entered against Macon on June 24, 1963. Prior to the execution of the "inquiry . . . before a jury to determine the amount of said damages," counsel for Macon on September 4, 1963, filed an "Entry of Appearance," and on October 17, 1963, filed a motion for an order permitting them to take the deposition of Dr. Thomas H. Wright.

In said motion, counsel for Macon assert: That "the defendants are informed and believe and therefore allege that the plaintiff was placed under the care of a psychiatrist, Dr. Thomas H. Wright, sometime in May of 1963 for the treatment of certain injuries to his mental health and that the plaintiff claims that said injuries to his mental health and said psychiatric care were causally related to the accident referred to in the complaint"; that "the defendants are not advised as to the nature and extent of the injury to the plaintiff's mental health, or as to the present condition of the plaintiff's mental health and have been unable to secure any medical reports as to the condition of the plaintiff's mental health"; that "Dr. Thomas H. Wright as the psychiatrist who treated the plaintiff is the person most qualified to furnish defendants an accurate statement as to the condition of the plaintiff's mental health and that the defendants desire to depose the said Dr. Thomas H. Wright with regard to the injury to the plaintiff's

mental health and as to his present mental condition"; and that "such deposition is necessary to enable the defendants to properly defend this action and to properly prepare for trial thereof and the ends of justice require that the defendants be permitted to examine the said Dr. Thomas H. Wright with regard to the matters referred to above."

On October 24, 1963, Judge McConnell, granting the prayer of the petition, entered the following order:

"This cause coming on to be heard and being heard before the Honorable John D. McConnell, Judge presiding at the October 21st Regular Schedule 'C' Term of the Superior Court of Mecklenburg County, on motion by the defendants for an order permitting them to take the deposition of one of the plaintiff's treating physicians, Dr. Thomas H. Wright, and the Court, after hearing arguments of counsel, finding as a fact that said deposition is necessary to the proper administration of justice, and being of the opinion that in its discretion said motion should be allowed;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that said motion be and it is hereby allowed and that the defendants may take the deposition of the said Dr. Thomas H. Wright at a time and place convenient for said doctor and that said doctor shall submit himself to the taking of said deposition pertaining to his examinations of the plaintiff relative to the injuries to the plaintiff's mental and emotional health subsequent to the accident occurring on or about the 11th day of February 1963, referred to in the complaint including the plaintiff's medical history as secured by him, his diagnosis and treatments of the plaintiff, the results of any tests conducted as a part of his examinations and treatments of the plaintiff and as to the plaintiff's present condition."

Plaintiff excepted to said order and appealed.

H. Parks Helms for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman and Charles V. Thompkins, Jr., for defendant appellee Macon.

BOBBITT, J. Referring to the deposition statute, G.S. 8-71, this Court in *Yow v. Pittman,* 241 N.C. 69, 84 S.E. 2d 297, in opinion by Higgins, J., said: "This statute does not contemplate the taking of deposition of a person disqualified to give evidence in the case."

As in *Yow,* the deposition statute must be considered in connection with G.S. 8-53, which provides: "Communications between physician and patient.—No person, duly authorized to practice physic or surgery,

shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

In *Yow,* a similar motion was heard by Judge Rudisill, the Resident Judge, in Chambers. His denial of the motion as a matter of law was affirmed by this Court. The ground of decision was stated as follows: "While Judge Rudisill was a Judge of the Superior Court, he was not at the time *the presiding judge of a Superior Court in term.* He had no authority to enter the requested order in Chambers."

While Judge McConnell was the Presiding Judge at the October 21, 1963, Regular Schedule "C" Session of Mecklenburg Superior Court, this case was not before him for trial. It was brought before him on October 24, 1963, solely for hearing on said motion of October 17, 1963.

Questions relating to the privilege created by G.S. 8-53 have been discussed and decided often by this Court. *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137, and cases cited; *Sims v. Insurance Co.,* 257 N.C. 32, 125 S.E. 2d 326, and cases cited. In all of our decisions except *Yow v. Pittman, supra,* the questions presented related to rulings made during the progress of the trial by the presiding superior court judge.

"It is the accepted construction of this statute (G.S. 8-53) that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.,* 147 N.C. 62, 64, 60 S.E. 717; *Sims v. Insurance Co., supra,* p. 37, and cases cited.

Undoubtedly, Judge McConnell's order purports to compel Dr. Wright to testify concerning matters which otherwise would be privileged. Whether Dr. Wright's deposition is offered in evidence is immaterial. If and when Dr. Wright is required to testify concerning privileged matters at a deposition hearing, *eo instante* the statutory privilege is destroyed. This fact precludes dismissal of the appeal as fragmentary and premature. *Cf. Buick Co. v. General Motors Corp.,* 251 N.C. 201, 110 S.E. 2d 870.

In the construction of G.S. 8-53, our chief concern is to ascertain the legislative intent. As stated by *Stacy, C.J.,* in *Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 270, 173 S.E. 601; "The heart of a statute is the intention of the law-making body." In performing our judicial task,

"we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language." *Ballard v. Charlotte,* 235 N.C. 484, 487, 70 S.E. 2d 575.

Appellee contends the statute, G.S. 8-53, is in derogation of the common law and should be strictly construed. However, we are not considering *what* matters are privileged or questions relating to waiver of the statutory privilege. Rather, our question is what superior court judge, upon appropriate findings of fact, may compel disclosure.

The following statement is pertinent: "A proviso should be construed together with the enacting clause or body of the act, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in *pari materia.* A strict but reasonable construction is to be given to the proviso so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso." 82 C.J.S., Statutes § 381(b)(1). Here, construction of *the proviso* is necessary to decision.

The sole purpose of the 1885 statute (Public Laws of 1885, Chapter 159), now codified as G.S. 8-53, was to create a privileged relationship between physician and patient. In view of this primary purpose, we think it clear the proviso was intended to refer to exceptional rather than ordinary factual situations.

Under a literal interpretation, the words of the proviso, "the presiding judge of a superior court," might include the superior court judge currently presiding in the judicial district. As indicated above, we have held they refer solely to a superior court judge presiding "in term." Too, the words, "the presiding judge of a superior court," might include any superior court judge who happens to be presiding over any term in any county in North Carolina. We think it obvious they refer solely to a judge presiding at a term of superior court in the county in which the action is pending. In short, the words, "the presiding judge of a superior court," must be construed to effectuate rather than to defeat the dominant purpose of the statute.

In our view, it was the intention of the General Assembly that the presiding judge authorized to compel disclosure by a physician on the ground such disclosure is necessary to the proper administration of justice is the judge presiding on the occasion when the physician is called upon to testify, namely, the trial judge. All relevant circumstances, including the nature and character of evidence offered by or in behalf of the injured person, are available for consideration by the trial judge. Moreover, the trial judge may ascertain from the physician the nature of the evidence involved and may determine what part, if any,

should be disclosed as necessary to the proper administration of justice. Obviously, the proper administration of justice might require disclosure as to certain but not as to all matters under the privilege. In short, we think it was intended that disclosure should be compelled only when the examination of the physician was conducted under the supervision of the trial judge.

G.S. 8-71 provides that a party may take "the depositions of persons *whose evidence he may desire to use.*" (Our italics). Appellee's contention, as stated in his brief, is that disclosure "is necessary to enable the defendant to accurately evaluate the case against him and to prepare his defense."

In our view, the proviso in G.S. 8-53 does not authorize a superior court judge, based on the circumstance that he is then presiding in the county in which the action is pending, to strike down the statutory privilege in respect of any and all matters concerning which the physician might be asked at a deposition hearing. Doubtless, in practically all personal injury actions the defendant would deem it advisable, if permitted to do so, to examine before a commissioner or notary public in advance of trial the physician(s) of the injured party to "evaluate the case" and "to prepare his defense." Obviously, if this course were permitted, the privilege created by the statute would be substantially nullified. This practice, if considered desirable, should be accomplished by amendment or repeal of the statute.

Although the question before us was not decided or drawn into focus, expressions in opinions of this Court would seem to indicate an understanding that the words, "the presiding judge of a superior court," refer to the superior court judge who presides at the trial. *Creech v. Woodmen of the World,* 211 N.C. 658, 661, 191 S.E. 840; *Sims v. Insurance Co., supra.* pp. 38-39.

With reference to examinations prior to trial by court-appointed physicians to ascertain the nature and extent of alleged injuries, see *Helton v. Stevens Co.,* 254 N.C. 321, 118 S.E. 2d 791.

In view of the foregoing, we need not consider whether the motion itself and the record proper constitute a sufficient basis for a finding "that said deposition is necessary to a proper administration of justice."

For the reasons stated, the order of the court below is reversed.

Reversed.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. JOHN C. PEARCE AND WIFE, ANNIE PEARCE.

(Filed 6 May, 1964.)

1. Eminent Domain § 6—

Where there is evidence that the sale of another tract of land in the locality was not a sale on the open market but a purchase forced because of necessity, the evidence supports the court's ruling excluding evidence of the purchase price of such other tract because of want of showing of similarity between it and defendant's property.

2. Trial § 15—

Where the court excludes certain testimony the court should permit the party offering the testimony to insert in the record what the witness' answer would have been for the purpose of review on appeal. But in this case the refusal of the court to do so was not prejudicial, since it appears from other parts of the record that the testimony was incompetent regardless of the answer.

3. Trial § 11—

Ordinarily, argument of counsel outside the record will be held cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it.

4. Eminent Domain § 11—

The failure of the court to charge the jury that it should not consider a building completed by the owner after the taking in fixing the value of the land remaining to the owner *held* not prejudicial in view of the fact that all of the evidence and the charge related to the value of the land immediately before and immediately after the taking, and thus excluded any value added after the taking.

APPEAL by the defendants from *Walker, S. J.*, September, 1963 Civil Session, RANDOLPH Superior Court.

The plaintiff condemned for highway purposes a perpetual easement over part of a triangular shaped tract of land containing 12 acres at the juncture of U. S. Highway 220 and N. C. Highway 49A in Randolph County. On March 30, 1963, Judge Walker signed a consent order determining all matters at issue except the amount of compensation due the defendants. The State Highway Commission deposited in court with its declaration of taking the sum of $5,950.00 as its estimate of just compensation for the taking of .35 acre from a tract containing 12 acres.

The defendants filed answer, alleging they were due $20,000.00 on account of the taking. The defendants' witnesses fixed the difference in value before and after the taking, the low at $17,860.00, and the high at $24,650.00. The plaintiff's witnesses fixed the difference in the before and after value, the low at $4,200.00 and the high at $6,546.00.

The court submitted the issue of just compensation which the jury fixed at $8,500.00. From judgment in accordance with the verdict, the defendants appealed, assigning errors.

Thomas Wade Bruton, Attorney General, Harrison Lewis, Assistant Attorney General, Claude W. Harris, Trial Attorney for plaintiff appellee.

Miller and Beck by Adam W. Beck for defendant appellants.

HIGGINS, J. All matters in dispute were settled by a consent judgment except the amount of just compensation which the plaintiff is due the defendants for the taking of a perpetual easement for highway purposes over their lands. With its declaration of taking, the plaintiff had deposited the sum of $5,950.00 as its estimate of the amount due. The defendants, in their answer, demanded $20,000.00. The jury fixed the recovery at $8,500.00.

The defendants demand a new trial upon the asserted ground the trial judge committed errors of law in three particulars: (1) By refusing to permit defendants' witnesses Galloway and Roberts to testify as to the price paid for other property in the vicinity; (2) by refusing to order a mistrial or set aside the verdict because of the argument of plaintiff's counsel; (3) by failing to instruct the jury as to the correct rule for the assessment of damages.

The defendants' witness Galloway, a real estate dealer, testified he knew the property involved and that immediately before the taking the 12 acres of defendants' property was worth $72,808.00; and immediately after, the remainder was worth $58,158.00, leaving a total damage of $24,650.00. The witness attempted to testify with respect to the sale of a lot on Balfour Avenue, (though he did not make the sale) to Esso (Humble Oil Company). Upon objection, the court excused the jury "to determine whether or not it was comparable." The court declined to permit the witness to tell how he knew the price, and refused to admit evidence on the ground it violated the hearsay rule. The court did not permit the defendant to insert in the record Galloway's answer to the question as to how he knew the price Esso paid for the lot.

The witness Roberts testified he knew the Pearce property and that immediately before the taking the whole was worth $74,439.00, and immediately afterwards the remainder was worth $48,001.00. In the absence of the jury the witness offered to testify that he sold a lot across 220 to "Carr Drug" and the Balfour Avenue property to Humble Oil Company, and the price paid by each purchaser. During the pre-

liminary examination in the absence of the jury, it developed that the Oil Company had a lot on either side of the Balfour lot which was needed in order to complete the development. The judge held this sale to Humble was a pressure or a forced purchase, because of necessity—not on the open market—and refused to permit the witness to testify as to the price paid.

Evidently, in excluding the proffered testimony of Galloway and Roberts as to the sale of other properties, the judge had in mind what the Court said in *Barnes v. Highway Comm.*, 250 N.C. 378, 109 S.E. 2d 219: "Actually no two parcels of land are exactly alike. Only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities. . . . It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of sale admissible. It is the better practice for the judge to hear evidence in the absence of the jury as a basis for determining admissibility."

In this case the evidence of similarity between the defendants' property and the lots purchased by Carr Drug and by Humble Oil, was not sufficient to require the court to admit evidence of the prices at which they sold. However, the trial judge should have permitted the defendants to insert in the record Galloway's evidence as to how he knew the price Humble Oil Company paid for the lot on Balfour Avenue. Having excepted to the exclusion of the evidence, the defendants were entitled to have the answer of the witness inserted in the record for purposes of review on appeal. However, the defendants' witness Roberts disclosed that the sale to Humble was not a sale on the open market, so the exclusion of Galloway's answer was not prejudicial. *Gallimore v. State Highway Comm.*, 241 N.C. 350, 85 S.E. 2d 392; *Harmon v. Harmon*, 245 N.C. 83, 95 S.E. 2d 355; *Brown v. Power Co.*, 140 N.C. 333, 52 S.E. 954.

After the defendants had completed their evidence, the plaintiff called as a witness H. R. Trollinger who testified he lived in Asheboro, had been engaged in the appraisal of real estate for 20 years. He had made appraisals for many banks, oil and power companies, city, county, State and Federal agencies, and private individuals. He gave as his opinion the fair market value of the Pearce property immediately before March 8, 1962, was $45,996.00. The value of the remaining property immediately after the appropriation was $39,450.00. On cross-examination, the witness testified he had appraised approximately 180 parcels of land for the State. The attorney for the Highway Commission argued to the jury that Mr. Trollinger had appraised more than 180 parcels for the Highway Commission which had settled with the

majority of the owners on the basis of his appraisals. The court promptly and properly sustained the defendants' objection to the argument and cautioned the jury not to consider it. We must assume the jury heeded the instruction and did not consider it to the defendants' prejudice.

Finally, the defendants contend the court committed prejudicial error by charging the jury: ". . . (T)he measure of damages in such a proceeding as this is the difference between the fair market value of the entire tract of 12 acres immediately before the taking and the fair market value of what is left after the taking of the .35 of an acre in this case. . . . the court has given you . . . the rule of law in determining just what is fair market value of the entire tract before the taking. When all of you have agreed upon that, then you will write the figure down. Then, you will determine what the fair market value of the remaining land is after the taking; write that figure down and subtract one figure from the other; . . . your difference will be your answer."

The defendants contend the evidence disclosed they had begun constructing a building on the remaining portion of the land before the taking and completed it afterwards, which added to the after-taking value; that the jury may have included the completed structure in their value of the remaining portion, thus reducing defendants' damages. However, the evidence of all witnesses fixed before and after value as of the date of the taking. There is no likelihood or reason to suppose the jury failed to understand they were dealing with the value of the whole immediately before the taking and what was left immediately afterwards, as required by G.S. 136-112. The date of the taking was stipulated. Nothing in the charge suggests the defendants were penalized by completing the building which they had previously begun; or that the jury failed to understand the issue before them.

A careful review of the assignments of error fails to disclose any reason in law why the verdict and judgment should be disturbed.

No error.

ANNETTE S. CHURCH v. CHARLES H. HANCOCK AND F. W. HANCOCK, JR.

(Filed 6 May, 1964.)

1. Parent and Child § 6—

While marriage of a child emancipates the child by operation of law and relieves the father of the legal duty of supporting the child thereafter, a parent can nevertheless bind himself by contract to support a child after emancipation and past majority.

2. Husband and Wife § 11—

The ordinary rules governing the interpretation of contracts apply to separation agreements, and the courts are without power to modify them.

3. Same; Contracts § 12—

Where the terms of a contract are plain and explicit, the courts will determine its legal effect and enforce it as written.

4. Husband and Wife § 11—

In consideration of the wife's relinquishment of her right to rents and profits from lands jointly owned by them (she being entitled to one-half thereof after the divorce subsequently obtained by her), the husband agreed to pay a sum monthly to her for the support of her and the children of the marriage, with provision for reduction in a certain amount if she remarried and provision for reduction in a certain other amount in the event of the death of a child, the payments to continue to a date specified. *Held:* The husband is not entitled under the support agreement to reduce the payments upon the marriage of a child within the term of the contract.

APPEAL by defendants from *Hobgood, J.*, November 1963 Civil Session of VANCE.

Plaintiff, the former wife of defendant Charles H. Hancock, instituted this action on July 22, 1963 to recover payments allegedly due under a separation agreement. The allegations of the complaint, answer, and reply established these facts: Plaintiff and defendant Charles H. Hancock were married on December 11, 1943. They had two children, Annette, born January 6, 1947, and Charles H. Hancock, Jr., born December 9, 1948. The parties separated on July 25, 1951. On August 10, 1951 they duly executed a separation agreement which, in addition to dividing specific properties, contained the following provisions:

> Plaintiff should have the custody of the two children. Beginning with September 1951, and continuing until December 9, 1969, Charles H. Hancock would pay plaintiff $250.00 a month for the support of herself and the children. If plaintiff remarried the monthly payment would be reduced by $75.00. If one child should die before December 9, 1969, the monthly payments would be re-

duced by $62.50; if both died, by $125.00. In consideration of these payments plaintiff relinquished all her rights to any income from property jointly owned by the parties until December 9, 1969. She also released her rights in the real and personal property then owned or thereafter to be acquired by Charles H. Hancock individually.

For a recited consideration, the defendant F. W. Hancock, Jr. guaranteed "the payment of the monthly amounts contracted in said deed of separation to be paid by the said Charles H. Hancock," his son.

On December 8, 1953 plaintiff obtained an absolute divorce from Charles H. Hancock. She married John C. Church on June 9, 1959 and thereafter Charles H. Hancock paid her only $175.00 a month as provided in the separation agreement. However, since May 1962 he has paid her nothing whatever. On May 11, 1963, Annette, then sixteen years of age, married one Floyd Daniel, Jr. with whom she is now living. Plaintiff alleges that as of July 1, 1963 defendants were indebted to her in the sum of $2,275.00 plus interest in the amount of $68.23, making a total of $2,343.23. Defendants concede their indebtedness to the plaintiff, but they allege that since the marriage of Annette it has been reduced by $62.50 a month. The trial judge gave judgment on the pleadings in favor of the plaintiff for the amount prayed and defendants appealed.

Gholson & Gholson by G. M. Beam and Gaither M. Beam for plaintiff.

Royster & Royster by T. S. Royster, Jr., for defendants.

SHARP, J. The marriage of a minor child legally terminates parental rights and obligations to the child. Upon marriage the child is emancipated by operation of law, and thereafter the father is not liable for the support of the child or entitled to its society and services. *Wilkinson v. Dellinger,* 126 N.C. 462, 35 S.E. 819; 3 Lee, N.C. Family Law, § 233; 39 Am. Jur., *Parent and Child* § 65. However, a parent can bind himself by contract to support a child after emancipation and past majority, and such a contract is enforceable as any other contract. Annot., 1 A.L.R. 2d 910; 39 Am. Jur., *Parent and Child* § 69. The ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113; *Howland v. Stitzer,* 236 N.C. 230, 72 S.E. 2d 583. Of course, no contract between the parents can deprive a court of its authority *by judgment* to require

that adequate provision be made for minor children. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487. For cases dealing with the effect of the marriage of a minor child upon an order or decree of the court for its support, see the annotation on that subject in 58 A.L.R. 2d 358.

Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties. *Goodyear v. Goodyear, supra; Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245; *Brock v. Porter,* 220 N.C. 28, 16 S.E. 2d 410. The terms of the contract under consideration are plain and unambiguous. The parties provided for those contingencies which would, upon occurrence, reduce Charles H. Hancock's stipulated monthly payments. They were the plaintiff's remarriage and the death of a child or children. The separation agreement contained no provision for a reduction in the event of a child's marriage, and defendants' contention that the marriage of the child was legally equivalent to its death cannot be sustained.

This case is almost identical with the case of *Kamper v. Waldon,* 17 Cal. 2d 718, 112 Pac. 2d 1, in which a husband and wife, after separation, entered into a property settlement agreement. In consideration of mutual covenants, it was agreed that the defendant wife should have the custody of the parties' four minor children and that the plaintiff husband would pay her the sum of thirty dollars a month for their support until the youngest child became twenty-one years of age. Plaintiff made the payments until the youngest child, a daughter, married at age seventeen. Plaintiff then notified defendant that he would pay no more. She immediately filed suit in the Justice Court for the first unpaid monthly payment and plaintiff instituted an action in the Superior Court for a declaratory judgment. In affirming the judgment of the Superior Court, the Supreme Court said,

> "It may be assumed, in the absence of an agreement to the contrary, that a parent is released from the legal duty of support upon the complete emancipation of a minor child, as by its lawful marriage.
>
> ". . . .
>
> "There is nothing in the law to prevent a parent from contracting to support a child, minor or adult, married or unmarried. And when the agreement, as here, is founded upon sufficient consideration, the contractual obligation is not measured by legal duties otherwise imposed. No principle of public policy intervenes to prevent such a contract and the courts have no right by a process of interpretation to release one of the contracting parties from disadvantageous terms actually agreed upon.

"No sound reason has been advanced why plaintiff should be relieved from the provisions of his agreement and the judgment of the trial court should not be disturbed."

Likewise, in the instant case, the defendants' contractual obligation is not limited to the legal duty of the father to support his daughter. The contract is supported by an additional consideration. Until December 9, 1969, when all of defendants' obligations under the contract will cease, in consideration of the support provisions in the contract, plaintiff gave up her rights to the rents and profits from all the land which she and Charles H. Hancock jointly owned at the time of their separation. Otherwise, after the divorce, he would have been required to divide them with her. *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566.

The trial judge correctly entered judgment on the pleadings in accordance with plaintiff's prayer for relief.

Affirmed.

W. F. PHILLIPS, C. C. PHILLIPS, AND B. M. HAGLER, JR., PARTNERS T/A P & H PLASTERING COMPANY, PLAINTIFFS V. PHILLIPS CONSTRUCTION COMPANY, INC., DEFENDANT.

(Filed 6 May, 1964.)

1. Contracts § 12—

Where the language in a contract is clear and unambiguous, it is the function of the court to declare its meaning in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.

2. Same; Customs and Usages—

Words of a contract referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning.

3. Same—

Where the contract under which defendants plastered the houses in question stipulated that defendants should perform all items required for a complete and first-class job whether particularly mentioned or not, and the particular specifications call for cornerites only for vertical corners, it *is held,* upon final agreement requiring the plastering of walls as well as ceilings, defendants were required to reinforce all wall corners with cornerites upon evidence disclosing that in the trade cornerites are standard for both vertical and horizontal corners when apposite.

4. Compromise and Settlement—

Where a check states that it is in full payment for the balance due under the contract, including claims for all work performed in addition to the

subject contract, acceptance of the check constitutes a settlement excluding claim for additional compensation for work beyond that called for in the original agreement.

APPEAL by plaintiff from *Campbell, J.*, October 21, 1963 Regular Schedule "A" Civil Session of MECKLENBURG.

In this action plaintiffs seek to recover $18,000.00 for installing horizontal cornerites in housing units constructed by defendant for the United States Government in South Carolina. They allege that these installations were not included in the original specifications and contract price and that defendant had agreed to pay them for these extras. Defendant denied any such agreement and pleaded an accord and satisfaction. At the close of all the evidence, defendant's motion for judgment as of nonsuit was allowed and plaintiffs appealed.

Fairley, Hamrick, Hamilton & Monteith for plaintiff.
Fleming, Robinson & Bradshaw for defendant.

SHARP, J. Upon the trial these facts were undisputed:

On October 2, 1957 the defendant, as general contractor, entered into a contract with the United States Government through the Department of the Air Force (Department) to construct eight hundred housing units at Myrtle Beach Air Force Base in South Carolina. On October 15, 1957 defendant and the plaintiffs, a partnership doing business as P & H Plastering Company, executed "an agreement between contractor and sub-contractor," whereby plaintiffs agreed to furnish all materials and perform all work described in the plastering and lathing specifications in defendant's contract with defendant and the Department for a total price of $602,750.00. Insofar as applicable to this subcontract, the plaintiffs and defendant agreed to be bound by the general provisions of defendant's contract with the Department and to assume *inter sese* the same rights and liabilities it fixed for those parties.

The provisions of the lathing and plastering specifications pertinent to this action follow with our enumeration:

(a) "All items required for a complete and first class installation shall be included whether particularly mentioned or not.

(b) "All operations connected with the lath and plastering shall be of a standard that will insure flat, true surfaces free of waves, edges that are straight for their entire length, corners that are straight and true, and accurate vertical and horizontal lines and planes.

(c) "All metal lath shall be installed in accordance with the standard established by 'Specifications for Metal and Furring,' 1950 edition, as published by the Metal Lath Manufacturer's Association, Cleveland 14, Ohio.

(d) "Cornerites for all interior vertical corners shall be reinforced with metal cornerites as manufactured by U. S. Gypsum Company, or equal."

Included in paragraph 2(c) of the general provisions of the contract between defendant and the Department was this stipulation:

"Omissions from the Drawings or Specifications or misdescription of detail of work which are manifestly necessary to carry out the intent of the Drawings and Specifications, or which are customarily performed, shall not relieve the eligible builder from performing such omitted or misdescribed details of work but they shall be performed as if fully and correctly set forth and described in the Drawings and Specifications."

The controversy involved in this action arises out of specification (d) above which refers only to cornerites for interior *vertical* corners. The cornerite referred to is a 3″ x 3″ metal diamond mesh lath angle. It is placed on the plaster base in the corners formed where wall and wall and ceiling abut. Its purpose is to re-inforce the corner and to minimize corner cracks in the plastering. Vertical cornerites are placed in the angle created where two walls adjoin; horizontal cornerites are used where a wall meets the ceiling.

Originally it was contemplated that only the ceilings would be plastered and that the walls in the houses would be of wallboard. In that event, cornerite would not have been used in the horizontal angles. However, the base bid contained plastered walls as an alternative plastering specification. In making their bid for the job, plaintiffs included the cost of vertical cornerites only. However, in computing the amount of their bid, plaintiffs referred to the 1950 edition of "Specifications for Metal & Furring" of the Metal Lath Manufacturer's Association mentioned in specification (c) above. This publication required the installation of cornerite at all horizontal and vertical angles. The North Carolina Building Code, which establishes minimum standards of construction likewise requires both, as do FHA regulations. During the construction of the first house, the government inspector informed plaintiffs that he would not approve their work unless they installed both vertical and horizontal cornerites; whereupon plaintiffs installed both at an additional cost of $18,250.00.

W. F. Phillips, one of the plaintiffs and a partner in the P & H Plastering Company, testified that approximately two weeks later he informed Dwight Phillips, president of the defendant corporation, of the inspector's requirement. The president told him to go ahead, that defendant would see that plaintiffs were paid for it. Dwight Phillips denied that he made this promise. His version was that he told Mr. Phillips he would present his claim to the Department by a "change order" and send it through "proper channels," and that defendant made no commitment to plaintiffs "except to the extent that money was recovered from the Air Force." This discrepancy is the only real conflict in the evidence in the case.

In May 1958 defendant wrote the project supervisor with reference to plaintiff's claim and he also sent a "change-order request" to the contracting office for additional compensation for the horizontal cornerite since no specific mention of it had been made in the specifications. Both replied immediately. The contracting office said that horizontal cornerites come within paragraph (a) of the specifications quoted above. The supervisor pointed out that while the base bid provided for sheetrock walls with crown mold, the alternate specification of plastered walls was employed. Therefore, good construction practices required the use of horizontal cornerites in order to avoid cracks. Defendant offered the evidence of three witnesses, found to be experts in the plastering and construction trade, that where both the walls and ceilings of a dwelling are plastered, it is the general practice to install both vertical and horizontal cornerites, and that a first-class installation requires cornerites in *all* interior angles whether specifically mentioned or not.

Mr. W. F. Phillips himself testified:

> "The purpose of installing cornerites at the vertical angles which is a corner between two walls is to eliminate cracks and it would be just as important to install them at the intersection of the ceiling and the wall if a person wanted it."

Plaintiffs filed no written claim with either defendant or the Department until May 20, 1959 when plaintiff W. F. Phillips signed a letter to the contracting officer, prepared for plaintiffs by defendant, in which they demanded the sum of $18,319.52. The Air Force denied the "change-order requests" and no payment of any kind was made in connection with them. Plaintiffs made no request to defendant to appeal this denial to the Contract Board of Appeals in Washington, D. C.

Plaintiffs finished their work in November 1959. On July 7, 1960 defendant's president called B. M. Hagler, Jr., one of the plaintiff part-

ners, and told him to come for "the final check." This check was made payable to the plaintiff in the amount of $3,451.89. On the back of the check, above the line for endorsement, was the following statement:

> "The payee by endorsement hereon acknowledges receipt of this final payment in the amount of $3,451.89 as full payment and complete settlement for all work performed under subcontract dated October 15, 1957, with Phillips Construction Co., Inc., and/or D. L. Phillips, Builder, and/or Myrtle Beach AFB Housing, Inc., and/or No. 2 and 3 and claims for any and all work performed in addition to subject subcontract at the Myrtle Beach AFB Housing Projects."

Beneath this statement W. F. Phillips endorsed the check by first signing the partnership's trade name and then his own. The plaintiffs received the money and executed lien waivers stating that all sums due under the subcontract had been paid.

To state the facts is to decide this case. The contract, prepared and executed by experts in the building industry, is free from ambiguity. It was, therefore, for the court to interpret and declare its meaning in the light of the undisputed evidence as to the custom, usage, and meaning of its terms in the plastering trade. *Briggs v. Mills, Inc.*, 251 N.C. 642, 111 S.E. 2d 841; *Young v. Mica Co.*, 237 N.C. 644, 75 S.E. 2d 795; *Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 856. Ordinarily, the court will interpret words used in a contract with reference to a particular trade according to their widely accepted trade meaning. 12 Am. Jur. *Contracts* § 237.

When the Department exercised its alternative election to use plastered walls in the housing project instead of sheetrock, the plaintiffs were still required to furnish all items necessary for first class construction whether particularly mentioned or not. The only inference to be drawn from all the evidence in this case is that, for the construction involved here, horizontal cornerites were thus required. However, be that as it may, when plaintiffs accepted and cashed defendant's "final check" which stated that it was in full payment and final settlement, not only for all work under the subcontract, but for all claims for any additional work, plaintiffs discharged their claim for any additional compensation. "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full or when such check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for."

Hardware Company v. Farmers Federation, 195 N.C. 702, 143 S.E. 471; *Durant v. Powell,* 215 N.C. 628, 2 S.E. 2d 884.

The judgment of the court below is

Affirmed.

STATE v. LULA MOREHEAD, CLAUDE WALL AND JAMES MOREHEAD.

(Filed 6 May, 1964.)

1. Intoxicating Liquor § 13a—

Evidence that an undercover agent purchased from one defendant a pint of whiskey, that the sale took place in the basement of the residence of the other defendant, that such other defendant was present, and that the first defendant gave the money received for the whiskey to the other defendant, *is held* sufficient to be submitted to the jury as to the guilt of each.

2. Intoxicating Liquor § 15; Criminal Law § 106—

Where two defendants are charged in one warrant and a third defendant is charged in a second warrant with unlawful possession of intoxicating liquor and possession of intoxicating liquor for the purpose of sale, each warrant being based upon a separate occasion, and the warrants are consolidated for trial, it is error for the court to charge in effect that the jury should either find all defendants guilty or all defendants not guilty, since each defendant is entitled to have submitted to the jury the question of his guilt in reference to the specific charge in the warrant against him.

3. Criminal Law § 111—

In this prosecution for violation of the liquor laws based upon testimony of an undercover agent, a charge to the effect that the State contended that the Alcoholic Beverage Control Board would not send out agents who were not thoroughly reliable and that it would be deplorable if officers could not be believed, *is held* inappropriate and prejudicial.

APPEAL by defendants from *Crissman, J.,* October 7, 1963, Criminal Session of GUILFORD Superior Court, Greensboro Division.

Criminal prosecutions on three warrants charging offenses committed March 24, 1963, *viz.:* In separate warrants, each of defendants Lula Morehead and Claude Wall was charged with (1) the unlawful possession, (2) the unlawful possession for the purpose of sale, and (3) the sale to James Alston for the sum of $4.00, of "One Pint of Tax Paid Whiskey." In a separate warrant, defendant James Morehead was charged with (1) the unlawful possession, (2) the unlawful possession for the purpose of sale, and (3) the sale to James Alston for the sum of $2.00, of "½ pint of Tax Paid Whiskey."

Each defendant was tried and convicted in the municipal-county court and appealed from the judgment pronounced therein. In the superior court, the three cases were consolidated for trial and tried *de novo*. As to each defendant, the jury returned a verdict of guilty as charged and the court pronounced judgment. Defendants appealed.

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

Lee & Lee for defendant appellants.

BOBBITT, J. The only evidence (that offered by the State) was the testimony of two ABC officers (Alston and Allen) who were engaged in "undercover work" in Greensboro. Their testimony tends to show the facts narrated below.

On Sunday afternoon, March 24, 1963, at 2:15 p.m., the officers were taken by one Tommy Young to the basement of the Morehead residence. There Alston purchased from Morehead for $2.00 one-half pint of taxpaid whiskey. Morehead gave the $2.00 to Mrs. Morehead. Morehead got the whiskey from behind a counter. The officers and Young consumed the whiskey on the Morehead premises. Mrs. Morehead was present when these events occurred. The officers and Young remained in the Morehead basement "about ten or fifteen minutes." Defendant Wall was not present at any time on said occasion.

Later that afternoon, about 5:45 p.m., Alston, Young and two unidentified ladies returned to the Morehead basement. (Allen was not with them.) On this occasion, Alston purchased from defendant Wall for $4.00 in the presence of Mrs. Morehead one pint of taxpaid whiskey, Wall gave the purchase price ($4.00) to Mrs. Morehead. This whiskey, Kentucky Gentleman, was in a pint bottle. Most of it was consumed on the Morehead premises. "Tommy Young took the rest of it with him."

Alston testified: "Tommy Young did not know who I was, who I was employed by, nor what my purpose was. We got acquainted with the defendants James and Lula Morehead when Tommy Young took us there."

There was ample evidence to support a verdict of guilty as to each defendant in respect of the particular offense of which that defendant was charged. Hence, the motion of each defendant for judgment as of nonsuit was properly overruled.

The evidence discloses two separate and distinct incidents, one at 2:15 p.m. relating to one-half pint of taxpaid whiskey sold to Alston for $2.00 and the other at 5:45 p.m. relating to one pint of taxpaid

whiskey sold to Alston for $4.00. The charge against defendant James Morehead relates solely to the 2:15 p.m. incident. The charge against defendants Lula Morehead and Claude Wall relates solely to the 5:45 p.m. incident.

Near the conclusion of the charge, the following appears: "so in these cases the Court charges you that if you are satisfied from this evidence beyond a reasonable doubt that these defendants had this tax-paid whiskey in their possession for the purpose of sale and further satisfied from this evidence beyond a reasonable doubt *that they did enter into these sales,* it would be your duty to return a verdict of guilty as charged *in this warrant.* If you are not so satisfied, you would return a verdict of not guilty." (Our italics).

The court's final instruction was in these words: "so the Court charges you if you are satisfied from this evidence beyond a reasonable doubt that these defendants had tax-paid whiskey in their possession on this date for the purpose of sale and that they actually did sell some of it or were party to it, it would be your duty to return a verdict of guilty as charged *in the warrant.* If you are not so satisfied, it would be your duty to return a verdict of not guilty." (Our italics).

In giving these instructions, the court, through inadvertence, assumed all warrants contained counts (or that there was a single warrant) relating to a criminal offense or offenses based on a single incident. The quoted instructions required the jury to find all defendants either guilty or not guilty. Each defendant was entitled to have submitted to the jury for consideration, determination and verdict the question as to *his (her)* guilt with reference to the specific charge(s) in the warrant against *him (her).* The quoted instructions were erroneous and entitle all defendants to a new trial.

Since a new trial is awarded on the ground stated above, we deem it unnecessary to consider at length defendants' contention that the court failed to give equal stress to the contentions of the State and defendants. One portion of the charge to which defendants except is in these words: "The State says and contends that when you weigh and consider this evidence, there could be only one conclusion, for the State says and contends that the Alcoholic Beverage Control Board would not send out agents that are not thoroughly reliable and agents that are not thoroughly trustworthy; and that if we have gotten to the point where the officer cannot be believed, that we are getting way down the line."

In the light of the rule applicable when passing upon the credibility of the testimony of an undercover officer or agent, *S. v. Love,* 229 N.C. 99, 47 S.E. 2d 712, the quoted summation was inappropriate and prej-

udicial. See *S. v. Hunt,* 246 N.C. 454, 98 S.E. 2d 337. It is noted that the jury was not instructed as to the rule stated in *S. v. Love, supra.*

New trial.

CHARLES M. KISTLER AND WIFE, JO ANN S. KISTLER v. CITY OF RALEIGH, A MUNICIPAL CORPORATION; T. A. LOVING & COMPANY, A NORTH CAROLINA CORPORATION, AND VERNON PEEBLES.

(Filed 6 May, 1964.)

1. Municipal Corporations § 40—

An action based on allegations that defendant municipality took possession of plaintiffs' property without negotiating for its purchase and seeking to compel the city to surrender possession *held* not barred by charter provisions of the city requiring an action for damages for the taking or appropriations of private property to be instituted within 90 days, the charter provisions being construed with other charter provisions and the General Statutes in regard to condemnation by the city, and it appearing that the city had denied title and had not followed either method for condemnation of the property.

2. Ejectment § 8—

A municipality is not required to file bond in defending an action for the possession of real property, since G.S. 1-111 does not apply to the State or its agencies.

APPEALS by plaintiffs and City of Raleigh from *Crissman, J.,* February 1964 Civil Session of WAKE.

This is an action to determine title to an area on Ridge Road, trapezoidal in shape, containing approximately 4100 square feet. Plaintiffs allege: They own the described area. Raleigh, acting through its agents, Peebles and Loving & Company, took possession, changed the grade and built thereon gutters and curbs. Raleigh has not negotiated for the purchase of the property. Plaintiffs seek an order compelling defendants to surrender possession. They do not seek damages for the asserted wrongful entry or detention.

Peebles and Loving & Company demurred for that the complaint failed to state a cause of action as to them. City of Raleigh answered. It denied each allegation of the complaint. To bar plaintiffs' right to recover, it pleaded the provisions of its charter requiring notice of a claim for damages or for compensation for the appropriation of property.

Raleigh did not file the defense bond described in G.S. 1-111. Because of the failure to file the bond there described, plaintiffs moved to strike the answer and for judgment by default final against City of Raleigh.

The court sustained the demurrers of the defendants, Peebles and Loving & Company. It held that the pleaded provisions of the city's charter did not bar plaintiffs' right to maintain the action. It denied the motion for judgment by default final against the city.

Plaintiffs and City of Raleigh excepted and appealed.

Lake, Boyce & Lake for plaintiffs.
Paul F. Smith for defendant City of Raleigh.
Thomas A. Banks for defendant T. A. Loving & Company.

RODMAN, J. The appeals present these questions: (1) Are plaintiffs prevented by the provisions of Raleigh's charter from maintaining this action? (2) If not, are plaintiffs, because of defendant's failure to give the bond prescribed by G.S. 1-111, entitled to judgment by default? The answer to each question is no.

Sec. 107(b) of the city's charter, c. 1184, S.L. 1949, provides: "No action for damages against the city of any character whatever, * * * including damages for the taking and/or appropriation of private property of any kind, shall be instituted against the City of Raleigh, unless within 90 days after * * * the infliction of injury * * * or appropriation of property, * * * the complainant, * * * shall have given notice in writing to the City Council of the City of Raleigh of such injury, damage, taking, appropriation, or other act complained of, * * *."

The quoted provision of the charter must, of course, be read and interpreted with other provisions of the charter, particularly the provisions relating to the city's right to acquire property by private negotiation, or failing in such negotiation to acquire title by condemnation. Raleigh is given by general law, G.S. 160-200(11), and by specific provision of its charter, sec. 22(15), authority to purchase property for the improvement of its streets. If it is unable to purchase by private negotiation, it may, as provided in sec. 104 of its charter, acquire title by condemnation. This section prescribes two methods, either of which the city may follow.

If the city and the owners are unable to agree on fair compensation, it may be determined by three disinterested freeholders of the city, one appointed by the city, one by the property owner, the third by the other two. If the property owner refuses to select a freeholder, the city may select one for him.

When the city denied plaintiffs' title, it waived the right to have the value of the property, title to which is in controversy, determined as provided by its charter. *Mason v. Durham,* 175 N.C. 638, 96 S.E. 110; *Keener v. Asheville,* 177 N.C. 1, 97 S.E. 724; *Rouse v. Kinston,* 188 N.C. 1, 123 S.E. 482; *Crisp v. Light Co.,* 201 N.C. 46, 158 S.E. 845; *Manufacturing Co. v. Aluminum Co.,* 207 N.C. 52, 175 S.E. 698; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144.

The charter also authorizes Raleigh to use the general law giving municipalities the power to condemn property. That right is given by G.S. 160-204. When and how it may be exercised is prescribed in G.S. 160-205.

Before the municipality can use either method to condemn, it must make a good faith effort to agree with the owner on the price to be paid. *Power Company v. King,* 259 N.C. 219, 130 S.E. 2d 318; *Winston-Salem v. Ashby,* 194 N.C. 388, 139 S.E. 764.

The charter provision requiring notice as a condition to the maintenance of an action for damages, or for compensation for property taken under the power of eminent domain, has no application to actions where the only question for decision is who owns the disputed area. Until it has been determined that plaintiffs are the owners of the area in controversy, they are not entitled to compensation nor is the city under obligation to pay. If it be adjudged that plaintiffs are the owners of the land in controversy, the city can comply with the prayer of the complaint, restore the property to its former condition and surrender possession to the plaintiffs. They are not obligated to purchase. The city can, however, if it elects to do so, have an issue submitted as to the value of the property if the jury determines that the plaintiffs are the owners. *Ridley v. R. R.,* 118 N.C. 996, 24 S.E. 730.

The court correctly concluded that the city may defend without giving the bond called for by G.S. 1-111. The statute is not applicable to defendant Raleigh. Plaintiffs do not seek damages or loss of profits. The word "defendant" was not intended to comprehend the State or its agencies. *Miller v. McConnell,* 226 N.C. 28, 36 S.E. 2d 722; *Charlotte v. Kavanaugh,* 221 N.C. 259, 20 S.E. 2d 97; 82 C.J.S. 936.

Plaintiffs seek no relief against Peebles and Loving & Company. They assert no title of their own. The court ruled correctly in sustaining the demurrer.

Affirmed.

ACCIDENT INDEMNITY INSURANCE COMPANY v. ROBERT LEE JOHNSON.

(Filed 6 May, 1964.)

1. Courts § 14—

An action instituted in a municipal-county court to recover a sum in excess of two thousand dollars must be instituted upon written pleadings as required in civil actions in the Superior Court, and while the matter is a question of procedure and not jurisdiction, such pleadings are prerequisite to the institution of such action, and in the absence of such pleadings defendant's motion to dismiss is properly allowed. G.S. 1-122, Rule 23 of the Municipal-County Court Act.

2. Process § 9—

A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within 31 days after the issuance of the order of attachment, G.S. 1-440.7, and plaintiff must file the affidavit required by G.S. 1-98.

3. Same—

Service of process by publication is in derrogation of the common law and the statutory provisions must be strictly construed.

APPEAL by plaintiff from *Crissman, J.*, 21 October 1963 Civil Session, Greensboro Division, GUILFORD.

Plaintiff instituted this action in the Municipal-County Court, Greensboro, Guilford County, North Carolina, on 6 August 1963, by having issued a summons with no written pleadings, to recover the sum of $2,014.02 of the defendant, stated in the summons to be due by contract; and in an ancillary proceeding posted bond and attached two Cadillac automobiles. No process was personally served on the defendant and no service of process by publication has been commenced.

Defendant made a special appearance and moved to dismiss the action under Rule 23 of the Municipal-County Court Act, Chapter 971 of the 1955 Session Laws of North Carolina. The motion was allowed. Plaintiff appealed to the Superior Court of Guilford County and the order of the Municipal-County Court was affirmed. The plaintiff appeals to this Court, assigning error.

Forman, Zuckerman & Scheer for plaintiff appellant.
Alston & Price for defendant appellee.

DENNY, C.J. The motion to dismiss allowed in the Municipal-County Court of Guilford County and affirmed upon appeal to the Superior Court of said county, was based upon Rule 23 of Chapter 971

of the 1955 Session Laws of North Carolina, which in pertinent part reads as follows: "Unless ordered by the judge, and except in cases where the plaintiff, as hereinafter provided, elects to file or is required to file a written complaint, it shall not be necessary to file written pleadings in any action in the court. Where an action is started without the filing of a written complaint, the summons shall state briefly the nature of the cause of action in which the same is issued and the amount sought to be recovered. No action shall be dismissed for failure of the summons to state the cause of action sufficiently; provided that the judge may require the plaintiff to restate the cause of action, or the judge, in his discretion, may order written pleadings to be filed in any action. * * * (W)here the sum sought to be recovered, exclusive of interest, or the stated value of the property sought to be recovered exceeds two thousand dollars ($2,000.00), * * * such actions cannot be instituted except upon written pleadings, and shall be subject to and governed by laws and rules applicable to actions in the Superior Court * * *."

As we construe this Rule, it simply means that when the plaintiff seeks to recover a sum in excess of $2,000.00 in the Municipal-County Court of Guilford County, such action cannot be instituted except upon written pleadings as required in civil actions in the Superior Court by G.S. 1-122. This being so, such pleadings are a prerequisite to the institution of such an action in the Municipal-County Court of Guilford County. It is not a question of jurisdiction but one of procedure.

Furthermore, irrespective of the provisions of Rule 23, the defendant was entitled to an order (if he had requested it) dissolving the attachment for failure to commence service by publication within 31 days after the issuance of the order of attachment. G.S. 1-440.7. The order of attachment was issued on 6 August 1963, while the order dismissing the action, pursuant to the provisions of Rule 23, was not entered until 25 September 1963, 50 days later; and neither at that time nor since does the record disclose any effort to obtain service by publication. No affidavit has been filed, as required by G.S. 1-98, nor has there been any request for an extension of time in which to procure such service. The service of process by publication is in derogation of the common law, and the statute making provision therefor must be strictly construed. *Com'rs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144, and cited cases.

The order entered below will be upheld.

Affirmed.

WORTH CHEMICAL CORPORATION v. DUANE S. FREEMAN, JR. AND CARDINAL PRODUCTS, INCORPORATED.

(Filed 6 May, 1964.)

Contracts § 7—

Where there is no written agreement at the inception of the employment that the employee should not engage in competition with the employer for a stated period after the termination of the employment, a written agreement to this effect executed thereafter is void for want of consideration.

APPEAL by plaintiff from *Phillips, E. J.,* December 1963 Civil Session of GUILFORD (Greensboro Division).

Plaintiff instituted this action on November 6, 1963 to restrain the defendant Freeman until July 19, 1964 from selling heavy industrial chemicals within a radius of 225 miles of Greensboro and to restrain defendant Cardinal Products, Inc. from employing Freeman as a salesman. Plaintiff applied to the court for a restraining order pending the final determination of the action. On December 11, 1963 the judge heard the application upon the verified pleadings and the affidavits of all the parties. Only brief summaries of the affidavit are included in the transcript. However, the "Statement of Facts" in the agreed case on appeal shows the following:

Plaintiff is a corporation engaged in selling heavy industrial chemicals to manufacturers in North Carolina and parts of South Carolina, Tennessee, Virginia, and West Virginia. It has never had more than three salesmen working for it at any one time. On September 1, 1960 plaintiff engaged Freeman as a salesman at $450.00 a month to work its territory. Thereafter on September 16, 1960, the parties signed an employment contract which recited, *inter alia,* that "Whereas, the Company (plaintiff) has employed the Employee (defendant) as a Salesman at a monthly salary of Four Hundred Fifty Dollars $450.-00)," the employee agreed that in the event he should terminate his employment with the Company he would not in any manner engage in any activity in competition with plaintiff for a period of twelve months within a radius of 225 miles of Greensboro, North Carolina. Because of a personality conflict with the plaintiff's president, Freeman terminated his contract with the plaintiff on July 19, 1963 and thereafter went to work as a salesman for defendant Cardinal Products, Inc., a competitor of plaintiff's. Since August 1963, Cardinal Products, Inc. had been aware of the terms of the written contract which plaintiff and Freeman executed on September 16th.

Judge Phillips held that plaintiff was not entitled to the restraining order for which it prayed. From his order denying an injunction, plaintiff appealed.

Forman, Zuckerman & Scheer for plaintiff.
Nick Galifianakis for defendant.

PER CURIAM. At the time the relationship of employer and employee was established between the plaintiff and defendant Freeman on September 1, 1960, no written contract evidenced a covenant restricting Freeman's right to engage in competitive employment. To be enforceable such a covenant must be (1) in writing, (2) supported by a valid consideration, and (3) reasonable as to terms, times and territory. The written contract of September 16, 1960 was a new contract without a new consideration. This case is controlled by *Greene v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166. Judge Phillips correctly declined to issue the injunction. His judgment is

Affirmed.

VIOLA C. LEONARD v. BAKER'S SHOE STORE, INC., AND NORTH CAROLINA FURNITURE, INC.

(Filed 6 May, 1964.)

Negligence § 37f—

Evidence tending to show that the seat of the chair in which plaintiff was sitting tilted forward, causing plaintiff to fall to the floor of defendant's store, that the seat of the chair tilted because two screws holding the seat at its rear were broken, that the heads of the screws were still countersunk after the accident, and that when plaintiff sat down the seat of the chair was apparently in good condition, without evidence that an inspection would have revealed any defect, *is held* insufficient to overrule nonsuit.

APPEAL by plaintiff from *Shaw, J.,* 11 November 1963 Regular Civil Session, Greensboro Division of GUILFORD.

This is an action to recover for personal injuries allegedly sustained when plaintiff sat sideways in a chair in defendant's shoe store. She occupied approximately the front one half of the seat. After she had been seated in that manner for between two and four minutes, the back of the seat came loose and the seat tilted forward and the plaintiff fell to the floor. The chair in which plaintiff was seated was one of a tier

of four chairs fastened together. When the plaintiff fell, the chair in which she was seated did not topple over but remained on its legs.

The chair complained of had been in use approximately six months and there had been no previous difficulty with any of the chairs. The chair was manufactured by North Carolina Furniture, Inc. The seat of the chair was fastened to the frame by four screws, two screws being in front and two in the back. After the alleged accident, it was found that the two rear screws were broken. The heads of the front and rear screws were still countersunk about one-eighth of an inch below the surface of the wood. When the plaintiff sat down in the chair the seat was apparently in good condition.

At the close of plaintiff's evidence North Carolina Furniture, Inc. moved for judgment as of nonsuit. The motion was allowed. At the close of all the evidence the defendant shoe store moved for judgment as of nonsuit. The motion was allowed and from this last ruling only the plaintiff appeals, assigning error.

Younce & Wall for plaintiff appellant.
Jordan, Wright, Henson & Nichols for defendant appellee.

PER CURIAM. The appellant insists that on authority of *Schueler v. Good Friend Corp.*, 231 N.C. 416, 57 S.E. 2d 324, 21 A.L.R. 2d 417, she is entitled to a reversal of the judgment as of nonsuit entered below.

In the *Schueler* case the entire tier of chairs turned over backwards when the plaintiff sat down and turned to place her purse in an adjoining chair. Moreover, there was evidence that the chairs had been fastened to the floor when the plaintiff had previously visited the store with one of her children about a week earlier. There also was evidence tending to show that the chairs were top-heavy and unbalanced and were not safe unless fastened to the floor.

In the instant case, there is no evidence tending to show that an inspection by the defendant would have revealed any defect or weakness in the chair involved.

We hold that plaintiff failed to establish actionable negligence on the part of the defendant.

Affirmed.

STATE v. HENDERSON BAILEY.

(Filed 6 May, 1964.)

APPEAL by defendant from *Shaw, J.*, October 28, 1963, Criminal Session of GUILFORD (High Point Division).

This is a criminal action.

Defendant is charged in the bill of indictment with the crimes of forging and uttering a false bank check. Plea: Not guilty. Verdict: Guilty as charged. Judgment: Active prison sentence.

The State introduced evidence tending to show that the signature of J. O. Connor, purported maker, was forged on a check for $51, dated 1 August 1963, drawn on the Wachovia Bank and Trust Company of High Point and payable to Thomas Davis, and that defendant had it in possession, endorsed the name of Thomas Davis thereon and negotiated it for goods and cash.

Attorney General Bruton and Deputy Attorney General McGalliard, and James F. Bullock, Asst. Attorney General for the State.

Haworth, Riggs, Kuhn and Haworth and Robert L. Cecil for defendant.

PER CURIAM. The evidence is sufficient to withstand defendant's motion for nonsuit. G.S. 15-173. When considered contextually the charge of the court complies with G.S. 1-180. Applicable principles of law were explained to the jury in a substantially correct manner. *State v. Phillips,* 256 N.C. 445, 124 S.E. 2d 146; *State v. Jestes,* 185 N.C. 735, 117 S.E. 385; *State v. Peterson,* 129 N.C. 556, 40 S.E. 9. We find from the record no error sufficiently prejudicial to warrant a new trial.

No error.

APPENDIX.

AMENDMENT TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA:

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, January 17, 1964.

Amend Article X, appearing 251 N.C. 857, Canon D, by adding a new sentence following the period after the word "Solicitor" at the end of Canon D as follows:

> "And provided further that nothing in this Canon is intended to preclude the Solicitor or Assistant Solicitor of any Superior Court from appearing in a Recorders Court or Municipal-County Court, upon request of the Solicitor of such court."

NORTH CAROLINA — WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 23rd day of January, 1964.

EDWARD L. CANNON, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto—Chapter 84, General Statutes.

This the 31 day of January, 1964.

SHARP, J.
For the Court.

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 31 day of January, 1964.

SHARP, J.
For the Court.

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§ 3. Abatement on Ground of Pendency of Prior Action in General.

A plea in abatement seeking dismissal of an action because another action is pending between the same parties on the same right of action should be sustained when, and only when, the actions are pending in different courts of the same sovereign. *In re Skipper*, 592.

Thus the pendency in another state of the wife's suit for divorce does not bar our courts having jurisdiction of the children or the power to determine the custody and support of the children. *Ibid.*

§ 10. Survival of Actions for Negligent Injury Causing Death.

A fatal injury negligently inflicted gives rise to two causes of action, one in behalf of the estate for pain and suffering and medical expenses prior to death, and the other for wrongful death in behalf of the next of kin and for medical expenses not exceeding $500.00. *In re Peacock*, 749.

ADMINISTRATIVE LAW.

§ 4. Appeal, Certiorari and Review.

An exception to the findings of an administrative agency is alone insufficient to present the question upon further appeal from the judgment of the Superior Court, but appellant must also except to the ruling of the Superior Court sustaining the findings made by the administrative agency. *Equipment Co. v. Johnson*, 269.

On appeal from Tax Review Board, Superior Court has no authority to make additional findings, but when there is no exception to findings by Superior Court, appeal must be determined on basis of findings of the Board and of the court if possible. *Ibid.*

The exercise of a quasi-judicial function by an administrative board is reviewable by *certiorari* when there is no statutory provision for appeal. *In re Burris*, 450.

Where a statute provides a hearing *de novo* in the Superior Court, the hearing is anew as though no action had been taken by the administrative board. *In re Hayes*, 616.

It is the function of the courts in proper instances to determine whether an administrative board acted arbitrarily, unreasonably or unjustly in applying the provisions of a statute. *Lithium Corp. v. Bessemer City*, 532.

AGRICULTURE.

§ 15. Regulation of Milk.

Where all of the evidence is to the effect that defendant retailer's acts in selling milk below cost as defined by G.S. 105-266.21 was not for the purpose of injuring, harassing, or destroying competition with other retail grocers in the vicinity as alleged in the complaint, the *prima facie* case created by the statute is rebutted and it is error for the court to continue to the hearing the temporary order restraining defendant from selling milk below cost. *Milk Comm. v. Dagenhardt*, 281.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

The owner of a subdivision dedicated a part thereof for use as a golf course and thereafter conveyed the golf course to a country club with restrictive covenants to the same effect. The country club thereafter conveyed an easement across the golf course for a street. *Held:* The conveyance of the easement for the street is void, either because repugnant to the purpose of the dedication or because in violation of the restrictive covenant, and the question whether the developer, after effecting the dedication, had any right to impose further restrictions by deed, need not be determined on this appeal. *Realty Co. v. Hobbs*, 414.

§ 2. Supervisory Jurisdiction of Supreme Court.

While an appeal from an order for an adverse examination prior to trial may be subject to dismissal as premature, the Supreme Court in the exercise of its supervisory jurisdiction may consider the appeal on its merits to determine a question of first impression in the interest of the expeditious administration of justice. *Allred v. Graves*, 31.

Where the question sought to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the Supreme Court may determine the appeal on the merits even though the appeal is from an intrlocutory order and premature. *Moses v. Highway Comm.*, 316.

§ 3. Right to Appeal and Judgments Appealable.

A judgment sustaining plaintiff's demurrer to defendant's plea in bar affects a substantial right of defendant and is appealable, G.S. 1-277, Rule of Practice in the Supreme Court No. 4 being applicable only when the demurrer is overruled. *Hardin v. Ins. Co.*, 67.

An appeal from the order of sale to make assets to pay debts of the estate is premature on the part of an appellant disputing only the manner in which the assets should be distributed. *Lucas v. Felder*, 169.

An appeal will lie from an interlocutory order when substantial rights would be lost if the matter were not determined prior to final judgment. *Lockwood v. McCaskill*, 754.

There is no statutory provision for appeal by a drainage district from order of the clerk allowing specified sums to landowners for easements taken for rights of way; G.S. 156-70.1 provides for appeal only on the part of landowners. *In re Drainage*, 407.

Ordinarily, order of the judge affirming the clerk in ordering actual partition is an interlocutory order and not appealable, but a decree denying the right to actual partition and ordering a sale is appealable. In the instant case order of sale might have ensued sequent the order appealed from, and the appeal is allowed. *Horne v. Horne*, 688.

§ 4. Parties Who May Appeal.

Where the trial court enters judgment that plaintiff recover nothing of certain defendants, such defendants may not, upon plaintiff's appeal from the refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since until a judgment is entered against them they are not parties aggrieved. *Bethea v. Kenly*, 736. See also, *Roberts v. Atkins*, 735.

APPEAL AND ERROR—*Continued.*

§ 12. Jurisdiction and Powers of Lower Court After Appeal.

G.S. 1-287.1 does not apply when no case on appeal is required, and in such instance the judge of the Superior Court has no authority to dismiss the appeal for failure to file case on appeal. *Edwards v. Edwards*, 445.

Notice of appeal from an order overruling a demurrer interposed on grounds other than a matter of right for misjoinder of parties and causes does not oust the jurisdiction of the lower court, since appeal from such order is not authorized. *Wheeler v. Thabit*, 479. And the lower court may enter a default judgment after the expiration of thirty days notwithstanding petition for *certiorari* filed after the default judgment. *Ibid.*

§ 16. Certiorari as Method of Review.

The granting of *certiorari* does not relieve movant of the necessity of preserving his exceptions and of perfecting his appeal with regard to the assignments of error as required by the Rules of Practice in the Supreme Court. *Williams v. Williams*, 48.

While *certiorari* has the effect of a supersedeas, it cannot preclude the lower court from proceeding in the cause by order entered prior to the filing of the petition for *certiorari*. *Wheeler v. Thabit*, 479.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error must be supported by an exception. *Equipment Co. v. Johnson*, 269.

§ 22a. Exceptions and Assignments of Error Relating to Pleadings.

An assignment of error to the denial of a motion to strike portions of the complaint must disclose the matter which appellant sought to have stricken without a voyage of discovery through the record. *Williams v. Williams*, 48.

§ 28. Necessity for Case on Appeal.

No case on appeal is required upon an appeal from a judgment on the pleadings since the record proper constitutes the case to be filed in the Supreme Court. *Edwards v. Edwards*, 445.

§ 34. Form and Requisites of Transcript.

The pages of the record in an appeal *in forma pauperis* must be numbered. *Pearce v. Hewitt*, 408.

§ 35. Conclusiveness and Effect of Record.

Statements in the record disclosing that the order appealed from was duly heard in regular course are controlling notwithstanding statements in appellant's brief to the contrary. *Williams v. Williams*, 48.

The Supreme Court will take judicial notice of matters disclosed by its records in prior interrelated actions. *Haley v. Pickelsimer*, 293.

§ 39. Presumptions and Burden of Showing Error.

The presumption is in favor of the regularity of the order or judgment of the lower court. *Shackleford v. Taylor*, 640.

§ 40. Harmless and Prejudicial Error in General.

Where as a matter of law plaintiff is not entitled to recover on the record,

APPEAL AND ERROR—*Continued.*

judgment dismissing the action, even though entered on an erroneous ground, will not be disturbed. *Abdalla v. Highway Comm.*, 114.

Where the allegations of the complaint fail to state a cause of action the Supreme Court may take notice thereof *ex mero motu*, and judgment dismissing the action will not be disturbed even though defendants' demurrer may have been sustained for the wrong reason. *Woodell v. Davis*, 160.

A new trial will not be awarded for mere technical error but only for error which is prejudicial. *Turner v. Turner*, 472.

§ 45. Whether Error is Cured by Verdict.

The admission of incompetent evidence tending to establish the absence of a breach of the contract in one aspect cannot be held cured by an affirmative verdict upon the issue when the adverse party has introduced evidence tending to establish a breach in two separate aspects, so that the issue might have been answered in the affirmative on the other aspect, and the incompetent evidence, in connection with the charge, might have affected the amount of damages awarded. *Lester Bros. v. Thompson Co.*, 210.

§ 46. Review of Discretionary Matters.

The action of the trial court as to matters within its judicial discretion will not be disturbed unless there is a clear abuse thereof. *Welch v. Kearns*, 171.

§ 47. Review of Orders Relating to Pleadings.

Where defendant insurer denies plaintiff insured's allegation of payment of premium and agreement of its agent to issue a binder for automobile liability insurance, defendant is not prejudiced by order of the court sustaining plaintiff's demurrer to insured's further answer setting up such defenses specifically, since defendant would be entitled to set up the defenses under its denial, and order sustaining demurrer will not be disturbed on appeal. *Harris v. Ins. Co.*, 499.

§ 49. Review of Findings or Judgments on Findings.

Where upon the hearing by a court of equity of a fiduciary's application for authority to make charitable gifts from the estate of his incompetent, there is no evidence that the incompetent, if sane, would make such gifts, order authorizing the fiduciary to make such gifts must be reversed, since such order must be predicated upon a finding based on evidence that the incompetent, if sane, would have made such gifts. *In re Kenan*, 1.

The findings of fact of the referee, approved by the trial court, are conclusive in the Supreme Court upon further appeal. *In re Hayes*, 616.

In the absence of an exception to the findings of fact by an administrative board it will be presumed that the findings are supported by competent evidence, but nevertheless an appeal constitutes an exception to the judgment and presents the question whether the facts found are sufficient to support the judgment. *In re Burris*, 450.

While findings supported by evidence are conclusive, whether the findings support the judgment is question of law and reviewable. *Ibid.*

§ 50. Review of Injunction Proceedings.

Upon appeal in a suit for injunction, the Supreme Court is not bound by the findings of fact of the court below and may review and weigh the evidence sub-

mitted to the hearing judge and find the facts for itself. *Milk Comm. v. Dagenhardt*, 281.

§ 51. Review of Judgments on Motions to Nonsuit.

Where a new trial is awarded on other exceptions, the Supreme Court will refrain from discussing the evidence in sustaining the denial of nonsuit except to the extent deemed necessary in the disposition of the other assignments of error. *Bass v. Robinson*, 125.

On appeal from judgment as of nonsuit, the Supreme Court must consider all the evidence admitted in the court below, even though some of it may have been incompetent. *Langley v. Ins. Co.*, 459.

§ 55. Remand.

Cause remanded for consistent findings. *Equipment Co. v. Johnson*, 269.

Where an order of the Superior Court is entered under the Court's erroneous holding that it had no discretionary authority in the matter, the cause will be remanded in order that the Court may determine the matter in the proper exercise of its discretion. *Deanes v. Clark*, 467.

§ 59. Force and Effect of Decision of Supreme Court.

The language in an opinion of the Supreme Court must be considered in relation to the facts of the particular case in which it was written. *Clark v. Ice Cream Co.*, 234.

§ 60. Law of the Case and Subsequent Proceedings.

The decision on appeal becomes the law of the case. *Welch v. Kearns*, 171.

§ 61. Stare Decisis.

An interpretation consistently and repeatedly given a statute by the Court constitutes a part of the statute and any change in such interpretation must be effected by the Legislature, and if the Legislature does not do so the interpretation of the Court must be considered in accord with the legislative intent. *O'Mary v. Clearing Corp.*, 508.

APPEARANCE.

§ 2. Effect of Appearance.

Where there has been no personal service of process, defendant's motion to dismiss an *in personam* action for want of jurisdiction must be allowed, notwithstanding defendant's later demurrer for failure of the complaint to state a cause of action, if at the time of the demurrer more than the ninety days has elapsed during which plaintiff was entitled to procure the issuance of an alias summons or an extension of time for service of the original summons, G.S. 1-59, but if at the time of the demurrer the ninety days allowed by the statute has not expired, defendant is not entitled to dismissal, and the demurrer for failure of the complaint to state a cause of action constitutes a general appearance waiving the service of process. *Murphy v. Murphy*, 95.

ASSAULT.

§ 5. Assault with Deadly Weapon.

"Serious injury" within the meaning of an assault with a deadly weapon

ASSAULT—*Continued.*

with intent to kill, inflicting serious injury, G.S. 14-32, means physical or bodily injury, and when a particular injury may or may not be serious, depending upon its severity and painful effects, such as a "whiplash" injury to the neck, it is for the jury to determine whether the injury is serious in the light of the particular facts disclosed by the evidence. *S. v. Ferguson*, 558.

Where the evidence tends to show an assault by defendant with a deadly weapon inflicting serious injury upon the victim, it is for the jury to determine from the facts and circumstances of the case whether the assault was committed with the specific intent to kill, and it is error for the court to charge that the jury might find an intent to kill if the defendant intended either to kill or inflict great bodily harm. *Ibid.*

ATHLETIC CONTESTS.

Evidence held for jury in prosecution for conspiracy to bribe and bribery of college varsity athletes. *S. v. Goldberg*, 181.

AUTOMOBILES.

§ 2. Grounds and Procedure for Suspension or Revocation of License.

Persons who may recover damages in connection with a collision upon which the Commissioner of Motor Vehicles has suspended an automobile driver's license have no standing as a matter of right at the hearing of the driver's petition for reversal of the Commissioner's order, but the court may permit such persons to file a statement relevant to the facts and participate in the hearing. *Carter v. Scheidt*, 702.

§ 5. Warranties in Sale of Vehicles and Negligence in Defective Parts.

The person who suffers damage to property as a result of defective steering mechanism of an automobile may not recover of the company which repaired the steering mechanism under contract with the owner-driver, since the person damaged is not privy to any contract of warranty between the company and the owner-driver. *Funeral Home v. Pride*, 723.

Evidence of damage to property resulting from defective steering mechanism of an automobile does not warrant recovery against the company that had three times repaired the steering mechanism for the owner-driver when the evidence discloses that the owner-driver had different complaints with respect to the steering on each occasion and there is no evidence as to what caused the defect, that the cause could have been discovered by the repairmen in the exercise of reasonable care, or that the repairmen had not been diligent in making the repairs, or that they did not find and correct the causes on each occasion. *Ibid.*

§ 7. Attention to Road, Look-out and Due Care in General.

It is the duty of a motorist to anticipate and expect the presence of others and he is under duty not merely to look but to keep a lookout in his direction of travel and will be held to the duty of seeing what he ought to see. *Sugg v. Baker*, 579.

§ 8. Turning and Turn Signals.

Driver turning left across another's lane of traffic must ascertain that the movement may be made in safety. *King v. Sloan*, 562.

AUTOMOBILES—*Continued.*

§ 10. Negligence and Contributory Negligence in Hitting Stopped or Parked Vehicle.

Where a motorist is traveling within the legal speed limit he will not be held contributorily negligent as a matter of law in hitting the rear of a vehicle stopped on the highway in his lane of travel at nighttime without lights. *Rouse v. Peterson*, 600; *Short v. Chapman*, 674.

§ 11. Lights.

The duty of a motorist to dim or deflect his headlights is not restricted by G.S. 20-131 solely to instances in which he is meeting oncoming traffic, since the statute refers to "normal atmospheric conditions," and therefore it may be permissible for a motorist to deflect his headlights when driving in fog or other atmospheric conditions in which deflected headlights afford better visibility. *Short v. Chapman*, 674.

§ 13. Skidding.

While the mere skidding of a motor vehicle does not imply negligence, if the cause of the skidding is the failure to use due care under the circumstances, the driver is liable for damages resulting from the skidding. *Howdershelt v. Handy*, 164.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

Evidence tending to show that a truck parked diagonally at the curb was backed into defendant's lane of travel as defendant approached on her right side of the street, that no traffic was approaching from the opposite direction, and that defendant pulled to her left to go around the truck, *held* not to reveal a violation of G.S. 20-149(a), and an instruction to the effect that the right to pass to the left under G.S. 20-149 and G.S. 20-150 did not apply, is error. *Bass v. Roberson*, 125.

§ 17. Right of Way at Intersections.

Where two automobiles approach an intersection at approximately the same time, the driver on the right has the right of way, notwithstanding that the other driver may have entered the intersection a hairsbreadth before him. *Benbow v. Tel. Co.*, 404.

§ 19. Doctrine of Last Clear Chance.

Defendant's original negligence, relied on as the basis for recovery, is barred by contributory negligence and cannot be relied on as the basis of the doctrine of last clear chance, and the doctrine of last clear chance applies only if defendant has a sufficient interval of time to avoid injury after the acts or omissions constituting negligence and contributory negligence have transpired and defendant saw or should have seen plaintiff's position of peril. *Clodfelter v. Carroll*, 630; *Mathis v. Marlow*, 636.

§ 21. Defects in Vehicles.

The owner of an automobile is not an insurer of the safety of the tires on the vehicle but is required to use reasonable care to see that each tire is in a safe and proper condition for operation on the highways, and may be held liable for injuries proximately resulting from a defective condition of a tire when he has actual or implied knowledge of such unsafe condition, but otherwise an ac-

cident resulting from a blowout is usually considered unavoidable. *Scott v. Clark*, 102.

Accident resulting from unforeseeable brake failure does not result in liability. *Stanley v. Brown*, 243.

§ 24.1. Doctrine of Rescue.

The doctrine of rescue, usually arising in negating contributory negligence on the part of a person rescuing another from peril resulting from the negligence of a third person, is applicable in this State to permit recovery by the rescurer injured in the rescue of a person placed in a position of peril by his own negligence. *Britt v. Mangum*, 250.

§ 33. Pedestrians.

It is unlawful for a pedestrian to cross a street between intersections at which traffic signals are maintained unless there is a marked crosswalk between the intersections at which he may cross and on which he has the right of way over vehicular traffic, and his failure to observe the statutory requirements is evidence of negligence but not negligence *per se*. *Bass v. Robertson*, 125.

§ 35. Pleadings.

A complaint containing allegations to the effect that defendant wrecked the automobile driven by her as the result of her negligent operation of the vehicle, that defendant's arm was pinned between the vehicle and the ground, that plaintiff, called to the scene as the result of defendant's cries for aid, lifted the vehicle and extricated defendant and took her into his home, and that in lifting the vehicle plaintiff suffered serious injury to his back, *is held* to state a cause of action. *Britt v. Mangum*, 250.

§ 38. Opinion Evidence as to Speed.

Evidence disclosing that the attention of the witness was attracted to a car with a loud muffler which passed her home a quarter of a mile from the scene of the collision, that no other car with a loud muffler passed her home that morning, and that the collision occurred shortly thereafter, with evidence tending to identify the car she saw with that driven by defendant, *is held* to render competent her testimony from her observation of the car as to its speed. *Honeycutt v. Strube*, 59.

§ 39. Physical Facts at Scene.

The physical facts at the scene of the accident may speak louder than the testimony of witnesses, and may in themselves be sufficiently strong to merit the inference of negligence with respect to speed. *Funeral Home v. Pride*, 723.

§ 40. Relevancy and Competency of Declarations and Admissions.

Testimony of the investigating officer that one of the drivers made a statement to the effect that he was on the left of his center of the highway *held* competent as a declaration against interest in an action against such driver's administrator. *Forte v. Goodwin*, 608.

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

The fact that plaintiff alleges negligence in respects not substantiated by proof does not warrant nonsuit for variance when in other respects there is

both allegation and evidence, since proof of negligence in any one of the respects alleged is sufficient if it proximately causes injury. *Funeral Home v. Pride*, 723.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care and in Traveling at Excessive Speed.

Evidence of excessive speed constituting proximate cause of injury held sufficient to take the issue to the jury. *Honeycutt v. Strube*, 59.

Evidence tending to show that a motorist made a right turn into a dominant street, discovered he could not straighten the car and continued in an arc, hit the curb, lost control, ran through a yard, knocked down an 8-inch thick concrete wall, and struck brick pillows supporting a porch, causing the porch to collapse, *is held* sufficient to be submitted to the jury on the issue of negligence, since it permits an inference of excessive speed or of failure to maintain reasonable control of the vehicle and apply the brakes after the driver realized the vehicle was continuing to turn to the right because of the defective steering mechanism. *Funeral Home v. Pride*, 723.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right in Passing Vehicle Traveling in Opposite Direction.

Plaintiff passenger was injured in a head-on collision of two automobiles on a dirt road in the dust raised by a third car. Testimony of witnesses respectively that at least a part of each driver's vehicle was to the left of his center of the highway takes the issue as to the negligence of each driver to the jury. *Forte v. Goodwin*, 608.

Evidence tending to show that intestate's car was standing about the middle of the highway with its lights on and that defendant approached from the opposite direction, slowed to some 30 miles an hour and had his right wheels in the ditch on defendant's right side of the highway when defendant's car struck intestate and the open door of intestate's car at approximately the same time, *held* insufficient to be submitted to the jury on the issue of negligence. *Harrington v. Nance*, 654.

§ 41e. Sufficiency of Evidence of Negligence in Stopping Without Signal or Parking Without Lights.

Evidence tending to show that defendant's tractor-trailer was left standing on the hardsurface, unattended at nighttime without lights, flares, or warning, and that a motorist was unable to see the vehicle in time to stop before colliding with its rear, takes the issue of negligence to the jury, notwithstanding contradictory evidence that there were lights on the vehicle and reflectors up to 200 feet to its rear. *Watt v. Crews*, 143.

Allegations that plaintiff pedestrian, while waiting to cross a city street, was struck by defendant's car, with evidence tending to show that plaintiff pedestrian was crossing the street and had gotten two feet beyond the center line of the street when he was struck, *held* to warrant nonsuit for variance. *Cannady v. Collins*, 412.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely and in Hitting Vehicle Stopped or Parked on Highway.

Evidence that defendant-driver rammed the rear of another vehicle stopped because of a red traffic light *held* sufficient to take the issue of negligence to the jury. *Stanley v. Brown*, 243.

AUTOMOBILES—Continued.

In this action by a motorist to recover for a collision with a car which was parked on its left side of the highway, partly on the hard surface and partly on the shoulder, resulting when plaintiff mistook two small lights on the vehicle to be tail lights of a car traveling in the same direction as plaintiff, and crashed into the car when blinded by bright lights suddenly turned on in his face, the evidence *is held* sufficient to be submitted to the jury on the issue of negligence and not to show contributory negligence as a matter of law. *Marlin v. Moss*, 737.

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

In an action by a passenger in an automobile to recover for injuries received in a collision at an intersection, evidence that the driver of the car in which plaintiff was riding stopped before entering the intersection with the dominant highway but then drove into the intersection although he could have seen the other car approaching from his right, and that the driver of the other car failed to keep a proper lookout and drove at an unlawful speed into the intersection and collided with the first car, which was first in the intersection, *held* sufficient to be submitted to the jury on the question of the actionable negligence of each driver. *Turner v. Turner*, 472.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Evidence tending to show that plaintiff, traveling east on a four-lane highway, came to a stop at an interspace in the median preparatory to making a left turn into a street making a "T" intersection, that a truck was stopped in the southern lane for traffic traveling west preparatory to making a "U" turn, that after plaintiff had crossed in front of this truck plaintiff's vehicle and defendant's vehicle, which was traveling at a lawful speed in the northern lane for west-bound traffic, collided, and that the view of plaintiff and defendant of the other's car was obstructed by the truck, *is held* sufficient to be submitted to the jury on defendant's counterclaim, since it is the duty of a driver making a left turn across another's lane of travel to first ascertain if the movement may be made in safety. *King v. Sloan*, 562.

§ 41j. Sufficiency of Evidence of Negligence in Skidding.

While the mere skidding of a motor vehicle does not imply negligence, where there is evidence that the driver was passing a preceding car at almost the maximum lawful speed on wet pavement and that she thought she saw a vehicle approaching from the opposite direction move out of line, causing her to cut more quickly and at a sharper angle to her right, with positive evidence that no vehicle was approaching out of line, *is held* sufficient to be submitted to the jury as to whether the skidding of the vehicle and subsequent injuries to plaintiff passenger were caused or accompanied by negligence. *Howdershelt v. Handy*, 164.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence in this case held sufficient to be submitted to the jury on the question of defendant motorist's negligence in failing to use due care to avoid colliding with a pedestrian he saw, or in the exercise of reasonable care, should have seen, in the street, notwithstanding that defendant had the right of way. *Bass v. Roberson*, 125.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Evidence tending to show that defendant was traveling some 15 to 20 miles

AUTOMOBILES—*Continued.*

per hour along a street, with his attention focused on a man and two youths with a homemade go-cart in a driveway to his left, and that he did not see plaintiff's intestate, a child some twenty-eight months old, until after he had struck the child, and that the child had wandered into the street from behind a hedge along a driveway on defendant's right, *is held* sufficient to be submitted to the jury on the issue of negligence, since the evidence permits an inference that had defendant kept a lookout he might have seen the child in time to have stopped or turned and avoided the injury. *Sugg v. Baker*, 579.

§ 41r. Sufficiency of Evidence of Negligence in Operating Defective Vehicle on Highway.

Evidence held sufficient to present question for jury as to negligence in operating vehicle with defective tire. *Scott v. Clark*, 102.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

The evidence in this case *is held* not to show contributory negligence as a matter of law on the part of plaintiff, driving at a lawful speed, in hitting the rear of an unlighted vehicle stopped in her lane of travel on the highway at nighttime, there being evidence that plaintiff was meeting oncoming traffic with lights which blinded her. *Rouse v. Peterson*, 600.

Evidence held not to warrant nonsuit for contributory negligence, the question of proximate cause being for the jury. *Short v. Chapman*, 674.

§ 42k. Contributory Negligence of Pedestrians.

Evidence held not to show contributory negligence as matter of law on part of plaintiff in pushing car on highway. *Underwood v. Usher*, 491.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

In determining the question of the sufficiency of one defendant's evidence to go to the jury on its cross-action against the other defendant, the first defendant's evidence must be taken as true, and where its evidence tends to show that its driver left lights and reflectors back of its stalled tractor-trailer as required by statute and that the other defendant drove his car into the rear of the tractor-trailer, its evidence is sufficient to be submitted to the jury on the cross-action. *Watts v. Crews*, 143.

The vehicle of the additional defendants was parked without lights on the highway and was struck by the original defendant's vehicle, causing the additional defendants' vehicle to strike plaintiff pedestrian, *held*, the evidence of the additional defendants' concurring negligence was properly submitted to the jury on the cross action of the original defendant. *Phillips v. Parnell*, 410.

Evidence of concurring negligence of drivers causing collision at intersection held for jury. *Turner v. Turner*, 472.

Where negligence continues up to the moment of impact, it cannot be insulated by negligence of co-defendant. *Porter v. Pitt*, 482.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Where the physical facts at the scene of the collision permit inferences that immediately befire the impact plaintiff's car was on its right side of the high-

way and also that it was to the left of its center of the highway, there being no eyewitness to the collision, the position of plaintiff's car immediately prior to the collision rests in mere surmise, and the evidence is insufficient to be submitted to the jury on the contention that plaintiff was guilty of contributory negligence in failing to keep her car on the right side of the highway, and therefore any error in the court's instruction upon the issue of contributory negligence is harmless upon defendant's appeal. *Honeycutt v. Strube*, 59.

Evidence tending to show that the *feme* plaintiff had drunk some egg nog, and collided with a wreck on the highway which she saw or could have seen for a distance of some 500 feet, while insufficient to constitute contributory negligence as a matter of law, *is held* sufficient to be submitted to the jury on that issue. *Russell v. Hamlett*, 603.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Evidence held insufficient to raise issue of last clear chance. *Clodfelter v. Carroll*, 630; *Mathis v. Marlow*, 636.

§ 46. Instructions in Automobile Accident Cases.

Where all of the evidence tends to show that a pedestrian attempted to cross a street within a municipality between intersections at a place where there was no marked crosswalk, an instruction leaving it to the jury to determine whether a motorist had the right of way over the pedestrian is error, since the law gives the motorist the right of way upon the uncontradicted facts. *Bass v. Roberson*, 125.

Where defendant introduces evidence that he ran into the rear of a stationary vehicle because of unforeseeable brake failure due to loss of brake fluid, the court should charge the jury as to the law if the jury should find the facts as contended by defendant, and the mere summarization of the evidence and statement of the defendant's contentions with respect to the failure of the brakes are insufficient. *Stanley v. Brown*, 243.

§ 47. Liabilities of Driver to Guests and Passengers in General.

Evidence tending to show that plaintiff passenger elected to sit on the top of a rear fender enclosed within the body of the truck instead of on the floor or on the flat tool box, and that when defendant slammed on his brakes to avoid an accident plaintiff was thrown from his position to his injury, *held* insufficient to overrule nonsuit, since the act of applying the brakes under the conditions cannot be held for negligence and, further, defendant could not have reasonably foreseen that plaintiff would take this position of peril when safe places were available. *Pittman v. Frost*, 349.

§ 49. Contributory Negligence of Guest or Passenger.

Ordinarily, the question of contributory negligence of a guest in an automobile involved in a collision is for the jury to determine in the light of the facts and circumstances of the particular case, but when contributory negligence is the sole reasonable conclusion that can be drawn from the evidence, nonsuit in the guest's action against the driver is proper. *Allen v. Metcalf*, 570.

In this case, the act of the guest in continuing the trip after knowledge that the driver was intoxicated and would not desist from speeding and recklessness except momentarily after admonition, *held* to show contributory negligence as a matter of law, notwithstanding the guest was asleep at the time of the accident. *Ibid.*

AUTOMOBILES—*Continued.*

A passenger who enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him is guilty of contributory negligence *per se* barring recovery as a matter of law. *Davis v. Rigsby*, 684.

§ 55.1. Action by Owner for Damage to Vehicle.

Where plaintiff's family purpose automobile is being driven by his wife, the wife's contributory negligence will bar plaintiff's action against the driver of the other car involved in the collision to recover for damages to his automobile. *Russell v. Hamlett*, 603.

§ 70. Warrant for Drunken Driving.

A warrant, charging that defendant, while under the influence of intoxicating liquor, operated a motor vehicle on a public highway or street cannot be amended so as to charge that defendant so operated the vehicle while on the premises of a business in the parking space provided for customers thereof, since the two offenses are separate and distinct. *S. v. Davis*, 655.

§ 74. Instructions in Prosecutions for Drunken Driving.

Where, in a prosecution for operating an automobile upon a public highway while under the influence of intoxicating liquor, the court correctly defines "under the influence," the fact that the court also charges that it was immaterial whether the liquor or beverage consumed was beer, wine, whisky, or whether it was a spoonful or a quart, etc., *held* not prejudicial error. *S. v. Ellis*, 606.

AVIATION.

§ 3. Accidents in Flight.

Under Federal regulations, a pilot is in command of the aircraft flown by him and nothing short of physical interference by a passenger will remove the pilot from control, notwithstanding the passenger has contracted with the pilot's employer for the service. *Mann v. Henderson*, 338.

Federal regulations are made applicable to intrastate flying by G.S. 63-20, and such Federal regulations as are applicable are binding on the State courts and will be given judicial notice by them. *Ibid.*

It being common knowledge that airplanes do fall without fault of the pilot, the doctrine of *res ipsa loquitur* does not apply to an airplane crash, but in order to support recovery there must be evidence of negligence constituting a proximate cause of the accident. *Ibid.*

Allegations held to leave in conjecture the cause of airplane crash, and demurrer was proper in action for wrongful death. *Ibid.*

BETTERMENTS.

§ 1. Nature and Requisites of Claim for Betterments.

During the term of the lease the lessee may not recover for betterments, notwithstanding his contention that the betterments were placed upon the property in reliance upon the landlord's verbal agreement to include in the lease a provision for renewal for an additional ten-year term. *Crary v. Civils*, 364.

Where the evidence tends to show a parol agreement by the owner of realty to convey to plaintiff's intestate to extinguish a debt and that intestate, in re-

BETTERMENTS—*Continued.*

liance upon the agreement, made improvements on the land, plaintiff administrator is entitled to recover for the estate the amount his intestate paid on the purchase money and the amount by which the improvements made on the land by his intestate enhanced its value, notwithstanding no recovery may be had on the parol agreement to convey in the face of defendant's denial thereof. *Hunt v. Hunt*, 437.

BILL OF DISCOVERY.

§ 1. Right to Examine Adverse Party in General.

In a civil action to recover compensatory and punitive damages for malicious assault, defendants are not entitled to the denial of plaintiff's application for an examination of defendants prior to trial, G.S. 1-568.11(a) (b), solely because they claim that any answer they might make might subject them to a penalty, but defendants must assert their constitutional right against self-incrimination by refusing to answer specific questions propounded to them upon such examination. *Allred v. Graves*, 31.

There is no common law right of discovery in criminal prosecutions. *S. v. Goldberg*, 181.

Physician may not be required to disclose confidential information by deposition prior to trial. *Lockwood v. McCaskill*, 754.

BILLS AND NOTES.

§ 1. Nature and Requisites of Negotiable Instruments.

A check is a bill of exchange drawn on a bank and payable on demand, G.S. 25-192, and is an acknowledgment of indebtedness and an unconditional promise to pay if the drawee refuses payment on presentment. *Kirk Co. v. Styles, Inc.*, 156.

§ 4. Consideration.

A negotiable instrument is deemed *prima facie* to be supported by a valuable consideration and want of consideration is an affirmative defense which must be pleaded. *Kirk Co. v. Styles, Inc.*, 156.

§ 10. Presentment and Acceptance.

The drawer of a check has the right prior to acceptance by the bank to stop payment, but his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder. *Kirk Co. v. Styles, Inc.*, 156.

§ 17. Defenses and Competency of Parol Evidence.

Where defendant admits the issuance of checks in stipulated amounts to plaintiff in payments on account, and that one check was returned for insufficient funds and the other returned after defendant had stopped payment, and defendant does not plead want of consideration, plaintiff is entitled to judgment on the pleadings, and the court correctly excludes evidence of want of consideration. *Kirk Co. v. Styles, Inc.*, 156.

BRIBERY.

§ 3. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to be submitted to jury on charge of conspiracy to bribe and bribery of varsity basketball players. *S. v. Goldberg*, 181.

BROKERS AND FACTORS.

§ 1. Nature and Essentials of the Relationship.

A contract between the broker and owner to negotiate the sale of land is not required to be in writing. *Thompson-McLean, Inc. v. Campbell*, 310.

§ 6. Right to Commissions.

In order to be entitled to recover his commission, a broker must show that he had procured a purchaser ready, able, and willing to purchase on the terms and conditions prescribed by the seller. *Thompson-McLean, Inc. v. Campbell*, 310.

The seller agreed to sell on condition that payment of a stipulated portion of the purchase price be deferred upon terms to be worked out to afford him the best tax advantage. The broker procured a purchaser willing to pay the entire purchase price in cash or partly in cash with the balance secured by a second mortgage, or a smaller down payment with the balance secured by a first mortgage. The seller refused the offers, stating that he required the stipulated cash payment with the balance payable in ten yearly installments at six per cent interest, secured by a first mortgage. *Held:* Nonsuit was properly entered in the broker's action for commission, since if the terms of the sale were not definitely fixed there was no contract, while if the terms of the sale were fixed the broker did not procure a purchaser willing and able to comply with the terms as set forth by the seller. *Ibid.*

BURGLARY.

§ 1. Elements and Essentials of Burglary.

There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key. *S. v. Knight*, 17.

§ 2.1. Indictment.

An indictment charging the non-burglarious breaking and entry of a certain store, shop, warehouse, dwelling, house and building occupied by a named person is not subject to quashal for failure to inform defendants of the type of structure they are charged with breaking into, defendant's remedy being by motion for a bill of particulars if they desire more specific information to formulate their defense. *S. v. Knight*, 17.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence of defendants' guilt of unlawful entry held sufficient for jury. *S. v. Knight*, 17.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud or Duress.

When plaintiffs were under valid contractual duty to sign the instrument, the fact that they were actually induced to sign the instrument by misrepresentations cannot constitute fraud. *Correll v. Hartness*, 89.

Deed may be cancelled if its execution is procured by fraudulent promissory representations of grantees to care for grantor for the remainder of her life, but conplaint must allege every element of fraud, *Gadsden v. Johnson*, 743.

Where the stepson executes a deed to his interest in realty inherited from his father to his stepmother, the administratrix of his father's estate, the law

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

presumes fraud even though the administratrix pays a fair consideration, and the son is entitled to have the issue submitted to the jury in his action to rescind his deed. *Smith v. Smith*, 278.

Signing deed of separation by wife to procure husband's support for minor children of marriage cannot be result of duress since wife had legal remedy to enforce support. *Jones v. Jones*, 612.

§ 5. Cancellation and Rescission for Breach of Condition.

Rescission is an equitable remedy which may be invoked only for a breach of condition or covenant constituting an indispensable part of the contract and without which the agreement would not have been made. *Wilson v. Wilson*, 40.

§ 10½. Instructions.

Where the agreement between the parties as contended by defendant and supported by his evidence is to the effect that plaintiffs were under contractual obligations to sign the note and deed of trust in question, the submission of the issue of fraud solely on the basis of plaintiff's contention that the execution of the note and deed of trust was procured by defendant's false representation that the papers were releases relating to other property owned by plaintiffs, is error, since the court is required to charge on all substantive features of the case arising on defendant's pleadings and evidence as well as on plaintiffs'. *Correll v. Hartness*, 89.

§ 11. Verdict and Judgment.

Where the grantor has his deed declared void and set aside for fraud he must return the consideration for the instrument. *Smith v. Smith*, 278.

CARRIERS.

§ 2. State License and Regulation.

In order to be entitled to a franchise authority the applicant has the burden of showing public convenience and necessity. *Utilities Comm. v. Coach Co.*, 384.

Public policy does not condemn competition as such but only competition which is unfair or destructive. *Ibid.*

§ 6. Common Use of Facilities.

The interchange of equipment by two carriers under lease agreement so as to afford passengers through service, instead of requiring them to change buses at interchange points along their respective routes, is authorized by statute and the rules of the Commission promulgated thereunder, G.S. 62-31, and does not involve any new or additional franchise requiring applicants to show public convenience and necessity, and such agreement, after the giving of proper notice and the filing of the agreement, is effective without the approval of the Commission, and may be suspended or disapproved by the Commission only when it finds upon supporting evidence that it is detrimental to the public interest. *Utilities Comm. v. Coach Co.*, 384.

COMPROMISE AND SETTLEMENT.

In an action by cotenants to recover their proportionate part of the funds received from the sale of the lands and deposited by one tenant to his sole account, evidence that there was a dispute as to the interests of plaintiffs in the

COMPROMISE AND SETTLEMENT—*Continued.*

fund and that this dispute was settled by the payment of a specified sum, tends to establish an affirmative defense, and the burden of establishing the defense of settlement is on defendant. *Hunt v. Hunt*, 437.

Where heirs at law sell in separate transactions different tracts of land inherited by them, a check by one tenant to another in full settlement of his part of the "estate" will not be held, as a matter of law, a full settlement of all the transactions when there is evidence, that the amount of the check was the sum justly due from only one transaction, and the question of settlement is properly submitted to the jury and motion to nonsuit correctly denied. *Ibid.*

Where a note owned by the estate is payable solely out of the proceeds of insurance on testator's life, and there is a real controversy whether insurers are liable on the policies, a court of equity has jurisdiction to approve for minor beneficiaries of the estate a compromise payment by insurers. *Trust Co. v. Buchan*, 595.

Where a check states that it is in full payment for the balance due under the contract, including claims for all work performed in addition to the subject contract, acceptance of the check constitutes a settlement excluding claim for additional compensation for work beyond that called for in the original agreement. *Phillips v. Construction Co.*, 767.

CONSPIRACY.

§ 3. Nature and Elements of Criminal Conspiracy.

A criminal conspiracy is an agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, and since the agreement itself is the offense no overt act in furtherance thereof is necessary to complete the crime. *S. v. Goldberg*, 181.

§ 4. Warrant and Indictment.

Any one or more of a group of conspirators may be tried alone. *S. v. Goldberg*, 181.

§ 5. Relevancy and Competency of Evidence.

The acts and declarations of each conspirator in furtherance of the common design is competent not only against the conspirator making them but also as to each co-conspirator. *S. v. Goldberg*, 181.

The introduction by the State of evidence to the effect that one of the defendants stated he was withdrawing from the conspiracy does not render incompetent evidence of subsequent acts and declarations of co-conspirators in furtherance of the common design when the evidence that such defendant had withdrawn from the conspiracy is not unequivocal and the State introduces other evidence tending to show that he had not withdrawn from the conspiracy. *Ibid.*

A co-conspirator is an accomplice and is a competent witness if he is *compos mentis*. *Ibid.*

In a prosecution of defendants for conspiracy to bribe and bribery of college varsity basketball players, evidence tending to show that a co-conspirator had bribed a number of basketball players in other states is competent as tending to show *animus* or intent. *Ibid.*

CONSTITUTIONAL LAW.

§ 2. Nature and Construction of Constitutional Provisions in General.

Within its compass the Constitution is supreme and any governmental act which violates its mandates or which thwarts the power granted to the United States is void. *In re Kenan*, 1.

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

While ordinarily the constitutionality of a statute may not be challenged in an action to enjoin its enforcement, injunction will lie as an exception to this rule to prevent the deprivation of constitutional rights. *Treasure City v. Clark*, 130.

A person seeking the benefit of a statute may not attack its constitutionality. *Ramsey v. Veterans Administration*, 645.

§ 6. Legislative Powers in General.

Changes in municipal boundaries are legislative matters, and the exercise of legislative authority by a municipality in annexing additional territory is not subject to judicial interference. *Lithium Corp. v. Bessemer City*, 532.

§ 10. Judicial Powers.

An interpretation consistently and repeatedly given a statute by the Court constitutes a part of the statute and any change in such interpretation must be effected by the Legislature, and if the Legislature does not do so the interpretation of the Court must be considered in accord with the legislative intent. *O'Mary v. Clearing Corp.*, 508.

It is the function of the courts to construe a statute of doubtful meaning. *Lithium Corp. v. Bessemer City*, 532.

The presumption is in favor of the constitutionality of a statute, and a statute will not be declared void if it can be upheld on any reasonable ground. *Ramsey v. Veterans Administration*, 645.

Only the General Assembly may amend or rewrite a statute, and therefore if that part of a statute excluding plaintiff from benefits is declared unconstitutional the courts may not rewrite the statute so as to specify qualifications which plaintiff may meet. *Ibid.*

§ 14. Police Power — Public Morals and Welfare.

The enactment of Sunday regulations comes within the police power, and the General Assembly or a municipal governing board exercising delegated power may enact such regulations provided the classifications of those affected are based upon reasonable distinctions, affect all persons similarly situated, and have some reasonable relation to the public peace, welfare, and safety. *Clark's v. Hunter*, 222.

§ 20. Equal Protection, Application and Enforcement of Laws and Discrimination.

Fact that businesses exempt from Sunday "blue laws" sell types of articles included in types sold by business proscribed does not in itself constitute discrimination. *Clark's v. Hunter*, 222.

Person refusing to leave restaurant after ordered to do so by proprietor is guilty of trespass, and conviction does not violate constitutional rights. *S. v. Davis*, 463.

CONSTITUTIONAL LAW—*Continued.*

The constitutional proscription against discrimination does not preclude the General assembly from selecting and classifying objects of legislation and thus create inequality provided the classifications are reasonable and just and apply uniformly to all persons of the affected class. *Ramsey v. Veterans Administration*, 645.

The provisions of G.S. 116-149(b) defining those eligible for scholarships as children of veterans resident of North Carolina at the time of induction or a veteran's child who was born in North Carolina and has lived here continuously since birth, *is held* not unconstitutional as discriminating against children of disabled veterans who have moved their residence to this State after birth of the children. *Ibid.*

§ 23. Due Process of Law in Civil Cases.

The constitutional prohibitions against the taking of private property without due process of law limits the powers of the executive and judicial branches as well as the legislative branch, and protects incompetents equally with persons of sound mind. *In re Kenan*, 1.

The constitutional prohibitions against the taking of private property except by due process of law preclude the Legislature from sanctioning the taking of a person's property except in satisfaction of a legal obligation or for a public purpose upon the payment of just compensation. *Ibid.*

§ 26. Full Faith and Credit to Foreign Judgments.

Since the court of the state rendering a decree for the support and custody of minor children of the marriage has jurisdiction to modify or change such decree in its discretion in furtherance of the welfare and best interest of the infants, without a showing of change of condition, the Full Faith and Credit Clause of the Federal Constitution does not preclude the courts of another state from modifying or changing such decree in like manner. *Dees v. McKenna*, 373.

§ 28. Necessity for and Sufficiency of Indictment.

The courts will not inquire into the extent incompetent evidence was admitted before the grand jury when it appears that there was sufficient competent evidence to sustain its findings. *S. v. Goldberg*, 181.

Waiver of indictment must be made in writing by defendant and his counsel, which presupposes counsel selected and employed by defendant himself or assigned to him by the judge, and does not include counsel appointed by the prosecuting attorney, and waiver of indictment signed by counsel so appointed is ineffective. *S. v. Hayes*, 648.

§ 30. Due Process of Law in Criminal Prosecutions.

It is not required that defendant be allowed to inspect the files of the State Bureau of Investigation, nothing in the files being introduced in evidence against him. *S. v. Goldberg*, 181.

Conviction of person refusing to leave restaurant after being ordered to do so by proprietor does not violate due process. *S. v. Davis*, 463.

§ 31. Right of Confrontation.

Right to counsel includes right to reasonable time for counsel to prepare case, but defendant *held* not prejudiced by denial of motion for continuance under facts of this case. *S. v. Phillip*, 263.

CONSTITUTIONAL LAW—*Continued.*

§ 32. Right to Counsel.

Every person charged with crime is entitled to be represented by counsel, and this right necessarily includes a reasonable time for counsel to prepare the case. *S. v. Phillip*, 263.

Defendant has the right to be represented by counsel or to appear *in propria persona* but he has no right to appear both by himself and by counsel. *Ibid.*

A defendant charged with a felony, or with a misdemeanor of such gravity that the judge in the exercise of sound discretion deems that justice so requires, is entitled to employ counsel of his own choosing or have the court appoint counsel for him, or appear *in propria persona*, and the appointment of counsel by the prosecuting attorney violates fundamental principles of fair trial. *S. v. Hayes*, 648.

§ 33. Right of Accused Not to Incriminate Self.

The constitutional guaranties against self-incrimination are to be liberally construed and they apply not only to criminal prosecutions but to any proceedings sanctioned by law, including examinations before trial. *Allred v. Graves*, 31.

A defendant may refuse to answer questions on pre-trial examination which might subject him to punitive damages in the trial of the civil action. *Ibid.*

CONTRACTS.

§ 3. Definiteness and Certainty of Agreement.

If there is no agreement in regard to all essential terms, there is no contract. *Thompson-McLean, Inc. v. Campbell*, 310.

§ 7. Contracts in Restraint of Trade.

A contract not to engage in competitive employment with the employer after termination of the employment ordinarily must be in writing, be supported by a valid consideration, and be reasonable as to terms, time, and territory. *Greene Co. v. Kelley*, 166.

Where plaintiff's evidence establishes that defendant had been working at the same employment for more than a year when defendant signed the contract containing a covenant restricting activities by defendant in competition with plaintiff after the termination of the employment, and plaintiff's evidence fails to show that any increase in defendant's salary was related to the covenant not to compete, plaintiff's evidence fails to show consideration for the covenant, notwithstanding the subsequent contract stipulated that it superseded all previous written and oral agreements between the parties. *Ibid.*

Where there is no written agreement at the inception of the employment that the employee should not engage in competition with the employer for a stated period after the termination of the employment, a written agreement to this effect executed thereafter is void for want of consideration. *Chemical Corp. v. Freeman*, 780.

§ 12. Construction and Operation of Contracts in General.

The contract of the parties must be enforced as written, and where the language is free from ambiguity the court must declare its meaning as a matter of law. *Lester Bros. v. Thompson Co.*, 210.

CONTRACTS—*Continued.*

Where a contract calls for the delivery of wood trusses completely assembled at the job site for a specified sum, the term "completely assembled" has a definite meaning, and while the manufacturer may be free to assemble the trusses at its plant or to assemble them for shipment at its plant and complete the assembly at the job site, the delivery to the purchaser in such condition as to require appreciable labor to complete the assembly fails to meet the specifications of the contract. *Ibid.*

Where contract is not ambiguous it is for court to declare the meaning. *Church v. Hancock*, 764; *Phillips v. Construction Co.*, 767. Words of contract referring to particular trade will be interpreted according to their trade meaning. *Phillips v. Construction Co.*, 767.

§ 21. Performance, Substantial Performance and Breach.

Evidence tending to show that the builder had its crew ready to handle trusses at the time of delivery by the manufacturer, that the trusses were too short, that the defect was not discovered until the crew had installed some of them, that the trusses installed had to be taken down, so that the crew lost time before it could be put back to work on some other job, *is held* sufficient to be submitted to the jury on the issue of damages from the delivery of trusses failing to meet the specifications, even though the defective trusses were later replaced. *Lester Bros. v. Thompson Co.*, 210.

CORPORATIONS.

§ 12. Liability of Officers and Agents to Third Persons.

Corporate officer is personally liable for purchases when he does not disclose that he is acting as agent of corporation. *Howell v. Smith*, 256.

COURTS.

§ 2. Jurisdiction in General.

Want of jurisdiction may be raised at any time. *Clark v. Ice Cream Co.*, 234.

§ 3. Original Jurisdiction of Superior Court in General.

The Superior Court has statewide jurisdiction. *Richardson v. Richardson*, 521.

§ 6. Jurisdiction of Superior Court on Appeal from Clerk.

Superior Court's jurisdiction on appeal from clerk is not derivative, but court gets complete jurisdiction of entire cause. *Deanes v. Clark*, 467.

§ 7. Appeals to Superior Court from Inferior Tribunals or Administrative Boards.

Where the statute provides a hearing *de novo* on appeal, the hearing is anew as though no previous action had been taken. *In re Hayes*, 616.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Judge.

Where the entry of judgment by default is within the authority of the presiding judge, another judge of the Superior Court has no power to set the de-

COURTS—*Continued.*

fault judgment aside except in proceedings to vacate the judgment in accordance with statutory procedure. *Wheeler v. Thabit*, 479.

§ 14. Jurisdiction and Proceedings in Superior Courts.

An action instituted in a municipal-county court to recover a sum in excess of two thousand dollars must be instituted upon written pleadings as required in civil actions in the Superior Court, and while the matter is a question of procedure and not jurisdiction, such pleadings are prerequisite to the institution of such action, and in the absence of such pleadings defendant's motion to dismiss is properly allowed. *Ins. Co. v. Johnson*, 778.

§ 20. Conflict of Laws — Laws of This and Other States.

Liability for negligence resulting in personal injury or death is determined by the laws of the state where the tort is committed, but the action is transitory and the situs thereof is the county of the state in which the tort-feasor may be personally served with process. *In re Scarborough*, 565.

CRIMINAL LAW.

§ 1. Nature and Element of Crime in General.

An ordinance proscribing the operation of certain businesses on Sunday *is held* to define the acts proscribed clearly enough so that a reasonably intelligent person is advised of the acts forbidden and to furnish a standard and method for its enforcement, and therefore the act is not void on the ground that it is unconstitutionally uncertain and vague. *Clark's v. Hunter*, 222.

§ 2. Intent; Wilfullness.

A person is presumed to intend the natural consequences of his act where a specific intent is not an element of the crime, but where a specific intent, in addition to the intent to commit the act, is required, such intent is not to be inferred as a matter of law from the commission of the act, but must ordinarily be found by the jury from the facts and circumstances of the case. *S. v. Ferguson*, 558.

§§ 3, 4. Attempts; Crimes and Misdemeanors.

An attempt to break and enter is a misdemeanor. *S. v. Grant*, 652.

§ 14. Commission of the Offense Within This State.

Our courts have jurisdiction over a conspiracy if any one of the conspirators commits within this State an overt act in furtherance of the common design, even though the conspiracy may have been entered into outside of the State. *S. v. Goldberg*, 181.

§ 16. Jurisdiction — Degree of Crime.

The Superior Court of Craven County does not have original jurisdiction of misdemeanors, G.S. 7-64, and therefore defendants may not be tried in the Superior Court upon indictment upon appeals from convictions in the recorder's court of trespassing. *S. v. Dove*, 366.

§ 17. Jurisdiction — Federal and State Courts.

The filing in the U. S. District Court and in the State court, with notice to the solicitor, of a petition to remove a prosecution from the Superior Court to

CRIMINAL LAW—*Continued.*

the United States District Court, effects the removal, and the State court is thereafter without jurisdiction to proceed further in the case unless and until it is remanded by the United States District Court. *S. v. Francis*, 358.

§ 26. Former Jeopardy.

A prosecution for forging a check will not bar a subsequent prosecution for forging an endorsement on the check. *S. v. Shepard*, 402.

§ 31. Judicial Notice.

The courts will take judicial notice of the county in which a municipality of the State is situate. *S. v. Painter*, 332.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Testimony that some four months prior to the larceny of the safe as charged in the bill of indictment, one of defendants stated that drawings of the working parts of a safe shown to him by the witness belonged to defendant, that he had memorized them and that if he ever robbed another safe it would be a big one, *held* competent against such defendant in connection with the other evidence adduced by the State tending to show that such defendant's *animus* continued to and through the date of the offense charged and naturally included the commission of such offense. *S. v. Knight*, 17.

Evidence of guilt of other like offenses is competent when it tends to show *animus*. *S. v. Goldberg*, 181.

§ 48. Silence of Defendant as Implied Admission.

In order for silence of defendant in the face of an incriminating statement to be competent as an implied admission of guilt, it must appear that the statement was made in the presence and hearing of the defendant, that defendant understood the statement, that the statement was made under circumstances naturally and properly calling for a reply, that the declarant or some person present had the right to the information, and that defendant had an opportunity to reply. *S. v. Guffey*, 322.

It is better practice for the court in the absence of the jury to hear evidence *pro* and *con* before determining the competency of admissions or confessions by reason of silent acquiescence. *Ibid.*

Silence held not an implied admission of guilt under the circumstances disclosed by the evidence in this case. *Ibid.*

§ 65. Evidence of Identity by Sight.

The courts will not hold as a matter of law that a witness could not identify defendant by the lights of an automobile and street lights when the defendent was some 20 feet away. *S. v. Humphrey*, 511.

§ 67.1. Tape Recordings.

Defendants held entitled to examine prosecuting witness to establish right to later introduce a television recording in evidence. *S. v. Knight*, 17.

§ 70. Hearsay Testimony in General.

Testimony of statements of a person not a witness that one defendant had paid for a car with twenty dollar bills and that the other had tried to sell another car having bullet holes in its side, is hearsay and incompetent to prove the facts recited in the statements. *S. v. Guffey*, 322.

CRIMINAL LAW—*Continued.*

§ 83. Cross-Examination.

During cross-examination of prosecuting witness, defendants may have witness identify a television recording for the purpose of establishing their right to introduce it in evidence later, but introduction of entire recording constitutes introduction of evidence by defendants. *S. v. Knight*, 17.

§ 85. Rule that Party May Not Impeach Own Witness and is Bound by Own Testimony.

The State is bound by exculpatory statements of defendant introduced in evidence by it when such statements are not contradicted or shown to be false by any other evidence. *S. v. Johnson*, 727.

§ 86. Time of Trial and Continuance.

Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge, but when the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. *S. v. Phillips*, 263.

Record held to show that no prejudice resulted from denial of motion for continuance. *Ibid.*

§ 90. Admission of Evidence Competent for Restricted Purpose.

Upon a joint indictment of two defendants, evidence tending to incriminate one of the defendants is properly admitted when its admission is restricted by the court exclusively to such defendant alone. *S. v. Knight*, 17.

§ 91. Withdrawal of Evidence.

The admission of incompetent evidence will not be held so prejudicial that its later withdrawal cannot cure the error in its admission when the incriminating part of such evidence is amply established by other competent evidence introduced at the trial and the irrelevant part is in no way connected with defendants so as to prejudice them. *S. v. Goldberg*, 181.

§ 94. Conduct and Action of the Court and Expression of Opinion on Evidence During Progress of Trial.

The record in this case *is held* to disclose that the questions asked the witnesses by the court were solely for the purpose of clarification of the witnesses' testimony and did not constitute an expression of opinion by the court in violation of G.S. 1-180. *S. v. Goldberg*, 181; *S. v. Phillip*, 263.

In a trial of two defendants on eight indictments containing twenty-nine counts it will not be held for prejudicial error that the court had delivered to the jurors blank tablets for the purpose of enabling them to list the indictments and the counts as recited to them by the court. *S. v. Goldberg*, 181.

§ 97. Argument and Conduct of Counsel.

During the examination of the prosecuting witness defendants have the right to have the witness identify a television recording for the purpose of establishing their right to later introduce the recording in evidence, if they should so elect, but defendants are not entitled to introduce the television recording in its entirety on cross-examination while the State is putting on its evidence, and when defendants are allowed to put the entire recording in evidence without objection, the defendants are putting on evidence so as to

CRIMINAL LAW—*Continued.*

entitle the State to the opening and closing arguments to the jury. *S. v. Knight*, 17.

The act of the court in permitting the solicitor to insistently question defendant as to a collateral matter denied by defendant and in repeating questions relating to incompetent matter after the court had sustained a prior objection to the question, *held* to require a new trial. *S. v. Wheeler*, 651.

§ 98. Function of Court and Jury in General.

Contradictions in the State's evidence are to be resolved by the jury and not the court. *S. v. Goldberg*, 181.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the State's evidence must be considered in the light most favorable to it. *S. v. Goldberg*, 181.

Evidence favorable to defendant, in conflict with that offered by the State, is not considered on motion to dismiss. *S. v. Goins*, 707.

§ 100. Necessity for Motion to Nonsuit and Renewal.

Where defendant does not renew his motion for nonsuit at the close of all the evidence he waives his motion made at the close of the State's evidence, and the matter is not subject to review in the Superior Court. *S. v. Howell*, 657.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

The jury may convict a defendant upon the unsupported testimony of an accomplice or a co-conspirator, but it should do so only after scrutinizing the testimony and ascertaining that the witness was telling the truth. *S. v. Goldberg*, 181.

The evidence, whether direct, circumstantial, or a combination of both, must amount to substantial proof of every essential element of the offense charged in order to warrant the submission of the issue to the jury, it being for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *S. v. Goins*, 707.

When the State's evidence and that of defendant are to the same effect and tend to exculpate defendant, motion for nonsuit should be allowed. *S. v. Johnson*, 727.

§ 104. Directed Verdict and Peremptory Instructions.

The correct form of peremptory instructions is that if the jury should find beyond a reasonable doubt the facts to be as all of the evidence tends to show, the jury should return a verdict of guilty, but that if the jury is not so satisfied it would be its duty to return a verdict of not guilty, since notwithstanding the evidence may be all one way the credibility of the evidence is always for the jury to determine. *S. v. Kimball*, 582.

§ 106. Instructions on Burden of Proof and Presumptions.

It is error for court to charge in effect that the jury should either find all the defendants guilty or all the defendants not guilty, since each defendant is entitled to have question of his guilt of specific charge against him decided by jury. *S. v. Morehead*, 772.

§ 108. Expression of Opinion by Court on Evidence in Charge.

Where defendant testifies that he was with a person who was not his "girl

CRIMINAL LAW—*Continued.*

friend" but "just a friend, girl" the remark of the court drawing the jury's attention to the fact that defendant seemed to make a distinction will not be held for prejudicial error. *S. v. Humphrey*, 511.

Where the court states fully the State's contentions but fails to state the contention of the defendant that the evidence completely failed to show the intent constituting an essential element of the offense charged, a new trial must be ordered. *S. v. Crawford*, 658.

§ 111. Charge on Character Evidence and Credibility of Witnesses.

In this prosecution for violation of the liquor laws based upon testimony of an undercover agent, a charge to the effect that the State contended that the Alcoholic Beverage Control Board would not send out agents who were not thoroughly reliable and that it would be deplorable if officers could not be believed, *is held* inappropriate and prejudicial. *S. v. Morehead*, 772.

§ 121. Arrest of Judgment.

A motion in arrest of judgment must be based on defects appearing on the face of the record proper and it may not be used, after verdict, as a substitute for a motion to nonsuit for variance. *S. v. Kimball*, 582.

On appeal from an inferior court the Superior Court must try defendant upon the original warrant in the absence of an indictment, and when defendant is tried under an unauthorized amendment to the original warrant motion in arrest of judgment must be allowed. *S. v. Davis*, 655.

§ 130. Conformity of Judgment to Indictment, Verdict or Plea.

The indictment and not the commitment of the clerk controls, and the punishment may not exceed that for the offense charged in the indictment. *S. v. Grant*, 652.

§ 131. Severity of Sentence.

Where defendant seeks and obtains a new trial he takes the risk of conviction of the crime charged in the bill of indictment even though the original conviction may have been for a less offense embraced therein, and the fact that different judges impose different punishment does not invalidate the sentence imposed at a second trial. *S. v. Williams*, 172.

The court is not compelled to give defendant credit for the period defendant spent in prison before a valid trial was had. *Ibid.*

In order to support judgment for a repeated offense the warrant or indictment should set forth that the prosecution is for a repeated offense and the time and place of the prior convictions of defendant. *S. v. Painter*, 332.

Where the sentence imposed does not exceed the statutory limit, the Supreme Court will not hold that it violates the constitutional provision against cruel and unusual punishment except when there is no doubt, the authority to make adjustment if the sentence is disproportionately long being vested in the Governor and the Board of Paroles. *S. v. Wright*, 356.

An attempt to break and enter is a misdemeanor for which the maximum punishment is two years imprisonment. *S. v. Grant*, 652.

§ 159. The Brief.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. *S. v. Goldberg*, 181.

CRIMINAL LAW—*Continued.*

§ 161. Harmless and Prejudicial Error in Instructions.

An instruction which is more favorable to defendants that that to which they are entitled cannot be held prejudicial to them on their appeal. *S. v. Goldberg*, 181.

A sentence from the charge cannot justify a new trial when the charge read contextually is without prejudicial error. *Ibid.*

§ 165.1. Invited Error.

Indulgence by the court in permitting defendant, who was represented by counsel, to personally cross-examine a witness, *held* not ground for a new trial, it not appearing that defendant was prejudiced thereby. *S. v. Phillip*, 263.

§ 169. Determination and Disposition of Cause.

Ordinarily, when the judgment imposed is excessive the cause will be remanded for proper judgment, but when the maximum legal sentence has already been served remand for proper judgment would be vain, so in such instance the cause will be remanded for correction of the judgment, with consecutive sentences subquently imposed to fall into place on the basis of the correction. *S. v. Grant*, 652.

§ 173. Post Conviction Hearing Act.

A delay of some two years in the hearing of a petition for a post-conviction review would seem inexcusable. *S. v. Hayes*, 648.

CURTESY.

The husband and not the wife's heirs is liable for taxes on lands left by her. *Smith v. Smith*, 278.

CUSTOMS AND USAGES.

When properly pleaded, a local custom or one peculiar to a particular trade or business may be shown in evidence for the purpose of clarifying ambiguous words of the contract, but evidence of customs and usages is incompetent to vary or contradict the terms of a written agreement which is free from ambiguity. *Lester Bros. v. Thompson Co.*, 210.

Where the categorical terms of the contract require the manufacturer to complete the assembly of the trusses either at its plant or, after shipment, on the job site, the admission of evidence of the manufacturer's contention that the trusses were assembled for shipment in the customary manner is incompetent and irrelevant, since it tends to vary the terms of the writing requiring complete assembly and not merely assembly for shipment. *Ibid.*

Words of a contract referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning. *Phillips v. Construction Co.*, 767.

DAMAGES.

§ 3. Compensatory Damages for Injury to the Person.

In order to support recovery of permanent damages plaintiff must show with reasonable certainty that the injury proximately resulted from the wrong-

DAMAGES—*Continued.*

ful act of plaintiff and that such injury is permanent, and while absolute certainty is not required, evidence which leaves the matters in mere speculation or conjecture is insufficient. *Short v. Chapman*, 674.

Testimony of plaintiff at the time of the trial that her head and neck and left leg still hurt and that she had numbness in her left leg, without evidence that these complaints resulted from the injury in suit rather than from other causes, and without expert testimony that such injuries would be permanent, *is held* insufficient to sustain an instruction that the jury might award damages for permanent disability. *Ibid.*

§ 4. Measure of Damages to Property.

The measure of damages for injury to personal property in this State is ordinarily the difference between the fair market value of the property immediately before and immediately after the injury, but when the property has no market there can be no market value, and in such instances the measure of damages may properly be gauged by the cost of repairs. *Light Co. v. Paul*, 710.

In this action to recover for tortious destruction of a power pole, the transformer attached to it, and a part of the transmission line and guy wire, it *is held* the court properly instructed the jury that the measure of damages was the out-of-pocket expenses of repair and replacement of the damaged facilities, less salvage value of the replaced parts. *Ibid.*

§ 10. Punitive Damages.

Punitive damages may be awarded in a civil action, not as an award of compensation, but by way of punishment or penalty for conduct intentionally wrongful. *Allred v. Graves*, 31.

Punitive damages may be recovered for an unlawful and malicious assault. *Ibid.*

A party constructing, under written permission of the Highway Commission, a sewer line within the highway easement across land owned by another in fee may not be held liable for punitive damages by such owner of the fee. *Van Leuven v. Motor Lines*, 539.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability. *Mann v. Henderson*, 338.

Liability for negligence resulting in personal injury or death is determined by the laws of the state where the tort is committed, but the action is transitory and the situs thereof is the county of the state in which the tort-feasor may be personally served with process. *In re Scarborough*, 565.

§ 8. Distribution of Recovery.

Under the facts of this case it *is held* that equity and justice require that the settlement for the wrongful death of a minor be divided between the cause of action for pain and suffering prior to death, against which are chargeable one-half of the cost of administration, including one-half attorney's fees, court costs, etc., and hospital and medical expenses, and the cause of action for wrongful death, against which are chargeable one-half the costs of administration, hospital and medical expenses not exceeding $500.00, with the balance

DEATH—*Continued.*

to be paid the deceased's mother unless it be determined that she had abandoned him prior to his injury and death. *In re Peacock*, 749.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The Commissioner of Revenue cannot be sued under the Act. *Housing Authority v. Johnson*, 76.

A contract, including a contract of insurance, may be the subject of a proceeding under the Declaratory Judgment Act even before a breach of the contract when there is a controversy between the parties as to their respective legal rights and liabilities under the policy and the resolution of such controversy is presently necessary to enable the parties to elect between conflicting positions in a companion case. *Ins. Co. v. Roberts*, 285.

§ 2. Proceedings Under the Act.

Where the complaint alleges an action justiciable under the Declaratory Judgment Act a demurrer is not apposite even though plaintiff is not entitled to the relief sought by him, but the court, after the filing of answer and the introduction of such evidence as the parties elect to present, should proceed to declare the rights of the parties. *Ins. Co. v. Roberts*, 285.

In a proceeding under the Declaratory Judgment Act the plaintiff should set forth in his pleading all facts necessary to disclose an existing controversy justiciable under the Act and all facts necessary to a complete adjudication of the controversy. *Haley v. Pickelsimer*, 293.

DEDICATION.

§ 1. Acts Constituting Dedication.

The sale of lots in a subdivision by deed referring to a recorded plat showing lots, streets, and a golf course, and containing restrictions that the developers were dedicating the golf links and the playground for the use and pleasure of the owners of the lots, *is held* a valid dedication of the golf course to the purchasers of lots in the subdivision, irrespective of acceptance by the public, but the dedication is to owners of lots and lands within the development and does not constitute a dedication to the owners of lots in the neighborhood or in an adjacent subdivision. *Realty Co. v. Hobbs*, 414.

DEEDS.

§ 8. Consideration.

While the consideration named in a deed is presumed correct, the matter is contractual and may be inquired into by parol, but partial or even total failure of consideration will not alone render the deed invalid and the inquiry in regard thereto will not be allowed to alter or contradict the conveyance itself, although it may be a competent circumstance in an action to set aside the conveyance for fraud. *Gadsden v. Johnson*, 743.

§ 12. Estates Created by Construction of Instrument in General.

Restrictive covenants inserted in a warranty deed between the description and the *habendum* are not invalid as repugnant to the unqualified fee conveyed

DEEDS—*Continued.*

by the instrument, since such restrictions do not delimit the fee and are not repugnant to the conveyance of the fee simple. *Realty Co. v. Hobbs*, 414.

§ 19. Restrictive Covenants.

The servitude imposed by restrictive covenants in a deed is a species of incorporeal right which runs with the land and is binding upon mesne purchasers from the grantor, even though the restrictions are not inserted in subsequent deeds. *Realty Co. v. Hobbs*, 414.

The grantee of lands in a deed restricting its use to a golf course may not convey an easement for a street across the golf course to the owners of land in an adjacent subdivision, since such use is inconsistent with the use contemplated by the restrictive covenants. *Ibid.*

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS.

"Drunk" within the meaning of G.S. 14-335 is not synonymous with "under the influence of intoxicating liquor" within the intent of G.S. 20-138 and G.S. 20-139, and in a prosecution for public drunkenness an instruction applying the definition of "under the influence of intoxicating liquor" must be held for prejudicial error. *S. v. Painter*, 332.

"Drunk" within the meaning of G.S. 14-335 is synonymous with "intoxicated", and a person is drunk within the meaning of the statute when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment materially impaired, or when his brain is so far affected by potations of intoxicating liquor that his intelligence, sense-preceptions, judgment, continuity of thought or of ideas, speech and coordination of volition with muscular action, or some of these faculties or processes, are materially impaired. *Ibid.*

DIVORCE AND ALIMONY.

§ 8. Abandonment.

One spouse is not justified in leaving the other unless the conduct of the other is such as to render it impossible for the first to continue the marital relation with safety, health and self-respect, and is sufficient to constitute ground for divorce, at least from bed and board. *Pressley v. Pressley*, 326.

§ 13. Divorce on Ground of Separation.

A deed of separation legalizes the separation, and neither party may attack its legality on account of the prior misconduct of the other. *Jones v. Jones*, 612.

§ 16. Alimony Without Divorce.

Separation agreement does not preclude wife from recovery of alimony without divorce when the agreement has been breached by the husband. *Wilson v. Wilson*, 40.

A wife is entitled to reasonable subsistence and counsel fees from the estate or earnings of her husband if he is guilty of misconduct which would entitle her to divorce, either absolute or from bed and board. *Pressley v. Pressley*, 326.

Evidence held insufficient predicate for instruction on principle that separation induced by misconduct of wife would not constitute abandonment. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

§ 17. Alimony upon Divorce from Bed and Board.

The court is without authority to award the wife alimony and counsel fees while a valid deed of separation between the parties remains unimpeached. *Williams v. Williams*, 48.

A resumption of marital relations rescinds a prior deed of separation. *Ibid.*

§ 18. Alimony Pendente Lite.

Where husband breaches separation agreement the wife may recover support. *Wilson v. Wilson*, 40.

Defendant in an action for divorce from bed and board may not contend that the court is without power to award counsel fees and subsistence *pendente lite* until after the validity of a prior deed of separation between the parties had been determined by a jury, but the court may enter the order *pendente lite* upon its findings that the deed of separation had been rescinded by a resumption of the marital relations, although its finding in this respect is not binding on the trial on the merits. *Williams v. Williams*, 48.

Under the 1961 amendment to G.S. 50-15 the lower court is no longer under the necessity of setting forth its findings of fact in detail in awarding subsistance *pendente lite* under G.S. 50-15, and when the evidence is sufficient to sustain an affirmative finding of all the predicate facts it will be presumed on appeal that the court found the facts entitling the wife to subsistence, and that it appeared to the court that the wife lacked sufficient means on which to subside during the pendency of the suit. *Ibid.*

Where plaintiff's amended complaint in an action for alimony without divorce alleges that the prior separation agreement between the parties was void, first because obtained by fraud and second because defendant had not made the payments as therein stipulated, it is error for the court upon the hearing of plaintiff's application for counsel fees and subsistence *pendente lite*, to decree that defendant pay the sums due under the separation agreement, since the court may not award plaintiff what amounts to specific performance of the separation agreement which plaintiff has alleged was void. *Coe v. Coe*, 174.

It is error for the court upon the hearing of the wife's application for alimony *pendente lite* to confine the hearing to the respective earnings of the parties and refuse to hear the husband's affidavit or evidence in support of his contentions that he had not abandoned his wife but had been forced to leave home because the wife's conduct made it impossible for him to live with her, since a wife who has abandoned her husband without justification has no right to alimony. *Parker v. Parker*, 176.

§ 22. Jurisdiction to Award Custody and Support of Children of Marriage.

A separation agreement does not deprive the court of its authority to enter an order requiring the husband to make specific monthly payments for the support of the minor children of the marriage, and the amounts agreed upon in the deed of separation for the support of the children is merely evidence for the court to consider with other evidence in determining a reasonable amount for their support. *Williams v. Williams*, 48; *Richardson v. Richardson*, 521; but the decree precludes the wife from recovering payments thereafter falling due under the deed of separation, although she may sue for amounts delinquent at the time of the decree. *Richardson v. Richardson*, 521.

DIVORCE AND ALIMONY—*Continued.*

Where there has been no divorce between the parties and no facts alleged constituting ground for divorce, action for support of children cannot be maintained under G.S. 50-13 or G.S. 50-16. *Murphy v. Murphy*, 95.

Where the children of the marriage are residents of this State and the parents are personally before the court, our courts have jurisdiction in the wife's action for subsistence under G.S. 50-16 to award the custody of the children to the wife and decree the amount defendant should contribute for their support, and to punish him as for contempt for wilful failure to comply with its order, notwithstanding that the husband may have obtained a decree of divorce in another State after the entry of the order for support. *Whitford v. Whitford*, 353.

Courts of this State have jurisdiction to modify decree of another state awarding custody of children when children are in this State. *Dees v. McKenna*, 373.

The fact that the child of the parties is born prior to their marriage ceremony does not affect the jurisdiction of the court, in decreeing annulment of the marriage, to award the custody of the child. *Ibid.*

When the children are in this State our courts have jurisdiction to award and support notwithstanding the pendency of the wife's action for divorce in another state. *In re Skipper*, 592.

§ 23. Support of Minor Children of Marriage.

The amount to be allowed by the court for the support of the minor children of a marriage rests in the court's sound discretion upon consideration of the needs of the children in the light of the special circumstances of the parties, their station in life, their standard of living and the advantages to which they had become accustomed. *Williams v. Williams*, 48.

DRAINAGE.

§ 7. Acquisition of Rights of Way.

There is no statutory provision for appeal by a drainage district from order of the clerk allowing specified sums to landowners for easements taken for rights of way; G.S. 156-70.1 provides for appeal only on the part of landowners. *In re Drainage*, 407.

EASEMENTS.

§ 7. Location and Relocation of Easement.

Where the Highway Commission purchases the right of way from an abutting owner, with provision that the owner should have access to the highway, the Highway Commission is in effect the servient owner with respect to the right of access, and it has the right to locate the access road under the general rule that, where the grant does not fix the location of an easement, the owner of the servient estate has the right in the first instance to designate the location, subject to the limitation that it must exercise the right in a reasonable manner with due regard to the rights of the abutting owner. *Abdalla v. Highway Comm.*, 114.

Restricted access to service road and denial of access along interchange ramp held in conformity with right of way agreement. *Ibid.*

EASEMENTS—*Continued.*

§ 8. Nature and Extent of Easement.

The grantor of an easement of access may not obstruct the easement so as to interfere with its reasonable enjoyment by the grantee, and he has no right to do or permit the doing of anything which results in the impairment of the easement granted. *Strickland v. Shew*, 82.

Whether grade of street constructed by developer interferred with reasonable use of easement for access by purchaser of lot *held* for jury. *Ibid.*

EJECTMENT.

§ 6. Nature and Essentials of Right of Action.

Where, in an action in ejectment, the defendant alleges facts constituting a sufficient predicate for the declaration of a constructive trust in her favor, the pleadings raise material issues of fact and plaintiff is not entitled to judgment on the pleadings, and further, the fact that defendant's further answer alleges that she had suffered a loss in a specific sum "in her sale of said premises prior to the filing of this action" will not be construed as an admission defeating defendant's defense, it not appearing that she had parted with all of her interest in the premises prior to the action. *Edwards v. Edwards*, 445.

§ 8. Defendant's Bond.

A municipality is not required to file bond in defending an action for the possession of real property, since G.S. 1-111 does not apply to the State or its agencies. *Kistler v. Raleigh*, 775.

ELECTION OF REMEDIES.

§ 1. When Election is Required.

A party is put to his election only when the remedies available to him are mutually inconsistent so that if he asserts the one he must necessarily repudiate the other, and the doctrine does not apply to co-existing and consistent remedies. *Richardson v. Richardson*, 521; *Van Leuven v. Motor Lines*, 539.

ELECTIONS.

§ 2. Qualification of Electors and Registration.

That part of G.S. 163-50 which requires an elector desiring to change his party affiliation to swear that he desires to make the change in good faith *held* constitutional and valid in having as its purpose the prevention of raids by one political party into the ranks of another in primary nominations, but the remainder of the statutory oath requiring the elector to swear or affirm that he will support the nominees of the party at that and in future elections until he should again change his affiliation, is void as preventing a voter from casting his ballot according to the dictates of his conscience. *Clark v. Meyland*, 140.

ELECTRICITY.

§ 2. Service to Customers.

Respective rights of power company and electric membership corporation to furnish electricity to customers within territory annexed by municipality. *Membership Corp. v. Light Co.*, 716.

EMINENT DOMAIN.

§ 2. Acts Constituting a "Taking."

At common law the owner of land abutting a highway, while not entitled to access at all points along the boundary between his land and the highway, has a special right of easement for access purposes, and substantial interference with this free and convenient access to the highway is a "taking" of a property right for which he may recover just compensation. *Abdalla v. Highway Comm.*, 114.

The common law right of access of the owner of property abutting a highway does not apply when the owner has conveyed a right of way to the Highway Commission, since in such instance the respective rights of the parties must be ascertained from the construction of the right of way agreement. *Ibid.*

When plaintiffs are given access to the main highway by means of a service road abutting their property, the fact that the main highway is changed into a nonaccess highway does not constitute a "taking" of plaintiff's property, either in depriving plaintiffs of direct access to the highway or in diminishing the flow of traffic having direct access to plaintiff's property, the inconvenience resulting from the necessity of using a more circuitous route and any diminution in value to plaintiff's property being incident to the exercise of the police power and *damnum absque injuria*. *Moses v. Highway Comm.*, 316.

The construction of a sewer line within a highway right of way imposes an additional burden on the fee for which the owner is entitled to compensation. *Van Leuven v. Motor Lines*, 539.

§ 6. Evidence of Value.

Where there is evidence that the sale of another tract of land in the locality was not a sale on the open market but a purchase forced because of necessity, the evidence supports the court's ruling excluding evidence of the purchase price of such other tract because of want of showing of similarity between it and defendant's property. *Highway Comm. v. Pearce*, 760.

§ 11. Actions to Assess Compensation.

The failure of the court to charge the jury that it should not consider a building completed by the owner after the taking in fixing the value of the land remaining to the owner *held* not prejudicial in view of the fact that all of the evidence and the charge related to the value of the land immediately before and immediately after the taking, and thus excluded any value added after the taking. *Highway Comm. v. Pearce*, 760.

ENGINEERS.

§ 2. Duties and Liabilities.

Engineering is a profession, and when an engineer undertakes to design and fabricate a mechanical model of a piece of machinery, the engineer implies that he possesses that degree of professional learning, skill and ability which others of that profession ordinarily possess, and that he will exercise reasonable care in the use of such skill and will exercise his best judgment in his performance of the undertaking, and he may incur liability in tort for negligent performance or in contract for breach of warranty of quality. *Service Co. v. Sales Co.*, 660.

ESCAPE.

§ 1. Prosecutions for Escape.

Where, in a prosecution under G.S. 148-45(a), all of the evidence tends to show that defendant was a work-release prisoner and that defendant, instead of reporting to the pickup point after work for return to the prison camp, voluntarily went to his home without permission, the evidence discloses a violation of G.S. 148-45(b) and will not support a conviction of the offense charged, and therefore peremptory instruction for the State upon the charge is error. *S. v. Kimball*, 582.

ESTATES.

§ 5. Actions for Waste.

The sale of timber under agreement between the life tenants and the then surviving contingent remaindermen and the distribution of the proceeds of sale pursuant to the agreement cannot constitute waste and therefore cannot terminate the life tenancies or work a forfeiture thereof. *Strickland v. Jackson*, 360.

§ 6. Liability for Taxes.

The son during the lifetime of his father is not liable for taxes on property inherited from his mother. *Smith v. Smith*, 278.

EVIDENCE.

§ 1. Judicial Notice of Governmental Acts and Geographical Facts.

The courts will take judicial notice of the county in which a municipality of the State is situate. *S. v. Painter*, 332.

The State courts will take judicial notice of the Federal regulations governing airplanes. *Mann v. Henderson*, 338.

Our courts are not required to take judicial notice of a decree of a court of another state. *Whitford v. Whitford*, 353.

The courts will take judicial notice that Neuse River in Pamlico County is a large, navigable river. *Miller v. Coppage*, 430.

§ 14. Communications Between Physician and Patient.

Physician may not be required to disclose confidential information by deposition prior to trial. *Lockwood v. McCaskill*, 754.

§ 20. Competency of Allegation in Pleadings.

A party is bound by an allegation contained in his own pleading and he cannot subsequently take a position contrary thereto. *Davis v. Rigsby*, 684.

§ 24. Proof of Public Records and Documents.

A decree of a court of another State should be authenticated as prescribed by 28 U.S.C.A. 1738, and a decree authenticated only by certification of a person designating himself as an attorney at law is insufficient. *Whitford v. Whitford*, 353.

§ 42. Expert Testimony in General.

The purpose of testimony of expert witnesses is to give the jury the benefit of opinions by experts upon factual situations of which the experts have no

EVIDENCE—*Continued.*

personal knowledge but which may be bound by the jury from the evidence. *Ingram v. McCuiston*, 392.

§ 51. Examination of Experts.

A hypothetical question may include only facts which are supported by evidence theretofore introduced, and should not contain repetitious, slanted, and argumentative words and phrases. *Ingram v. McCuiston*, 392.

A hypothetical question should not assume that plaintiff was in excellent psychological health prior to the accident when all of the evidence indicates plaintiff always had some nervousness; it should not assume plaintiff developed "suicidal tendencies" when the evidence discloses only mental depression; it should not assume injury to a part of the spine of which there was no evidence. *Ibid.*

A hypothetical question to an expert may not be predicated in whole or in part upon the opinions, inferences, or conclusions of another witness, either expert or lay, but may be predicated upon such opinions or conclusions only when the opinions or conclusions are in evidence and are assumed to be facts; it is error to include in a question to one medical expert a statement that at the time of the examination by another expert such other expert diagnosed plaintiff's condition in a certain manner. *Ibid.*

A hypothetical question relating to whether the accident could not have caused specific physical injury to plaintiff's spine should not include facts assumed in regard to plaintiff's mental health. *Ibid.*

A hypothetical question relating to whether plaintiff's injuries resulted in permanent mental or emotional injury should not assume the very facts sought to be established by the expert's opinion. *Ibid.*

Hypothetical questions relating to whether the accident in suit caused specific injury to plaintiff's spine and permanent emotional injury should not contain references to plaintiff's childhood, the cost of medical bills, her consultation with another medical expert and his diagnosis, the route and manner of plaintiff's driving which brought her to the scene of the collision, or other entirely extraneous facts. *Ibid.*

§ 54. Rule That Party is Bound by His Own Testimony.

While a party may not impeach his own witness and is bound by the testimony which he himself elicits, he is not precluded from showing the facts to be otherwise than as testified to by the witness. *Funeral Home v. Pride*, 723.

EXECUTION.

§ 17. Execution Against the Person.

Execution against the person of defendants may issue after return of execution against their property has been returned wholly or partly unsatisfied when the judgment is for punitive damages. *Allred v. Graves*, 31.

EXECUTORS AND ADMINISTRATORS.

§ 3. Appointment of Administrators.

Authority to appoint an administrator is vested in the clerk of the Superior Court, but such authority is limited to the instances set forth in the Statute, G.S. 28-1. *In re Scarborough*, 565.

EXECUTORS AND ADMINISTRATORS—*Continued.*

The clerk of the Superior Court of the county in which personal service may be had upon the agent of the tort-feasor has authority to appoint an ancillary administrator to sue for wrongful death, notwithstanding deceased was a nonresident, died in another state, and that the tort resulting in death occurred in another state, the right of action for wrongful death being an asset of the estate in the county in which the tort-feasor is found. *Ibid.*

The authority of the clerk of the Superior Court of a county of this State to appoint an ancillary administrator is not affected by matters relating to defense, such as settlement. *Ibid.*

§ 13. Proceedings to Sell to Make Assets to Pay Debts.

Where the widow elects to take a life estate in the real estate as permitted by G.S. 29-30 and admits that a sale of the real estate is necessary to pay debts of the estate and asks that the cash value of her life estate be computed and paid from the proceeds of sale, the appeal of an heir on the ground that the widow had forfeited any interest in the estate is premature, the rights of the parties in the distribution of the proceeds of the sale not being adjudicated by the order of the sale. *Lucas v. Felder*, 169.

§ 24a. Actions for Personal Services Rendered Decedent.

In this action to recover for personal services rendered decedent the evidence *is held* sufficient to be submitted to the jury under authority of *Johnson v. Sanders*, 260 N.C. 291. *Gibbs v. Jones*, 610.

FORGERY.

§ 2. Prosecution.

A prosecution for forging and uttering a specifically described check will not support a plea of former jeopardy in a subsequent prosecution for forging an endorsement upon the identical check and uttering the check with the forged endorsement, knowing it had been forged. *S. v. Shepard*, 402.

FRAUD.

§ 2. Construction or Legal Fraud.

Where the stepson executes a deed to his interest in realty inherited from his father to his stepmother, the administratrix of his father's estate, the law presumes fraud even though the administratrix pays a fair consideration, and the son is entitled to have the issue submitted to the jury in his action to rescind his deed. *Smith v. Smith*, 278.

§ 3. Material Misrepresentation of Past or Subsisting Fact.

A promissory representation is sufficient basis for fraud if it is made with fraudulent intent and with a present intent not to perform. *Gadsden v. Johnson*, 743.

§ 8. Pleadings.

Sufficiency of allegations of fraud. *Gadsden v. Johnson*, 743.

§ 11. Sufficiency of Evidence and Nonsuit.

Inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on the issue of fraud, and when

FRAUD—*Continued.*

it is so gross that it shows practically nothing was paid, it may be sufficient to be submitted to the jury without other evidence. *Wall v. Ruffin*, 720.

FRAUDS, STATUTE OF.

§ 6a. Contracts Affecting Realty in General.

A contract between a broker and the owner to negotiate a sale of land is not required to be in writing. *Thompson-McLean, Inc. v. Campbell*, 310.

§ 6b. Contracts to Convey or Devise.

Plaintiff's evidence to the effect that the holder of the legal title orally promised to convey the property to his intestate in extinguishment of a debt owed the intestate is insufficient to establish an enforceable contract when the owner denies the alleged contract to convey, since the denial of the contract is a sufficient pleading of the statute of frauds and under the statute such contract is void notwithstanding the introduction of evidence tending to establish the parol agreement. *Hunt v. Hunt*, 438.

HABEAS CORPUS.

§ 3. For Custody of Children.

Complaint *held* to allege facts sufficient to constitute causes of action for support and custody of minor children of marriage. *Murphy v. Murphy*, 95.

While a reasonable allowance for attorney's fees may be made a part of the costs in a *habeas corpus* proceeding, this may not be done until there is a proper hearing or an opportunity for defendant to be heard. *Ibid.*

The pendency in another state of the wife's suit for divorce and custody and support of the children of the marriage does not deprive the courts of this State of jurisdiction in *habeas corpus* proceedings against the husband to determine the right to custody, the children, constituting the *res*, being within the State. *In re Skipper*, 592.

HIGHWAYS.

§ 5. Rights of Way and Access.

Owner of abutting property has common law right of access to highway, but not at all points along the boundary; but when he conveys the right of way to the Commission his right of access must be determined from a construction of the right of way agreement. *Abdalla v. Highway Comm.*, 114.

The Highway Commission has exclusive control of a highway easement and authority to make reasonable rules and ordinances to implement such control, G.S. 136-18(10), G.S. 136-93, and it may issue a permit authorizing the holder of the permit to construct a sewer line within the right of way over lands owned by another in fee, but in such case the owner of the fee is entitled to compensation for the additional burden placed upon the land. *Van Leuven v. Motor Lines*, 539.

HOMICIDE.

§ 9. Self-Defense.

A person in his own home who is free from fault in bringing on the difficulty is not required to retreat in the fact of an assault, regardless of its char-

acter, but is entitled to stand his ground and repel force with force so as to overcome the assault and secure himself from harm, provided excessive force is not used. *S. v. Johnson*, 727.

§ 13. Presumptions and Burden of Proof.

While the intentional killing of a human being with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. *S. v. Johnson*, 727.

§ 20. Sufficiency of Evidence and Nonsuit.

Where defendant's evidence as well as the State's evidence upon the point disclosed that defendant was in her home with the screen door hooked, that deceased was drunk and had theretofore assaulted defendant, and after being told to leave began arguing and cursing, that defendant went to the kitchen and procured a knife and when deceased broke open the door and attempted to grab her, stabbed him with the knife, inflicting fatal wounds, *is held* to warrant nonsuit, since the evidence affirmatively establishes self-defense. *S. v. Johnson*, 727.

HUSBAND AND WIFE.

§ 2. Rights, Privileges and Liabilities in General.

The law imposes upon the husband the duty to support his wife, which duty may be enforced by decree of the court, and such duty is a continuing one so that the fact that the husband has performed such duty in the past is no defense against present failure to perform. *Wilson v. Wilson*, 40.

§ 11. Construction and Operation of Separation Agreements.

A separation agreement when properly executed is binding and conclusive on the parties. *Wilson v. Wilson*, 40.

Where husband breaches separation agreement it cannot preclude the wife from recovery of alimony without divorce and *pendente lite*. *Ibid.*

The court is without authority to award the wife alimony and counsel fees while a valid deed of separation between the parties remains unimpeached, but the deed of separation does not affect the court's jurisdiction to order the husband to make payments for the support of the children of the marriage. *Williams v. Williams*, 48.

The ordinary rules governing the interpretation of contracts apply to separation agreements, and the courts are without power to modify them. *Church v. Hancock*, 764.

Where the terms of a contract are plain and explicit, the courts will determine its legal effect and enforce it as written. *Ibid.*

In consideration of the wife's relinquishment of her right to rents and profits from lands jointly owned by them (she being entitled to one-half thereof after the divorce subsequently obtained by her), the husband agreed to pay a sum monthly to her for the support of her and the children of the marriage, with provision for reduction in a certain amount if she remarried and provision for reduction in a certain other amount in the event of the death of a child, the payments to continue to a date specified. *Held:* The husband is not entitled under the support agreement to reduce the payments upon the marriage of a child within the term of the contract. *Ibid.*

HUSBAND AND WIFE—*Continued.*

§ 12. Revocation and Rescission of Deeds of Separation.

Allegations and evidence that the wife signed the deed of separation providing for the support of the children of the marriage in desperation because of her destitution *held* insufficient for the cancellation of the agreement since a threat to withhold that which a party has an adequate remedy to enforce cannot constitute duress. *Jones v. Jones*, 612.

§ 13. Enforcement of Deeds of Separation.

Allegations held to state cause of action for breach of separation agreement or for *habeas corpus*. *Murphy v. Murphy*, 95.

The wife may sue in her own name to recover the amount the husband is delinquent in payments for the support of the minor children of the marriage as set forth in a deed of separation executed by the parties, but the wife holds the recovery of such amounts as trustee for her children. *Richardson v. Richardson*, 521.

Where a divorce decree is subsequently entered providing a less amount for the support of the children, the wife may recover the amount due under the deed of separation at the time the decree was entered, but she may not recover under the deed of separation for payments subsequently due. *Ibid.*

INDICTMENT AND WARRANT.

§ 4. Evidence and Proceedings Before Grand Jury.

The courts will not inquire into the extent incompetent evidence may have been admitted before the grand jury, it appearing that there was sufficient competent evidence to support its findings. *S. v. Goldberg*, 181.

The failure of the indictment to show by check marks or endorsement on its back that witnesses appeared before the grand jury is not grounds for quashal. *S. v. Smith*, 613.

§ 8. Joinder of Defendants and Counts.

An indictment may jointly charge two defendants with non-burglarious breaking and entry, with larceny, and with receiving, since the offenses may be committed by more than one person at the same time. *S. v. Knight*, 17.

An indictment may join a count of non-burglarious breaking and entry with a count of larceny and a count of receiving. *Ibid.*

§ 10. Identification of Accused.

The fact that defendant's name does not appear in the affidavit upon which the warrant in arrest was issued is not fatal when the warrant itself identifies defendant by name. *S. v. Howell*, 657.

§ 12. Amendment.

A warrant cannot be amended to charge a different, although related offense. *S. v. Davis*, 655.

§ 17. Variance.

The fact that the indictment charges that the crime was committed on one day and the evidence sets the date five days thereafter ordinarily is not a material variance. *S. v. Williams*, 172.

INFANTS.

§ 1. Protection and Supervision of Infants by Courts.

Where a note owned by the estate is payable solely out of the proceeds of insurance on testator's life, and there is a real controversy whether insurers are liable on the policies, a court of equity has jurisdiction to approve for minor beneficiaries of the estate a compromise payment by insurers. *Trust Co. v. Buchan*, 595.

§ 2. Liability of Infants on Contracts.

An infant is liable for necessaries, including medical services rendered in an emergency to save his life, as an exception to the general rule that an infant is not liable on contract. *In re Peacock*, 749.

§§ 5, 6. Authority of Next Friends and Guardians Ad Litem.

The powers of a next friend or guardian *ad litem*, as distinguished from a general guardian, are coterminous with the particular action, so that the entry of judgment renders him *functus officio*, and he has no authority to receive payment of the judgment for the minor. *Teele v. Kerr*, 148.

INJUNCTIONS.

§ 13. Continuance and Dissolution of Temporary Orders.

The constitutionality of a statute ordinarily will not be determined upon the hearing of an order to show cause, but the question of constitutionality should be determined upon the final hearing after the filing of answer when all of the facts can be shown. *Milk Comm. v. Dagenhardt*, 281.

Where all of the evidence is to the effect that defendant retailer's acts in selling milk below cost as defined by G.S. 105-266.21 was not for the purpose of injuring, harassing, or destroying competition with other retail grocers in the vicinity as alleged in the complaint, the *prima facie* case created by the statute is rebutted and it is error for the court to continue to the hearing the temporary order restraining defendant from selling milk below cost. *Ibid.*

Findings and adjudications upon the hearing to show cause are not binding upon the hearing on the merits. *Roberts v. Atkins*, 735.

§ 14. Hearing on the Merits and Judgment.

Where injunction is the sole relief sought and plaintiff's evidence at the final hearing fails to make out a cause of action for the relief, dismissal of the action is proper. *Greene Co. v. Kelley*, 166.

INNKEEPERS.

§ 1. Definitions.

G.S. 72-1 has no application to a prosecution of defendant for trespass in refusing to leave a restaurant after she had been ordered to do so by the manager of the restaurant, notwithstanding that the manager also owned an adjacent motel, when there is no evidence that he operated or managed the motel, or that defendant ever applied for lodging at the motel. *S. v. Davis*, 463.

INSANE PERSONS.

§ 4. Control and Management of Estate by Guardian.

A court of equity may not, either in the exercise of its inherent jurisdic-

INSANE PERSONS—*Continued.*

tion or with legislative sanction (G.S. 35-29.1, .4, .5, .10, .11, .16), authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. *In re Kenan*, 1.

Court may sanction gift to charity by trustee of incompetent only upon finding that incompetent, if sane, would make such gift. *Ibid.*

INSURANCE.

§ 3. Construction and Operation of Policies in General.

Where the language of a policy is plain and unambiguous it must be given its plain and commonly accepted meaning, and there is no room for construction. *Hardin v. Ins. Co.*, 67.

Where a policy is susceptible to two reasonable interpretations, one imposing liability and the other excluding it, the courts will adopt that construction favorable to insured. *Mills v. Ins. Co.*, 546.

A rider must be construed with the policy and harmonized therewith if possible, and the rider will not be held to alter the provisions of the policy except to the extent its provisions are in substitution of those of the original policy or create a new and different contract, but in case of irreconcilable conflict the provisions of the rider prevail. *Ibid.*

§ 28. Existing Illness or Disease within Coverage of Policy of Health Insurance.

Provision of a policy for benefits if a person covered is confined to a hospital by reason of sickness refers to an existing illness which is the cause of the hospitalization, and does not cover an operation to prevent future illness. *Price v. Ins. Co.*, 152.

The evidence disclosed that plaintiff's wife had arrested tuberculosis, that she became increasingly nervous and depressed during each successive pregnancy, and that after the delivery of her fourth child her physician was of the opinion she was headed for a post-partum psychosis unless a tubal ligation was performed. *Held:* If the operation was to prevent future illness it was not within the coverage of the hospital policy, but if the post-partum depression was serious enough to be classified as a sickness, the operation was within the coverage, and the issue should be submitted to the jury. *Ibid.*

Serious emotional depression even though not amounting to insanity, is akin to it, and insanity is generally held to be a sickness within the meaning of a health and accident policy. *Ibid.*

§ 34. Death or Injury by Accident or Accidental Means.

Suffocation of insured when he voluntarily laid on his bed face down does not result from accident. *Langley v. Ins. Co.*, 459.

Injury intentionally inflicted by another but not due to misconduct, provocation or assault on part of insured is accidental injury. *Mills v. Ins. Co.*, 546.

§ 42. Limitation of Coverage in Regard to Cause or Time of Injury.

Insurance of employer under group policy held not limited to injury while engaged in course of employment. *Mills v. Insurance Co.*, 546.

§ 45. Notice and Proof of Loss Under Accident Policies.

Denial of liability does not waive notice of loss when such denial is based

INSURANCE—*Continued.*

upon incorrect statement of facts furnished insurer. *Fleming v. Insurance Co.*, 303.

§ 47.1. Insurance Against Damage from Uninsured Vehicles.

The fact that the carrier of liability insurance on the other vehicle involved in the collision becomes insolvent subsequent to the collision does not constitute such other vehicle an uninsured vehicle within the meaning of a personal injury policy protecting insured against damages inflicted as the result of the negligent operation of an uninsured vehicle. *Hardin v. Ins. Co.*, 67.

§ 49. Accidental Damage to Car Other Than by Collision.

Where, in an action to recover on a policy for the destruction of the insured automobile by fire, the court categorically instructs the jury on the issue of coverage that plaintiff was not entitled to recover unless the fire occurred prior to the expiration of the policy and unless it was accidental within the meaning of the policy, insured may not complain of the refusal of the court to submit a separate issue as to whether the loss was accidental. *Williford v. Ins. Co.*, 486.

§ 53.2. Construction and Operation of Auto Liability Policies in General.

To the extent of coverage required by statute, a policy of automobile liability insurance must be construed in accordance with the applicable statutory provisions and in the light of the overall purpose of the statute to provide compensation for innocent victims injured by financially irresponsible motorists. *Ins. Co. v. Roberts*, 285.

An assigned risk policy of automobile liability insurance imposes liability upon insurer for injuries intentionally inflicted by insured in assaulting his victim with an automobile, notwithstanding the policy expressly excludes liability for injuries for assault and battery committed by or at the direction of insured, since under the provisions of the Safety and Financial Responsibility Act a policy is required to provide insurance for liability imposed by law for damages arising out of the ownership of the vehicle insured, and the exclusionary provision of the policy, being in contravention of the Act, is void. *Ibid.*

As between insurer and insured, the issuance by insurer of Form FS-1 does not estop insurer from denying that the policy was in force or that notice of the accident was given as required by the policy. *Harris v. Ins. Co.*, 499.

In insured's action against insurer to recover for sums expended in defending a suit against insured within the coverage of the policy, insured's allegations of the payment of a sum to insurer's agent under agreement for the issuance of a binder, do not relate to liability imposed by the Financial Responsibility Act, and therefore furnish no basis for a counterclaim against insured under G.S. 20-279.21. *Ibid.*

§ 60. Notice of Accident to Insurer in Liability Policy.

Where insurer refuses to defend an action against insured after request by insured accompanied by the suit papers, such refusal is tantamount to a denial of liability, and as a general rule such denial waives notice of the accident. *Harris v. Ins. Co.*, 499.

Request by insured that insurer defend an action brought against insured, accompanied by suit papers, constitutes notice to insurer of the accident, and whether such notice is given within a reasonable time depends upon the facts and circumstances of each case. *Ibid.*

INSURANCE—*Continued.*

As between insurer and insured, Form FS-1 does not preclude insurer from defending on ground that notice of accident was not given. *Ibid.*

§ 63. Defense of Action Brought by Injured Party Against Insured.

If insured in a liability policy gives timely notice of a suit against him within the coverage of the liability policy, and insurer refuses to defend such suit, insured is entitled to recover of insurer the amount he is reasonably required to spend by virtue of the failure of insurer to defend the suit. *Harris v. Ins. Co.*, 499.

INTEREST.

§ 2. Time and Computation.

Where one tenant in common receives the total purchase price for the property and deposits same to his account under an agreement that the income from the fund should be paid to another tenant for life and at the death of such other tenant the principal should be paid to the surviving tenants, such agreement fixes the date from which interest on this sum accrues. *Hunt v. Hunt*, 437.

Interest does not begin to run on an account until there is a demand and refusal to pay, and therefore where an agent collects rentals from houses, interest on the amounts so collected does not begin to run until demand and refusal, and in the absence of evidence of any demand, interest begins to run only from the date of the institution of the action for the recovery of the funds. *Ibid.*

INTOXICATING LIQUOR.

§ 13a. Sufficiency of Evidence and Nonsuit in General.

Evidence that an undercover agent purchased from one defendant a pint of whiskey, that the sale took place in the basement of the residence of the other defendant, that such other defendant was present, and that the first defendant gave the money received for the whiskey to the other defendant, *is held* sufficient to be submitted to the jury as to the guilt of each. *S. v. Morehead*, 772.

§ 15. Instructions.

Where two defendants are charged in one warrant and a third defendant is charged in a second warrant with unlawful possession of intoxicating liquor and possession of intoxicating liquor for the purpose of sale, each warrant being based upon a separate occasion, and the warrants are consolidated for trial, it is error for the court to charge in effect that the jury should either find all defendants guilty or all defendants not guilty, since each defendant is entitled to have submitted to the jury the question of his guilt in reference to the specific charge in the warrant against him. *S. v. Morehead*, 772.

JUDGMENTS.

§ 2. Time and Place of Rendition.

Where defendant files a demurrer for failure of the complaint to state a cause of action, which demurrer constitutes a general appearance waiving service of process, the court may not, upon overruling the demurrer, enter an

order on the merits without giving defendant an opportunity to plead and to a hearing on the motion. *Murphy v. Murphy*, 95.

Where the judge trying the case without a jury under agreement of the parties finds the facts and that the defendant is indebted to plaintiff in a specified sum, the findings have the force and effect of a verdict, and a judge holding a subsequent term may enter judgment thereon. *Stegall v. Produce Co.*, 487.

§ 5. Interlocutory and Final Judgments.

Judgments are either interlocutory or final, and a judgment is interlocutory when it is subject to change by the court during the pendency of the action to meet the exigencies of the case. *Skidmore v. Austin*, 713.

§ 6. Modification and Correction of Judgment in Trial Court.

The judgment must be supported by and conform to the verdict in all substantial particulars, and where it fails to do so the interested party may move to correct the judgment by inserting therein the verdict actually rendered in the case so as to make the judgment speak the truth. *Russell v. Hamlett*, 603.

§ 13. Judgments by Default in General.

When more than thirty days after order overruling a demurrer has transpired, the court has jurisdiction to enter a judgment by default, and the court's authority to do so is not affected by the subsequent filing of a petition for *certiorari*, even though the petition be filed later on the same day. *Wheeler v. Thabit*, 479.

An unverified complaint is insufficient basis for a default judgment, either final or upon inquiry. *Shackleford v. Taylor*, 640.

§ 22. Setting Aside Judgments for Surprise and Excusable Neglect.

The lower court entered an order setting aside default judgment against defendant on the ground of excusable neglect upon findings that the complaint was not verified and that defendant, without experience in such matters, believed it to be nothing more than a notice that suit would be instituted against him if settlement were not made. *Held:* The order setting aside the default judgment is affirmed under the presumption in favor of the order. *Shackleford v. Taylor*, 640.

§ 29. Parties Concluded.

Persons who are not properly before the court are not bound by its orders and such orders are void as to them. *Lucas v. Felder*, 169.

§ 30. Matters Concluded.

In an action by a passenger against one of the drivers involved in a collision in which the other driver is joined for contribution, judgment upon the affirmative findings to the issues of negligence that plaintiff recover of the original defendant and that the original defendant recover from the additional defendant for contribution, bars a subsequent action by one driver against the other. *Pittman v. Snedeker*, 365.

A divorce decree stipulating that the husband pay a certain sum monthly for the support of the children of the marriage does not bar the wife from thereafter maintaining an action to recover amounts due at the time of decree under a prior deed of separation, but the decree bars recovery of any amounts

JUDGMENTS—*Continued.*

subsequently becoming due under the deed of separation. *Richardson v. Richardson*, 521.

An action solely for an injunction to restrain defendant from constructing a sewer line across plaintiff's property, amended after the construction of the sewer line to request a mandatory injunction to compel its removal, which suit is dismissed, will not bar a subsequent action to recover damages for the burden of the easement, even though damages might have been, but were not, demanded in the prior suit. *Van Leuven v. Motor Lines*, 539.

§ 43. Actions on Judgments.

The cause of action is merged in the judgment rendered therein, and the judgment is a debt of record so that an action on the judgment is a new action on a debt separate and distinct from the original cause of action. *Teele v. Kerr*, 148.

Where judgment is recovered in favor of an infant in an action brought by the next friend, the infant having no general guardian, the ten year limitation on an action on the judgment, G.S. 1-47(1), begins to run when the infant reaches his majority. *Ibid.*

The ten-year limitation of G.S. 1-47(1) must be computed on an award of the Industrial Commission from the time judgment of the Superior Court is rendered upon the certified copy of the award filed in the Superior Court in conformity with G.S. 97-87, and not from the date the award was entered by the Industrial Commission. *Bryant v. Poole*, 553.

JURY.

§ 4. Challenges.

In a prosecution of two defendants jointly for offenses less than capital, the State is entitled to challenge peremptorily four jurors for each defendant. *S. v. Knight*, 17.

LARCENY.

§ 6. Competency and Relevancy of Evidence.

Upon the prosecution of two defendants jointly for larceny, evidence tending to show that each defendant possessed a quantity of the stolen money shortly after the commission of the theft is competent respectively against each. *S. v. Knight*, 17.

§ 8. Sufficiency of Evidence and Nonsuit.

Evidence of defendants' guilt of larceny held sufficient to be submitted to the jury. *S. v. Knight*, 17.

§ 10. Punishment.

Larceny from the person is a felony, G.S. 14-72, and the punishment therefor can be imprisonment for ten years. *S. v. Williams*, 172.

LIMITATIONS OF ACTIONS.

§ 18. Determination of Plea.

Where all of the relevant facts are admitted, the question of the bar of a properly pleaded statute of limitations is a question of law. *Teele v. Kerr*, 148.

MALICIOUS PROSECUTION.

§ 3. Valid Process.

An action for malicious prosecution must be based upon a valid warrant, and the validity may be challenged by motion to nonsuit. *Bassinov v. Finkle*, 109.

The law does not require the same particularity in warrants as in indictments, and, in an action for malicious prosecution, a warrant charging the larceny of goods of a value constituting a felony will not be held void for failure to use the word "feloniously" if the clerk issuing the warrant had authority to issue warrants for felonies and the court has the power to bind defendant over on felony charges. *Ibid.*

§§ 4, 5. Want of Probable Cause and Malice.

The rule in North Carolina is that advice of counsel upon a full disclosure of the facts will not of itself afford protection from a suit for malicious prosecution as a matter of law; but is only evidence to be considered on the issue of probable cause and malice. However, in the instant case, the evidence *is held* not to show that defendant acted on the advice of counsel in instituting the prosecution. *Bassinov v. Finkle*, 109.

MASTER AND SERVANT.

§ 53. Injuries Compensable Under Compensation Act in General.

Whether an employee's injury is sustained by accident arising out of and in the course of his employment is a mixed question of law and fact. *Clark v. Ice Cream Co.*, 234.

To establish a claim under the Workmen's Compensation Act claimant has the burden of proving that he sustained an injury by accident arising out of and in the course of his employment. *O'Mary v. Clearing Corp.*, 508.

Plaintiff's evidence to the effect that while he was walking over cleared land in the usual and customary manner in the performance of his duties he felt a stinging on his right foot, discovered a blister on his toe, and that later the blister became infected, resulting in serious injury, *held*, not to show that the injury resulted from an accident within the meaning of the Workmen's Compensation Act. *Ibid.*

§ 74. Review of Award by Commission for Change of Condition.

Where insurer does not give employee notice required by rules of Commission, that claim for additional compensation had to be filed within one year, the limitation prescribed by the statute does not begin to run. *White v. Boat Corporation*, 495.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

It has no jurisdiction to reform policy of compensation insurance. *Clark v. Ice Cream Co.*, 234.

it by statute, expressly or by necessary implication. *Clark v. Ice Cream Co.*, 234; *Bryant v. Poole*, 553.

It has no jurisdiction to reform policy of compensation insurance. *Ibid.*

The N. C. Industrial Commission has statutory authority to promulgate rules for the orderly administration of the Act. *White v. Boat Co.*, 495.

MASTER AND SERVANT—*Continued.*

§ 86. Common Law Right of Action Against Tort-Feasor.

The Workmen's Compensation Act precludes an action by one employee against another to recover for negligent injury when the employees and the employer are subject to the Compensation Act and the injury arises out of and in the course of the employment. *Stanley v. Brown*, 243.

Where the Industrial Commission has entered an award affirming an agreement for compensation for injuries inflicted by a fellow employee, a commissioner may not thereafter, upon agreement of the injured employee, the employer and the insurer that the injured employee was not engaged in the employment at the time, set aside the award without a hearing and without notice to the fellow employee, G.S. 97-6, G.S. 97-17, and an action at common law thereafter instituted by the injured employee against his fellow employee should be nonsuited in the Superior Court. *Ibid.*

§ 91. Findings and Award of Commission.

The approval by the Industrial Commission of an agreement for compensation upon facts stipulated is as conclusive as an award of the Commission in an adversary proceeding. *Stanley v. Brown*, 243.

It may not modify or change such agreement without notice and an opportunity to be heard by parties whose interest may be affected. *Ibid.*

The award of the Industrial Commission is not a judgment within the meaning of G.S. 1-47(1). *Bryant v. Poole*, 553.

§ 93. Review of Award in Superior Court.

Where there is no exception to the findings of the particular facts and the particular findings provide a factual basis for the ultimate finding that the employee's injury arose out of and in the course of his employment, exception to the ultimate finding will not be sustained. *Clark v. Ice Cream Co.*, 234.

MORTGAGES AND DEEDS OF TRUST.

§ 1. Equitable Mortgages.

Evidence *held* insufficient to show that a warranty deed and an agreement giving the grantors twenty years within which to redeem the property were intended by the parties to be a mortgage. *Pearce v. Hewitt*, 408.

Deed and contract to reconvey held to constitute equitable mortgage. *Hardy v. Neville*, 454.

§ 13. Estates, Rights and Duties of Parties to the Instrument.

Where a deed and contracts constitute an equitable mortgage, neither the equitable mortgagee nor the equitable mortgagor alone may convey a clear title, and, the instruments being recorded, a grantee solely from the equitable mortgagee takes with notice and is in no better position than the equitable mortgagee, and as properly made a party to the action to have the transaction declared a mortgage. *Hardy v. Neville*, 454.

§ 19. Right to Foreclosure and Defenses.

Allegations that the purchaser of a note secured by a deed of trust promised not to foreclose so long as the interest was paid on the note and not to foreclose without giving the maker of the note personal notice so that she could refinance, *held* insufficient to allege a defense to foreclosure in the absence of

MORTGAGES AND DEEDS OF TRUST—*Continued.*

allegation that such promises were supported by consideration, there being no contention that the notice required by statute was not given. *Woodell v. Davis*, 160.

MUNICIPAL CORPORATIONS.

§ 2. Annexation of Territory.

Changes in municipal boundaries are legislative matters, and the exercise of legislative authority by a municipality in annexing additional territory is not subject to judicial interference. *Lithium Corp. v. Bessemer City*, 532.

A proceeding by a municipality to annex territory pursuant to G.S. 160-453.1 *et seq.*, is summary in nature and the material statutory requirements must be complied with. *R. R. v. Hook*, 517.

Where about a tenth of a tract of land, marked off by a bumper strip or barrier, is used for parking, and the rest of the tract is graded and held by the owner for possible future industrial development, *held*, the vacant part of the tract is not "used" for industrial purposes within the purview of G.S. 160-453.4(c). *Ibid.*

In order for an area to be subject to annexation by a municipality under the provisions of G.S. 160-453.4(c), it is necessary that at least 60 per cent of its total number of lots and tracts be in use for residential, commercial, industrial, institutional or governmental purposes and also that at least 60 per cent of its total acreage, not counting the acreage used at that time for commercial, industrial, governmental or institutional purposes, be subdivided into lots and tracts of five acres or less in size. *Lithium Corp. v. Bessemer City*, 532.

An area owned by two industrial concerns and used exclusively for commercial purposes does not comply with the literal requirements of G.S. 160-453.4(c) or come within the reasonable intent and application of the statute, and an ordinance of a municipality annexing such area must be set aside by the courts. *Ibid.*

§ 9. Discharge of Municipal Employees.

The discharge of a municipal employee by the Civil Service Board in accordance with the procedure outlined in Chapter 757, Session Laws of 1953, is in the exercise of a quasi-judicial function and is reviewable in Superior Court upon a writ of *certiorari*. *In re Burris*, 450.

On the hearing of a writ of *certiorari* used as a substitute for appeal from order of a municipal Civil Service Board discharging a municipal employee for conflict of interest, the findings of fact of the administrative board are conclusive when supported by the evidence, but the Superior Court has the jurisdiction and duty to determine whether the facts found are sufficient under the law and the regulations of the board to constitute a valid cause for discharge. *Ibid.*

§ 12. Injuries from Defects or Obstructions in Streets or Sidewalks.

City may not be held liable for injuries resulting from acceleration in flow of surface waters sequent to construction of streets and gutters if direction of flow is not changed. *Roberson v. Kinston*, 135.

§ 25. Zoning Ordinances and Building Permits.

Where the facts are not in dispute, whether the activities of the owner

MUNICIPAL CORPORATION—*Continued.*

amount to a completion of a project started before the enactment of the zoning ordinance or amount to an enlargement of a nonconforming use, is a question of law. *In re Tadlock*, 120.

Landowner is entitled as a matter of law to complete project already begun at the time of the enactment of ordinance. *Ibid.*

§ 27. Regulations Relating to Public Morals and Welfare.

Municipal corporations of this State are clothed with power to enact and enforce ordinances for the observation of Sunday. *Clark's v. Hunter*, 222.

Municipal "blue law" ordinance *held* constitutional. *Ibid.*

§ 40. Actions Against Municipal Corporations.

An action based on allegations that defendant municipality took possession of plaintiff's property without negotiating for its purchase and seeking to compel the city to surrender possession *held* not barred by charter provisions of the city requiring an action for damages for the taking or appropriations of private property to be instituted within 90 days, the charter provisions being construed with other charter provisions and the General Statutes in regard to condemnation by the city, and it appearing that the city had denied title and had not followed either method for condemnation of the property. *Kistler v. Raleigh*, 775.

NEGLIGENCE.

§ 5. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply to an airplane crash. *Mann v. Henderson*, 338.

§ 7. Proximate Cause and Foreseeability of Injury.

The only negligence of legal import is negligence which proximately causes or contributes to the death or injury under judicial investigation. *Miller v. Coppage*, 430.

Proximate cause is ordinarily a question for the jury. *Short v. Chapman*, 674.

§ 8. Concurring and Intervening Negligence.

Where the active negligence of each of two responsible agents combines and constitutes a proximate cause in producing the injury, each is civilly liable notwithstanding one may have been more or less negligent that the other. *Turner v. Turner*, 472.

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance or discovered peril presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, and is applicable only if defendant saw or should have discovered plaintiff's position of peril sequent the negligence and contributory negligence in time to have avoided the injury in the exercise of due care. *Clodfelter v. Carroll*, 631; *Mathis v. Marlow*, 636.

§ 11. Contributory Negligence in General.

Only contributory negligence which proximately causes or contributes to

NEGLIGENCE—*Continued.*

the injury under judicial investigation is of legal import. *Short v. Chapman*, 674.

§ 21. Presumptions and Burden of Proof.

The burden is upon defendant to prove contributory negligence. *Honeycutt v. Strube*, 59.

§ 24a. Sufficiency of Evidence and Nonsuit in General.

In order to make out a case plaintiff must not only show negligence on the part of defendant and an injury to himself, but also that the injury was proximately caused by the negligence, including, as an essential element of proximate cause, that the injury was reasonably forseeable. *Pittman v. Frost*, 349.

Evidence held insufficient to show causal relation between excavation of sand from river bed and drowning of boy. *Miller v. Coppage*, 430.

§ 24d. Nonsuit for Variance.

The fact that plaintiff alleges negligence in respects not substantiated by proof does not warrant nonsuit for variance when in other respects there is both allegation and evidence, since proof of negligence in any one of the respects alleged is sufficient if it proximately causes injury. *Funeral Home v. Pride*, 723.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper only when the evidence is so clear on that issue that no other conclusion is reasonably permissible. *Allen v. Metcalf*, 570; *Rouse v. Peterson*, 600; *Short v. Chapman*, 674.

The question of proximate cause is ordinarily a question of fact for the determination of the jury from the attendant circumstances, and it cannot be a question of law when conflicting inferences of causation arise upon the evidence. *Short v. Chapman*, 674.

§ 30. Verdict and Judgment.

In a passenger's action to recover for injuries received in a collision, verdict exculpating both drivers will not be set aside for inconsistency. *Benbow v. Tel. Co.*, 404.

A verdict finding that defendants were negligent, that plaintiff by his own negligence contributed to his injury, and awarding damages, will not be set aside for inconsistency, and the court correctly sets aside the award of damages and enters judgment that plaintiff recover nothing. *Bass v. Brown*, 739.

§ 36. Attractive Nuisances and Injury to Children.

Since the attractive nuisance doctrine generally is not applicable to bodies of water, and since the owner of land is not under duty to erect a fence or other obstruction to protect small children from obtaining access to a branch or creek flowing in its natural state, a Housing Authority may not be held liable for the death of a child of one of its tenants who drowned when she fell into a stream, swollen by heavy rains, flowing adjacent the property. *Roberson v. Kinston*, 135.

§ 37b. Duties of Proprietor to Invitee in General.

The proprietor is not an insurer of the safety of his customers while on the premises but owes them the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden perils so

NEGLIGENCE—*Continued.*

far as he can ascertain them by reasonable inspection and supervision, but he is not under duty to give warning of obvious conditions. *Jones v. Pinehurst, Inc.*, 575.

The person responsible for the condition of the premises is not under duty to give warning of obvious dangers. *Spell v. Contractors*, 589.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence tending to show that defendant provided a speaker's platform elevated a foot from the floor, that the platform touched the radiators at the back but left some 14 inches between it and the wall, and that plaintiff, in leaving the speaker's platform at the banquet by the same route she had used in going to her seat, fell when she stepped off or her foot slipped off the rear of the platform, that plaintiff did not look where her feet were, and without evidence of any defect in the platform or of any foreign substance or defect in the floor of the platform, *is held* insufficient to be submitted to the jury on the issue of negligence. *Jones v. Pinehurst, Inc.*, 575.

Negligence is not presumed from the mere fact of injury, and the doctrine of *res ipsa loquitur* does not apply to an action against a contractor by a pedestrian injured in a fall in a filled ditch in a driveway. *Spell v. Contractor*, 589.

Plaintiff's evidence tended to show that when he stepped into dirt filling a ditch excavated by defendant his foot mired down ten to twelve inches, and he fell to his injury. Plaintiff's evidence further tended to show that it had rained for several days prior to the injury, that he had traversed the ditch by automobile and by foot shortly before the accident in suit and that there was nothing from the appearance of the dirt in the ditch to indicate hazard. There was no evidence that the ditch had been improperly filled. *Held:* Plaintiff's own evidence fails to show defect which defendant should have discovered by reasonable inspection, and nonsuit should have been entered. *Ibid.*

Evidence tending to show that the seat of the chair in which plaintiff was sitting tilted forward, causing plaintiff to fall to the floor of defendant's store, that the seat of the chair tilted because two screws holding the seat at its rear were broken, that the heads of the screws were still countersunk after the accident, and that when plaintiff sat down the seat of the chair was apparently in good condition, without evidence that an inspection would have revealed any defect, *is held* insufficient to overrule nonsuit. *Leonard v. Shoe Store*, 781.

PARENT AND CHILD.

§ 6. Duty to Support Child.

The primary obligation for the support of a minor child rests upon the father, and such duty does not end with the furnishing of mere necessities if the father is able to afford more, and in addition to the actual needs of the child the father has a legal duty to give the child those advantages which are reasonable, considering his financial condition and position in society. *Williams v. Williams*, 48.

Parents are under a legal obligation to support their children and this obligation rests primarily on the father. *In re Skipper*, 592.

While marriage of a child emancipates the child by operation of law and relieves the father of the legal duty of supporting the child thereafter, a parent can nevertheless bind himself by contract to support a child after emancipation and past majority. *Church v. Hancock*, 764.

PARTITION.

§ 1. Nature and Extent of Right to Partition in General.

A tenant in common has the right to insist that the entire lands owned by them be partitioned in the one proceeding even though it is necessary to allot the widow's dower and partition the lands subject to the dower estate. *Horne v. Horne*, 688; *Coats v. Williams*, 692.

§ 3. Petition and Proceedings.

A petition for partition is subject to demurrer under the ordinary rules governing pleadings. *Coats v. Williams*, 692.

The petition alleged that the widow had agreed that she would renounce her dower right in one tract of land in consideration of the conveyance by some of the tenants of their interest in another tract, and prayed for sale for partition of the first tract. The petition failed to allege clearly the respective interests of each party in each tract or the extent to which the agreement between the widow and some of the tenants had been executed. *Held:* Order sustaining demurrer of the guardian *ad litem* for a minor tenant for failure of the petition to allege that actual partition could not be fairly made if both tracts were sold, is upheld. *Ibid.*

§ 9. Proceeds of Sale and Distribution.

The amount of commission allowed by the Superior Court to the commissioner selling lands for partition is governed by G.S. 1-408 and rests in the discretion of the court, and the court's order will not be disturbed in the absence of a showing of abuse of discretion. *Welch v. Kearns*, 171.

All orders in partition proceedings are interlocutory until final confirmation of the report, and if the widow dies prior to the sale her death terminates her dower estate and there can be no sale thereof, and therefore her estate is not entitled to any part of the proceeds of sale notwithstanding the order of sale directs that the lands be sold free of dower and the cash value of the widow's dower paid to her or her general guardian. *Skidmore v. Austin*, 713.

PAYMENT.

§ 4. Evidence and Proof of Payment.

Where, in the principal's cross-action against the agent to recover funds collected by the agent in her behalf, the agent admits collecting the funds as agent but asserts that he paid the full amount of the funds to the principal, the burden is upon the agent to prove his affirmative plea of payment, and he may not complain of an instruction placing the burden upon the principal to satisfy the jury by the greater weight of the evidence of the indebtedness and the amount thereof. *White v. McCarter*, 362.

PLEADINGS.

§ 1. Filing and Service of Complaint.

While the clerk of the Superior Court has authority, at the time of issuance of summons, to extend the time for filing complaint to a day certain, not to exceed twenty days, upon plaintiff's application stating the nature and purpose of the suit, the clerk has no authority to extend the time for filing complaint beyond the time specified in such order unless the plaintiff has secured an order to examine the defendant prior to filing complaint. *Deanes v. Clark*, 467.

PLEADINGS—*Continued.*

While the clerk has no authority to again extend the time, the judge, on appeal from the clerk's order refusing to do so, has the discretionary power to do so. *Ibid.*

§ 2. Statement of Cause of Action.

The pleadings properly contain a plain and concise statement of the ultimate facts constituting the cause of action without alleging the evidentiary facts. *King v. Sloan*, 562.

Where plaintiff brings suit on two causes of action, each must be separately stated. *Bannister v. Williams*, 586; *Service Co. v. Sales Co.*, 660.

§ 3. Joinder of Causes of Action.

An action against the drawer of a dishonored draft to recover the purchase price of goods for which the draft had been given may not be joined with an action against the bank for its negligent failure to follow instructions to present the draft for payment promptly and give notice of dishonor. *Bannister v. Williams*, 586.

§ 4. Prayer for Relief.

The facts alleged in the complaint determine the relief to which plaintiff is entitled and not the prayer for relief. *Murphy v. Murphy*, 95; *Coe v. Coe*, 174.

§ 6. Filing of Answer.

A defendant has thirty days after order overruling his demurrer in which to file answer or petition the Supreme Court for *certiorari*. *Wheeler v. Thabit*, 479.

§ 7. Form and Contents of Answer.

A defendant may set up and rely upon contradictory defenses. *Woods v. Turner*, 643.

§ 8. Cross-Actions and Counterclaims.

In action by original seller against purchaser and guarantor of payment, the guarantor, who purchased the goods in turn, may not maintain a cross-action against the purchaser or a counterclaim against the original seller for breach of warranty, but may maintain a counterclaim based upon an independent sale made to him by the original seller. *Service Co. v. Sales Co.*, 660.

A counterclaim is substantially the allegation of a cause of action on the part of defendant against plaintiff. *Short v. Chapman*, 674.

§ 12. Office and Effect of Demurrer.

Whether allegations set forth as the basis for a plea in bar to plaintiff's entire cause of action are sufficient for that purpose may be tested by demurrer. *Hardin v. Ins. Co.*, 67.

A demurrer admits the facts properly pleaded but not the pleader's legal conclusions, and the sufficiency of the pleading must be determined on the basis of the facts alleged, liberally construed in favor of the pleader. *Bennett v. Surety Corp.*, 345.

§ 17. Demurrer to the Jurisdiction.

A demurrer to the complaint on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action will not

PLEADINGS—*Continued.*

be sustained when no such jurisdictional defect appears on the face of the complaint. *Richardson v. Richardson*, 521.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Where there is misjoinder of parties and causes of action, the action must be dismissed upon demurrer. *Bannister v. Williams*, 586.

The filing of an answer waives the right to demur for misjoinder of parties and causes of action. *Ibid.*

§ 19. Demurrer for Failure of Pleading to State Cause of Action.

If the complaint presents facts sufficient to constitute a cause of action or if facts sufficient for that purpose can be fairly gathered from it, it is good as against demurrer, notwithstanding the prayer for relief is for an inapposite remedy. *Murphy v. Murphy*, 95.

Where the complaint contains a defective statement of a good cause of action, defendants' demurrer will be allowed, even in the Supreme Court, but the action will not be dismissed until plaintiff is given opportunity to amend. *Gadsden v. Johnson*, 743.

Answer alleging that if defendant was negligent, other driver was plaintiff's agent and was guilty of contributory negligence, or that if other driver was not agent he should be joined for contribution, *held* not demurrable, since defendant may allege inconsistent defenses. *Woods v. Turner*, 643.

Where one defendant attempts to allege a cross-action against his co-defendant and also a counterclaim against the plaintiff, but does not distinguish between the allegations relating to the cross-action and the allegations relating to the counterclaim, demurrer to the counterclaim must be sustained, even though the counterclaim, if properly alleged, is maintainable. *Service Co. v. Sales Co.*, 660.

§ 25. Scope of Amendment to Pleadings.

The court has discretionary power to allow an amendment to a pleading provided the amendment does not set up a wholly different or inconsistent cause of action, and the allowance of an amendment for the recovery of punitive damages on the cause of action originally stated does not change the cause of action but merely permits a new kind of relief in the same cause, and is within the discretion of the court. *Bassinov v. Finkle*, 109.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

A party is bound by an allegation contained in his own pleading and he cannot subsequently take a position contrary thereto. *Davis v. Rigsby*, 684.

§ 30. Motions for Judgment on the Pleadings.

Allegations of the complaint admitted in the answer are not in issue, and when the answer admits all facts essential to plaintiff's cause of action and fails to set up any defense or new matter sufficient in law to avoid plaintiff's claim, judgment on the pleadings is proper. *Kirk Co. v. Styles, Inc.*, 156.

A motion for judgment on the pleadings is to be determined from an examination of the pleadings alone. *Edwards v. Edwards*, 445.

A motion for judgment on the pleadings admits the truth of the facts well pleaded. *Ibid.*

Judgment on the pleadings is not favored by the law, and on motion for

PLEADINGS—*Continued.*

judgment on the pleadings the pleadings will be liberally construed with a view to substantial justice between the parties. *Ibid.*

§ 34. Motions to Strike.

Allegations which are evidentiary or redundant or which relate to a cause of action which the pleader is not entitled to set up in the action, are properly stricken on motion. *Service Co. v. Sales Co.*, 660.

PRINCIPAL AND AGENT.

§ 5. Scope of Authority.

Ordinarily a collecting agent has authority to accept only money or legal tender, but when a check accepted by the agent is duly paid the principal is bound regardless of whether the agent gets the actual cash or only a credit at the bank to his own account. *Petroleum Corp. v. Turlington*, 475.

Where the evidence discloses that a collecting agent also operated a separate business owned by him and that payments on account for monies due the principal were made to the agent by checks, some of which were made payable to the principal and some to the agent's business, but further that the agent had authority to accept checks payable to his individuel business provided he endorsed them over to the principal, *held*, the agent's authority being admitted, payment to the agent constituted in law payment to the principal, and, in the absence of notice the payer was not under duty to see to the application of payment. *Ibid.*

§ 7. Undisclosed Agency.

An agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity. *Howell v. Smith*, 256.

An agent acting for a principal in the purchase of materials has the duty to disclose the fact of agency and the name of his principal if he would relieve himself of personal liability, and the use of a trade name or the existence of means by which the seller might discover the fact of agency is not sufficient for this purpose, nor will the discovery of the fact of agency by the seller after the extension of credit relieve the agent of personal liability. *Ibid.*

Where over a period of years plaintiff, in selling petroleum products, deals with defendant as an individual, checks in payment of the products being signed individually by defendant or the manager under a printed trade name without disclosing the fact of incorporation, the fact that five statements for products sold by the corporation to plaintiff over the period of several years had the word "Inc." printed after the trade name, although such word did not appear on the invoices, *held* insufficient to establish actual knowledge by plaintiff that he was dealing with a corporation. *Ibid.*

PRINCIPAL AND SURETY.

§ 7. Bonds of Private or Corporate Officers and Agents.

Surety is not liable for losses incident to employee's suit against employer for malicious prosecution. *Bennett v. Surety Corp.*, 345.

PROCESS.

§ 9. Service by Publication.

A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within 31 days after the issuance of the order of attachment, G.S. 1-440.7, and plaintiff must file the affidavit required by G.S. 1-98. *Ins. Co. v. Johnson*, 778.

Service of process by publication is in derrogation of the common law and the statutory provisions must be strictly construed. *Ibid.*

§ 15. Service on Nonresident in Actions Involving Operation of Automobile.

An action for a declaratory judgment to construe a contract of insurance does not arise out of an automobile collision, and therefore insured may not be served with process by service upon the Commissioner of Motor Vehicles. *Ins. Co. v. Roberts*, 285.

The 1953 Amendment to G.S. 1-105 authorizes service of process on and the maintenance of an action against a foreign administrator of a non-resident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. *Franklin v. Cellulose Products*, 626.

RAILROADS.

§ 5. Crossing Accidents.

Evidence tending to show that intestate, with an unobstructed view of the approaching train, drove onto the track in front of the locomotive, which had its headlights burning, and was killed in the collision between the locomotive and the automobile, *is held* to disclose contributory negligence barring as a matter of law recovery for wrongful death. *Medlin v. R. R.*, 484.

RECEIVERS.

§ 1. Nature and Grounds of Remedy.

Receivership is a harsh remedy and ordinarily will be granted only where there is no other safe or expedient remedy. *Murphy v. Murphy*, 95.

In an action by the wife against her husband to recover support for the minor children of the marriage, the appointment of a receivership to take possession of bank deposits of the husband is inappropriate, even though the complaint alleges that the husband had abandoned the children and was about to dispose of his property for the purpose of defeating plaintiff's claim for support of the children, since plaintiff has an expedient and appropriate remedy by attachment. *Ibid.*

REFERENCE.

§ 2. Consent Reference.

Even though a statute provides for a jury trial in the Superior Court the parties may, by consent, waive jury trial and substitute therefor a hearing before a referee. *In re Hayes*, 616.

§ 8. Review of Exceptions by Court.

The trial court has the power, upon exceptions to the referee's findings, to

REFERENCE—*Continued.*

affirm in whole or in part, modify, or set aside or make additional findings in passing upon the exceptions. *In re Hayes*, 616.

REGISTRATION.

§ 5. Parties Protected by Registration.

Purchasers by warranty deed from the grantee in a registered instrument take free of such grantee's prior executed but subsequently registered agreement tending to constitute the deed a mortgage, instead of an absolute conveyance. *Pearce v. Hewitt*, 408.

ROBBERY.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendants are brothers-in-law and lived together, that one of them had in his possession at the time of the robbery a gun which was positively identified by the victim of the robbery as the one used in the perpetration of the offense, that the other defendant borrowed two stockings shortly before the offense was committed, and on the day after the robbery had in his possession approximately one-half of the money stolen and admitted his participation in the robbery, and that the perpetrators while committing the offense wore stockings over their heads, *is held* sufficient to be submitted to the jury as to each defendant on the charge of armed robbery. *S. v. Goins*, 707.

SALES.

§ 8. Parties to Warranty.

A warranty, express or implied, is contractual and extends ordinarily only to the parties to the contract of sale. *Service Co. v. Sales Co.*, 660.

§ 14a. Actions and Counterclaims for Breach of Warranty.

In an action by the original seller, the subpurchaser may not maintain counterclaim against purchaser for breach of warranty. *Service Co. v. Sales Co.*, 660.

Nor may the subpurchaser, sued on his guaranty of payment, maintain a counterclaim on the original seller's warranty, although he may maintain a counterclaim arising out of another contract. *Ibid.*

SCHOOLS.

§ 10. Assignment of Pupils.

The Pupil Assignment Law provides for the assignment *en masse* of pupils without a hearing, based upon residence, by the respective administrative units, with provision for reassignment in proper instances upon an individual basis on application in writing by the parents of a pupil, and the law places all emphasis on the welfare of the child and the effect upon the school to which reassignment is requested. G.S. 115-176, G.S. 115-178. *In re Hayes*, 616.

The hearing in the Superior Court upon appeal by parents from the refusal of their request for reassignment of a pupil is *de novo*, G.S. 115-179, and a

SCHOOLS—*Continued.*

de novo hearing is a new hearing as though no action whatever had been taken in an inferior court or administrative agency. *Ibid.*

Where, on appeal in the Superior Court from the refusal of the administrative unit to reassign a pupil, the cause is referred by consent and the referee concludes, upon supporting findings, that the reassignment of the pupil would be to her best interest and would not interfere with the proper administration of said school, order of the court that the pupil be reassigned to the school of her choice, even though it be in a different administrative unit, will be upheld, such reassignment being entirely satisfactory to the authorities of the unit to which the reassignment is ordered. *Ibid.*

STATUTES.

§ 2. Constitutional Proscription Against Enactment of Local Statutes Relating to Certain Matters.

A statute proscribing the sale on Sunday of merchandise falling within certain classifications is a statute regulating trade under the purview of Article II, § 29 of the State Constitution. *Treasure City v. Clark*, 130.

G.S. 14-346.2 proscribing the sale of merchandise of specific classifications within the State but exempting designated counties and parts of counties therefrom, with provision that the areas exempted were exempted upon the classification of such areas as resort or tourist areas, but which does not define "resort area" and which as a matter of common knowledge does not exempt all recognized tourist areas of the State or by its classifications of goods, preclude the sale only of such merchandise as is appropriate to the tourist trade, *is held* void as a local law in violation of Article II, § 29 of the State Constitution. *Ibid.*

§ 4. Construction in Regard to Constitutionality.

Where that part of a statute imposing an unconstitutional limitation is divisible from other parts of the statute, which are constitutional, the statute stands with the unconstitutional provision deleated. *Clark v. Meyland*, 140.

The constitutionality of a statute ordinarily will not be determined upon the hearing of an order to show cause, but the question of constitutionality should be determined upon the final hearing after the filing of answer when all of the facts can be shown. *Milk Comm. v. Dagenhardt*, 281.

§ 5. General Rules of Construction.

The intent of the Legislature controls the interpretation of a statute. *Lithium Corp. v. Bessemer City*, 533.

When the meaning of a statute is doubtful, the courts may consider the history of the legislation in question in connection with the object, purpose and language of the statute in ascertaining the legislative intent. *Ibid.*

Where clauses of a statute setting forth the requirements for the application of the statute are connected by the conjunctive "and", it is generally necessary that the conditions set forth in both clauses be met in order for the statute to be applicable. *Ibid.*

While the caption of a statute may be considered in proper instances in its construction, the caption cannot control the text when the text is clear, especially when the caption is prepared by compilers rather than the person preparing the bill. *Bryant v. Poole*, 553.

STATUTES—*Continued.*

A statute must be construed to effectuate the legislative intent. *Lockwood v. McCaskill*, 754.

A proviso should be construed with the act with a view to giving effect to each, and a proviso takes out of the enacting clause only those cases which fall fairly within its terms. *Ibid.*

§ 11. Repeal and Revival.

An unconstitutional statute cannot operate to supersede, affect or modify an existing valid city ordinance. *Clark's v. Hunter*, 222.

TAXATION.

§ 15. Sales, Use and Transfer Taxes.

A housing authority is not entitled to a refund of sales taxes paid by it on purchases made by it, since G.S. 157-26 has no application to sales taxes but applies to ad valorem taxes, and although a housing authority is a municipal corporation, it is not a county or unincorporated city or town which are the only agencies entitled to a refund under G.S. 105-164.14(c), and since a housing authority is a municipal corporation, it is not a charitable organization entitled to a refund under G.S. 105-164.14(b), nor is U.S.C.A., § 1405(e) applicable. *Housing Authority v. Johnson*, 76.

§ 28b. Computation of Income Tax on Foreign Corporations.

This State may tax income earned by a nonresident in this State, but may not tax income of such nonresident earned beyond its borders. *Equipment Co. v. Johnson*, 269.

The format prescribed by G.S. 105-134(6) (a) for the allocation of that portion of the income of a foreign corporation which is taxable by this State is *prima facie* just, and the burden is upon the complaining taxpayer to establish by clear, cogent and convincing proof that the results are inequitable in order for differing and additional factors to be considered in ascertaining the income taxable by this State. *Ibid.*

Findings by the Tax Review Board to the effect that plaintiff corporation was a unitary business so that its income taxable by this State should be computed in accordance with G.S. 105-134(6) (a) together with findings by the Superior Court that each division of the corporation operated separately and each was required to attain its operating success independent of the others, (there being evidence that the division which carried on business in North Carolina sustained a loss instead of a profit according to the books of the corporation) *held* contradictory, and the cause must be remanded. *Ibid.*

§ 28c. Computation of Income Tax on Domestic Corporations.

The forgiveness of an indebtedness by an officer-stockholder constitutes a contribution to capital and does not constitute income of the corporation, and therefore the forgiveness of such indebtedness does not offset a net operating loss of the corporation for a taxable year, and the corporation is entitled to carry forward such loss under the provisions of G.S. 105-147(9) (d). *Mfg. Co. v. Johnson*, 504.

§ 36. Remedies of Taxpayer.

The Commissioner of Revenue cannot be sued pursuant to the provisions of

TAXATION—*Continued.*

the Declaratory Judgment Act to determine liability for a tax. *Housing Authority v. Johnson*, 76.

The rights granted under G.S. 105-266.1 are in addition to the rights provided by G.S. 105-267, and a taxpayer may sue to recover sales taxes paid within ninety days from the denial of its claim for refund of said taxes notwithstanding more than ninety days may have elapsed since the payment of the sales tax on specific items purchased, since the limitation envisions the computation of time from a decision rendered applicable to a specific factual situation in a quasi-judicial hearing. *Ibid.*

On appeal from the Tax Review Board the Superior Court is without authority to weigh the evidence and make its own findings, G.S. 143-315, but when there is no exception by the State to findings made by the court in favor of the taxpayer, the matter must be determined on appeal if possible on the basis of the facts found by the Board and the additional facts found by the Superior Court. *Equipment Co. v. Johnson*, 269.

TENANTS IN COMMON.

§ 3. Mutual Rights and Liabilities.

Evidence that one tenant in common collected the rents from the property is sufficient to support a cause of action in favor of the other tenants for an accounting of the rents. *Hunt v. Hunt*, 437.

TORTS.

§ 4. Right to Joinder of Others for Contribution.

In an action by a passenger against the driver of the other car involved in the collision the defendant may deny negligence on his part and conditionally plead negligence on the part of the driver of the car in which plaintiff was riding, that such driver was plaintiff's agent and assert such negligence in bar of recovery and, in the alternative, allege that if such driver was not plaintiff's agent such driver should be joined as a joint tort-feasor for contribution, and demurrer on the ground that the defenses were inconsistent should have been overruled. *Woods v. Turner*, 643.

TRESPASS.

§ 12. Nature and Elements of Criminal Trespass.

A person who, without permission or invitation, enters upon premises in the peaceful possession of another and who, after his presence is discovered and he is unconditionally ordered to leave by the one in legal possession, refuses to leave and remains on the premises, is a trespasser from the beginning, and may be convicted of violating G.S. 14-134, and such result does not violate any constitutional rights. *S. v. Davis*, 463.

TRIAL.

§ 7. Pre-Trial.

The purpose of a pre-trial conference is to narrow the controversy to matters actually controverted, and the court's orders thereat are interlocutory, and

the court exceeds its authority in finding controverted facts and entering a final judgment. *Whitaker v. Beasley*, 733.

§ 11. Argument and Conduct of Counsel.

Ordinarily, argument of counsel outside the record will be held cured by the court's action promptly sustaining objection to the argument and cautioning the jury not to consider it. *Highway Comm. v. Pearce*, 760.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

Where the court excludes certain testimony the court should permit the party offering the testimony to insert in the record what the witness' answer would have been for the purpose of review on appeal. But in this case the refusal of the court to do so was not prejudicial, since it appears from other parts of the record that the testimony was incompetent regardless of the answer. *Highway Comm. v. Pearce*, 760.

§ 20. Necessity for Motions to Nonsuit and Time of Determination of Such Motions.

The trial court may not grant nonsuit after verdict. *Bethea v. Kenly*, 730.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence together with evidence of defendant which is not in conflict therewith but which tends to clarify or explain plaintiff's evidence, is to be considered in the light most favorable to plaintiff. *Sugg v. Baker*, 579.

On motion to nonsuit plaintiff may not avail himself of evidence contrary to a positive allegation in his complaint. *Davis v. Rigbby*, 684.

§ 22. Sufficiency of Evidence to Overrule Nonsuit.

Contradictions, even in plaintiff's evidence, do not justify nonsuit. *Watt v. Crews*, 143; *Price v. Ins. Co.*, 152.

Evidence which leaves the facts in issue in mere conjecture is insufficient to be submitted to the jury. *Miller v. Coppage*, 430; *Funeral Home v. Pride*, 723.

§ 31. Directed Verdict and Peremptory Instructions.

Even in those instances in which a peremptory instruction in favor of the party having the burden of proof is permissible, it is required that the court leave it to the jury to determine the credibility of the testimony, and the instruction must be in such form as to clearly permit a verdict unfavorable to such party in the event the jury finds that the evidence is not of sufficient weight and credibility to carry the burden. *Wall v. Ruffin*, 720.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

The court is required to charge the law on every substantive feature of the case arising on the allegations and evidence, even in the absence of a special request for instructions. *Correll v. Hartness*, 89.

It is error for the court to charge on a principle of law not presented by any view of the evidence. *Pressley v. Pressley*, 326.

Where the terms of the contract are unambiguous, whether facts established by uncontradicted evidence constitute a breach of such contract is a ques-

tion of law, and the party asserting such breach is entitled to an explicit instruction to this effect. *Lester Bros. v. Thompson Co.*, 210.

Where the court charges the circumstances under which the jury should answer the issue "no" but fails to charge the circumstances, arising upon the evidence, under which the jury should answer the issue in the affrmative, the charge must be held for prejudicial error, since it is the duty of the court to charge the jury on all substantial features of the case arising on the evidence. *Ibid.*

The fact that the statement of one witness was attributed by the court to another witness *held* not prejudicial, appellant having failed to call the court's attention to the inadvertance before the jury retired. *Forte v. Goodwin*, 608.

§ 34. Instructions on Burden of Proof.

The court is required to charge the jury as to which party has the burden of proof on each issue, and the failure of the court to charge the jury that the burden is on the original defendant to prove the negligence of the additional defendant and that such negligence was a proximate cause of the injury, must be held for prejudicial error. *Watt v. Crews*, 143.

§ 35. Expression of Opinion by Court on Evidence.

The court is not required to give the contentions of the litigants in its charge, but when it undertakes to do so the court must give equal stress to the respective contentions of the parties, and the giving of the contentions of one party alone must be held for prejudicial error. *Watt v. Crews*, 143.

A remark of the court in its charge that a witness was "of perhaps weak mentality" must be held for prejudicial error as tending to discredit the witness, there being no admission, stipulation or testimony in the record bearing on the mental condition of the witness. *Burkey v. Kornegay*, 513.

§ 42. Form and Sufficiency of Verdict.

The verdict must be interpreted with reference to the pleadings, the evidence and the judge's charge. *Lester Bros. v. Thompson Co.*, 210.

Where a passenger sues both drivers involved in a collision at an intersection he is not entitled as a matter of right to have a verdict exculpating both drivers set aside for inconsistency. *Benbow v. Tel. Co.*, 404.

§ 45. Acceptance or Rejection of Verdict.

The judgment must follow the verdict, and while the trial court has the discretionary power to set the verdict aside as being against the weight of the evidence, it is error for the court to change the verdict by diminishing the award over the objection of plaintiff. *Bethea v. Kenly*, 730.

The trial court may not, after verdict, dismiss the action as of nonsuit for insufficiency of the evidence. *Ibid.*

§ 57. Findings and Judgment of Court in Trial by Court.

Where, in a trial by the court under agreement by the parties, the court finds that the defendant is indebted to the plaintiff in a specified sum, but fails to adjudicate that plaintiff recovered the sum so found, *held* the facts found by the court have the force and effect of a verdict, and judgment, with interest from the time of the rendition of the verdict, should be rendered thereon by the judge holding a subsequent term when the matter is brought to his attention. *Stegall v. Produce Co.*, 487.

TRUSTS.

§ 6. Title, Authority and Duties of Trustee.

A trustee of an express trust may sue without joining his *cestui que trust. Murphy v. Murphy*, 95; *Richardson v. Richardson*, 521.

§ 13. Creation of Resulting Trust.

A parol trust may be impressed upon the legal title when the grantee takes title under an express agreement to hold the property for the benefit of a person other than the grantor, provided such agreement is made contemporaneously with or prior to the execution of the conveyance. *McDaniel v. Fordham*, 423.

An express trust cannot be engrafted by parol upon an inheritance. *Ibid.*

Where a deed is executed under a contemporaneous parol agreement that grantors should remain in possession and that the grantees would pay off the existing mortgage indebtedness, and, after the grantors had repaid them, would hold the land in trust until the death of the survivors of the grantors and then convey the property to the grantors' children, the parol trust is not on the prospective inheritance of the grantors' children, since the beneficial interest is in the grantors' children at all times after the execution of the deed. *Ibid.*

An action to establish a parol trust and to compel an accounting of the rents and profits by the alleged trustees is not demurrable for misjoinder of parties and causes of action, notwithstanding the asserted trust is in favor of the daughters of a decedent and is instituted by some of the daughters, with the joinder of their respective husbands, against two other daughters and their respective husbands, one of which was the alleged trustee and the other the grantee of a portion of the land in satisfaction of her interest in the trust estate. *Ibid.*

Where a party furnishes the consideration for the purchase of land and title is taken in the name of another in violation of the agreement between them a resulting trust arises by operation of law. *Edwards v. Edwards*, 445.

UTILITIES COMMISSION.

§ 1. Nature and Functions of Commission in General.

The Utilities Commission and not the court is authorized to regulate utilities. *Utilities Comm. v. Coach Co.*, 384.

§ 9. Appeal and Review.

An order of the Utilities Commission is *prima facie* just and reasonable, G.S. 62.26.10, and its findings are conclusive if supported by competent, material and substantial evidence; however, when its order is based on conclusions not supported by any competent, material and substantial evidence such order may not be upheld by the courts. *Utilities Comm. v. Coach Co.*, 384.

The rule that where an order of the Utilities Commission is not based on competent, material and substantial evidence the court must remand the cause to the Commission for further proceedings applies where the Commission has the duty to make a positive determination and does not apply when no action or order of the Commission is necessary. *Ibid.*

Where a lease agreement of carriers to provide through service is disapproved by an order of the Utilities Commission which is not supported by any competent, material and substantial evidence, no remand to the Commission is necessary, but the order should be reversed by the Superior Court, the Commis-

UTILITIES COMMISSION—*Continued.*

sion being free at any time thereafter to institute another hearing to determine, upon proper evidence, whether the agreement is contrary to public interest. *Ibid.*

WATERS AND WATERCOURSES.

§ 1. Surface Waters.

A hastening of the flow of surface waters necessarily results from the construction of streets and gutters by a municipality, and the city may not be held liable for injuries resulting from such acceleration in flow if the surface waters are not diverted from their natural direction of flow. *Roberson v. Kinston*, 135.

The failure of a municipality to provide adequate culverts to take care of the drainage of surface water through a natural stream in ordinary and foreseeable storms cannot be a contributing cause of the drowning of a child who fell into the stream when the evidence discloses that there was no backup of waters at the point where the child fell in, but to the contrary, that the water was flowing rapidly at that place and that the child's body was recovered some two blocks downstream. *Ibid.*

§ 6. Title and Rights in Navigable Waters.

The State owns lands covered by navigable waters within its territorial limits, except insofar as private rights have been acquired therein by State grant or otherwise, subject to the control of the Federal Government over commerce, *Miller v. Coppage*, 430.

The owner of land having a State highway between it and a navigable river is not a riparian owner. *Ibid.*

WILLS.

§ 8. Proof of Will and Probate in Common Form.

Notwithstanding original jurisdiction to probate a will is vested in the clerk, parties who file a caveat to a paper writing probated in common form and also advise the clerk they wish to probate a prior instrument executed by testator, furnish the clerk a copy thereof, and ask that all interested parties be given notice, seek to probate the prior instrument in solemn form, and the Superior Court acquires jurisdiction. *In re Will of Belvin*, 275.

§ 15. Parties Entitled to File Caveat.

Beneficiaries under a prior paper writing are persons interested within the purview of G.S. 31-32 and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify. *In re Will of Belvin*, 275.

§ 27. General Rules of Construction.

The object of testamentary construction is to effectuate the intent of testator as ascertained from the language of the instrument. *Quickel v. Quickel*, 696.

When a word is used in one part of the will in a certain sense, the same meaning will ordinarily be given the word in construing other parts of the instrument. *Ibid.*

WILLS—*Continued.*

§ 29. Presumptions.

It will be presumed that testator did not intend to die intestate as to any part of his estate. *Quickel v. Quickel*, 696.

§ 31. Dispositive and Precatory Words.

Use of the precatory words "I desire" will not create a trust or limit the fee, but will be given their ordinary meaning in the absence of a showing of a contrary intent. *Quickel v. Quickel*, 696.

§ 37. Estates in Trust.

Testator left certain stock to his wife without reservation but a subsequent sentence stated that it was his desire that the stock be held by a trustee with the income to be paid his wife and at her death to a son so long as he continued his college education and to be the property of the son when he obtained his college degree. *Held:* It being apparant that in another part of the will testator used the words "I desire" solely in a precatory sense and that to construe the bequest as creating a trust might result in partial intestacy, it was the intention of testator to make an absolute gift of the stock to his wife. *Quickel v. Quickel*, 696.

§ 39. Devises with Power of Disposition.

A general devise to testator's wife to have and hold or dispose of as she desires with following provision that "in case of survival of any heir it shall be his and if he does not survive it is my desire that" it go to testator's brother, *is held* to take the fee to the widow under the rule that a general devise with unlimited power of disposition transmits the fee and that a subsequent clause in conflict therewith will be disregarded. *Quickel v. Quickel*, 696.

§ 59. Renunciation, Forfeiture and Acceleration.

A forfeiture provision of a will that a beneficiary thereunder should receive nothing if he contests the instrument will not be given effect provided the con test is in good faith and with probable cause, but in order to adjudicate the question the elements of good faith and probable cause must be properly determined. *Haley v. Pickelsimer*, 293.

A forfeiture provision of a will that a beneficiary should receive nothing thereunder if he contests the will or any of its dispositive provisions will be strictly construed. *Ibid.*

A suit to recover for breach of contract by the decedent to leave property to a minor in consideration of personal services rendered by the minor's mother does not constitute an objection to or dissent from the terms and provisions of decedent's will, and therefore does not come within the provision of the will that any beneficiary contesting the will should forfeit all benefits thereunder. The minor not being barred, *a fortiori* the mother, not a party to the prior action, would not be barred. *Ibid.*

§ 63. Whether Beneficiary is Put to Election.

The doctrine of election applies only when the intent to put the beneficiary to an election clearly appears from the instrument and the beneficiary is confronted with the inconsistent choices of affirming the will by taking property devised or bequeathed to him thereunder or disaffirming the will by denying testator's right to dispose of other property belonging to the beneficiary. *Haley v. Pickelsimer*, 293.

An unsuccessful suit against the estate to recover for breach of contract to devise or convey property in consideration of personal services rendered does not constitute an election precluding the plaintiff from taking benefits under the will, since the doctrine of election applies only when the will confronts a beneficiary with a choice between benefits inconsistent with each other. *Ibid.*

§ 71. Actions to Construe Wills.

An adjudication of the right of a beneficiary to take under the will should not decree that such beneficiary is entitled to the amounts specified in the instrument, there being no determination of the status of the estate or the sufficiency of its funds to satisfy all claims within the same priority. *Haley v. Pickelsimer*, 293.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-11. Defendant has the right to be represented by counsel or to appear *in propria persona*, but not both. *S. v. Phillip*, 263.

1-17, 1-47(1). Ten year statute of limitation on action on judgment for minor begins to run when the minor reaches his majority. *Teele v. Kerr*, 148.

1-47(1), 97-87. Ten year limitation on award of Industrial Commission must be computed from time judgment of Superior Court is rendered upon the award. *Bryant v. Poole*, 553.

1-63. Trustee of express trust may sue without joining *cestui*. *Richardson v. Richardson*, 521.

1-64. Next friend or guardian *ad litem* of minor is not authorized to receive payment of the judgment for the minor. *Teele v. Kerr*, 148.

1-95, 1-131. Action may not be dismissed for want of service during ninety-day period for alias summons or extension of time for service. *Murphy v. Murphy*, 95.

1-98, 1-440.7. Defendant is entitled to dissolution of attachment if plaintiff fails to commence service by publication within 31 days after issuance of attachment. *Ins. Co. v. Johnson*, 778.

1-105. The amendment authorizes service on foreign administrator of nonresident driver to recover for negligent operation of vehicle in this State. *Franklin v. Cellulose Products*, 626.

1-105, 1-105.1. Action to construe contract of automobile insurance does not arise out of automobile collision and process may not be served by service on Commissioner of Motor Vehicles. *Insurance Co. v. Roberts*, 285.

1-111. Municipality is not required to file bond in defending action of ejectment. *Kistler v. Raleigh*, 775.

1-121, 1-152. Judge of Superior Court has discretionary power to permit filing of complaint after time specified in order of clerk. *Deanes v. Clark*, 468.

1-122. Written pleadings are required in an action in a municipal-county court to recover sum in excess of two thousand dollars. *Ins. Co. v. Johnson*, 778.

1-122(2). Complaint should not contain evidentiary facts. *King v. Sloan*, 562.

1-123. Each cause of action must be separately stated. *Bannister v. Williams*, 586.

1-125, 1-131. Defendant has thirty days after order overruling demurrer in which to file answer or petition for *certiorari*. *Wheeler v. Thabit*, 479.

1-127. Where answer fails to distinguish between allegations relating to cross action and allegations relating to counterclaim, demurrer must be sustained. *Service Co. v. Sales Co.*, 660.

GENERAL STATUTES CONSTRUED—*Continued.*

Defect must appear on face of complaint to be demurrable. *Richardson v. Richardson*, 521.

1-131. Complaint containing defective statement of good cause of action should not be dismissed upon demurrer. *Gadsden v. Johnson*, 743.

1-132. Action must be dismissed upon demurrer for misjoinder of parties and causes. *Bannister v. Williams*, 586.

1-137(2). In an action *ex contractu*, defendant may set up counterclaim for total worthlessness of chattels sold under separate contract, since both causes arise out of contract. *Service Co. v. Sales Co.*, 660.

1-141. Plea in bar to entire cause of action may be tested by demurrer. *Hardin v. Ins. Co.*, 67.

1-151. Pleadings will be liberally construed. *Edwards v. Edwards*, 445.

1-180. Questions asked witness by court held solely for purpose of clarification of testimony. *S. v. Goldberg*, 181; *S. v. Phillip*, 263. Charge instructing jury upon what circumstances issue should be answered in the negative but failing to charge circumstances under which it should be answered in the affirmative held erroneous. *Lester Bros. v. Thompson Co.*, 210.

1-269. Superior Court, on appeal from administrative board, has duty to determine whether facts found are sufficient to support conclusions of law. *In re Burris*, 450.

1-271. Upon plaintiff's appeal from refusal of the court to enter judgment on verdict, defendants are not parties aggrieved and may not appeal from court's refusal to set aside the verdict. *Bethea v. Kenly*, 730.

1-271, 29-30. Where necessity for sale is not controverted, appeal from order of sale to determine respective rights in proceeds of sale is premature. *Lucas v. Felder*, 169.

1-277. Judgment sustaining demurrer to plea in bar to entire cause of action is appealable. *Hardin v. Ins. Co.*, 67.

1-277, 1-278. Supreme Court may determine question of public policy even though appeal is from interlocutory order and premature. *Moses v. Highway Comm.*, 316.

1-408. Commission to commissioner selling land for partition rests in discretion of court. *Welch v. Kearns*, 171.

1-410(1), 1-311, 23-29(2), 23-23, 23-30. Constitutional guaranties against self-incrimination applies to action for unlawful and malicious assault. *Allred v. Graves*, 31.

1-568.11(a). In action for malicious assault, defendants are not entitled to denial of application for examination of defendants prior to trial solely on ground of self-incrimination. *Allred v. Graves*, 31.

6-21. Attorney's fees may not be allowed in a *habeas corpus* proceeding until defendant is given opportunity to be heard. *Murphy v. Murphy*, 95.

GENERAL STATUTES CONSTRUED—*Continued.*

7-64, 14-126, 14-134. Where Superior Court does not have original jurisdiction of misdemeanors, defendants may not be tried in Superior Court upon indictment upon appeal. *S. v. Dove*, 366.

7-395, 7-396. Warrant charging larceny of goods of a value constituting a felony is not void for failure to use word "feloniously". *Bassinov v. Finkle*, 109.

8-53, 8-71. Physician may not be required to disclose confidential information by deposition prior to trial. *Lockwood v. McCaskill*, 754.

14-32. "Serious injury" within intent of statute means physical or bodily injury. *S. v. Ferguson*, 558.

14-70, 14-72. Punishment for larceny from the person may be imprisonment for ten years. *S. v. Williams*, 172.

14-134. Person refusing to leave premises after order of proprietor is trespasser. *S. v. Davis*, 463.

14-335, 20-138, 20-139. In prosecution for public drunkenness an instruction equiating "drunkenness" with "under the influence of intoxicating liquor" within the drunken driving statute, is error. *S. v. Painter*, 332.

14-346.2. Sunday "Blue Law" held special statute proscribed by the Constitution. *Treasure City v. Clark*, 130.

14-373. Evidence held sufficient to sustain conviction of bribery and conspiracy to bribe members of college basketball team. *S. v. Goldberg*, 181.

15-143. Indictment for breaking and entering is not subject to quashal for failure to identify type of structure broken into. *S. v. Knight*, 17.

15-147. In order to sustain more severe sentence warrant or indictment should set forth that prosecution is for repeated offenses and the time and place of prior convictions. *S. v. Painter*, 332.

15-164. In prosecution for offenses less than capital, the State is entitled to challenge peremptorily four jurors for each defendant. *S. v. Knight*, 17.

15-217. Delay of two years in hearing of petition is inexcusable. *S. v. Hayes*, 648.

17-39.1. Pendency in another state of wife's suit for divorce does not deprive courts of this State of jurisdiction in *habeas corpus* to determine right to custody of children. *In re Skipper*, 592.

20-131. Duty to deflect headlights is not restricted to meeting oncoming traffic but also refers to atmospheric conditions. *Short v. Chapman*, 674.

20-138. Instruction defining "under the influence" held not prejudicial. *S. v. Ellis*, 606.

20-138, 20-139. Warrant charging operation of vehicle on highway while under the influence may not be amended to charge such operation in parking lot. *S. v. Davis*, 656.

GENERAL STATUTES CONSTRUED—*Continued.*

20-141(e). Where motorist is traveling within legal speed limit, collision with unlighted vehicle is not negligence *per se*. *Rouse v. Peterson*, 600; *Short v. Chapman*, 674.

20-146. Evidence held for jury on question of whether each driver was over left of his center of highway. *Forte v. Goodwin*, 608.

20-149(a), 20-150. Where truck parked diagonally at the curb is backed into defendant's lane of travel, defendant may pass on the left side of the highway under the general rule. *Bass v. Roberson*, 125.

20-154(a), 20-155(b). Driver turning left across another's lane of travel must ascertain movement can be made in safety. *King v. Sloan*, 562.

20-155(a). Where two automobiles approach an intersection at approximately the same time, the driver on the right has the right of way. *Benbow v. Telegraph Co.*, 404.

20-279.2(b). Commissioner of Motor Vehicles has duty to answer motorist's petition for reversal of order of Commission suspending his license; other person involved in collision upon which revocation is ordered is not party to proceedings for revocation. *Carter v. Scheidt*, 702.

20-279.21. Assigned risk policy of automobile liability insurance imposes liability upon insurer for injuries intentionally inflicted by insured in assaulting his victim with automobile. *Insurance Co. v. Roberts*, 285. Where insurer's liability is not predicated upon Financial Responsibility Act, insurer may not maintain counterclaim. *Harris v. Insurance Co.*, 499.

25-192. A check is a bill of exchange. *Kirk Co. v. Styles*, 156.

28-1. Clerk may appoint ancillary administrator to sue for wrongful death in county in which personal service may be had on agent of tort feasor. *In re Scarborough*, 565.

28-173, 44-49. Allocation of funds received in settlement for wrongful death and suffering prior to death. *In re Peacock*, 749.

30-3(a). Widow's share held chargeable with one-half administrative costs and Federal estate taxes, the statute being applicable only in the event of a dissent. *Adams v. Adams*, 342.

30-5. Nothing else appearing, a widow is entitled to dower in each tract of which husband died seized. *Coats v. Williams*, 692.

31-32. Beneficiaries under prior paper writing may file caveat to subsequent instrument probated in common form, notwithstanding they are not made beneficiaries thereunder and are not heirs. *In re Will of Belvin*, 275.

31-33. Superior Court acquires jurisdiction on appeal from clerk in proceedings to probate prior instrument in solemn form. *In re Will of Belvin*, 275.

31-38. General devise with unlimited power of disposition transmits fee. *Quickel v. Quickel*, 696.

GENERAL STATUTES CONSTRUED—*Continued.*

31A-2. Mother who had abandoned infant is not entitled to proceeds of recovery for infant's wrongful death. *In re Peacock*, 749.

35-29.1, .4, .10, .11, .16. Neither statute nor court of equity can sanction gift to charity by guardian for incompetent. *In re Kenan*, 1.

46-15. Tenant in common has right to insist that all lands be partitioned in one proceeding. *Horne v. Horne*, 688; *Coats v. Williams*, 692.

50-13, 50-16, 17-39, 17-39.1. Where complaint does not state cause of action for divorce, court has no jurisdiction to adjudicate the right to custody of the children of the marriage, but such right must be determined by *habeas corpus*. *Murphy v. Murphy*, 95.

50-15. Under 1961 amendment, the lower courts need not set forth findings. *Williams v. Williams*, 48. Court may order subsistence *pendente lite* before determination by a jury of the validity of a prior order of separation. *Ibid.*

50-16. Order for support and custody of children may be enforced by contempt proceedings notwithstanding the husband may have obtained decree of divorce in another state after the entry of the order for support. *Whitford v. Whitford*, 353. Evidence held insufficient to show that separation was induced by misconduct of wife. *Pressley v. Pressley*, 326. Court must hear husband's evidence on contention that he had not abandoned his wife. *Parker v. Parker*, 176.

62-31. Interchange of equipment by carriers to afford through service does not involve any new or additional franchise requiring applicant to show public convenience and necessity. *Utilities Comm. v. Coach Co.*, 384.

62-121.44. Public policy does not condemn competition as such but only competition which is unfair. *Utilities Comm. v. Coach Co.*, 384.

62-262. Applicant for franchise has burden of showing public convenience and necessity. *Utilities Comm. v. Coach Co.*, 384.

63-20. Federal regulations relating to interstate flying are made applicable to intrastate flying. *Mann v. Henderson*, 338.

72-1. Has no application to restaurant operated separately from inn. *S. v. Davis*, 463.

97-6, 97-17. Commission may not set aside award affirming agreement for compensation without notice and a hearing to fellow employee whose negligence caused the injury. *Stanley v. Brown*, 243.

97-47. Employer and insurance carrier may be estopped from asserting one year limitation for application for additional compensation for change of condition. *White v. Boat Corp.*, 495.

97-80. Industrial Commission has authority to promulgate rules for orderly administration of Workmen's Compensation Act. *White v. Boat Corp.*, 495.

GENERAL STATUTES CONSTRUED—*Continued.*

97-82. Agreement for compensation approved by Commission is equivalent to an award. *White v. Boat Corp.*, 495.

97-82, 97-83. Approval by Commission of agreement for compensation is as conclusive as an award. *Stanley v. Brown*, 243.

97-91. Where insurer's liability is dependent upon reformation of policy, the Industrial Commission has no jurisdiction to determine matter. *Clark v. Ice Cream Co.*, 234.

105-134(6). Formula prescribed for allocation of foreign income taxable by this State is *prima facie* just. *Equipment Co. v. Johnson*, 269.

105-147(9)(d). Forgiveness of an indebtedness by officer-stockholder constitutes contribution to capital and not income. *Mfg. Co. v. Johnson*, 504.

105-266.1, 105-267. Remedies are cumulative and taxpayer may sue to recover sales taxes within ninety days from denial of claim for refund. *Housing Authority v. Johnson*, 76.

105-266.21. Where sale of milk by retailer below cost is not for the purpose of destroying competition, the temporary order restraining sale should be dissolved. *Milk Comm. v. Dagenhardt*, 281.

115-176, 115-178, 115-179. Pupil may be assigned to school in another administrative unit when such assignment is satisfactory to such unit and is in the best interest of the pupil. *In re Hayes*, 616.

116-149(b). Child of disabled veteran who has moved his residence to this State after birth of the child is not entitled to benefits. *Ramsey v. Veterans Comm.*, 646.

136-18(10), 136-93. Where Commission permits construction of sewer lines in right of way, owner of fee is entitled to compensation for additional burden. *Van Leuven v. Motor Lines*, 539.

143-315. Superior Court may not find facts on appeal from Tax Review Board. *Equipment Co. v. Johnson*, 269.

148-45(a), 148-45(b). Prosecution of work-release prisoner for failure to report to pick-up point must be based on (b). *S. v. Kimball*, 582.

156-70.1. Statute provides for appeal on part of landowners and does not authorize appeal by drainage district from order allowing compensation. *In re Drainage*, 407.

157-26, 105-164.14(c), 105-164.14(b). Housing Authority is liable for sales taxes paid by it on purchases made by it. *Housing Authority v. Johnson*, 76.

160-453.4(c). Land held for possible future industrial development is not "used" for industrial purposes within purview of annexation statute. *R. R. v. Hook*, 517. Sixty per cent of acreage outside of that used for industrial purposes must be subdivided into lots of five acres or less in order to come within annexation statute. *Lithium Corp. v. Bessemer City*, 532.

GENERAL STATUTES CONSTRUED—*Continued.*

163-50. Part of statute requiring elector to swear that he will support nominee is void. *Clark v. Meyland*, 140.

279-21. Finding that carrier of insurance became insolvent does not render vehicle insured an uninsured vehicle. *Hardin v. Ins. Co.*, 67.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art.

I, § 10. Part of statute requiring elector to swear that he will support nominee is void. *Clark v. Meyland*, 140.

I, §§ 11, 17. Defendants are not entitled to inspection of files of the Bureau of Investigation, there being no testimony at the trial by a member of the Bureau. *S. v. Goldberg*, 181.

I, § 17. Person refusing to leave premises after being ordered to do so by proprietor may be convicted of trespassing. *S. v. Davis*, 463. Constitutional guaranties against self-incrimination applies to any proceeding sanctioned by law in which execution against the person may issue. *Allred v. Graves*, 31. Fact that business exempt from Sunday ordinance sells types of articles included in types sold by businesses proscribed does not constitute unlawful discrimination. *Clark's Charlotte v. Hunter*, 222. Neither statute nor court of equity can sanction gift to charity by guardian for incompetent. *In re Kenan*, 1. Where land owner is given access to highway by means of service road abutting the property, the making of the highway a nonaccess highway does not constitute a taking of his property. *Moses v. Highway Comm.*, 316.

II, § 29. Sunday "Blue Law" is statute regulating trade within the purview of the Constitution. *Treasure City v. Clark*, 130.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

IV, § 1. Full Faith and Credit Clause does not preclude court of one state from modifying decree for support and custody of minor children, since the court rendering the decree is empowered to modify it. *Dees v. McKenna*, 373.

Fifth, Sixth, Seventh and Fourteenth Amendments. Defendants are not entitled to inspection of files of the Bureau of Investigation, there being no testimony at the trial by a member of the Bureau. *S. v. Goldberg*, 181.

Fifth and Fourteenth Amendments. Neither statute nor court of equity can sanction gift to charity by guardian for incompetent. *In re Kenan*, 1.

Fourteenth Amendment. Fact that business exempt from Sunday ordinance sells types of articles included in types sold by businesses proscribed does not constitute unlawful discrimination. *Clark's Charlotte v. Hunter*, 222. Person refusing to leave premises after being ordered to do so by proprietor may be convicted of trespassing. *S. v. Davis*, 463.